

Farrah's first set of arguments relate to her counsel at trial. Specifically, Farrah argues that her conviction should be vacated because: (1) the District Court abused its discretion in denying her pre-trial motion for substitute counsel; (2) her counsel had a conflict of interest arising from his involvement in other litigation; (3) there was a total breakdown of the attorney-client relationship during trial; (4) her counsel provided ineffective assistance during trial; and (5) the District Court failed to conduct an adequate inquiry into the counsel's potential conflict of interest. We reject these contentions substantially for the reasons stated in the District Court's thorough ruling of January 16, 2001. See *United States v. Farrah*, 128 F. Supp. 2d 103 (2001). With respect to the new material presented by Farrah on appeal, and unavailable to the District Court, we find that her counsel did not have a *per se* conflict of interest and that, to the extent that any conflict did exist, there has been no showing of any adverse effect from such conflict on Farrah's representation by counsel.

11 Fed. Appx. 34, 35 (2d Cir. 2001).

Farrah has filed with the court three documents, which she contends constitute new evidence. Farrah concedes, however, in reaching the conclusion quoted above, the Second Circuit has before it one of those three documents, which reflected that at the time one of her two defense counsel, F. Lee Bailey, was representing Farrah on money laundering charges, Bailey had himself become the subject of a criminal investigation for money laundering in connection with his representation of a client in a federal case in Florida, *United States v. McCorkle*. See Pet'r Reply (doc. #195) at 2. The issue in the Florida litigation related to the source of Bailey's attorney's fees and had no connection to Farrah's case.

II. **Discussion**

Farrah makes three arguments in support of her motion:

(1) her right to effective assistance of counsel was violated because she and her counsel had an irreconcilable conflict and a total breakdown of the attorney-client relationship, (2) that her counsel had a *per se* conflict of interest, and (3) that her counsel had an actual conflict of interest.

A. Irreconcilable Conflict, Etc.

Farrah argues that her trial was prejudiced by the court's denial of her motion to substitute counsel because there had been an irreconcilable conflict and total breakdown of the attorney-client relationship, and notes that she raised this issue prior to trial. In ruling on Farrah's motion for a new trial, the court analyzed Farrah's claims that there had been such conflict and breakdown of the attorney-client relationship and concluded that there had been no breakdown of effective communication between Farrah and her defense counsel. See Farrah, 128 F. Supp. 2d at 114-15. The Second Circuit rejected this contention by Farrah for substantially the reasons stated in that ruling, and Farrah has presented the court with no new facts that would change the court's analysis on this issue.

The court notes that Farrah appears to argue, in support of this argument, that there were "grave problems" with the *in camera* hearing conducted by the court on the eve of trial, at which Farrah sought to remove her defense counsel. This argument was made by Farrah in support of her motion for a new

trial, and the court rejected it. See Farrah, 128 F. Supp. 2d at 116-17. The Second Circuit rejected this contention for substantially the reasons set forth in the court's ruling.

B. Per Se Conflict of Interest

Farrah argued in her motion for a new trial that she had established that there was *per se* ineffective assistance of counsel because of Bailey's involvement in the McCorkle and Duboc cases. The court rejected this argument, noting that Bailey had not been investigated for, much less charged with, laundering money. The court then observed: "Thus, the factual predicate on which Farrah bases her argument that she has made a showing that there was *per se* ineffective assistance of counsel does not exist." Farrah, 128 F. Supp. 2d at 114. Farrah supports the instant motion with evidence that Attorney Bailey was, in fact, being investigated for laundering money. Her argument is nonetheless unavailing.

Even if the court considers the three documents Farrah submits as "new evidence," together those three documents amount only to a showing that Bailey was under investigation for money laundering at the time he was representing her in this case. Although the factual predicate upon which Farrah bases her argument is different, the court's conclusion is the same. As discussed in the ruling denying Farrah's motion for a new trial, the *per se* rule has been applied in the Second Circuit to only

two situations, namely, (1) when defense counsel was not licensed to practice law because of a failure to meet the substantive requirements for the practice of law, and (2) when defense counsel was implicated in the defendant's crimes. United States v. Rondon, 204 F.3d 376, 379-80 (2d Cir. 2000). The fact that defense counsel is being investigated for other offenses does not fall within either of these categories. See Armienti v. United States, 313 F.3d 807, 813 (2d Cir. 2002) (fact that defense counsel was the target of a pending Grand Jury investigation was analyzed in context of whether defense counsel had an actual conflict of interest).

In addition, the court notes that it appears that the new material Farrah presented to the Second Circuit showed that Bailey was being investigated for money laundering, and the Second Circuit specifically found that he did not have a *per se* conflict of interest.

C. Actual Conflict of Interest

"An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." United States v. Winkler, 7 F.3d 304, 307 (2d Cir. 1993) (internal quotation marks and citation omitted).

Under *Strickland v. Washington*, 466 U.S. 668 (1984), if a defendant establishes that her

attorney has a potential conflict of interest, in order to prove that the conflict resulted in a violation of her Sixth Amendment right to effective assistance of counsel, she must demonstrate prejudice. However, prejudice is presumed when a defendant establishes that her attorney had an actual conflict of interest that adversely affected the attorney's performance.

Id. To show that her counsel's actual conflict of interest adversely affected that counsel's performance, a defendant must "demonstrate that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." United States v. Levy, 25 F.3d 146, 157 (2d Cir. 1994) (internal quotation marks and citation omitted).¹

Farrah's motion must be denied because she has failed to show that her counsel had an actual conflict. Also, assuming *arguendo* that she could show that her counsel had an actual conflict of interest, she has failed to show that it adversely affected her counsel's performance.

Farrah appears to argue that her interests and Bailey's interests diverged with respect to a particular course of action, specifically with respect to Bailey's cross-examination of the government's money laundering expert and his failure to rebut the testimony of that expert with a money laundering expert for the

¹ The court notes that Farrah mischaracterizes this test in her memorandum in support of her motion. See Doc. #188 at 33.

defense. Farrah appears to point to the same factors in support of her argument that an actual conflict of interest adversely affected Bailey's performance. The court considered Farrah's contentions concerning her counsel's failure to call an expert witness to rebut the government's expert witness on the subject of money laundering in ruling on Farrah's motion for a new trial. Farrah did not in support of that motion, and she does not in support of this motion, offer any information as to what the substance of the testimony of a defense expert on money laundering would have been. There is no basis anywhere in the record for concluding that Farrah's and Bailey's interests were divergent on the issue of whether a defense expert should have been called; nor is there any basis anywhere in the record for concluding that calling a money laundering expert would have been a plausible defense strategy or tactic.

Farrah also contends that Bailey sought to curry favor with the United States Attorney's Office for the District of Connecticut and "by implication, federal prosecutors everywhere," because he was concerned about being the subject of a criminal investigation. Pet'r Mem. (doc. #188) at 39. The record in this case does not support that contention.

Finally, the court notes that, as she did in her motion for a new trial, Farrah neglects to address the fact that she was represented not only by Attorney Bailey but also by Attorney Fishman, and she makes no claim that Fishman at any time had even a potential conflict of interest. As the court noted in the ruling on Farrah's motion for a new trial, there was no indication that Fishman at any time failed to fully discharge his professional responsibilities to Farrah. See Farrah, 128 F. Supp 2d at 114.

Therefore, the court finds Farrah's contentions with respect to an actual conflict of interest unpersuasive.

III. Conclusion

For the foregoing reasons, the Motion to Vacate or Set Aside Sentence Pursuant to 28 U.S.C. § 2255 (doc. #187) is hereby DENIED. The Clerk shall close this case.

It is so ordered.

Dated this 5th day of February 2004 at Hartford,
Connecticut.

_____/s/_____
Alvin W. Thompson
United States District Judge