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United States District Court, S.D. Florida.

UNITED STATES of America, Plaintiff,

v.

**Claudia** Patricia **DIAZ GUILLEN**, Defendant.

Case No. 18-CR-80160-

DIMITROULEAS/MATTHEWMAN

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Signed September 30, 2022

**Attorneys and Law Firms**

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**ORDER FOLLOWING****SECOND<sup>1</sup> GARCIA HEARING**

[WILLIAM MATTHEWMAN](#), United States Magistrate Judge

\*1 **THIS CAUSE** is before the Court upon the following: (1) the Government's Unopposed Motion for a *Garcia*<sup>2</sup> Hearing ("Unopposed Motion") [DE 124]; the Court's August 31, 2022 Interim Order on the Government's Unopposed Motion for a *Garcia* Hearing [DE 130]; (3) the Government's "Response to the Court's Order Docket Entry 130" [DE 133]; (4) Defendant **Claudia** Patricia **Diaz Guillen's** "Memorandum in Support of *Garcia* Hearing to Permit Andrew S. Feldman, Esq. to Serve as Co-Counsel for Mrs. **Claudia Diaz Guillen** at Trial" [DE 134]; (5) the Court's September 7, 2022 Paperless Order granting the Government's Unopposed Motion [DE 135]; and (6) Defendant **Diaz Guillen's** Notice of Filing Declarations [DE 142].

The Court held a *Garcia*/Rule 44(c) hearing on September 22, 2022, during which the Court considered whether Andrew S. Feldman, Esq., could represent Defendant **Diaz Guillen** due to his simultaneous representation of fugitive co-defendant Adrian Jose Velasquez Figueroa ("Velasquez Figueroa"), Defendant **Diaz Guillen's** husband, who is currently awaiting extradition to the United States from Spain. The Court also addressed any conflict issues arising from Ms. Descalzo's concurrent representation of Defendant **Diaz Guillen** and her fugitive co-defendant husband, Mr. Velasquez Figueroa. This is because both Ms. Descalzo and Mr. Feldman seek to jointly represent **Diaz Guillen** in this case while they have also been representing and intend to continue representing her co-defendant husband Mr. Velasquez Figueroa who is engaged in extradition proceedings where the United States is seeking to extradite him from Spain to this district to stand trial in this case.

In attendance at the *Garcia*/Rule 44(c) hearing were: (1) Assistant United States Attorney Kurt K. Lunkenheimer, Esq.; (2) Department of Justice Trial Attorney Paul A. Hayden, Esq.; (3) Defendant **Diaz Guillen**; (4) Marissel Descalzo, Esq.; and (5) Andrew S. Feldman, Esq.

**I. Relevant Facts**

**a. Procedural History Leading  
Up to the Second *Garcia* Hearing**

Defendant **Diaz Guillen** is charged by Superseding Indictment with one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), and two counts of laundering of monetary instruments, in violation of 18 U.S.C. § 1956(a)(2)(A). [DE 44]. Within the Superseding Indictment, Defendant **Diaz Guillen's** husband, co-defendant Velasquez Figueroa, is charged with the same offenses, under the same counts. [DE 44].

As stated in note 1, *supra*, previously on May 31, 2022, the Court entered an Order Following *Garcia* Hearing [DE 72], accepting Marissel Descalzo, Esq.'s permanent representation of Defendant **Diaz Guillen**. [DE 72 at 16]. The Court permitted Ms. Descalzo to represent Defendant **Diaz Guillen** only after conducting a *Garcia* Hearing to account for Ms. Descalzo's prior representation of Gabriel Arturo Jimenez Aray, a named individual in the Superseding Indictment and a potential witness. [DE 72 at 12].

Around this time, Defendants **Diaz Guillen** and Velasquez Figueroa filed a “Joint Motion to Dismiss Counts 2, 9 and 10 of the Superseding Indictment and Request for an Expedited Hearing” (“Joint Motion”) [DE 77]. In connection therewith, Andrew S. Feldman, Esq. filed a “Notice of Temporary Appearance on behalf of Defendant Velasquez.” [DE 83]. The Government responded with a “Motion to Strike Defendant Adrian Jose Velasquez Figueroa's Joinder in the Motion to Dismiss (Docket Entry 77)” [DE 84], requesting that co-defendant Velasquez Figueroa be stricken from the Joint Motion based on the fugitive disentitlement doctrine. [R. 84 at 7]. The Court granted the Government's motion, striking co-defendant Velasquez Figueroa from the Joint Motion. *See* DE 86 at 1.

\*2 Subsequently, after having previously appeared on behalf of co-defendant Velasquez Figueroa, Mr. Feldman filed a Notice of Appearance [DE 123] as co-counsel for Defendant **Diaz Guillen**, on August 27, 2022. Two days later, the Government filed an Unopposed Motion for a *Garcia* Hearing (“Unopposed Motion”) [DE 124], which was then referred to the Undersigned by the Honorable William P. Dimitrouleas, United States District Judge. [DE 126]. In light of the urgency of the matter, the Undersigned “preliminarily addressed the Government's Unopposed [*Garcia*] Motion at [an] August 30, 2022 in-Court hearing, which hearing had previously been scheduled to address another matter.” [DE 130 at 1]. And, after consideration of the Unopposed Motion, argument of counsel, and Ms. Descalzo's and Mr. Feldman's representations to the Court,<sup>3</sup> the Court entered an Interim Order on the Government's Unopposed Motion (“Interim Order”) [DE 130].

Within the Interim Order, the Court took notice of “Mr. Feldman's intended joint representation of two named co-defendants,” stating that such intended representation raised issues under Rule 44(c) of the Federal Rules of Criminal Procedure and necessitated a *Garcia* hearing. [DE 130 at 1–2]. However, because co-defendant Velasquez Figueroa was awaiting extradition from Spain, and because Rule 44(c) provides that the Court “must promptly inquire about the propriety of joint representation and *must personally advise each defendant* of the right to the effective assistance of counsel, including separate representation,” *Fed. R. Crim. P. 44(c)(2)* (emphasis added), the Court had questions about how it could “personally advise” fugitive co-defendant Velasquez Figueroa. Thus, the Court directed the parties to:

each separately file a memorandum addressing the issue of whether this Court can now proceed under Rule 44(c) with a *Garcia* hearing in light of Mr. Velasquez Figueroa's status a fugitive co-defendant who is currently in Spain facing potential extradition to the United States in this case, or whether this Court must wait to hold any *Garcia* hearing until such time as co-defendant Velasquez Figueroa is personally present before this Court. In this regard, the parties shall further address whether an affidavit or declaration from Mr. Velasquez Figueroa evidencing any waiver of conflict would satisfy this Court's obligation under Rule 44(c)(2).

[DE 130 at 2]. The Court stated it would issue a further Order after receiving the parties' respective memoranda. *Id.*

Pursuant to the Court's Interim Order, the Government timely filed its memorandum, titled “Government's Response to the Court's Order Docket Entry 130” [DE 133]. Despite previously having requested a *Garcia* hearing, the Government maintained that the Court could not proceed with a *Garcia* hearing “as long as Velasquez [Figueroa] remains a fugitive” due to the fugitive disentitlement doctrine. [DE 133 at 1]. Indeed, the Government noted the Court had previously stricken co-defendant Velasquez Figueroa from participating based on such. *Id.* at 2. In any event, the Government also argued that, “[e]ven if the Court were inclined to allow him to ‘appear’ via affidavit, there is no way, without Velasquez [Figueroa] being present at the hearing, that the Court can properly ‘inquire about the propriety of joint representation’ and ‘*personally* advise each defendant [(in this case, Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa)] of the right to the effective assistance of counsel, including separate representation.’ ” [DE 133 at 2] (original alterations omitted) (quoting *Fed. R. Crim. P. 44(c)(2)*). According to the Government, Mr. Velasquez Figueroa “should not be allowed to avail himself of the benefits of this Court, without likewise submitting to its burdens.” *Id.*

\*3 That same day, Mr. Feldman timely filed a memorandum of his own; specifically, a “Memorandum in Support of *Garcia* Hearing to Permit Andrew S. Feldman, Esq. to Serve as Co-Counsel for Mrs. **Claudia Diaz Guillen** at Trial.” [DE 134]. In his memorandum, Mr. Feldman stressed that Defendant **Diaz Guillen** was in fact married to co-defendant Velasquez Figueroa, and pointed out that, because Defendant **Diaz Guillen** seeks a speedy trial (while Mr. Velasquez Figueroa awaits a decision on extradition from Spain), his “contemplated joint representation is not the same as joint representation of a husband and wife in the same trial with the same jurors and the same witnesses.” [DE 134 at 4]. But with that aside, he argued that “there is no actual or potential conflict of interest that is likely to arise between Mr. Velasquez Figueroa and Mrs. **Diaz Guillen** by virtue of [his] representation of Mrs. **Diaz Guillen** at trial.” *Id.* at 6. To this end, he stated that Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa’s central and legal defenses are the same, and that neither spouse was interested in cooperating or pleading guilty. *Id.*

With respect to the methodology of ensuring that no actual or potential conflict exists, Mr. Feldman argued that “this Court may satisfy the [Rule 44](#) requirement to implement ‘appropriate measures to protect each defendant’s right to counsel’ by accepting the signed and executed waivers from Mrs. **Diaz Guillen** and Mr. Vela[s]quez Figueroa and by personally advising Mrs. **Diaz Guillen** of her rights under [Rule 44\(c\)](#).” *Id.* After outlining various additional ways of “adequately protect[ing] each defendant under [Rule 44](#) without *personally* advising” co-defendant Velasquez Figueroa, Mr. Feldman then argued that the Court has the “inherent and equitable discretion” to interpret [Rule 44\(c\)](#) and fashion an appropriate method of compliance. *Id.* at 7–9.

And lastly, after arguing that “no federal court has ever extended the fugitive entitlement [sic] doctrine to [Rule 44](#) hearings,” Mr. Feldman asserted that the Court should not apply such doctrine, as a [Rule 44](#) hearing “is instead designed to safeguard against potential post-conviction Sixth Amendment claims arising from joint representation.” *Id.* at 9. Indeed, Mr. Feldman argued that “[o]n balance, the [G]overnment’s objection to a virtual appearance or any alternative measure to protect the rights of the defendants consistent with [Rule 44](#) – short of a personal live appearance by Mr. [Velasquez Figueroa] amounts to a deprivation of Mrs. **Diaz Guillen**’s Sixth Amendment right to counsel.” *Id.* at 14. And, as stated by Mr. Feldman, “the blanket refusal to entertain other methods of conducting *Garcia* and complying

with [Rule 44](#) based on Mr. [Velasquez Figueroa’s] supposed ‘fugitive’ status is a plain deprivation of Mrs. **Diaz Guillen**’s right to have counsel of her choice appear on her behalf at trial.” *Id.* at 15.

After reviewing the parties’ memoranda and positions on the matter, the Court granted the Government’s Unopposed Motion and scheduled a *Garcia*/Rule 44(c) hearing. [DE 135]. In doing so, the Court directed defense counsel to “obtain and file an affidavit or declaration from both Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa stating their respective positions on the proposed joint representation and stating whether the defendants waive any potential or actual conflict of interest which may arise if the joint representation is allowed, along with suitable translations.” [DE 135]. However, the Court stressed that it had “not yet made any decision as to whether an affidavit or declaration of co-defendant Velasquez Figueroa shall be permitted while he remains in Spain contesting his extradition to this jurisdiction” and that it was “nonetheless request[ing] such an affidavit or declaration in advance of the hearing in the event it is deemed permissible.” [DE 135]. Thus, pursuant to the Court’s directive, on September 19, 2022, a “Notice of Filing Declarations” [DE 142] was filed, attaching both Defendant **Diaz Guillen**’s and co-defendant Velasquez Figueroa’s Declarations (in Spanish and in English). In their Declarations, Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa stated they understood Ms. Descalzo’s and Mr. Feldman’s joint representation could result in a conflict of interest, but that they waived any such conflict.

#### b. September 22, 2022 *Garcia* Hearing

\*4 On September 22, 2022, the Court conducted the *Garcia*/Rule 44(c) hearing, as scheduled. At the outset, the Court noted the unique tension that exists in this case between: (1) Defendant **Diaz Guillen**’s right to her choice of counsel under the Sixth Amendment, and the requirement that there be no conflict of interest or that any potential or actual conflict of interest be knowingly and voluntarily waived by the Defendants; and (2) Mr. Velasquez Figueroa’s status as a fugitive co-defendant awaiting extradition from Spain. The Court then heard argument of counsel.<sup>4</sup>

The Government largely reiterated its position from its September 6, 2022 memorandum [DE 133]. In other words, the Government argued that co-defendant Velasquez Figueroa should not be allowed to appear in any form due to the fugitive

disentitlement doctrine. According to the Government, co-defendant Velasquez Figueroa's appearance in any form in this case would be improperly allowing him the benefit of discovery. Additionally, the Government noted its concern that co-defendant Velasquez Figueroa had the potential to unduly influence Defendant **Diaz Guillen's** proceedings. Indeed, the Government found it notable that it was *Mr. Feldman* that had filed the requisite September 9, 2022 memorandum, and not Ms. Descalzo. But even turning to the substance of Mr. Velasquez Figueroa's Declaration, the Government argued that Mr. Velasquez Figueroa's waiver was "completely inadequate" and not as detailed as is required by law.

Mr. Feldman and Ms. Descalzo then argued their respective positions on the matter. Mr. Feldman argued that co-defendant Velasquez Figueroa is not a fugitive in the first instance, as he is instead merely exercising his rights under a treaty and fighting extradition. Moreover, Mr. Feldman asserted that the Government's argument about undue influence was nothing more than insinuation or speculation. Ms. Descalzo, in turn, argued that the Court should accept the Declaration of co-defendant Velasquez Figueroa because it was the Government that invited the *Garcia* hearing, and because Declarations are regularly accepted by federal courts. Thus, with the parties' positions on the record, the Court turned to an examination of Defendant **Diaz Guillen** herself.

#### i) Defendant **Diaz Guillen**

Defendant **Diaz Guillen** was sworn and testified thereafter. While Defendant is not fluent in the English language, she testified that she understood everything that had occurred (and was occurring) through the aid of a Federal Court-certified Spanish interpreter. The Court questioned Defendant as to her competency and understanding of the proceedings. Additionally, both Mr. Feldman and Ms. Descalzo stated that there was no doubt as to Defendant **Diaz Guillen's** competence. After inquiry, the Court found **Diaz Guillen** to be competent, intelligent, clearheaded, and not under the influence of any narcotics, drugs, pills, or alcoholic beverages at the time of her testimony.

Defendant testified that she is an attorney, having worked for the Venezuelan military (with a law degree from the Central University of Venezuela), and that she has a Master's degree in Finance, as well as a Master's degree in at least one other area. As to the matter at hand, Defendant **Diaz Guillen**

testified she understood that Ms. Descalzo and Mr. Feldman sought to represent both her and her husband (co-defendant Velasquez Figueroa), and that she understood the actual or potential conflicts of interest that might arise as a result. In this regard, Defendant **Diaz Guillen** testified that she had carefully considered any such actual or potential conflicts of interest that might arise and confirmed that she did not wish to consult with independent counsel.

\*5 With respect to any actual or potential conflicts of interest concerning Mr. Feldman's or Ms. Descalzo's dual or joint representation of her and co-defendant Velasquez Figueroa, Defendant **Diaz Guillen** testified she understood: (1) the contents of the Superseding Indictment; (2) what she is charged with, having had sufficient time to discuss such with counsel; (3) that conflicts of interest pertaining to dual representation may still surface; (4) that Mr. Feldman and Ms. Descalzo hope to represent co-defendant Velasquez Figueroa in this case upon his extradition to the United States and currently are representing him; (5) that Mr. Feldman and Ms. Descalzo's representation of co-defendant Velasquez Figueroa both during and after extradition could raise all types of conflicts; (6) that dual representation could get in the way of jury selection, lead to cross-examination issues, or prevent post-trial sentencing offers; and (7) that dual representation would effectively make it impossible to blame shift or to argue that co-defendant Velasquez Figueroa is more culpable. The Court carefully questioned Defendant **Diaz Guillen** on these and other issues affecting actual or potential conflicts.

The Court then questioned Defendant **Diaz Guillen** concerning the contents of her Declaration [DE 142-1]. Defendant **Diaz Guillen** testified that she had knowingly and voluntarily signed both the English and Spanish versions of her Declaration, and that the Declaration is in fact true. In doing so, she further testified that she knowingly and voluntarily waived any actual or potential conflict that might arise; that she waived any argument that Ms. Descalzo and Mr. Feldman should not be representing her and her husband, Mr. Velasquez Figueroa; and that she was "one-hundred percent" sure she wanted both Mr. Feldman and Ms. Descalzo to represent her. Accordingly, the Court admitted Defendant **Diaz Guillen's** Declaration, without objection.

#### ii) Ms. Descalzo and Mr. Feldman

The Court next heard from Ms. Descalzo and Mr. Feldman as to how they could assure the Court that an actual or



potential conflict of interest would not arise. Ms. Descalzo first argued that Defendant **Diaz Guillen** was a public official, but that co-defendant Velasquez Figueroa was not. On this matter, Ms. Descalzo argued that the Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa's defenses would differ. Moreover, Ms. Descalzo argued that Mr. Velasquez Figueroa was not currently being represented in this Court and is not a part of the current proceedings, as he is in Spain contesting extradition to this country. Consequently, she stated that any potential conflict of interest issues would not arise until he was in the United States, which was not likely to occur here by the date of Defendant **Diaz Guillen's** scheduled trial. And, Ms. Descalzo argued that she was currently representing co-defendant Velasquez Figueroa more so for informational purposes, that her review of the discovery to date had not revealed any change in defense strategy, and that the spousal privilege would not be implicated here based on her review of the evidence.

Mr. Feldman, in turn, echoed much of what Ms. Descalzo stated. He added that, to the extent Ms. Descalzo argued Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa's defenses would differ based on their positions, the Defendants' *overall* defenses were identical. Further, he argued the instant case involved more of a successive representation than a joint or dual representation, as Defendant's trial date is rapidly approaching and co-defendant Velasquez Figueroa continues to fight extradition. Therefore, it appears they will be tried separately. Finally, Mr. Feldman argued that he: (1) does not foresee any hypothetical conflict; (2) can assure the Court that there is no undue influence in *either* direction; (3) will not be hampered in his defense of **Diaz Guillen** in any matter pertaining to cross-examination; and (4) has not seen a single text or email between Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa that would implicate the spousal privilege.

### iii) The Government's Concerns

The Government responded that, while Ms. Descalzo and Mr. Feldman stated they had not seen any texts or emails between the two defendants, Defendant **Diaz Guillen** may want to testify, which could still implicate the spousal privilege. The Government also argued that Defendant **Diaz Guillen** may want to blame co-conspirators and noted that there could be a funding or influence issue, as all of Defendant **Diaz Guillen's** money comes from co-defendant Velasquez Figueroa.

\*6 Accordingly, with the Government's stated concerns in mind, the Court conducted further inquiry of Defendant **Diaz Guillen**. Defendant **Diaz Guillen** then testified she understood that she has the right to testify in her own defense and that a spousal privilege issue may come up, and that blaming a conspirator is a common defense in criminal proceedings. However, knowing these and other sources of actual or potential conflict, Defendant **Diaz Guillen** testified she still wished to waive any actual or potential conflict in this case.

Further, as to the funding issue, Ms. Descalzo requested an *ex parte* hearing, which the Government did not oppose. After briefly hearing from Ms. Descalzo, the Court was satisfied that an actual or potential conflict would not arise due to any funding issue.

### iv) Co-Defendant Velasquez Figueroa's Declaration

Finally, at the *Garcia*/Rule 44(c) hearing, the Court heard final argument on whether it should admit the Declaration of co-defendant Velasquez Figueroa. The Government repeated its earlier arguments pertaining to the fugitive disentitlement doctrine, arguing that the Declaration was insufficient and did not come close to the same level of scrutiny as Defendant **Diaz Guillen's** colloquy. Ms. Descalzo and Mr. Feldman then argued that co-defendant Velasquez Figueroa's Declaration was simply for the benefit of Defendant **Diaz Guillen**, that only **Diaz Guillen** currently has rights in this case (with Mr. Velasquez Figueroa's Declaration only clarifying his position at this moment in time), and that this Court has considerable discretion.

### v) The Court's Ruling

At the conclusion of the September 22, 2022 *Garcia*/Rule 44(c) hearing, the Court orally found that Ms. Descalzo's and Mr. Feldman's representation of Defendant **Diaz Guillen** in this case was permissible. The Court explained the reasons for its rulings on the record at the hearing, finding that, on balance, Defendant's Sixth Amendment right to counsel prevailed. Accordingly, the Court accepted the permanent appearance of counsel from attorney Andrew S. Feldman, Esq., on behalf of Defendant **Diaz Guillen**. This written Order is now being entered to memorialize and further explain the Court's findings and rulings.

## II. Relevant Case Law

“The sixth amendment right to counsel is perhaps the most precious of constitutional rights a criminal defendant possesses. It ensures that an accused has an advocate, skilled in the art of trial advocacy, to test the evidence offered and challenge the allegations levied by the government.” *United States v. Urbana*, 770 F. Supp. 1552, 1555 (S.D. Fla. 1991). However, “a court must balance the right to counsel of defendant's choice with the defendant's right to a conflict-free attorney.” *United States v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994); *United States v. Kaley*, No. 07-80021-CR, 2014 WL 3734679, at \*5 (S.D. Fla. June 19, 2014) (citing *Wheat v. United States*, 486 U.S. 153, 162–63 (1988)). In the pre-trial stage, a court may disqualify an attorney if it determines that either an actual or a potential conflict of interest exists. See *Ross*, 33 F.3d at 1523; *United States v. Culp*, 934 F. Supp. 394, 399 (M.D. Fla. 1996).

In deciding whether joint representation of two co-defendants in a federal criminal case should be allowed, or should lead to disqualification of defense counsel, the Court must look to [Federal Rule of Criminal Procedure 44\(c\)](#) and consider the applicable facts and law. [Federal Rule of Criminal Procedure 44\(c\)\(2\)](#) states in relevant part:

The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

\*7 [Fed. R. Crim. P. 44\(c\)](#). Moreover, *United States v. Garcia* specifically requires that courts do the following:

scrupulously evaluate the insistence of the defendants on the right to privately retained counsel of their choice even though the district court may discern a conflict of interest in

such representation. In addition, that court must also carefully evaluate the persistent efforts of the defendants to waive any imperfections in such representation which may be apparent to the court. The trial court should actively participate in the waiver decision.

*United States v. Garcia*, 517 F.2d 272, 277 (5th Cir. 1975), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259 (1984).

Indeed, despite the existence of an actual or potential conflict, “[a] defendant's right to a conflict-free attorney can be waived ‘as long as the waiver is knowingly and intelligently made.’” *United States v. Gutierrez*, No. 10-80083, 2010 WL 3769448, at \*4 (S.D. Fla. Aug. 3, 2010) (quoting *Ross*, 33 F.3d at 1524). To ascertain whether a defendant's waiver of conflict is knowingly and intelligently made, a district court must conduct a hearing and address:

[e]ach defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. Cf. *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972). It is, of course, vital that the waiver be established by “clear, unequivocal, and unambiguous language.” *National Equipment Rental v. Szukhent*, 375 U.S. 311, 332, 84

S.Ct. 411, 423, 11 L.Ed.2d 354, 367–68 (1964).

*United States v. Robaina*, No. 13-20346, 2013 WL 3243368, at \*6 (S.D. Fla. June 25, 2013) (quoting *Garcia*, 517 F.2d at 278). “However, a court may decline a proffer of waiver where there is an actual conflict or a showing of a ‘serious potential for conflict.’ ” *Gutierrez*, 2010 WL 3769448, at \*5 (citing *Wheat*, 486 U.S. at 162–64).

### III. Analysis

As a preliminary matter, the Court notes the unique procedural posture of this case, with counsel Ms. Descalzo and Mr. Feldman seeking to represent both a defendant that is currently before this Court, and a fugitive co-defendant husband who is contesting extradition from a foreign country. Indeed, both this Court and the parties have been unable to identify a case that is factually similar.

With that being said, the Court first finds that the Declaration of co-defendant Velasquez Figueroa is allowable and that the fugitive disentitlement doctrine is inapplicable to the Court's consideration of co-defendant Velasquez Figueroa's Declaration under the unique facts of this case. This is because it is Defendant **Diaz Guillen** that is seeking relief before this Court—not co-defendant Velasquez Figueroa. The Court is merely deciding whether Mr. Feldman and Ms. Descalzo are permitted to jointly represent Defendant **Diaz Guillen** while Mr. Velasquez Figueroa contests extradition from Spain. In this regard, the Court is ensuring Defendant **Diaz Guillen's** Sixth Amendment right to counsel of her choice. But even assuming the fugitive disentitlement doctrine were applicable here to the Court's consideration of Mr. Velasquez Figueroa's Declaration, the Court finds that Defendant **Diaz Guillen's** Sixth Amendment right to her choice of counsel prevails. The Court does not find it appropriate to permit Mr. Velasquez Figueroa's fugitive posture in this case to derail Defendant **Diaz Guillen's** right to counsel of her choice, especially with her facing an imminent trial.

\*8 Next, the Court notes that this alleged conflict implicates Rule 4-1.7 of the Rules Regulating the Florida Bar, Southern District of Florida Local Rule 11.1(c), [Federal Rule of Criminal Procedure 44\(c\)](#), the Eleventh Circuit's opinion in *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994), the Supreme Court's opinion in *Wheat v. United States*, 486 U.S. 153 (1988), and other applicable case law, as it involves

the joint representation by Mr. Feldman and Ms. Descalzo of Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa. After taking into account all of the case law, facts, and the argument by the parties, and after carefully considering the testimony of Defendant **Diaz Guillen**—as well as the Declaration of co-defendant Velasquez Figueroa—the Court finds that any actual and potential conflicts of interest due to Mr. Feldman's and Ms. Descalzo's joint representation of Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa are waivable and have, in fact, been knowingly, intelligently, and voluntarily waived by Defendant **Diaz Guillen**.

Here, Defendant **Diaz Guillen** testified that she was fully aware of the conflicts that could arise in this case due to Mr. Feldman's and Ms. Descalzo's joint representation of co-defendant Velasquez Figueroa and has filed a signed Declaration indicating as much. Additionally, co-defendant Velasquez Figueroa has included a signed Declaration stating that he, too, is aware of potential conflicts but nonetheless waives them. While the Court would certainly prefer co-defendant Velasquez Figueroa's personal presence to conduct a full [Rule 44\(c\)](#) inquiry, he is currently in Spain contesting extradition and this Court is therefore limited in its ability to conduct a full inquiry. Nonetheless, as stated earlier, the true inquiry at this current moment relates to Defendant **Diaz Guillen's** right to her Sixth Amendment counsel of choice, especially since it appears that her trial will begin very soon and will be separate from Mr. Velasquez Figueroa's trial, if and when he is successfully extradited here. Under these facts, the Court is convinced that Mr. Feldman and Ms. Descalzo will vigorously and ethically represent Defendant **Diaz Guillen** and not be limited in any way because of their joint representation of Mr. Velasquez Figueroa, who will likely still be in Spain during Defendant's trial.

It is important to remember that Defendant **Diaz Guillen** and co-defendant Velasquez Figueroa are married. And, “[c]ases involving married couples who are criminal defendants in the same prosecution are in significant ways different than multi-defendant cases involving strangers or defendants whose only common thread is the alleged criminal activity.... Their interests, both in life and in [the] case, are largely aligned.” *Robaina*, 2013 WL 3243368, at \*10. Accordingly, the Court finds that Defendant **Diaz Guillen** is intelligent and competent, fully understands all potential or actual conflicts which may arise in this case, and nonetheless wants Mr. Feldman and Ms. Descalzo as her defense counsel in this case, even though they jointly represent Mr. Velasquez Figueroa.

The facts of this specific case are such that no appearance of impropriety will arise by allowing Defendant **Diaz Guillen** her counsel of choice. Additionally, the Court notes that it conducted a full inquiry of Defendant **Diaz Guillen** to ensure that she was competent, that she understood the actual and potential conflicts of interest that could arise in this case, and that she had sufficiently conferred with independent counsel (or had the opportunity to consult with independent counsel) before making her decision. The Court also inquired about Defendant **Diaz Guillen's** age, education, mental capacity, and other characteristics relevant to her ability to waive the conflicts of counsel. Ultimately, after conducting the full colloquy described above, hearing Defendant **Diaz Guillen's** testimony, and observing her demeanor and determining her credibility, the Court found Defendant **Diaz Guillen** to be competent and credible. The Court also determined that Defendant **Diaz Guillen** was fully aware of the actual or potential conflicts which may arise in this case and that she knowingly, intelligently, and voluntarily waived any such actual or potential conflict relating to Mr. Feldman's and Ms. Descalzo's joint representation of co-defendant Velasquez Figueroa.

\*9 In summation, Defendant **Diaz Guillen's** right to counsel of choice is extremely important. See *United States v. Garcia*, 447 F.3d 1327, 1337 (11th Cir. 2006) (explaining that there is a presumption in favor of a defendant's right to counsel of his or her choice). The Court finds that, on balance, Defendant **Diaz Guillen's** right to counsel of choice in this case must prevail. The Court further finds that the representation of Defendant **Diaz Guillen** by Mr. Feldman and Ms. Descalzo will not negatively affect the

fair, efficient, and orderly administration of justice, nor will Defendant **Diaz Guillen's** representation by her counsel of choice negatively affect the public's interest in maintaining the integrity of the judicial process and the fairness of the trial proceedings. Finally, the Court finds that Mr. Feldman's and Ms. Descalzo's representation of Defendant **Diaz Guillen** will cause absolutely no harm to the courts, the public, or to co-defendant Velasquez Figueroa. Thus, Defendant's right to counsel of choice—Mr. Feldman and Ms. Descalzo—carries the day.

#### IV. Conclusion

Based on the very specific facts of this case and based on the knowing, voluntary, and intelligent express written and oral waiver from Defendant **Diaz Guillen**—as well as the Declaration/waiver from co-defendant Velasquez Figueroa—the Court finds that Defendant **Diaz Guillen** has knowingly, intelligently, and voluntarily waived any actual or potential conflicts of interest and that such conflicts are, indeed, waivable under the relevant case law. The Court accepts the waivers of any potential or actual conflict of interest in this case. Therefore, Mr. Feldman may permanently represent Defendant in this case, and Ms. Descalzo may continue to permanently represent Defendant.<sup>5</sup>

**DONE AND ORDERED** in Chambers at West Palm Beach in the Southern District of Florida, this 30th day of September, 2022.

#### All Citations

Not Reported in Fed. Supp., 2022 WL 4647131

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#### Footnotes

- 1 The Court previously held a *Garcia*/Rule 44(c) hearing in this case on a prior Government motion which addressed potential conflict of interest issues based on Marissel Descalzo, Esq.'s prior representation of a potential witness in this case. See DE 65. After a full hearing, the Court entered its Order dated May 31, 2022, allowing Ms. Descalzo's representation of **Diaz Guillen** in this case. [DE 72]. The pending conflict issue is unrelated to the prior conflict issue.
- 2 *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).



- 3 As previously stated, “[t]he Court heard from the parties’ counsel on [the *Garcia*] issue during the public portion of the hearing, and also heard from Ms. Descalzo at a sealed, *ex parte* hearing which she requested, and to which the Government had no objection.” [DE 130 at 2].
- 4 The Court noted that, based on the Declarations each stating that Ms. Descalzo was also representing co-defendant Velasquez Figueroa, the *Garcia*/Rule 44(c) issue actually pertained to both Ms. Descalzo and Mr. Feldman. That is, both Ms. Descalzo and Mr. Feldman jointly seek to represent both **Diaz Guillen** and Velasquez Figueroa.
- 5 In the event Mr. Velasquez Figueroa is extradited here from Spain and appears in this case, an additional *Garcia*/Rule 44(c) will have to be conducted at that time with his presence should Ms. Descalzo and Mr. Feldman seek to represent him in this case post-extradition.

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