No. ________

In The
Supreme Court of the United States

SHOLAM WEISS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the prosecutor effect an erroneous denial of choice of counsel under *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), by threatening and then issuing an unwarranted and unnecessary trial subpoena upon a criminal defendant's long-time chosen counsel which effectively prevents further representation by said counsel?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner, Sholam Weiss, was a defendant in the district court and the sole appellant in the opinion and judgment by the Eleventh Circuit for which review is sought. Sholam Weiss is an individual. Thus, there is no disclosure to be made by him pursuant to the Supreme Court Rule 29.6.

The Respondent is the United States of America.

Keith Pound, Jan Schneiderman, Yaakov Stark, a/k/a Jan Stair, and Richard B. Heiman were co-defendants with Weiss in the 1999 trial, but were not parties in the appeal to the Eleventh Circuit for which review is sought in this petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
I. Course of Proceedings Below	3
A. Overview	3
B. Reinstatement of Direct Appeal	5
II. Statement of Facts	6
III. The *De Facto* Disqualification of Chosen Counsel by the Government's Issuance of an Unwarranted Subpoena Prior to Trial	7
REASONS FOR GRANTING THE PETITION	20

TABLE OF CONTENTS – Continued

Page

I. THE COURT OF APPEALS' DECISION (1) CONFLICTS WITH THIS COURT'S DECISION IN *UNITED STATES V. GONZALEZ-LOPEZ*, 548 U.S. 140 (2006), WHICH REQUIRES AUTOMATIC REVERSAL WHERE THE PROSECUTOR, BY ISSUING AND SEEKING ENFORCEMENT OF AN UNWARRANTED AND UNNECESSARY TRIAL SUBPOENA UPON A CRIMINAL DEFENDANT'S LONG-TIME CHOSEN COUNSEL, EFFECTIVELY PREVENTS REPRESENTATION BY SAID COUNSEL AT TRIAL; (2) ERRONEOUSLY REQUIRES A SHOWING OF BAD FAITH; (3) IS IN CONFLICT WITH DECISIONS FROM THIS COURT AND OTHER CIRCUITS REGARDING ACTUAL CONFLICTS OF INTEREST; AND (4) RAISES A GENUINE RISK THAT MISUSE OF THE SUBPOENA POWER CAN ENABLE THE GOVERNMENT TO DEPRIVE VIRTUALLY ANY DEFENDANT OF COUNSEL OF CHOICE........................ 20

A. Bad Faith is not a necessary element in a claim of erroneous deprivation of choice of counsel 21

B. Contrary to the Eleventh Circuit's ruling, Leventhal did not have an actual conflict of interest which would preclude his representation of Weiss at trial 23

TABLE OF CONTENTS – Continued

Page

C. The decision below directly conflicts with the correct decision of the United States Court of Appeals in *United States v. Diozzi,* 807 F.2d 10 (1st Cir. 1986), and with decisions of other federal courts 32

D. The reality is that defense counsel routinely produce requested documents on behalf of defendants, so that if a prosecutor can issue an unwarranted and unnecessary subpoena for testimony about defense counsel's production, the subpoena can deprive the defendant of counsel of choice in any case in which the subpoena effectively makes it impractical, if not impossible, for defense counsel to prepare for trial 37

CONCLUSION 38

APPENDIX

U.S. Court of Appeals for the Eleventh Circuit, Per Curiam Opinion, filed September 24, 2013 .... App. 1

U.S. District Court, Order, filed October 28, 1998 .... App. 12

U.S. District Court, Order, filed December 15, 1998 .... App. 16

TABLE OF CONTENTS – Continued

Page

U.S. District Court, Order, filed January 21, 1999 .... App. 42

U.S. Court of Appeals for the Eleventh Circuit, Denial of Petition for Panel Rehearing, filed November 15, 2013 .... App. 49

TABLE OF AUTHORITIES

Page

CASES:

Brady v. Maryland, 373 U.S. 83 (1963) 21

Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) 27

Harris v. New York, 401 U.S. 222 (1971) 29

In re Amendments to the Florida Bar, 933 So.2d 417 (Fla. 2006) 26

Macheca Transp. Co. v. Philadelphia Idem. Co., 463 F.3d 827 (8th Cir. 2006) 35

Mickens v. Taylor, 535 U.S. 162 (2002) 26, 28

Nix v. Whiteside, 475 U.S. 157 (1986) 26, 27, 29, 30

Rodriguez v. Chandler, 382 F.3d 670 (7th Cir. 2004) 23, 24

The Florida Bar Re: Amendments to the Rules, 605 So.2d 252 (Fla. 1992) 26

United States v. Crockett, 506 F.2d 759 (5th Cir. 1975) 14

United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986) 14, 32, 33, 34

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) .... *passim*

United States v. Martinez, 151 F.3d 384 (5th Cir. 1998) 14

United States v. McKeighan, 685 F.3d 956 (10th Cir. 2012) 31

TABLE OF AUTHORITIES – Continued

Page

United States v. Melton, 2013 WL 2456015 (N.D. Iowa 2013) 34, 35

United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988) 23

United States v. Starnes, 157 Fed. Appx. 587 (5th Cir. 2005) 35

Wheat v. United States, 486 U.S. 153 (1988).....24, 25, 37

CONSTITUTION & STATUTES:

U.S. Const. amend. VI ....*passim*

18 U.S.C. §1001 4

18 U.S.C. §1343 4

18 U.S.C. §1346 4

18 U.S.C. §1503 4

18 U.S.C. §1956 4

18 U.S.C. §1957 4

18 U.S.C. §1962 ....3, 4

18 U.S.C. §2314 4

28 U.S.C. §1254(1) 1

28 U.S.C. §2241 5

TABLE OF AUTHORITIES – Continued

Page

RULES:

Florida Rules of Professional Conduct

Rule 4-1.16 26

Rule 4-3.3 29

Rule 4-3.7 9

PETITION FOR WRIT OF CERTIORARI

Sholam Weiss ("Weiss") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is unpublished and is attached at App. 1-11 and its order denying rehearing is attached at App. 49-50. The relevant orders of the district court are unpublished and are attached at App. 12-15; 16-41; 42-48.[1]

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on September 24, 2013, App. 1, and denied rehearing on November 15, 2013, App. 49. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution, in pertinent part, provides as follows: "In all

[1] Docket entries in the District Court are referred to as "Doc."

criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

INTRODUCTION

Does a prosecutor violate a defendant's Sixth Amendment right to counsel of his choice, as recognized in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), by issuing an unwarranted and unnecessary trial subpoena to defendant's long-time chosen counsel and continuing to seek enforcement of that subpoena which precludes chosen counsel from representing the defendant at trial? That is the core issue in this petition for certiorari.

As developed below, the undisputed key facts are as follows:

1. Weiss had been represented by Robert Leventhal ("Leventhal") for three and one-half years prior to the return of the operative indictment.

2. The subpoena related to two counts (in a 93 count indictment) in which Weiss was alleged to have submitted false documents to the Government.

3. The prosecution conceded that although Leventhal delivered the documents, he did so innocently.

4. The defense was willing to stipulate that the documents were furnished by Weiss to

Leventhal and were delivered to the Government at Weiss's request.

5. Both the magistrate judge and the district judge found that there was no basis for the subpoena, but the enforcement proceeding dragged on until the eve of trial.

6. Consequently, Leventhal was effectively sidelined for nearly the entire eight month pre-trial period and could not prepare for trial. Weiss was forced to hire substitute counsel.

7. Days before trial, long after it was possible for Leventhal to handle the trial, the prosecutor agreed to withdraw the subpoena and accept the offered stipulation.

STATEMENT OF THE CASE

I. Course of Proceedings Below

A. Overview

Weiss is currently incarcerated at Canaan USP, Waymart, Pennsylvania, serving an 835-year sentence.

On April 29, 1998, the Grand Jury for the Middle District of Florida returned a 93-count indictment against Weiss and various corporations and individuals in connection with the financial collapse of National Heritage Life Insurance Company ("NHLIC").

The indictment charged Weiss with 79 counts: one (1) count of racketeering, in violation of 18 U.S.C.

§1962(c); one (1) count of racketeering conspiracy, in violation of 18 U.S.C. §1962(d); twenty-seven (27) counts of wire fraud, in violation of 18 U.S.C. §§1343 and 1346; twenty-four (24) counts of interstate transportation of stolen funds, in violation of 18 U.S.C. §2314;[2] eighteen (18) counts of money laundering, in violation of 18 U.S.C. §1956(a)(1)(A) and (B); five (5) counts of money laundering, in violation of 18 U.S.C. §1957; two (2) counts of false statements, in violation of 18 U.S.C. §1001; and one (1) count of obstruction of justice, in violation of 18 U.S.C. §1503.

Weiss and his co-defendants were tried before a jury in the United States District Court for the Middle District of Florida (Honorable Patricia Fawsett, presiding) for nine months, from February 1, 1999, until November 1, 1999. Weiss was convicted in *absentia* of all remaining seventy-eight (78) charges against him, and sentenced in *absentia* to eight hundred forty-five (845) years.[3] The court imposed a criminal fine of $123,399,910 plus restitution of $125,016,656 and forfeiture of certain assets. (Doc. 1363). The judgment of conviction was entered on February 15, 2000. (Doc. 1372).

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[2] One of the §2314 violations (Count 13) was dismissed on the Government's motion during the course of the proceedings. (Docket Sheet, July 12, 1999).

[3] Weiss was found absent before jury deliberations began on October 18, 1999 and an arrest warrant for his arrest was issued. (Doc. 1250).

B. Reinstatement of Direct Appeal

Because Weiss was a fugitive at the time his appeal was filed, his appeal was dismissed on the basis of the fugitive disentitlement doctrine.[4] Weiss was subsequently arrested in Austria, which demanded assurances that Weiss would receive a full appeal of his conviction and sentence upon his return to the United States. Austria extradited Weiss on June 9, 2002. Subsequently, Weiss filed a petition of *habeas corpus* under 28 U.S.C. §2241, arguing that absent a full re-sentencing and full appeal, he was being held in violation of the extradition treaty between Austria and the United States. After years of litigation, the district court (Honorable William Terrell Hodges, presiding) found the representations to Austria made by the United States (that Weiss would receive an appeal of his conviction and sentence) were binding under the United States-Austria extradition treaty and terms of extradition. As a remedy to enforce that obligation, Judge Hodges vacated Count 93 (denied extradition by Austria under the rule of specialty) reducing Weiss' 845-year sentence to an 835-year sentence, which allowed him to file a notice of appeal. The amended judgment and commitment order was entered on July 16, 2009. (Doc. 2223).

Weiss timely filed his notice of appeal in this case on July 24, 2009 (Doc. 2226). On September 24, 2013, the Eleventh Circuit affirmed *per curiam* Weiss'

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[4] District Court Case No. 5:02:cv-204-Oc-10GRJ, Doc. 189.

conviction. His petition for rehearing was denied on November 15, 2013.

II. Statement of Facts

The specific facts relative to Weiss' legal argument in support of this petition are set forth under Section III. However, an overview of the facts presented to the jury is set forth below:

The core, but by no means the limit, of Weiss' involvement in this case pertained to his purchase of non-performing mortgages from federal agencies with funds provided by NHLIC. In the summer of 1993, Weiss entered into an agreement with NHLIC to purchase discounted mortgages with its funds. (Doc. 1538, pp.688-702). Weiss' company, South Star Management ("South Star"), was to service and clean-up the mortgages to increase their value, and then return them to NHLIC. (*Id*., pp.704-05). The increase of value was intended to help remove a $35 million loss by NHLIC, which Weiss was initially led to believe came from bad investments (*Id*., pp.700-02), but later learned was from fraud and embezzlement by NHLIC officials, including CEO Patrick Smythe, financial adviser Lyle Pfeffer, outside counsel Michael Blutrich and others. (*Id*., pp.606-26; Doc. 1539, pp.806-07). Attempts were made to hide this scheme (and the $35 million loss) from insurance regulators and NHLIC's own CFO, including bundling the underperforming mortgages into a series of bonds to be owned by NHLIC. (*Id*., pp.816-22). This scheme eventually

collapsed, resulting in substantial losses for the already financially troubled NHLIC. NHLIC was placed under receivership and a federal criminal investigation ensued. That investigation led to a series of indictments and the conviction below.

III. The *De Facto* Disqualification of Chosen Counsel by the Government's Issuance of an Unwarranted Subpoena Prior to Trial

Weiss argued both in district court and on appeal that the Government erroneously deprived him of his Sixth Amendment right to choice of counsel by its misuse of a trial subpoena upon Robert Leventhal, his long-standing attorney. The subpoena was issued without any justifiable basis and was eventually quashed by the district court on the very eve of trial. However, the eight month long enforcement litigation resulted in Leventhal's *de facto* disqualification to serve as trial counsel in the case below. Under *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), a wrongful denial of a defendant's choice of counsel is structural error which requires automatic reversal.

Leventhal was originally retained by Weiss in January, 1995, in connection with the investigation of the collapse of NHLIC. (Doc. 421, p.1; Doc. 610, p.12). Leventhal was also sole counsel of record for Weiss in Case No. 97-71-CR-ORL-22,[5] the original

[5] The original indictment against Weiss returned on July 24, 1997 superseded an earlier indictment returned on April 24,

(Continued on following page)

indictment which preceded the operative indictment and conviction below in Case No. 98-99-CR-ORL-19A. *Id*. The Government made no objection to Leventhal's representation of Weiss in the 1997 case nor was Leventhal threatened with subpoena in that case. (Doc. 585, p.3).

The Government dismissed the 1997 indictment without prejudice after the trial court (Conway, J.) rejected the Government's attempt to delay the trial and seek a second superseding indictment against Weiss and others. (Doc. 229, pp.1-3).

Thereafter, on April 29, 1998, the Grand Jury returned the operative indictment against Weiss and others charging racketeering, wire fraud, money laundering and other offenses. (Doc. 1). Included in the charges against Weiss were two counts of false statement (Counts 91 and 92) and one count of obstruction of justice (Count 93).

Shortly before Weiss' initial appearance on May 15, 1998, the Government advised Leventhal that he would be subpoenaed by the Government to appear at trial as a prosecution witness against his own client with respect to Counts 91-92. (Doc. 105, pp.28-30). The anticipated testimony went largely to whether Leventhal was acting with Weiss' authority in 1995 when Leventhal provided certain documents to the

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1997 in which Weiss was not charged. Leventhal entered his appearance for Weiss in that case on August 21, 1997.

Government during Weiss' initial cooperation, as well as Leventhal's understanding of Weiss' source of documents. The Government, however, did not actually serve its subpoena upon Leventhal until July 7, 1998.[6] (Doc. 421, p.2). At the initial appearance, in response to a challenge as to why the alleged need for Leventhal's testimony was not resolved at the Grand Jury stage, the Government admitted: "*it wasn't right what was done.*" (Doc. 105, p.30). The Government acknowledged that Leventhal was not complicit in any misconduct by Weiss and had been used by his client "unwittingly." (Doc. 105, p.28).

The immediate effect of the Government advising Leventhal that he would be subpoenaed to testify against Weiss was clearly predictable. Under Rule 4-3.7 of the Florida Rules of Professional Conduct, Leventhal could not ethically represent Weiss at such trial and, therefore, could not enter a general

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[6] The subpoena sought Leventhal's testimony at trial as well as documents in his possessions related to (i) certain asset sale agreements or drafts thereof between NHLIC and South Star, copies of which were previously provided to federal agents in 1995 and the Grand Jury in February, 1996; (ii) a handwritten memorandum to Leo Fox (a business attorney for Weiss) signed by Lyle Pfeffer, a copy of which was previously provided to the Government in August, 1995 and (iii) two tape recorded conversations, excerpts of which were played to a federal agent in August, 1995 and copies of which had been already produced to the Grand Jury. (Doc. 421, pp.2, 12-13). The asset sale agreements, Pfeffer memo and the two tape recordings were the basis of the false statement and obstruction counts against Weiss. (Doc. 1, pp.156-59; Doc. 421, p.2).

appearance on behalf of his client as he did in the earlier indictment and as he fully intended to do in this case. (Doc. 421, pp.3-5; Doc. 610, p.12). Meanwhile, the court was insistent that Weiss proceed as scheduled with either retained or appointed counsel. (Doc. 216, p.8). Accordingly, Weiss was forced to retain Joel Hirschhorn of Miami, as replacement counsel. (Doc. 207; Doc. 501, p.20). Hirschhorn was entirely new to the case, whereas Leventhal, at that point, had been engaged in the matter for three and a half years. (Doc. 421, p.1; Doc. 610, p.12).

At Weiss' June 18, 1998 arraignment, the Magistrate agreed that the parties should first attempt to resolve the issue of the Government's planned subpoena upon Leventhal, even before expecting Leventhal to make a general appearance, "because there is no point in going – jumping through all the hoops to make an appearance only to have disqualifications done at that time." (Doc. 216, pp.11-12). As the court had made clear, an attorney entering a general appearance had to make satisfactory financial arrangements with his client and would not be allowed to withdraw from the case for lack of payment. (Doc. 105, p.25). Considering the magnitude and complexity of the case, with approximately 1.5 million documents[7] and an estimate of 144 days of trial

[7] While Leventhal was familiar with some of the 540,000 documents in the 1997 case, the new indictment would require the review of an additional 1,000,000 documents. (Doc. 610, pp.2-4; Doc. 263, pp.10-13, 16-21, 27-33).

(Doc. 19),[8] the financial burden upon any defendant, including Weiss, to fund in advance Leventhal (to sit on the sidelines and await resolution of the subpoena litigation) and, at the same time, fully fund a back-up or replacement counsel, would be inherently unfair.

The subpoenaed documents were originally provided to the Government in mid-1995 by Leventhal, acting on behalf of Weiss while he was cooperating with the Government. (Doc. 585, pp.9-11). The Government came to believe as early as August of 1995 (Doc. 590, pp.89-93) that these documents had been falsified and the conversations on the tapes had been staged[9] in an effort by Weiss to corroborate his exculpatory version of events.[10] Yet, the Government delayed for nearly three (3) years in advising Leventhal of its concerns. (Doc. 590, pp.50, 90, 101, 155). F.B.I. Special Agent Joseph Judge, the lead case agent,

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[8] The trial actually lasted nine (9) months from February 1, 1999 to November 1, 1999, which was preceded by eight (8) months of pre-trial motions and trial preparation. (Docket Sheet, pp.2-43).

[9] Shortly thereafter, the Government ended its cooperation agreement with Weiss. (Doc. 590, p.94).

[10] Weiss maintained in interviews with the F.B.I. that the asset sale agreement between his company, South Star, and NHLIC permitted the purchase of non-performing mortgages. The asset sale agreement provided by Smythe (and given to the Delaware Insurance Commission) did not permit South Star to purchase non-performing mortgages on behalf of NHLIC. The documents that Weiss later provided the Government in 1995 through Leventhal permitted the purchase of non-performing mortgages. (Doc. 585, pp.9-13).

testified that the Government had concluded by the summer of 1997 that the asset sale documents, which Leventhal tendered on behalf of Weiss in 1995, were false. (Doc. 590, p.40). The Government never cogently explained its reasons for not bringing Leventhal before the Grand Jury, assuming that was even necessary.[11]

In attempting to resolve the issue even before the subpoena was served, Weiss and Leventhal immediately offered to stipulate to any reasonable set of facts which would avoid disqualification or the need to

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[11] In response to a Grand Jury subpoena served upon Leventhal as agent for Weiss, Leventhal provided the requested documents along with a cover letter dated February 16, 1996. (Doc. 590, pp.28-32). This letter was marked as an exhibit at the hearing on the motions to quash and retained by the Government. Appellate counsel has been advised by the Government that said exhibit cannot be located. Nonetheless, the content of the February 16th Leventhal letter is described in AUSA Thomas Turner's September 23, 1998 letter to Leventhal's counsel:

> Mr. Leventhal produced these same documents again in a letter dated February 16, 1998 [sic] (copy enclosed), in which Mr. Leventhal said that Mr. Weiss stated, at the time of the original production [in 1995] (presumably from Mr. Leventhal to Mr. Judge) that the document or documents were located in a file belonging to Mr. Blutrich. [Added]. (Doc. 421, p.21).

This self-authenticating letter, which Weiss confirmed in his Grand Jury testimony, obviated the need for Leventhal's testimony about his authority to act on behalf of Weiss and his understanding of the source of the documents. (Doc. 1, p.160; Doc. 421, p.21; Doc. 585, p.10).

formally challenge the subpoena.[12] (Doc. 421, pp.3-4, 14-19). After negotiations failed, the Government revealed its true motive in refusing to stipulate: "*[w]e do not think it is appropriate for Mr. Leventhal, having been used unwittingly as an instrument to obstruct justice, to continue to represent such a client. We cannot understand why Mr. Leventhal would wish to proceed to represent a client under those circumstances.*" *See* AUSA Thomas Turner's September 23, 1998 letter. (Doc. 421, p.21). [Emphasis added.] As a result of the Government's refusal to accept a stipulation, both Leventhal and Weiss filed motions to quash the subpoena on grounds, *inter alia*, of lack of necessity and the Sixth Amendment right to choice of counsel, respectively. (Docs. 421, 540).

The motion by Leventhal, which Weiss adopted in his own motion, specifically raised the issue of misuse of a trial subpoena by the Government as a "litigation tool" designed "to increase the likelihood of

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[12] As evidenced by the stipulation entered on March 1, 1999 (Doc. 843), the Government sought testimony from Leventhal to establish that: (i) Weiss authorized Leventhal (whom the government acknowledged had acted innocently) to provide the documents to the Government in 1995; (ii) the same documents were again produced to the Grand Jury on February 16, 1996 by Leventhal at the direction of Weiss; and (iii) Weiss represented said documents as consistent with his understanding of the actual terms of the asset sale. The stipulation originally offered by Leventhal and Weiss, which the Government rejected, was broader than that finally agreed upon by Hirschhorn and the Government during trial. (Doc. 421, pp.3-4, 14-15; Doc. 585, p.7; Doc. 843).

Mr. Leventhal's disability to serve as trial counsel." (Doc. 421, pp.4-5; Doc. 552, p.2). The court ordered both sides to meet and confer in an effort to resolve the dispute, but the Government forced a hearing on the matter before the Magistrate on November 23 and 30, 1998. (Doc. 492).

In her order for an evidentiary hearing (App. 12-15), the Magistrate set forth the applicable law for determining whether the Government's subpoena of Leventhal was warranted or erroneous: "[A] party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources," citing *United States v. Crockett*, 506 F.2d 759, 760 (5th Cir. 1975), accord *United States v. Martinez*, 151 F.3d 384, 393 (5th Cir. 1998). *Id*. at 13. The Magistrate commented that " . . . the government bears a heavy burden of establishing the disqualification [of chosen counsel] is justified," quoting *United States v. Diozzi*, 807 F.2d 10 (1st Cir. 1986). *Id.* at 14.

As the Magistrate ultimately held, "Leventhal's testimony is not necessary to link Weiss to the allegedly false documents and tape recordings." App. 37. The Magistrate found that the "United States failed to establish that Leventhal's testimony is necessary to its case and that it is not obtainable by other means." App. 39-40. According to the Magistrate, such routine authority-to-act testimony could readily be

furnished by the case agents[13] or be the subject of stipulation (App. 40) *which Weiss and Leventhal had repeatedly offered the Government* even before the subpoena was served. (*Id.*; Doc. 421, pp.3-4).

The Government appealed the Magistrate's ruling to the district court. (Doc. 606). The district court's decision affirmed the Magistrate's ruling under both the abuse of discretion and *de novo* standards of review. App. 44. Quoting the Magistrate's opinion with approval, the district court stated:

> Government agents could testify that Leventhal produced the documents and played the tape recordings, which testimony could be admitted against Weiss as acts by him through his agent or representative. Weiss removed any argument about the admissibility of this testimony by agreeing to stipulate to its admission. The only other testimony that the United States speculates Leventhal could offer is evidence that Weiss also deceived Leventhal by telling him that the documents and tape recordings are genuine. Such testimony would not prove any element of the offenses charged against Weiss in the indictment.

Id. at 43.

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[13] As the Magistrate acknowledged, attorneys are presumed to act as authorized representatives of their clients, absent a claim that such attorney is acting *ultra vires*. App. 37. Weiss never made such claim and was willing to stipulate to the contrary. App. 40.

The district court further found "that the testimony of Defendant Weiss' own attorney ostensibly as an innocent individual who was deceived by Weiss would unduly and unnecessarily prejudice the jury when other witnesses who did not represent Weiss could testify to the same facts to which Mr. Leventhal would testify." *Id*. at 46. The district court noted that the "Government has not cited any case law to support the proposition that it is entitled to have Mr. Leventhal testify at trial without showing that such testimony is necessary." *Id*. at 45. Additionally, the court rejected and criticized the Government's demand, unsupported by any case law, that the court wait until trial to determine the issue. *Id.*

That final ruling did not come until January 21, 1999, just ten (10) days before the start of Weiss' trial. *Id.* As a result, Leventhal was effectively disqualified by the Government from the time of Weiss' initial appearance on May 15, 1998 until the very eve of the trial. (Doc. 610, p.12). Leventhal's lingering status as a potential Government witness precluded him from participating in meaningful trial preparation.[14] *Id*. By the time the district court affirmed the order of the Magistrate quashing his subpoena, Leventhal was unable to join the trial team. *Id*. The uncertain status

[14] Weiss' replacement attorney, Joel Hirschhorn, just one (1) month before the trial, stated "Mr. Leventhal, because of ethical concerns relating to his possible status as a government witness, declined to participate in witness interviews, strategy sessions and other important trial preparation." (Doc. 610, p.5).

of his ability to represent Weiss forced Leventhal to accept work from other clients, and his professional obligations to those clients precluded his ability to serve as even co-counsel of record to Weiss.[15] *Id.* It was not realistic to expect Leventhal to block off more than a year of his business calendar and not accept any new work while the issues of his subpoena and the potential disqualification were being litigated.

As stated in Leventhal's December 31, 1998 affidavit, had a subpoena not been threatened or issued, he would have filed a notice of appearance in the 1998 case as he did in the 1997 case. It was the improperly issued subpoena which caused Leventhal's *de facto* disqualification. (Doc. 610, p.12). On March 1, 1999, one month after commencement of the trial

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[15] The affidavit filed by Leventhal on December 31, 1998 stated as follows:

> *I have not filed a notice of appearance in the current indictment against Weiss as I was issued Government trial subpoena duces tecum.* That subpoena was recently quashed by order of Judge Magistrate Spalding. I am advised that the Government may seek to appeal that order.
>
> *Because of ethical considerations, while under Government subpoena, my ability to assist Joel Hirschhorn, Weiss' trial counsel, was severely hampered. . . .*
>
> I advised both Magistrate Judge Spalding and Mr. Weiss that *I was not in the position to be able to file a general appearance on his behalf for the February trial (after the subpoena was quashed) due to other business obligations as well as my view that I would not have sufficient time to prepare for trial.*

(Doc. 610, p.12). [Emphasis added.]

without Leventhal, the Government finally entered into the trial stipulation which had been offered eight (8) months earlier by Weiss. (Doc. 421, pp.3-4; Doc. 843, pp.1-2). Leventhal never sat at counsel's table during trial. Leventhal's only appearance at trial was as a witness on September 23 and 27, 1999. The Government had issued a second subpoena[16] to Leventhal to rebut certain testimony offered by Weiss regarding matters outside the scope of the March 1, 1999 trial stipulation. (Docs. 1189, 1238).

By December 1998, with the trial date fast approaching, the only remedy left for Leventhal to reenter the trial in any capacity was a continuance, which would allow him the time to free-up his schedule of new cases he had taken in the wake of the protracted subpoena litigation. The district court, however, had made it clear on July 1, 1998, when it set the February 1, 1999 trial date that "[n]o further continuance of trial should be anticipated by any party." (Doc. 229, p.6). On December 31, 1998, Weiss nevertheless requested a continuance to June 1, 1999 to permit "Mr. Leventhal [to] be able to assist in my defense," noting that "Leventhal was my first choice of counsel." (Doc. 610, p.11). With no way of knowing how much, if any, time would be granted, Leventhal could only promise in his affidavit that if the trial

[16] No error was assigned to either the issuance of that subpoena or the district court's rejection of Weiss' challenge to the subpoena since it was the original subpoena which caused the constitutional injury more than a year earlier. (Docs. 1189, 1238).

were delayed (and the quashing of the subpoena upheld), he "would be able to devote sufficient time to the case to assist Mr. Hirschhorn in being prepared for trial." *Id*. at 12.

The motion to continue was denied on January 6, 1999. (Doc. 617). When the Government's appeal of the Magistrate's quashing of the subpoena was finally rejected by the district court on January 21, 1999, Leventhal would have had only ten days to clear his schedule and prepare for what was anticipated to be a seven month trial. This, of course, was impossible.[17, 18]

[17] Whether any remediation afforded by a continuance would have been sufficient to cure the constitutional injury caused by the Government's misconduct, is an issue not reached since the continuance was not granted and the potential extent of Leventhal's re-involvement in the case cannot be determined.

[18] The Government was well aware of the court's position of February 1, 1999 being a firm trial date. Thus, by dragging out the subpoena litigation, the Government effectively caused Leventhal's disqualification notwithstanding that the subpoena was ultimately quashed.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION (1) CONFLICTS WITH THIS COURT'S DECISION IN *UNITED STATES V. GONZALEZ-LOPEZ*, 548 U.S. 140 (2006), WHICH REQUIRES AUTOMATIC REVERSAL WHERE THE PROSECUTOR, BY ISSUING AND SEEKING ENFORCEMENT OF AN UNWARRANTED AND UNNECESSARY TRIAL SUBPOENA UPON A CRIMINAL DEFENDANT'S LONG-TIME CHOSEN COUNSEL, EFFECTIVELY PREVENTS REPRESENTATION BY SAID COUNSEL AT TRIAL; (2) ERRONEOUSLY REQUIRES A SHOWING OF BAD FAITH; (3) IS IN CONFLICT WITH DECISIONS FROM THIS COURT AND OTHER CIRCUITS REGARDING ACTUAL CONFLICTS OF INTEREST; AND (4) RAISES A GENUINE RISK THAT MISUSE OF THE SUBPOENA POWER CAN ENABLE THE GOVERNMENT TO DEPRIVE VIRTUALLY ANY DEFENDANT OF COUNSEL OF CHOICE.

The Government wrongly deprived Weiss of his Sixth Amendment right to choice of counsel by its misuse of a trial subpoena upon his long-time attorney, Robert Leventhal. The threat of the subpoena at the outset of the 1998 case, and the prospect of his testifying as a prosecution witness, prevented Leventhal from entering a notice of appearance (as he had done in the 1997 indictment of this case) and forced Weiss to retain replacement counsel. The

subpoena was issued without any justifiable basis and was eventually quashed by the district court on the very eve of trial. However, the protracted subpoena litigation resulted in Leventhal's *de facto* disqualification to serve as trial counsel. A wrongful denial of a defendant's choice of counsel is structural error which requires automatic reversal. *United States v. Gonzalez-Lopez,* 548 U.S. 140, 146-50 (2006). No further showing of prejudice is necessary, nor is harmless error review available. *Id.*

A. Bad Faith is not a necessary element in a claim of erroneous deprivation of choice of counsel.

The Eleventh Circuit's opinion states that "there is no evidence that the government acted in bad faith when it subpoenaed Leventhal's testimony." App. 6. Prosecutorial misconduct does not always require a showing of bad faith,[19] and this is certainly true in a Sixth Amendment choice of counsel claim. This Court simply requires a showing that a defendant's choice of counsel has been "wrongly" or "erroneously" denied. *Gonzalez-Lopez*, 548 U.S. at 148 (2006). In *Gonzalez-Lopez*, the district court denied the application for admission *pro hac vice* of defendant's chosen counsel based upon an honest misinterpretation of the local

[19] *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (where prosecutor fails to disclose exculpatory evidence to the defense, such failure is error regardless of whether or not the prosecutor acted in bad faith).

rules. *Id*. at 143. There was no allegation that the district court acted in bad faith, but only that it erroneously denied the defendant's choice of counsel.

This Court has recognized a defendant's right to choice of counsel to be of such fundamental constitutional importance that the erroneous denial of choice of counsel constitutes "structural error." *Id*. at 149. Once there is a determination that a defendant's choice of counsel has been wrongly denied, the Sixth Amendment violation is "complete," and no further showing of prejudice (or the "comparative effectiveness" of attorneys)[20] is necessary. *Id*. at 148.

Structural error is a constitutional error that "affect[s] the framework within which the trial proceeds, and [is] not simply an error in the trial process itself." *Gonzalez-Lopez* at 148. Therefore, structural error is determined by the nature of the constitutional injury, here, the denial of choice of counsel, and not by the identity of the official, prosecutor or Magistrate, who caused the injury.

That the Government in this case was the primary actor in the denial of choice of counsel doesn't alter the structural nature of the constitutional

[20] Judge Barkett voiced a misapprehension during oral argument that attorneys Calvacca or Hirschhorn would have been just as good for Weiss as his chosen long-time counsel Leventhal. In *Gonzalez-Lopez*, this Court disagreed and recognized choice of counsel to be a separate constitutional right independent of the general right to effective counsel. *Id.* at 148.

violation; to the contrary, the Government's role only underscores the need for deterrence. Prosecutors, and not neutral judicial officers, have a much greater incentive to disqualify formidable adversaries. *United States v. Nichols,* 841 F.2d 1485, 1508 (10th Cir. 1988) (noting the misuse of subpoenas to exclude certain defense attorneys).

The Eleventh Circuit's ruling, at least by clear implication, that bad faith is a necessary element of a claim of wrongful denial of choice of counsel finds no support in any case law and is in conflict with *Gonzalez-Lopez* and the Seventh Circuit's decision in *Rodriguez v. Chandler*, 382 F.3d 670, 673 (7th Cir. 2004). There, Judge Easterbrook, writing for the court, held that petitioner was not required to allege or establish that the prosecutor was "acting in bad faith [since] that is not an element of the constitutional theory" of wrongful denial of choice of counsel. *Id*.

B. Contrary to the Eleventh Circuit's ruling, Leventhal did not have an actual conflict of interest which would preclude his representation of Weiss at trial.

The Eleventh Circuit held that "Weiss has failed to show that it was the issuance of the subpoena that caused Leventhal's failure to represent Weiss [because] Leventhal had an actual conflict of interest that arose when Weiss used his services to obstruct justice and could not represent Weiss for that reason."

App. 6. In the view of the Eleventh Circuit, "Leventhal could not counsel Weiss as to whether he should or should not testify regarding, for example, the timing and circumstances of the conveyance of the documents when Leventhal's knowledge of events was different from Weiss' testimony."[21] *Id.*

The Eleventh Circuit's ruling conflicts with several decisions of this Court regarding the right to choice of counsel and what constitutes an actual conflict of interest which would limit a criminal defendant's choice of counsel.

In *Wheat v. United States*, 486 U.S. 153 (1988), this Court recognized a defendant's right to choose his counsel subject only to certain limitations regarding licensure, availability, ability to meet counsel's fee demands and, as relevant to the discussion here, that such counsel not have an actual or even serious potential for a conflict of interest which could give

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[21] Weiss did not, nor could not, in his testimony dispute the stipulation of facts regarding Leventhal's conveyance of the documents to investigators in the summer of 1995. (Doc. 1664, pp.28231-33). The stipulation was binding on both sides. Rather, Weiss recalled having personally delivered the same documents to F.B.I. Special Agent Joseph Judge on an earlier occasion, a matter which fell outside the stipulation. In his testimony as a rebuttal witness for the Government, Leventhal could not recall any such earlier conveyance of the documents by Weiss. (Doc. 1678, pp.31017-20). Of course, the best evidence of whether Weiss, in fact, made such an earlier delivery would be the testimony of Special Agent Judge, not Leventhal, as the district court itself acknowledged. (Doc. 1677, p.30654).

rise to divided loyalties on the part of counsel. *Id*. at 159. None of those limitations applied here.

Leventhal was licensed in Florida and admitted to practice in the Middle District of Florida; was available to Weiss whom he had represented continuously for three and a half years prior to the return of operative indictment in 1998 and was his sole counsel of record in the original 1997 indictment. Weiss had already paid substantial fees to Leventhal up through the return of the 1998 indictment (Doc. 501, p.20) and had the approval of the Government to raise the funds necessary for a seven month trial by borrowing against a property owned by his family in New York, notwithstanding the substitute forfeiture counts in the indictment.[22]

The foundation of the court's decision was its determination that Leventhal had an actual conflict of interest that precluded his representation of Weiss. App. 6. This determination is unsupported by the Florida Rules of Professional Conduct and conflicts with *United States v. Gonzalez-Lopez* and this Court's

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[22] The forfeiture concerns that originally prompted a limited appearance by Leventhal (Doc. 22) were resolved at arraignment for replacement counsel Hirschhorn. (Doc. 216, p.8). But for the looming subpoena, the funds which the Government allowed to be used to pay Hirschhorn would have been available for Weiss to pay Leventhal. Weiss planned to use Hirschhorn as a "back up" to Leventhal and to assist in the preliminary organization of his case until Leventhal's status as a witness was resolved. (Doc. 501, p.20).

decisions in *Mickens v. Taylor*, 535 U.S. 162 (2002), and *Nix v. Whiteside*, 475 U.S. 157 (1986).

At oral argument, the Government acknowledged it had wrongly relied upon the current (2006) version of Rule 4-1.16 of the Florida Rules of Professional Conduct in arguing for the first time on appeal that Leventhal was ethically prohibited from representing Weiss given the allegations that Weiss had previously "used the lawyer's services to perpetuate a crime or fraud."[23] The Government then argued that Leventhal was barred from representing Weiss by another section of Rule 4-1.16 that provides that a lawyer has to withdraw if "the representation will result in violation of the Rules of Professional

[23] The version of Rule 4-1.16 in existence at the time of Weiss' trial in 1998-99 merely *permitted*, but did not require, withdrawal under the circumstances set forth in the rule. *See The Florida Bar Re: Amendments to the Rules*, 605 So.2d 252, 340-42 (Fla. 1992); *In re Amendments to the Florida Bar*, 933 So.2d 417, 455-57 (Fla. 2006). At the time of Weiss' trial, under the terms of Rule 4-1.16, it would have been Leventhal's judgment as to whether he would represent Weiss at trial given the allegation of past misuse [referring to Weiss having used Leventhal to convey the false documents to the Government], a judgment that could not be usurped by the Government. The current (2006) version of the rule presupposes that the lawyer himself is of the view that the client has, in fact, used his services to perpetrate a crime or fraud. The Government, however, cites no support in the record that Leventhal was of such a mind. To the contrary, whether the Weiss documents were false was by no means a foregone conclusion. Thus, even the current version of the rule would not have required Leventhal's withdrawal.

Conduct or law." The Government posed a scenario that if Leventhal had been trial counsel and Weiss were to insist upon giving testimony known by Leventhal to be false, then he would have had to terminate the representation. This led the Court to accept the Government's argument that Leventhal's departure from the case would have been inevitable, meaning that the Government's actions were not the cause of Leventhal's *de facto* disqualification.

The Government's argument rested upon a "speculative inquiry into what might have occurred in an alternate universe" with different counsel "pursu[ing] different strategies." *Gonzalez-Lopez*, 548 U.S. at 148-51. The fact is that Leventhal had the ability to make clear to Weiss in preparing him for trial that it was imperative that Weiss not put Leventhal in a compromised position, and there is nothing in the record to suggest that Weiss would not have followed Leventhal's ethically required instructions in this regard. Moreover, the law is clear that Leventhal had no obligation to Weiss to permit his false testimony. *See Nix v. Whiteside*, 475 U.S. 157 (1986) (right to assistance of counsel not violated by attorney's refusal to present defendant's perjured testimony). An actual conflict of interest occurs only when a lawyer "has inconsistent interests" between his client and either himself or another client. *Freund v. Butterworth*, 165

F.3d 839, 859 (11th Cir. 1999) (*en banc*). No such showing was made below.[24]

Nothing in Weiss' testimony conflicted with any discernible personal interest that Leventhal may have had. An actual conflict of interest would arise if the defendant's testimony at trial might expose the lawyer's complicity or wrongdoing and, thus, the lawyer's advice to the client as to whether to testify would be compromised by the lawyer's own self-interest. As the Government itself recognized, however, Leventhal had no exposure arising from his innocent conveyance of documents. App. 3. Nothing in Weiss' testimony was even remotely suggestive of wrongdoing by Leventhal.

The Eleventh Circuit incorrectly held that "Leventhal's representation of Weiss was rife with conflict – conflict about the nature, timing, and circumstances of disgorging the documents at issue to federal law enforcement." *Id*. at 6. In *Mickens*, this Court held that an actual conflict "is a conflict of interest that adversely affects counsel's performance." 535 U.S. at 172, n.5. The only "adverse" impact of Leventhal having personal knowledge of certain events about the delivery of documents to the Government would be, at most, his having to remonstrate

[24] The Government has never claimed that Leventhal was complicit in any underlying criminal conduct, or that Leventhal had an attorney-client relationship with any Government witness. Nor did Leventhal ever represent any of the co-defendants. (Doc. 1678, p.31065; Doc. 1680, pp.31483-494).

with Weiss to prevent any possible perjury on that issue. Under *Nix*, "the scope of the constitutional right to testify . . . does not extend to testifying *falsely*." 475 U.S. at 173 (citing *Harris v. New York*, 401 U.S. 222, 225 (1971)). [Emphasis in original]. Hence, as a matter of law, Leventhal's personal knowledge of certain events cannot be said to create any actual or potential conflict of interest which would "adversely affect [ ] counsel's performance." 535 U.S. at 172, n.5.

Any advice by Leventhal to the effect that Weiss, if he chose to testify, should testify truthfully, is not a "conflict of interest," but rather the ethical obligation of all members of the bar. *See, e.g.,* Rule 4-3.3, Florida Rules of Professional Conduct. For the Eleventh Circuit to rule otherwise represents a fundamental misunderstanding of the applicable Rules of Professional Conduct and conflicts with this Court's decision in *Nix v. Whiteside*. *See* 475 U.S. at 176. Even if one were to assume *arguendo* that Leventhal "knew" that Weiss' proposed testimony about the timing and circumstances of the delivery of the documents to Government agents was indeed false,[25] that is hardly

[25] It is not known whether Leventhal would have considered Weiss' apparently different recollection of certain meetings with the Government as "false" or simply an arguably honest difference in their respective recollections. Neither state of affairs, however, implicates a true conflict under *Nix*. *See* 475 U.S. at 176; *see also id.* at 190-91 (conc. opn., Stevens, J.) ("A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury – as well as judicial review of such apparent certainty – should be tempered by realization that . . . the most

(Continued on following page)

the stuff of which disqualifying conflicts of interest are made. In reversing the Court of Appeals' issuance of a writ of habeas corpus, *Nix* stated:

> Here, there was indeed a "conflict," but of a quite different kind; it was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony without which, as he put it, "I'm dead." This is not remotely the kind of conflict of interests dealt with in *Cuyler v. Sullivan*. Even in that case we did not suggest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm. If a "conflict" between a client's proposal and counsel's ethical obligation gives rise to a presumption that counsel's assistance was prejudicially ineffective, every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means. Can anyone doubt what practices and problems would be spawned by such a rule and what volumes of litigation it would generate?

475 U.S. at 176.

The Eleventh Circuit's determination of actual conflict also ignored the fact that the Government never made any claim of actual conflict of interest below either in support of the original subpoena or

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honest witness may recall . . . details that he previously overlooked.").

with respect to Leventhal's ability to represent Weiss at trial. Nor did the district court make any such finding of conflict. Certainly, had the Government actually perceived a conflict of interest on the part of Leventhal below, it was duty bound then to make those concerns known to the court. *United States v. McKeighan*, 685 F.3d 956, 967 (10th Cir. 2012) (prosecution should advise court of defense counsel conflicts). It would have been derelict for the Government to offer to "permit" Leventhal to rejoin the defense at the eleventh hour (an offer too belated to be of any value with trial only days away)[26] if it truly entertained any concerns that Leventhal had a disqualifying conflict of interest at the time of trial.

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[26] The Government only made this offer however, on January 11, 1999, after successfully depriving Weiss of his choice of counsel for eight (8) months during which the Government stubbornly refused to stipulate to the routine chain-of-custody and authority-to-act testimony that it sought through the original subpoena. This eleventh-hour reversal of position came only after the trial court announced that there would be no continuances and Leventhal advised the court that the new business which he was forced to take would not permit his participation in the trial without a substantial continuance. (Doc. 610, p.12). In short, it was a cynical and hollow gesture to save face with the court which was critical of the Government's misuse of its subpoena and delaying tactics.

C. The decision below directly conflicts with the correct decision of the United States Court of Appeals in *United States v. Diozzi,* 807 F.2d 10 (1st Cir. 1986), and with decisions of other federal courts.

In his briefs below, Weiss discusses at length the decision of the First Circuit in *United States v. Diozzi*, 807 F.2d 10, 14 (1st Cir. 1986). *See* Initial Brief, pp.32-33, 35, 38-39; Reply Brief, p.6. The Eleventh Circuit's decision is in direct conflict with *Diozzi*, which the court did not even acknowledge.

In *Diozzi*, the Government subpoenaed defense counsel to establish that the false statements contained in the memoranda that counsel submitted to the IRS had been provided to counsel by their clients. 807 F.2d at 12. The Government sought to introduce the false statements through the attorneys as "material evidence of defendants' consciousness of guilt."[27] *Id*. The Government in *Diozzi* also argued, as did the Government here, "that ethical rules would have required the disqualification of both defense counsel" even if the introduction of the statements were by stipulation. *Id*. at 14. The First Circuit rejected the Government's claim of ethical disqualification:

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[27] While *Diozzi* did not involve a separate charge of false statement or obstruction, the evidence of defendants having made false statements through their attorneys to the IRS was critical in proving the tax evasion charges. *Id*. at 11-12. The facts in *Diozzi* are functionally no different than those presented here.

> Defense counsel cannot be subject to disqualification merely for arguing their clients' positions of statements that are in evidence. . . . [T]he government's claim that counsel's credibility would have been in issue in this case must therefore rest upon the notion that attorneys Twomey and Lehman had *personally* vouched for the truth of their clients' statements contained in the written submissions. We fail to see how Twomey and Lehman, by submitting factual statements to the government under power of attorney on behalf of their clients, had vouched for the truth of those statements in a manner requiring their disqualification as trial counsel.

Id.

The court noted that "any perceived 'unsworn witness' problem could have been eliminated by redacting the attorneys' names from the written stipulation," 807 F.2d 14, n.8, which was *precisely* the method employed below. (Doc. 843) ("With the express authorization of Mr. Weiss, the then attorney for Mr. Weiss told Special Agent Judge that said documents were consistent with Mr. Weiss' understanding of the facts related to the South Star Asset Agreement."). As the First Circuit observed, "attorneys are of course subject to the ethical prohibition against *knowingly* making false statements of law or fact . . . [b]ut no precedent has been brought to our attention . . . that an attorney . . . endangers his or her own credibility more by filing a document with the IRS under power

of attorney than by filing a motion, memorandum or brief with a court." *Id*. at n.9.

In reversing the convictions based upon the subpoena's adverse impact upon the Sixth Amendment right to counsel of choice, the *Diozzi* court stated:

> Defense counsel cannot be subject to disqualification merely for having represented their clients in a pre-indictment investigation. In this case, defense counsel's express or implied arguments at trial regarding appellants' statements would have been no more testimonial than any other lawyer's examination of witnesses or summation to a jury.

Id. at 14-15.

Here, Leventhal's having innocently provided documents to Government agents (at their request) which later were alleged to be false, was no more a disqualifying act than that which occurred in *Diozzi*.

In *United States v. Melton*, 2013 WL 2456015 (N.D. Iowa 2013), a defense attorney, along with several other court personnel, witnessed his client resist and injure a U.S. Marshall during a court proceeding. The prosecutor moved to have the attorney disqualified because he might be called as a rebuttal witness. The district court reversed the Magistrate's order of disqualification as being "contrary to law" because the sought testimony of counsel was not "necessary" in that other witnesses could provide such testimony. In reaching this decision, the *Melton* court reviewed case law in numerous circuits, including the

First Circuit's decision in *Diozzi*, and held that the testimony of a defendant's attorney was "necessary" only where "there are things to which he will be the only one available to testify." *Id*. at *7 (citing *Macheca Transp. Co. v. Philadelphia Idem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006); *United States v. Starnes*, 157 Fed. Appx. 587, 693-94 (5th Cir. 2005)).

Melton, Macheca and *Starnes* fully support the district court's quashing of the first subpoena upon Leventhal, and would also have supported the quashing of the second subpoena if Leventhal were then acting as Weiss' trial attorney. Even if one assumes Weiss would have testified in the same manner with Leventhal as trial counsel (an unlikely scenario and an inappropriate assumption under *Gonzalez-Lopez*), Government agents, rather than Leventhal, could have been called to rebut Weiss' testimony regarding his personal contacts with the Government.[28] Thus, there is no legitimate argument that Leventhal would have eventually been disqualified as a necessary rebuttal witness. It is apparent that the only reason

[28] Special Agent Joe Judge testified at pretrial as to when he received the Asset Sale Agreement and drafts, which was a point of contention only after Weiss testified. (Doc. 590, pp.16, 22, 27; Doc. 585, p.9). The only other fact purportedly at issue was whether the signed copy the Government received in 1995, and then misplaced, was the same in content as that provided by Leventhal in 1996 pursuant to a Grand Jury subpoena. The parties, however, had already stipulated to this fact. (Doc. 843). Additionally, Agent Judge was available to testify on this point, making the stipulation redundant and Leventhal's testimony unnecessary. (Doc. 585, p.17, n.5; Doc. 590, p.24).

the court permitted Leventhal to testify on rebuttal was that he was not then Weiss' counsel of record and, accordingly, the second subpoena was upheld under a lesser standard of scrutiny.

In the pre-trial proceedings, the Government was unable to articulate any necessary evidence from Leventhal outside of what was available from Government agents or Weiss' stipulation, except for vague requests for what Weiss may have told Leventhal about the documents and tape recordings which the court rejected as immaterial. App. 38. The Government's acknowledgement of Leventhal's non-complicity foreclosed upon the possibility of Weiss having made any incriminating statements to Leventhal. As the Magistrate noted, "[t]estimony from Leventhal that Weiss told him the documents . . . were authentic . . . adds nothing to the government's case. . . ." *Id*. Conclusive evidence that the Government had no need to have Leventhal testify to such conversations is the fact that when Leventhal did testify as a Government trial witness on rebuttal, the Government's direct examination contained no questions regarding his conversations with Weiss. (Doc. 1678, pp.31002-039).

D. The reality is that defense counsel routinely produce requested documents on behalf of defendants, so that if a prosecutor can issue an unwarranted and unnecessary subpoena for testimony about defense counsel's production, the subpoena can deprive the defendant of counsel of choice in any case in which the subpoena effectively makes it impractical, if not impossible, for defense counsel to prepare for trial.

The Court of Appeals never even cited *United States v. Gonzalez-Lopez* and failed completely to recognize the adverse impact its decision would have on the ability of attorneys to effectively represent their clients. To tolerate the Government's outrageous misuse of its subpoena authority in this case would not only undermine the Sixth Amendment as cautioned by this Court in *Wheat*, 486 U.S. at 163 ("Government may seek to manufacture a conflict in order to prevent a defendant from having a particularly able counsel at his side"), but would inhibit defense attorneys from providing documents during Rule 11 proffers or cooperation agreements with the Government. If the prosecution's conduct below is condoned, no lawyer would be sanguine in turning over records or engaging in other routine acts of facilitation, lest the lawyer become a witness against his or her own client. Such Government-instilled reticence would impair the ability of defense lawyers to act on behalf of their clients, undermine the attorney-client relationship and unduly burden the administration of justice.

This case demonstrates the genuine danger of misuse of the Government's subpoena power. The government was able to effectively drive Leventhal from the case and thereby deprive Weiss of the knowledge and experience of his chosen counsel. The end result was that Weiss was forced to go to trial on a 93 count indictment without his long-time chosen counsel, was convicted and received perhaps the longest sentence ever imposed for a white collar offense. The core issue in this petition strikes at the heart of the lawyer-client relationship and of the ability of defense counsel to provide effective representation, especially in white collar cases in which defense counsel and prosecutors are required to interact with numerous documents and exhibits to make a trial manageable. To permit prosecutors to subpoena lawyers without a proper basis – simply for having produced documents in good faith – leaves prosecutors in a position to veto a defendant's choice of counsel. Nothing could be more damaging to the defendant's Sixth Amendment right to counsel of choice.

CONCLUSION

The single question posed in this case goes to the essence of a defendant's right to counsel of choice. The decision below is in conflict with *Gonzalez-Lopez* and other decisions of this Court as well as those of other federal courts. Even worse, if permitted to stand, the Eleventh Circuit's ruling constitutes judicial authorization for prosecutors to nullify a defendant's choice

of counsel. The Sixth Amendment cannot tolerate such a result.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-13778

D.C. Docket No. 6:98-cr-00099-PCF-KRS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHOLAM WEISS,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(September 24, 2013)

Before BARKETT, MARCUS, and HILL, Circuit Judges.

PER CURIAM:

Sholam Weiss appeals his conviction following a jury trial for seventy-eight counts of racketeering, wire fraud, interstate transportation of stolen funds, money laundering, and other offenses arising out of a scheme to defraud the National Heritage Life Insurance Company ("NHLIC"). Weiss argues (1) that the

government violated his Sixth Amendment right to counsel when it improperly subpoenaed his attorney, thereby preventing the attorney from serving as trial counsel, and (2) that he was denied his Sixth Amendment right to a unanimous verdict because the trial court failed to instruct the jury that it had to unanimously agree on whether the wire fraud convictions were predicated on a scheme to obtain money or property or on a scheme to deprive another of the intangible right to honest services. After a review of the record and oral argument, we affirm.

I. Choice of Counsel

Weiss first argues that he was deprived of his Sixth Amendment right to counsel of his choice when the government improperly issued a trial subpoena to his long-time counsel, Robert Leventhal. Weiss contends that the subpoena, which was eventually quashed by the district court, was issued in bad faith and resulted in the *de facto* disqualification of Leventhal from serving as trial counsel. Weiss argues that the deprivation of chosen counsel is a structural error that does not require any showing of prejudice. Weiss further argues that dismissal of the indictment is warranted here because the government engaged in willful misconduct when it issued the subpoena and because Weiss would suffer actual prejudice from a retrial. In the alternative, Weiss asks this Court to vacate his convictions and remand to the district court for further proceedings.

a. Factual and Procedural Background

Weiss first retained Leventhal in 1995 in connection with the investigation of the failure of NHLIC. During that investigation, Leventhal provided certain documents and recordings to the government on Weiss's behalf, which the government later discovered Weiss had fabricated. Both parties agree that Leventhal was not aware that the documents and recordings were false.

As a result of the NHLIC investigation, Weiss was indicted in 1997, and Leventhal entered his appearance in that case as sole counsel of record for Weiss. The government dismissed the 1997 indictment without prejudice and, in April 1998, a grand jury returned a ninety-three count indictment against Weiss charging him with racketeering, wire fraud, money laundering, and other offenses relating to the collapse of NHLIC.

Sometime before Weiss's initial appearance on May 15, 1998,[1] the government advised Leventhal that he would be subpoenaed by the government to testify at trial regarding the documents he had provided to the government on Weiss's behalf in 1995 and to provide those documents he still had in his

[1] Weiss contends that the government did not inform Leventhal of the anticipated subpoena until shortly before his initial appearance in May 1998. The government, on the other hand, claims that prosecutors informed Leventhal of the subpoena at least by January 1998.

possession to the prosecution. According to the government, the anticipated testimony concerned when and what Weiss told Leventhal about the fraudulent documents and recordings and their production to the government. The documents in question formed the basis of the two counts of false statement and one count of obstruction of justice against Weiss. Before the subpoena was served, Weiss and Leventhal offered to enter into certain stipulations to avoid the need for Leventhal's testimony, but negotiations with the government failed. The government served the subpoena on Leventhal on July 7, 1998. Leventhal did not enter a general appearance on behalf of Weiss[2] and Weiss retained Joel Hirschhorn, who had not previously been involved in the investigation or case, as replacement counsel.

Both Weiss and Leventhal filed motions to quash the subpoena on the grounds of lack of necessity and

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[2] The parties disagree as to why Leventhal did not enter a general appearance. While Weiss contends that the only reason Leventhal did not enter a general appearance was because of the pending subpoena, the government points to certain statements made during pre-trial and trial proceedings that Leventhal did not enter a general appearance because Weiss was unable to arrange payment for Leventhal's services, Leventhal had other business obligations, and Leventhal did not want to work with Weiss's current lawyer. The government also argues that Leventhal had an actual conflict of interest in the case because Weiss used his services to obstruct justice and, for this reason, could not represent Weiss at trial.

the Sixth Amendment right to counsel.[3] The district court, believing that Leventhal's testimony was not necessary to the case because of Weiss's proposed stipulations, quashed the subpoena.

According to Weiss, there was not enough time for Leventhal to clear his schedule and prepare for the nine-month trial that was scheduled to begin ten days after the district court issued its ruling. Thus, Weiss argues, Leventhal was effectively disqualified from serving as Weiss's trial counsel because of the government's alleged bad faith issuance of the trial subpoena.

During trial, Weiss testified regarding the fraudulent documents and recordings. The government objected that Weiss's testimony contradicted the stipulation that the parties had entered as a result of the litigation surrounding Leventhal's trial subpoena and re-subpoenaed Leventhal to rebut Weiss's testimony. Weiss filed a motion to quash the subpoena, arguing that Leventhal had been assisting Hirschhorn with the trial and that the re-issued subpoena had a chilling effect on Hirschhorn's ability to consult with Leventhal. After hearing Leventhal's testimony outside of the presence of the jury, the district court denied the motion to quash and allowed Leventhal to

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[3] Leventhal argued in his motion to quash that the government issued the subpoena in bad faith. Weiss did not explicitly make any bad faith argument, but did incorporate by reference all arguments in Leventhal's motion to quash.

testify, finding that the testimony concerned some disputed issued of material fact that were not covered by the stipulation and to which no other witness could testify. Leventhal eventually testified during trial.

b. Discussion

We review claims of prosecutorial misconduct, which involve questions of law and fact, *de novo*. *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006).[4] Here, there is no evidence that the government acted in bad faith when it subpoenaed Leventhal's testimony. It was evident that Leventhal's representation of Weiss was rife with conflict – conflict about the nature, timing, and circumstances of disgorging the documents at issue to federal law enforcement authority.

Furthermore, Weiss has failed to show that it was the issuance of the subpoena that caused Leventhal's failure to represent Weiss. Leventhal had an actual conflict of interest that arose when Weiss used his services to obstruct justice and could not represent Weiss for that reason. Certainly, Leventhal could not counsel Weiss as to whether he should or should not testify regarding, for example, the timing and

[4] The government argues that this claim should be subject to plain error review because Weiss did not raise it front of the district court. However, the prolonged subpoena litigation, including Weiss's motion to quash in which he adopted by reference Leventhal's allegations of prosecutorial misconduct, are sufficient to preserve his prosecutorial misconduct for appellate review.

circumstances of the conveyance of the documents when Leventhal's knowledge of events differed from Weiss's testimony. We find no violation of Weiss's Sixth Amendment right to counsel.

II. Unanimous Verdict

Weiss also argues that he was denied his Sixth Amendment right to a unanimous verdict. Weiss was charged with twenty-seven counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 1346 for participating in a scheme to fraudulently obtain money or property *or* to fraudulently deprive another of the intangible right of honest services. At trial, although the district court gave the jury a general unanimity instruction, it did not specifically instruct the jury that they had to unanimously agree on whether Weiss was guilty of wire fraud because he engaged in a scheme to obtain money or property or because he engaged in a scheme to deprive of honest services. Weiss argues that the failure to give this additional unanimity instruction violated the Sixth Amendment.

Because Weiss did not raise this issue in the district court, we review the district court's instructions for plain error. *United States v. Felts*, 579 F.3d 1341, 1343 (11th Cir. 2009). Under the plain error standard, a defendant must demonstrate that (1) an error occurred, (2) the error was plain, and (3) the error affected the defendant's substantial rights. *Id.* at 1344. For an error to be plain, the error must be "clear from the plain meaning of a statute or

constitutional provision, or from a holding of the Supreme Court of this Court" at the time of appellate review. *United States v. Pantle*, 637 F.3d 1172, 1174-75 (11th Cir. 2011). Here, even assuming that the district court erred in failing to give a specific unanimity instruction as to the wire fraud charges, we cannot find such error was plain. *Id.*

It is clear that, under the Sixth Amendment, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element [of the offense]." *Richardson v. United States*, 526 U.S. 813, 817 (1999). However, the Supreme Court has made clear that jurors need not unanimously agree on the underlying facts that make up a particular element of the offense, such as which of several possible means a defendant used to commit that element, so long as they unanimously agree that the government has proven the element beyond a reasonable doubt. *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991); *see also Richardson*, 526 U.S. at 817 ("Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement – a disagreement about means – would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.").

In the case of wire fraud, neither the Supreme Court nor this Court has decided whether the nature

of the wire fraud scheme is an element of the offense, requiring the jury's unanimous agreement on whether the scheme was to fraudulently obtain money or property or whether it was to fraudulently deprive of honest services. Therefore, the district court's failure to instruct the jury that they must unanimously agree on the nature of the wire fraud scheme was not plain error.

Weiss argues that this Court has previously approved of a similar unanimity instruction in a wire fraud prosecution. *See United States v. Woodard*, 459 F.3d 1078, 1084 (11th Cir. 2006). However, the Court in *Woodard* held only that the district court did not err in giving the specific unanimity instruction; it did not consider whether failure to give such an instruction would violate the Sixth Amendment. Weiss's reliance on the government's own current practice of using special verdict forms or specific unanimity instructions in wire fraud prosecutions is similarly misplaced. *See United States v. Cabrera*, 804 F. Supp. 2d 1261, 1264-68 (M.D. Fla. 2011) (noting that the district court instructed the jury that they must unanimously agree on the nature of the defendant's wire fraud scheme and that the court used a special verdict form requested by the government which called for the jury to decide whether the defendant was guilty of a scheme to defraud of money or of a scheme to deprive of honest services). The mere fact that the government now has a practice of requesting specific unanimity instructions or special verdict forms does not plainly establish "from a holding of the

Supreme Court of this Court" that such instructions are required by the Sixth Amendment. *See Pantle*, 637 F.3d at 1174-75.

Furthermore, Weiss cannot show that the failure to give a specific unanimity instruction, even if it were plainly erroneous, affected his substantial rights, as required for a reversal under the plain error standard of review. *United States v. Felts*, 579 F.3d at 1344. In other words, Weiss has the burden of proving that there is a reasonable probability that, but for the alleged error, the outcome of the trial would have been different. *United States v. Kennard*, 472 F.3d 851, 858 (11th Cir. 2006). Here, the district court instructed the jury that the verdict must be unanimous. Consequently, Weiss's proposed specific unanimity instruction on the wire fraud counts was substantially covered by the district court's other instructions. *See United States v. Gonzales*, 122 F.3d 1383, 1388 n.5 (11th Cir. 1997) (holding that the failure to give a specific unanimity instruction was not reversible under plain error review because the district court gave a general unanimity instruction); *see also United States v. Fredette*, 315 F.3d 1235, 1242-43 (10th Cir. 2003) (affirming, under plain error review, the district court's failure to give a specific unanimity instruction on a wire fraud count because "it is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict" and because the evidence was sufficient to convict the defendant of

both types of wire fraud). For these reasons, we affirm the district court's jury instructions.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

-vs- **Case No. 98-0099-Cr-Orl-19A**

SHOLAM WEISS,

Defendant.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	**MOTION BY ATTORNEY ROBERT LEVENTHAL TO QUASH SUBPOENA DUCES TECUM (Doc. No. 421)**
FILED:	**September 30, 1998**

The United States served a subpoena on Robert Leventhal, Esq., to testify at the trial of this case and to produce documents. Mr. Leventhal previously served as counsel for Defendant Sholam Weiss, and he has represented to the Court that he will continue to serve as counsel for Mr. Weiss in this case if he is not disqualified from that representation. Mr. Leventhal requests that the trial subpoena be quashed because the requested testimony may be privileged, is irrelevant and because precluding Mr. Leventhal

from serving as trial counsel would cause unfair prejudice to Mr. Weiss.

The United States asserts that Mr. Leventhal's testimony is necessary to prove the crimes charged in Counts 91 through 93 of the indictment, which allege that Mr. Weiss, through his attorney, submitted false documents and tape recordings to investigators for the United States and that Mr. Weiss obstructed justice. The United States contends that Mr. Leventhal does not have standing to argue that Mr. Weiss will be prejudiced because Mr. Leventhal is not currently serving as counsel for Mr. Weiss and because Mr. Weiss has not personally invoked the attorney-client privilege with respect to the matters about which Mr. Leventhal may be called to testify.

"As a general rule, a party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources." *United States v. Crockett,* 506 F.2d 759, 760 (5th Cir. 1975); *accord United States v. Martinez,* 151 F.3d 384, 393 (5th Cir. 1998). The United States raised the issue of disqualification when Mr. Leventhal made a limited appearance at the beginning of this case. Mr. Leventhal has continued to attend court hearings as an "advisor" to Joel Hirschhorn, Esq., counsel of the record for Mr. Weiss. It appears, therefore, that Mr. Leventhal is counsel for Mr. Weiss, albeit not "counsel of record" in this case.[1]

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[1] Mr. Leventhal should confirm that he currently serves as counsel for Mr. Weiss or submit evidence at the hearing on his

(Continued on following page)

"If merely by announcing his intention to call opposing counsel as a witness an adversary could thereby orchestrate that counsel's disqualification . . . such 'a device' might often be used as tools of litigation strategy. Therefore, whenever an adversary declares his intent to call opposing counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel's testimony is, in fact, genuinely needed." *Connell v. Clairol, Inc.,* 440 F. Supp. 17, 18 n. 1 (N.D. Ga. 1977); *accord United States v. Diozzi,* 807 F.2d 10 (1st Cir. 1986) ("In moving to disqualify appellants' chosen counsel, the government bears a heavy burden of establishing that disqualification is justified."). Accordingly, it is appropriate for the Court to hold an evidentiary hearing to address the issues raised in the motion to quash and the government's response to that motion.

It is, therefore, ORDERED that an evidentiary hearing on the Motion by Attorney Robert Leventhal to Quash Subpoena Duces Tecum (Doc. No. 421) in the above-captioned case is set for **November 16, 1998, at 10:00 a.m. until 12:00 noon** before Magistrate Judge Karla R. Spaulding in Courtroom #5, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida. Counsel for the United States, Robert Leventhal and his counsel, Stephen Calvacca, and

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motion establishing that he will serve as trial counsel for Mr. Weiss if the trial subpoena is quashed.

Defendant Sholam Weiss and his counsel, Joel Hirschhorn, Esq., are required to be present. Other defendants in this case and their counsel may attend the hearing, but they are not required to do so.

It is further ORDERED that counsel for the United States and for Mr. Leventhal shall confer in person or by telephone before the hearing in a good faith attempt to resolve or narrow the issues presented by the motion. Counsel should discuss the testimony that the United States expects to elicit from Mr. Leventhal, whether Mr. Weiss will assert the attorney/client privilege with respect to Mr. Leventhal's proposed trial testimony, and whether the substance of that testimony can be obtained through other sources, including by stipulation. *See, e.g., United States v. Diozzi,* 807 F.2d 10 (1st Cir. 1986).

DONE and **ORDERED** in Orlando, Florida on October 28, 1998.

/s/ Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES
MAGISTRATE JUDGE

Copies furnished to: ✓ DJD

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,	**Case No. 98-99-CR-ORL-19A**

-vs-

SHOLAM WEISS,
Defendant. /

ORDER

This case came on for consideration after an evidentiary hearing on the following motions filed herein:

MOTION:	**MOTION BY ATTORNEY ROBERT A. LEVENTHAL TO QUASH SUBPOENA DUCES TECUM** (Docket No. 421).
FILED:	September 30, 1998.

THEREON it is **ORDERED** that the motion is **GRANTED**.

MOTION: **SHOLAM WEISS'S MOTION TO QUASH SUBPOENA TO TESTIFY AT TRIAL SERVED ON HIS ATTORNEY, ROBERT LEVENTHAL** (Docket No. 540).

FILED: November 17, 1998.

THEREON it is **ORDERED** that the motion is **GRANTED**.

I. PROCEDURAL HISTORY.

In 1995, Sholam Weiss provided information to federal agents and prosecutors who were engaged in a grand jury investigation of fraud and other illegal activities involving National Heritage Life Insurance Company ("NHLIC") and its parent company, LifeCo, pursuant to an oral agreement in which the United States agreed not to use Weiss's statements against him. (TR. 14-19). After Weiss's cooperation with the United States concluded, an issue arose as to whether documents given to the United States by Weiss's attorney, Robert Leventhal, Esq., and tape-recorded conversations played by Leventhal for agents of the United States as part of Weiss's cooperation could be used against Weiss in the grand jury's consideration of whether probable cause existed to indict Weiss. This issue was considered by Magistrate Judge David

A. Baker in sealed proceedings entitled *In re: Grand Jury Subpoenas Return Dates of November 16, 1995,* Case No. MISC-OS-96-13(18).

After an evidentiary hearing, the transcript of which is not part of the record in Case No. MISC-OS-96-13(18) or in the instant case, Magistrate Judge Baker found that on January 10, 1995, Weiss's attorney and a government agent agreed that an interview of Weiss would be conducted as a proffer governed by Fed. R. Crim. P. 11 (hereinafter referred to as "the Rule 11 proffer agreement"). (Case No. MISC-OS-96-13(18), Docket No. S-40 at 3). Although Magistrate Judge Baker found that Rule 11 did not apply to the interview because it was not a plea negotiation, he recognized the validity of the government's contractual agreement that "statements made by Weiss during that, and other subsequent investigative interviews were to be inadmissible." (*Id.*). He further held that two audiotapes played for agents of the United States during Weiss's cooperation with the United States were not within the ambit of the Rule 11 proffer agreement because they were "simply not statements made by Mr. Weiss 'in the course' of those investigative interviews." (*Id.*).

Magistrate Judge Baker did not consider the question of whether documents furnished during Weiss's cooperation were covered by the Rule 11 proffer agreement because the United States withdrew the grand jury subpoena seeking those documents, requesting leave to recast it as a subpoena to

Weiss in his capacity as the custodian of records for South Star Management, Inc. and National Housing Exchange, Inc. Magistrate Judge Baker granted this request. (*Id.* at 4). The parties agree that documents produced by Leventhal during the Rule 11 proffer agreement were ultimately given to the grand jury in response to the subpoenas to Weiss in his capacity as a corporate records custodian.

Weiss and others were named as defendants in an indictment returned on July 24, 1997, in *United States v. Smythe, et al.,* Case No. 97-71-CR-ORL-22 (M.D. Fla.) (Docket No. 5). In that indictment, Weiss was charged with bank fraud. (*Id.*). Leventhal made a general appearance as counsel for Weiss in that case. (Docket No. 27). The United States did not move to disqualify Leventhal, and there is no indication that it served Leventhal with a subpoena to testify in the *Smythe* case. When the Honorable Anne C. Conway, United States District Judge, denied a motion by the United States to continue the trial so that it could seek a superseding indictment, the United States dismissed the charges against Weiss and other individual defendants who did not indicate an intent to plead guilty. (Docket No. 156).

Thereafter, Weiss and others were named in the indictment in this case, which was returned on April 29, 1998. (Docket No. 1). The indictment charged Weiss with racketeering, racketeering conspiracy and various substantive counts. Count 91 of the indictment alleged that in or about the summer of 1995, Weiss made a false statement in violation of 18

U.S.C. § 1001 by causing to be delivered to unnamed investigators "three false, fraudulent and manufactured documents, two of which purported to be copies of agreements between SOUTH STAR and NHLIC, and the third purporting to be a draft of one of the agreements." (*Id.*, ¶ 390). Count 92 of the indictment alleged that on or about August 3, 1995, Weiss made another false statement in violation of 18 U.S.C. § 1001 by causing his attorney to deliver to unnamed investigators "a false, fraudulent and manufactured document which purported to be a memorandum from Pfeffer to WEISS' attorney related to the NHLIC loan to Solar, and also caused his attorney to play tape recordings to one of the Investigators which purported to be true and accurate conversations between WEISS, Blutrich, and Pfeffer." Finally, Count 93 of the indictment alleged that from on or about February 16, 1996, continuing through on or about January 21, 1998, Weiss obstructed justice in violation of 18 U.S.C. § 1503 by causing his attorney to deliver "three false, fraudulent and manufactured documents, two of which purported to be copies of agreement between SOUTH STAR and NHLIC, and the third purporting to be a draft of one of the agreements" as records responsive to a grand jury subpoena and by confirming, through Weiss's testimony before the grand jury on January 21, 1998, that these records were produced by Weiss's agent in response to the grand jury subpoena. Counts 91 through 93 name only Weiss as a defendant; the crimes alleged in these counts are not alleged to have been committed in

furtherance of the racketeering, racketeering conspiracy or other offenses charged in the indictment.

Leventhal entered a limited appearance as counsel for Weiss at the initial appearance and bond hearings in the instant case, but he did not enter a general appearance as counsel of record. (Docket No. 36). When Leventhal made this limited appearance, the United States notified the Court that it intended to subpoena Leventhal to testify at the trial. Thereafter, Leventhal did not enter a general appearance as counsel for Weiss. Joel Hirschhorn, Esq., entered a general appearance on behalf of Weiss at arraignment, and he continues to represent Weiss in this case. (Docket No. 207). Leventhal later appeared in various court hearings in this case as an "advisor" to Hirschhorn. The United States did not object to Leventhal's appearance in that capacity.

On July 7, 1998, the United States caused a trial subpoena to be served on Leventhal requiring his testimony at Weiss's trial on the indictment in this case. (Docket No. 421, Ex. A). The subpoena also required Leventhal to produce documents relating to the following:

1. South Star contracts that were surrendered to the federal grand jury investigating Sholam Weiss (referred to in the Summary of Evidence Presented, *infra,* as the Weiss Documents);

2. A handwritten memorandum allegedly signed by Lyle Pfeffer addressed to Leo

Fox a copy of which was delivered to Special Agent James Mock (referred to in the Summary of Evidence Presented, *infra,* as the Fox Document); and

3. Tape-recorded conversations, copies of which were produced to the federal grand jury.

(*Id*). Correspondence ensued between Stephen J. Calvacca, Esq., who is counsel for Leventhal, Hirschhorn and the United States. (Docket No. 421, Exs. B-D). In this correspondence, Weiss offered to stipulate that any statements made by Leventhal in connection with tendering the documents referred to in the trial subpoena could be offered against Weiss at trial as a statement of his agent. (*Id.,* Ex. B). The parties were unable to reach agreement on a stipulation in lieu of Leventhal's testimony.

The issue of whether Leventhal could be required to testify at Weiss's trial was first brought before the Court on September 30, 1998, when Leventhal filed a motion to quash the subpoena. (Docket No. 421). On November 17, 1998, Weiss also filed a motion to quash the subpoena to Leventhal, asserting, among other things, that Leventhal's testimony would violate the attorney-client privilege and work product doctrine and that it would deprive him of his Fifth Amendment right to due process and his Sixth Amendment right to counsel of his choosing. (Docket No. 540). The United States responded that the

crime-fraud exception applied, thus rendering the attorney-client privilege and work product doctrine inapplicable. (Docket No. 471).

These motions were referred to me for disposition pursuant to Middle District of Florida Local Rule 6.01(c)(14). I held an evidentiary hearing on the motions to quash on November 23, 1998 (cited herein as TR.), and continuing on November 30, 1998 (cited herein as "11/30/98 Transcript"). Present at the hearing were Leventhal and his attorney, Calvacca, Weiss and his attorney, Hirschhorn, and attorneys for the United States, Judy K. Hunt and Thomas W. Turner. At the beginning of the hearing, the United States stipulated that any communications between Leventhal and Weiss that it intended to inquire about would be within the attorney-client privilege but for the application of the crime-fraud exception. (TR. 12). Calvacca submitted a statement by Leventhal that if the subpoena were quashed, Leventhal would not make a general appearance as trial counsel but that he would continue to represent Weiss and to assist Hirschhorn throughout the trial of the case. (Court Ex. 1).

At the conclusion of the hearing, counsel for Weiss offered to stipulate to the following in lieu of Leventhal's testimony at trial:

1. There was an issue between Weiss and the United States as to the terms of the South Star asset sale agreement;

2. Weiss gave Leventhal the Weiss Documents;

3. Leventhal provided the Weiss Documents to the United States;

4. Weiss authorized Leventhal to provide the Weiss Documents to the United States;

5. Leventhal told Special Agent Joseph Judge of the Federal Bureau of Investigation that the Weiss Documents were consistent with Weiss's understanding of the facts related to the South Star asset sale agreement;

6. Weiss was authorized by the United States to make consensual tape recordings of conversations with Blutrich and Pfeffer;

7. Weiss gave Leventhal two tape recordings made pursuant to this authorization;

8. Weiss authorized Leventhal to play these tape recordings for the United States, and Leventhal played these tape recording for agents of the United States;

9. In late July, 1995, representatives of the United States told Leventhal that they believed Weiss may have criminal involvement in certain transactions;

10. Weiss delivered the Fox Document to Leventhal and authorized Leventhal to deliver it to the United States;

> Leventhal delivered the Fox Document to the United States.

(11/30/98 Transcript at 53-56).

The United States responded that this stipulation was inadequate because it also sought to inquire of Leventhal concerning any conversations he may have had with Weiss about the source of the Weiss Documents and the Fox Documents, as well as the tape recordings, and their authenticity. (11/30/98 Transcript at 60; Court Ex. 2). The United States also seeks to have Leventhal confirm that the copy of the final asset sale agreement submitted to the grand jury was identical to the copy of the final asset sale agreement earlier submitted to Special Agent Judge that cannot now be located. (*Id.*).

Because Weiss, through his counsel, asserted that the attorney-client privilege applies to any communications between Leventhal and Weiss about these issues, the United States is unable to state whether such conversations occurred or the substance of any such conversations.

II. Summary of the Evidence Presented.[1]

Joseph K. Judge, a Special Agent with the Federal Bureau of Investigation, testified that he was one of the people involved in the investigation of the reasons for the failure of NHLIC. (TR. 14). In 1995, during the course of the investigation, Sholam Weiss agreed to provide information to the United States related to the NHLIC investigation. (TR. 15). He was also authorized by the United States to tape record his conversations with various individuals including Michael Blutrich and Lyle Pfeffer. (TR. 161-62).

During his cooperation with the United States, Weiss gave the United States a copy of an "Agreement of Assignment" between South Star Management Company, Inc. ("South Star") and NHLIC. (TR. 16; Gov't Ex. 1). In April, 1995, Judge discussed an

[1] In ruling on the motions before me, I have not considered any conversations between Leventhal and the United States that occurred between January and August, 1995, because those statements may be inadmissible under the Rule 11 proffer agreement. Therefore, I have not summarized that evidence in this Summary of the Evidence Presented at the hearing. Because the parties did not present any evidence of the terms or scope of the Rule 11 proffer agreement, I must rely on the previous decision in this case with respect to the scope of that agreement. Under the rationale of Magistrate Judge Baker's order holding that tape recordings played during the course of Weiss's cooperation were not covered under the Rule 11 proffer agreement because they were not Weiss's statements, I find that documents furnished by Weiss or his attorney to the United States during the cooperation agreement also would not be within the scope of the Rule 11 proffer agreement.

asset sale agreement between South Star and NHLIC with Weiss. (TR. 37). During that interview, Judge showed Weiss a copy of the South Star Asset Sale Agreement that he had obtained from the Delaware Insurance Commissioner, who had obtained it from Keith Pound, another defendant in this case (hereinafter referred to as the "Delaware Insurance Commissioner Document"). (TR. 24-25, 37). Judge testified that Weiss appeared to be "taken aback" by the Delaware Insurance Commissioner Document. (TR. 38).

Judge testified that Weiss's attorney, Robert Leventhal, thereafter delivered three documents to Judge pertaining to the South Star asset sales agreement (hereinafter collectively referred to as the "Weiss Documents."). (TR. 22, 38). Two of these documents were entitled "Asset Sale Agreement" and marked "DRAFT." (TR. 22-23; Gov't Exs. 2 & 3). The third document was the final "Asset Sale Agreement" purportedly signed by Patrick Smythe and Jan Starr.[2] (TR. 24). Leventhal testified that he did not recall giving these documents to the United States. (TR. 150-51). However, he acknowledged that he was aware that Weiss intended to submit two of the Weiss Documents, government's exhibits 2 and 3, to federal investigators. (TR. 154, 158).

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[2] Judge testified that he was unable to locate this document, so a copy of it was not introduced at the hearing. (TR. 23). However, Judge testified that this document was identical to Government's Exhibit 7. (TR. 32).

The Weiss Documents differed from the Delaware Insurance Commissioner Document in the possession of the United States, including that the final "Asset Sale Agreement" produced by Weiss referred to the purchase of non-performing mortgages (Gov't Ex. 7, ¶ 2.1) while the Delaware Insurance Commissioner Document referred to the purchase of performing mortgages (Gov't Ex. 4, Art. II). Judge testified that the differences between the Weiss Documents and the Delaware Insurance Commissioner Document were material to his investigation. (TR. 27).

Weiss's cooperation with the United States ended in August, 1995. (TR. 28). Thereafter, a federal grand jury subpoenaed Weiss as the custodian of records of South Star Management Company, Inc. (TR. 29). In response to that subpoena, Leventhal sent the United States two letters, one of which enclosed the documents related to South Star Management Company, Inc. described in the letter as follows: "a fourteen page document entitled 'Asset Sale Agreement' stamped 'draft'," "a thirteen page document entitled 'Asset Sale Agreement'," and "a thirteen page document entitled 'Asset Sale Agreement' stamped 'draft' with handwriting contained thereon." (Gov't Ex. 5). Leventhal stated in the letter that these documents had previously been provided by Weiss to the United States during his cooperation with the United States. (*Id.*). The documents enclosed with the letter were admitted as Government's Exhibits 6, 7 and 8. (TR. 32).

The United States called Leventhal as a witness and asked him a series of questions concerning the source of the documents he produced to the government, the source of the tape recordings he played for a federal agent, and the substance of his conversations with Weiss about these documents and tape recordings. (TR. 147-75). Weiss invoked the attorney-client privilege with respect to substantially all of these questions. (*Id.*).

James Mock, a United States Postal Inspector who was involved in the investigation of NHLIC, also testified. (TR. 89). On August 3, 1995, while Weiss was still cooperating with the United States, Mock met with Leventhal. (TR. 89-90). During this meeting, Leventhal gave Mock a handwritten letter purportedly from Lyle Pfeffer, outside financial advisor to NHLIC (TR. 133), to Leo Fox, an attorney, relating to a closing involving a company known as Solar (hereinafter the "Fox Document"). (TR. 91, Gov't Ex. 9).[3] Leventhal also played portions of tape recordings for Mock. (TR. 92-93).[4] The tape recorded conversations were of discussions between Weiss and Pfeffer regarding two companies, Watch Portfolio and Paragon. (TR. 93). After this meeting, a federal grand jury issued a subpoena to Weiss for production of those tape

[3] Leventhal acknowledged providing this document to Mock. (TR. 171).

[4] Leventhal acknowledged playing these tape recordings. (TR. 167).

recordings, in response to which the recordings were surrendered to the grand jury. (TR. 94).

After the August 3, 1995, meeting, Mock met with Leo Fox and showed him the Fox Document. (TR. 95, 118-19). Fox stated that he did not know if he had ever seen the Fox Document before. (TR. 95).

Harry J. Brister, a special agent with the criminal division of the Internal Revenue Service who was also involved in the NHLIC investigation, also testified. (R. 121-22). He said that Patrick Smythe, who had been the chief operating officer of NHLIC, pleaded guilty to defrauding NHLIC and agreed to cooperate with the United States. (R. 123-24). Smythe said that he had never before seen the "Agreement of Assignment" given by Weiss to the United States. (TR. 124; Gov't Ex. 1). David Schik, an attorney, told Brister that he created this "Agreement of Assignment" at the request of Weiss and Michael Blutrich, outside counsel to NHLIC. (TR. 125-126, 130). Weiss and Blutrich told him to make the last page of the agreement identical to a draft of the agreement they had because, they stated, they already had a signed copy of the document. (TR. 126).

Smythe also provided the United States with yet another copy of the South Star asset sale agreement, which was the version of the agreement Smythe said he signed (hereinafter referred to as the "Smythe Document."). (TR. 126-27; Gov't Ex. 10). The terms of the version of the Smythe Document are the same as the terms of the Delaware Insurance Commissioner

Document. (TR. 127). However, the terms of both the Smythe Document and the Delaware Insurance Commissioner Document differed from the terms of the Weiss Documents. (TR. 128). Smythe did not recall ever seeing the final version of the asset sale agreement contained in the Weiss Documents before, and he denied signing that document or agreeing to its terms. (TR. 129).

Blutrich, who also pleaded guilty to defrauding NHLIC and agreed to cooperate with the United States, provided the United States with another South Star asset sale agreement bearing the original signatures of Smythe and Jan Starr, another defendant in this case (hereinafter referred to as the "Blutrich Document."). (TR. 130-31). The Blutrich Document contains substantially the same terms as the Smythe Document and the Delaware Insurance Commissioner Document. (TR. 131).

Blutrich explained that the Weiss Documents were created after the United States showed Weiss the Delaware Insurance Commissioner Document during the course of Weiss's cooperation. (TR. 132). Blutrich told federal investigators that Weiss said he needed documents to corroborate a story he had told Special Agent Judge. (TR. 132-33). Blutrich and Weiss then created the Weiss Documents, preparing first the "final version" of the asset sales agreement, then creating two apparent "drafts" of the agreement. (TR. 133). The drafts were created because Weiss said this would make his story seem more credible to the United States. (*Id.*). Lyle Pfeffer, who also has

pleaded guilty to defrauding NHLIC and is cooperating with the United States, confirmed that he was aware Blutrich was creating these documents to be used by Weiss to corroborate a story Weiss had told Judge. (TR. 134).

With respect to the tape recordings played for Mock and later furnished to the grand jury. Brister testified that both Blutrich and Pfeffer told the United States that the conversations on the tape recordings were staged. (TR. 135). The purpose of the staged recordings was to shift blame from Weiss to Smythe or others at NHLIC. (*Id*).

Finally, Pfeffer told agents of the United States that he created the Fox Document at Weiss's request. (TR. 136-37). Blutrich told federal agents that the letter to Fox was also created to shift blame from Weiss to Smythe. (TR. 137).

III. STANDARD OF REVIEW.

"[T]he district court's determination that the fact set forth by the government establish a prima facie showing of criminal or fraudulent conduct can be reversed only for an abuse of discretion." *In re Grand Jury Investigation (Schroeder),* 842 F.2d 1223, 1226 (11th Cir. 1987). "[Matters of discovery and evidence are committed to the discretion of the district court." *Cox v. Administrator, United States Steel & Carnegie,* 17 F.3d 1386, 1413 (11th Cir.), *modified on other grounds,* 30 F.3d 1347 (11th Cir. 1994).

IV. Analysis.

A. Application of the Crime-Fraud Exception.

The United States seeks to establish through Leventhal's testimony that he tendered the Weiss Documents and the Fox Document and played portions of two tape recordings for agents of the United States at Weiss's behest and direction. It also wishes to inquire at trial about conversations between Leventhal and Weiss concerning these documents and tape-recorded conversations and to obtain any documents in Leventhal's possession relating to these documents and tape recordings. The United States stipulated that conversations between Leventhal and Weiss about which it seeks to inquire would fall within the attorney-client privilege unless the crime-fraud exception to the privilege applies. The crime-fraud exception would also apply to defeat any claim of work product protection with respect to the documents. *Cox v. Administrator, United States Steel and Carnegie,* 17 F.3d 1386, 1422 (11th Cir.), *modified on other grounds,* 30 F.3d 1347 (11th Cir. 1994); *In re Int'l Sys. and Controls Corp. Litig.,* 693 F.2d 1235, 1242 (5th Cir. 1982).

When the United States wishes to obtain evidence of conversations between an attorney and his client and related documents that it contends were part of the client's commission of a crime, it must make "a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning

such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice" and "that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it." *In re Grand Jury Investigation (Schroeder),* 842 F.2d 1223, 1226 (11th Cir. 1987). The attorney need not have known he was assisting in a crime for the crime-fraud exception to apply. *Id.* at 1227. This showing by the United States must be based on facts, not mere allegations. *Id.* In making this showing, the government may use "any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged." *United States v. Zolin,* 491 U.S. 554, 575 (1989). When assessing the evidence presented in support of the prima facie case, the court is not required to make credibility determinations. *In re Grand Jury Investigation (Schroeder),* 842 F.2d at 1226 (a prima facie case is established by "a showing of evidence that, if believed by a trier of facts, would establish the elements of some violation that was ongoing to about to be committed.").

The evidence presented by the United States, if believed by the trier of fact, establishes that Weiss caused Leventhal to tender false documents and to play false or fraudulent tape recordings to agents of the United States. If Michael Blutrich, Lyle Pfeffer and David Schik are believed, the Weiss Documents were not copies of a legitimate asset sale agreement and drafts of that agreement. Rather, they were created for the express purpose of corroborating

information Weiss provided to Special Agent Judge. Similarly, if Lyle Pfeffer is believed, the Fox Document was fraudulently created by him again to corroborate a story Weiss told federal investigators. Finally. again if the statements of Blutrich and Pfeffer are believed by the jury, the tape recordings played for Inspector Mock, and subsequently surrendered to a federal grand jury, were recordings of conversations staged and scripted to support a story Weiss told federal investigators. This evidence establishes the first part of the crime-fraud exception, that is that Weiss was engaged in criminal or fraudulent conduct, specifically engaging in an attempt to obstruct a federal criminal investigation and supplying false documents to the federal investigators as alleged in Counts 91, 92 and 93 of the indictment.

It is undisputed that Weiss sought the advice of Leventhal with respect to his purported cooperation with the United States. The evidence, if believed by the trier of fact, also establishes that during the course of their attorney-client relationship, Weiss used Leventhal to further his criminal conduct by causing him to transmit false documents and tape recordings to federal investigators and ultimately to a federal grand jury. This satisfies the second part of the crime-fraud exception, that Weiss obtained Leventhal's assistance to advance his criminal activity.

Therefore, the evidence presented is sufficient to establish the prima facie case necessary to support application of the crime-fraud exception to the inquiries

the United States proposes to make into the conversations between Leventhal and Weiss and any documents that might otherwise be subject to work product protection. Accordingly, the motion to quash the subpoena to Leventhal based on the attorney-client privilege and work product doctrine is DENIED.

B. Subpoena to Counsel for a Defendant.

Weiss also argues that the subpoena must be quashed because requiring one of his attorneys to testify at his trial would be tantamount to disqualifying his chosen attorney in violation of his Fifth Amendment right to due process and his Sixth Amendment right to counsel. Leventhal concurs, adding that the United States has not shown that he has any relevant information to offer. The United States argues in response that the Court cannot consider evidentiary issues, such as the relevance of Leventhal's testimony or the application of Fed. R. Evid. 403, before trial. The United States further asserts that "Leventhal is not only a helpful, but a necessary, witness in establishing the link between the fraudulent materials and Weiss." (Docket No. 471 at 4).

"As a general rule, a party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources." *United States v. Crockett,* 506 F.2d 759, 760 (5th Cir. 1975); *accord United States v. Martinez,* 151 F.3d 384,

393 (5th Cir. 1998). The rationale underlying this rule is clear. "If merely by announcing his intention to call opposing counsel as a witness an adversary could thereby orchestrate that counsel's disqualification . . . such 'a device' might often be employed as a purely tactical maneuver." *Connell v. Clairol, Inc.,* 440 F. Supp. 17, 18 n.1 (N.D. Ga. 1977).

Leventhal's testimony is not necessary to link Weiss to the allegedly false documents and tape recordings. Case law supports admission against Weiss of the testimony of federal agents that Leventhal delivered the documents to and played the tape recordings for the United States, because in doing so Leventhal acted as Weiss's representative or agent. *See, e.g., Hanson v. Waller,* 888 F.2d 806, 814 (11th Cir. 1989); *United States v. McKeon,* 738 F.2d 26 (2d Cir. 1984); *but see United States v. Valencia,* 826 F.2d 169 (2d Cir. 1987) (refusal to admit statements made by criminal defense attorney in out-of-court conversations with government agents). Further, Weiss agreed to stipulate that Leventhal produced these documents and played the tape recordings for the United States in his capacity as Weiss's lawyer at Weiss's direction. This stipulation alleviates any argument about the admissibility of the evidence.[5]

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[5] Leventhal's testimony would not assist the United States in establishing that the final agreement contained in the Weiss Documents that Special Agent Judge testified he received from Leventhal, which document the United States cannot now locate, is identical to the final agreement provided to the grand

(Continued on following page)

The United States has not presented evidence that Leventhal would be able to testify that Weiss told him the documents and tape recording were false or fraudulent. Rather, the United States argues that Weiss must have represented to Leventhal that the documents were "real, genuine and exculpatory materials." (Docket No. 471 at 4). Testimony from Leventhal that Weiss told him the documents and tape recordings were authentic, if that were to be Leventhal's testimony, adds nothing to the government's case once it is established that Leventhal presented these documents and the tape recordings to the United States on Weiss's behalf and at his direction. It would merely establish, viewing the anticipated testimony in the light most favorable to the government, that Weiss deceived his attorney as well as the United States.

Finally, the government's argument that it cannot accept Weiss's stipulation because other defendants might not join in the stipulation ignores the fact that this evidence would only be admissible against Weiss. The indictment does not allege that Weiss made false statements and obstructed justice in furtherance of a conspiracy or scheme involving

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jury because Leventhal does not recall providing the Weiss Documents to Judge. Moreover, Judge testified that the final agreement provided by Leventhal was identical to the final agreement provided to the grand jury. Thus, even if Leventhal could also confirm the identity of the documents, his testimony would be duplicative of Judge's testimony on this point.

any other defendant. As such, Weiss's actions, including the documents and tape recordings tendered by him through his agent to the United States, would not be admissible against other defendants. *E.g., Lutwak v. United States,* 344 U.S. 604, 618 (1953) ("Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the declarant's participation therein. The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. Therefore, when the trial court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch.* Such declaration is inadmissible as to all but the declarant."); *United States v. Adkinson,* 158 F.3d 1147, 1161 (11th Cir. 1998) ("We have acknowledged that *Grunewald [v. United States,* 353 U.S. 391 (1957),] 'unambiguously' excludes acts of concealment from the original conspiracy."). While other defendants may argue that a limiting instruction is insufficient to protect them from the prejudicial impact of this evidence, whether it is admitted through Leventhal's testimony or by stipulation, they do not have standing to object to a stipulation between the United States and Weiss regarding the evidence.

The United States failed to establish that Leventhal's testimony is necessary to its case and

that it is not obtainable by other means. Government agents could testify that Leventhal produced the documents and played the tape recordings, which testimony could be admitted against Weiss as acts by him through his agent or representative. Weiss removed any argument about the admissibility of this testimony by agreeing to stipulate to its admission. The only other testimony that the United States speculates Leventhal could offer is evidence that Weiss also deceived Leventhal by telling him that the documents and tape recordings were genuine. Such testimony would not prove any element of the offenses charged against Weiss in the indictment.

Accordingly, under the principles enunciated in *Crockett,* the subpoena to Robert Leventhal must be quashed.[6]

V. CONCLUSION.

For the reasons set forth herein, the Motion by Attorney Robert A. Leventhal to Quash Subpoena Duces Tecum (Docket No. 421) and Sholam Weiss's Motion to Quash Subpoena to Testify at Trial Served on His Attorney, Robert Leventhal (Docket No. 540) are **GRANTED**.

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[6] Because the subpoena is quashed, I do not address whether enforcement of the subpoena would violate Weiss's Fifth or Sixth Amendment rights or whether the United States acted in bad faith by failing to notify Leventhal earlier that he would be called as a witness at Weiss's trial.

DONE and ORDERED this 15th day of December, 1998, at Orlando, Florida.

/s/ Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES
MAGISTRATE JUDGE

✓ DJD
Copies to:
Presiding District Judge
Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

v.

SHOLAM WEISS,

Defendant.
______________________/

CASE NO.
98-99-CRIM-ORL-19A

ORDER

This cause came before the Court on the Government's Notice of Appeal and Motion for Additional Time to File Supporting Legal Memorandum (Doc. No. 606, filed December 28, 1998); Government's Supplemental Memorandum Pertaining to Its Notice of Appeal of December 15, 1998 Order of Magistrate Judge Karla R. Spaulding Quashing Subpoena of Attorney Robert A. Leventhal (Doc. No. 638, filed January 8, 1999); The December 16, 1998 Order of United States Magistrate Judge Karla R. Spaulding (Doc. No. 585, filed December 16, 1998); Sholam Weiss's Motion to Quash Subpoena to Testify at Trial Served on His Attorney, Robert Leventhal (Doc. No. 540, filed November 17, 1998); Motion by Attorney Robert A. Leventhal to Quash Subpoena Duces Tecum (Doc. No. 421, filed September 30, 1998); and Government's Response to Attorney Leventhal's Motion to Quash Subpoena Duces Tecum (Doc. No. 471, filed

October 22, 1998). The Court has reviewed the transcripts of the proceedings before United States Magistrate Karla R. Spaulding in this matter dated November 23, 1998 and November 30, 1998. (Doc. No. 590, filed December 17, 1998; Doc. No. 591, filed December 17, 1998).

The Court reviews the December 16, 1998 Order of United States Magistrate Judge Karla R. Spaulding to determine whether it was "clearly erroneous or contrary to law." *See* 28 U.S.C. 636(b)(1)(A). In the Order, the United States Magistrate Judge quashed the subpoena of attorney Robert A. Leventhal because she found the Government had failed to establish that Mr. Leventhal's testimony is necessary to its case and that it is not obtainable by other means. (Doc. No. 585 at 19). Specifically, she found as follows:

> Government agents could testify that Leventhal produced the documents and played the tape recordings, which testimony could be admitted against Weiss as acts by him through his agent or representative. Weiss removed any argument about the admissibility of this testimony by agreeing to stipulate to its admission. The only other testimony that the United States speculates Leventhal could offer is evidence that Weiss also deceived Leventhal by telling him that the documents and tape recordings were genuine. Such testimony would not prove any element of the offenses charged against Weiss in the indictment.

Id. The Government asserts that the United States Magistrate Judge erred in quashing the subpoena because Mr. Leventhal has not entered an appearance as trial counsel. The Government also asserts that the United States Magistrate Judge erred in making the pretrial determination that certain portions of Mr. Leventhal's expected testimony were not necessary to the Government's case. After reviewing the record and the relevant case law, the Court determines that the United States Magistrate Judge's Order was not clearly erroneous or contrary to law.[1]

The United States Magistrate Judge was correct in quashing the subpoena because the Government failed to show that Mr. Leventhal's testimony was necessary to its case. As the United States Magistrate Judge noted, "a party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources." *United States v. Crockett,* 506 F.2d 759, 760 (5th Cir. 1975); *accord United States v. Martinez,* 151 F.3d 384, 393 (5th Cir. 1998). The Eleventh Circuit and former Fifth Circuit have repeatedly emphasized that trial courts should avoid allowing a party's attorney to testify at trial. *See United States v. Roberson,* 898 F.2d 1092, 1097 (11th Cir. 1990) (stating that a prosecutor should only testify in a trial in which she is participating if there is a compelling need); *United States v. Bates,* 600 F.2d 505, 510 (5th Cir. 1979) (finding trial court properly

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[1] The Court notes that it would also affirm the Order under a de novo standard of review.

precluded defense attorney's testimony where conversation that would have been recounted had already been put before the jury during cross-examination); *United States v. Cochran,* 546 F.2d 27, 29 n.5 (5th Cir. 1977) (stating that "[t]he mere appearance of an attorney testifying against a former client, even as to matters of public record, is distasteful and should only be used in rare instances."); *United States v. Phillips,* 519 F.2d 58, 50 (stating that "[c]ourts are reluctant to allow lawyers to testify in trials where they are advocates").[2] The Government has not cited any case law to support the proposition that it is entitled to have Mr. Leventhal testify at trial without showing that such testimony is necessary. The Government also has not provided any case law to

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[2] A number of courts have also found that a party's attorney should not be called as a witness unless his or her testimony is necessary. *See United States v. Fiorillo,* 376 F.2d 180, 185 (2nd Cir. 1967) ("the attorney should not be called when no showing of necessity is made as when the testimony or evidence could be procured from other sources"); *In re Cropwell Leasing,* 1996 WL 592747, **1-2 (Oct. 15, 1996 E.D. La.) (granting motion to strike witnesses where plaintiff failed to show that testimony of attorneys was necessary and unobtainable); *Perez v. State,* 474 So.2d 398, 400 (Fla. Dist. Ct. App. 1985) ("the State should not have been permitted to list the defendant's attorney as a witness, because his testimony was not needed and was available to the State through other witnesses"); *State v. Crespo,* 718 A.2d 925, 942 (Conn. 1998) ("we have concluded that a defendant's current or former attorney may not be called to testify by either the defendant or the state in the absence of 'compelling need.'"); *Giraldi v. Community Consolidated Sch. Dist. #62,* 665 N.E.2d 332, 337 Ill. App. Ct.1996); *see also* 27 Charles Alan Wright and Victor James Gold, Federal Practice and Procedure § 6012 (1998).

support its assertion that the Court must wait until trial to determine whether such testimony is necessary. The Court has not found such case law based on its independent research.

After reviewing the testimony of the Government agents, the stipulations to which Defendant Weiss agreed, and the other testimony the Government speculates Mr. Leventhal could offer, the Court agrees with the United States Magistrate Judge that the Government has failed to establish that Mr. Leventhal's testimony is necessary and not obtainable by other means. The Court also finds that allowing Mr. Leventhal to testify against Defendant Weiss at this late juncture would unduly prejudice Defendant Weiss who has relied on Mr. Leventhal as both his former attorney and as an assistant to his current attorney. (Doc. No. 617 at 9, filed January 6, 1999; Doc. No. 610, Exh. B and Exh. C, filed December 31, 1998). The Court also notes that Defendant Weiss would be further prejudiced if the Court waited until trial to determine whether or not to quash the subpoena. Finally, the Court finds that the testimony of Defendant Weiss's own attorney ostensibly as an innocent individual who was deceived by Weiss would unduly and unnecessarily prejudice the jury when other witnesses who did not represent Weiss could testify to the same facts to which Mr. Leventhal would testify.[3]

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[3] In finding that a defendant was prejudiced when his attorney testified against him, the Third Circuit noted the

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The Government also asserts that the United States Magistrate Judge erred in quashing the subpoena because Mr. Leventhal has not entered an appearance in this case as trial counsel. As noted above, the former Fifth Circuit indicated that courts should refrain from allowing attorneys to testify against former clients. *See Cochran,* 546 F.2d at 29 n.5; *see also State v. Crespo,* 718 A.2d 925, 942 (Conn. 1998) ("a defendant's . . . former attorney may not be called to testify by either the defendant or the state in the absence of 'compelling need' "). Mr. Leventhal represented Defendant Weiss from January 1995 until April 1998 in matters relating to the investigation that led to the Indictment in this case. (Doc. No. 610, Exh. C, filed December 31, 1998). According to Defendant Weiss's attorney, Joel Hirschhorn, Mr. Leventhal is the most familiar of Defendant Weiss's current and former attorneys with the transactions which were the subject matter of the current indictment. (Doc. No. 610 at ¶ 16). While Mr. Leventhal has not entered a general appearance in this case, Mr. Leventhal has appeared at several hearings and has been specifically introduced by

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following: "With your own lawyer testifying against you, should there be any surprise that the jury finds you guilty?" *Government of the Virgin Islands v. Zepp,* 748 F.2d 125, 138 (5th Cir. 1984); *see also People v. Rodriguez,* 171 Cal. Rptr. 798, 800 (Cal. Ct. App. 1981) ("[i]t is fundamentally unfair to a criminal defendant to use his own attorney's testimony to convict him, and such a substantial infringement on the right to counsel requires reversal").

Mr. Hirschhorn as an individual who is assisting him on the case. Further, the United States Magistrate Judge stated that Mr. Leventhal has appeared as an "'advisor" to Mr. Hirschhorn at various court hearings over which she presided. (Doc. No. 585 at 5). Mr. Leventhal has advised Mr. Hirschhorn that he would be able to provide more meaningful assistance if he was not required to testify as a government witness. (Doc. No. 610 at ¶ 17). Based on Mr. Leventhal's long-standing and continued work on behalf of Defendant Weiss, the Court finds that the United States Magistrate Judge correctly quashed the subpoena despite the fact that Mr. Leventhal has not entered an appearance in this case.

Accordingly, the Government's Appeal (Doc. No. 606, filed December 28, 1998) is **DENIED**. The December 16, 1998 Order of United States Magistrate Judge Karla R. Spaulding (Doc. No. 585, filed December 16, 1998) is **AFFIRMED**.

DONE AND ORDERED at Orlando, Florida, this 21st day January, 1999.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

[jm] Copies to:
All Counsel of Record.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 09-13778-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHOLAM WEISS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Nov. 15, 2013)

BEFORE: MARCUS and HILL, Circuit Judges.*

PER CURIAM:

The petition for panel rehearing filed by Appellant, Sholam Weiss, is DENIED.

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* This order is being entered by a quorum pursuant to 18 U.S.C. §46(d) due to Judge Barkett's retirement on September 30, 2013.

ENTERED FOR THE COURT

/s/ STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE