

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA

v.

JULIA BEATRICE KELEHER,
Defendant.

CRIMINAL NO. 19-431 (PAD)

SUPPLEMENTAL MOTION IN COMPLIANCE WITH THE COURT’S ORDER

On October 1, 2019 the United States filed a motion requesting that this Court hold a hearing to inquire whether Attorneys Maria Dominguez (“Dominguez”) and Javier Micheo (“Micheo”) have an unwaivable conflict of interest that should preclude them from continuing to represent Defendant Julia Beatrice Keleher (“Keleher”) in this case. Docket No. 139. Keleher filed a written opposition to the United States’ request on October 2, 2019. Docket No. 141. The next day, the Court ordered the parties to file a supplemental motion citing case law with facts analogous to those that exist in this case. *See* Docket No. 144. The United States, through its undersigned counsel, respectfully submits this supplemental motion in compliance with the Court’s order. A review of the legal authorities cited below should compel the Court to conclude that the United States’ request for a hearing is warranted, and that Dominguez and Micheo have an unwaivable conflict of interest that should preclude them from continuing to represent Keleher.

A. Binding First Circuit precedent should compel the Court to hold a hearing

“Where a defendant’s selection of counsel might give rise to a conflict of interest, the Court *must investigate* the conflict to determine if different counsel is warranted. The Court may disqualify counsel if there exists an actual conflict or *a serious potential for conflict*, which may or may not become an actual conflict as the case proceeds.” *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir. 1988) (citing *Wheat v. United States*, 486 U.S. 153, 164 (1988) (emphasis added)).

In *In re Grand Jury*, an attorney who represented an indicted defendant also purported to represent a witness subpoenaed to testify before the grand jury in connection with its ongoing investigation of which the already indicted defendant remained a target. *Id.* at 1022. The government filed a motion to disqualify the attorney from representing the witness, who had received immunity. *Id.* The district court then held a hearing after which it concluded that an actual conflict existed, rejecting the attorney’s argument that the issue was not ripe for disposition until the witness actually testified before the grand jury. *Id.* Weeks later, the witness reappeared before the grand jury with another lawyer, and refused to testify, claiming that he had been denied the right to counsel of his choice. *Id.* The district court held the witness in contempt, but stayed the contempt order pending appeal.

On appeal, the First Circuit described various scenarios in which the attorney would have a conflict or serious potential for conflict. *See id.* at 1025-26. Nonetheless, the First Circuit remanded the matter to the district court to make specific factual findings as to whether a specific conflict or potential conflict existed, and noted that “generally there must be a direct link between the clients of an attorney . . . before the right to counsel of choice is barred by disqualification.” *Id.* at 1026.

Like the attorney in *In re Grand Jury Proceedings*, Dominguez and Micheo have represented multiple entities and an individual (*i.e.*, Banco Popular, Company B, and Individual K) in connection with the grand jury investigation that resulted in the indictment of their client, Julia Keleher, and her co-defendants. The mere prospect that Dominguez or Micheo may have to cross-examine their own clients (or former clients) to offer Keleher the vigorous defense to which she is constitutionally entitled raises the non-trivial possibility of a conflict of interest materializing. *See United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991) (disqualifying law firm that represented a defendant and witnesses during the grand jury's investigation leading to the defendant's indictment, while observing that "[c]onflicts of interest arise whenever an attorney's loyalties are divided, and an attorney who cross-examines former clients inherently encounters divided loyalties...") (citations omitted); *see also United States v. Cannistraro*, 794 F. Supp. 1313 (D.N.J. 1992) ("When the Government calls a witness whom defense counsel has previously represented, a conflict of interest arises because defense counsel has a duty to vigorously cross-examine the witness and may reveal confidential information in the process. In the alternative, defense counsel may breach his duty to vigorously represent the defendant in fear of divulging confidences of the Government witness.").

At a minimum, the United States respectfully submits that *In re Grand Jury Proceedings* requires that the Court hold a hearing to inquire as to the extent to which Dominguez and Micheo's representation of Banco Popular, Company B, and Individual K raises an actual or potential conflict of interest. *See also Mickens v. Taylor*, 535 U.S. 162, 168 (2002) (observing that a trial court has a "duty to inquire into the propriety of multiple representation . . . when the trial court knows or reasonably should know that a particular conflict exists."); *Mountjoy v. Warden*, 245 F.3d 31, 38 (1st Cir. 2001) (holding that trial courts have a duty to inquire into possible conflicts

of interest “not only when defendants object to a possible conflict, but also when trial judges are or should be independently aware of a possible conflict.”) (citing *Wood v. Georgia*, 450 U.S. 261 (1981)).

B. Dominguez and Micheo’s conflict of interest is unwaivable

United States v. Gingras, Crim. No. 02-47-1-M, 2002 U.S. Dist. LEXIS 18019 (D.N.H. Sept. 23, 2002) aptly illustrates why the Court should not accept any conflict waiver from Keleher, Banco Popular, Company B, or Individual K.¹ In *Gingras*, an attorney represented a witness who was subpoenaed to testify before the grand jury, and negotiated an order of immunity for the witness. 2002 U.S. Dist. LEXIS 18019, at *2. The grand jury then returned an indictment charging the defendant with criminal offenses. *Id.* The defendant asked the attorney who represented the subpoenaed grand jury witness to join his legal team, and serve as co-counsel to his lead counsel. *Id.* at *3. The attorney accepted the defendant’s invitation, but only after obtaining the grand jury witness’s oral and written consent. *Id.* at *3-5. In so doing, the attorney informed his former client that he would neither disclose privileged information to the defendant or lead counsel, nor

¹ The United States respectfully submits that, inasmuch as the Court would even consider a waiver, it should do so only after hearing from Keleher, Banco Popular, Company B, and Individual K in open court to ensure that the waiver is knowing, voluntary, and intelligent. *See, e.g., Doherty v. United States*, 948 F. Supp. 111, 116 (D. Mass. 1996) (noting that “[g]enerally, the *trial judge* must *conduct some type of inquiry* before accepting a waiver of the defendant’s right to conflict-free representation,” while observing that “in the case of successive representation – where counsel previously represented an individual later called as a witness against his current client – this [c]ourt must follow the same *stringent* procedures for accepting a waiver of the right to conflict-free representation.”) (emphasis added). Furthermore, it would be prudent for the Court to appoint counsel for Keleher prior to inquiring whether she desires to waive the right to conflict-free representation. *See, e.g., United States v. Elder*, 311 F. Supp. 3d 589, 593 (E.D.N.Y. 2018) (appointing CJA counsel to appear for defendant in connection with proceedings related to conflicts in a case in which the defendant’s counsel represented a witness who testified before the grand jury); *id.* (“In a multiple representation situation, the defendant should be advised by independent counsel of the dangers the representation may pose and make a knowing and intelligent decision that he wishes to continue to be represented by his attorney despite the attorney’s representation of another defendant or witness.”).

participate in cross-examination should the government call the former client as a witness at trial. *Id.* The attorney made the same representations to the defendant before agreeing to join the defendant's legal team as co-counsel. *Id.* The attorney then communicated to the government that he would be representing the defendant as co-counsel, after which point the government sought to disqualify him. *Id.*

The *Gingras* court ultimately declined to disqualify the attorney based largely on the attorney's representation that he would play a "limited role" as co-counsel, and would neither participate in the cross-examination of his former client nor disclose any information learned during the course of that representation to further the defendant's defense. *Id.* at *13-14.

Unlike the defendant in *Gingras*, Keleher is represented by two counsel who, for all intents and purposes, are one and the same. Dominguez and Micheo worked at the same firm when Dominguez represented Banco Popular, Company B, and Individual K before the grand jury, worked at the same firm when Keleher retained them, and—as of September 20, 2019—are partners of the same firm. It is, therefore, impossible for either Dominguez or Micheo to take on a "limited role" in defending Keleher to avoid any potential conflict of interest.

Indeed, this case is most analogous to *United States v. Lanoue*, 137 F.3d 656 (1st Cir. 1998). *Lanoue* involved a defendant who chose an attorney who had previously represented a co-defendant. 137 F.3d at 663. The government moved to disqualify the attorney because it intended to call the previously represented co-defendant as a witness at trial. In spite of the fact that both the previously represented co-defendant and the defendant waived their right to conflict-free counsel, and in spite of the co-defendant's submission of an affidavit stating that he had no information to provide regarding the defendant, the First Circuit affirmed the district court's disqualification of the attorney. *Id.* at 663-65. In so doing, it observed that although the facts of

the case “may well reach the outer limits of ‘potential conflict,’” “[i]f the attorney is allowed to continue and the conflict does arise then the defendant may not receive the representation to which he is entitled.” *Id.* at 664.

As the United States has previously argued, Dominguez and Micheo owe a fiduciary duty not only to Keleher, but also to entities and to an individual who are potential witnesses. Under such circumstances, the United States respectfully submits that Keleher’s right to conflict-free representation and the integrity of the proceedings before this Court depend on Dominguez and Micheo’s disqualification. *See, e.g., United States v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994) (“The need for fair, efficient, and orderly administration of justice overcomes the right to counsel of choice where an attorney has an actual conflict of interest, *such as when he has previously represented a person who will be called as a witness against a current client at a criminal trial.*”) (emphasis added).

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 9th day of October, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/Alexander L. Alum

Alexander L. Alum

Assistant United States Attorney – G01915