No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL GRADY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Beau B. Brindley
COUNSEL OF RECORD

For Petitioner Michael Grady

Law Offices of Beau B. Brindley
53 W Jackson Blvd. Ste 1410
Chicago IL 60604
(312)765-8878
bbbrindley@gmail.com

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United States Court of Appeals
For the Eighth Circuit

No. 22-2415

United States of America

Plaintiff - Appellee

v.

Michael Grady

Defendant - Appellant

No. 22-2447

United States of America

Plaintiff - Appellee

v.

Oscar Dillon, III, also known as Ant, also known as Chest, also known as Muscles

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: September 21, 2023
Filed: December 19, 2023

Appendix A

Before SHEPHERD, KELLY, and STRAS, Circuit Judges.

SHEPHERD, Circuit Judge.

Michael Grady and Oscar Dillon, III were convicted of (1) conspiracy to distribute and possession with intent to distribute cocaine and heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), (2) attempted obstruction of justice, in violation of 18 U.S.C. § 1512(c)(2), and (3) conspiracy to commit money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i), (h). Grady and Dillon were sentenced to 226 and 187 months' imprisonment, respectively, and each to 5 years of supervised release. On appeal, they challenge the district court's[1] denial of their motion to dismiss the indictment on Speedy Trial Act grounds and admission of prior criminal history at trial. They also assert that the evidence was insufficient to support their convictions. Grady separately challenges the district court's denial of his motion to substitute counsel of his choice. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

This case is the product of an investigation into a large-scale drug operation run by Derrick Terry that led to the indictment of 34 criminal defendants, including Grady and Dillon. Terry's organization bought and sold cocaine and heroin in St. Louis, Missouri. Grady and Dillon, who worked at a paralegal and consulting company, began aiding the organization in 2014 by drafting a motion for early termination of Terry's supervised release for a prior conviction. Thereafter, they would conduct intelligence about potential government informants by attending court proceedings and researching court and arrest records. This allowed them to counsel Terry about whom he should trust, and Terry used this information to enhance his relationships with other drug dealers.

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[1]The Honorable Henry E. Autrey, United States District Judge for the Eastern District of Missouri.

After Terry was indicted in January 2016, he met with Appellants at an Applebee's restaurant to discuss his best plan of action. Appellants encouraged Terry to throw his phones away and flee for 18 months to 2 years. They reasoned that by allowing the other defendants' cases to play out, the Government would likely have fewer cooperating witnesses against Terry for two reasons: his codefendants' plea deals would probably be solidified, and some defendants might fear that cooperating against Terry may lead him to hurt their families. The three men also discussed the possibility of retaining an attorney for Terry, which led to a series of financial transactions between Appellants and Terry. Terry made multiple payments to Appellants using drug proceeds with instructions that the money be delivered to Beau Brindley, an attorney, as a retainer securing his representation. Terry made one $50,000 payment to Grady shortly after Terry was indicted to prevent its seizure by law enforcement should he be arrested. Shortly thereafter, he directed his associate, Stanford Williams, to make another $10,000 payment through Terry's girlfriend, Charda Davis, to Appellants to give to Brindley.

Appellants, along with several others, were charged on December 1, 2016, in the Fourth Superseding Indictment, and a witness-tampering charge was later added against Grady in the Fifth Superseding Indictment on December 20, 2018. After each indictment in this case, including the Fourth and Fifth Superseding Indictments, the magistrate judge[2] continued the trial, with no objections, beyond the limits imposed by the Speedy Trial Act. She did so based on her finding that the case was complex and therefore the ends of justice outweighed the interest in a speedy trial.

On October 6, 2017, Dillon filed a motion to sever his case from his codefendants. The Government opposed the motion and recommended that a ruling on the motion be reserved for a later time when it was clear which defendants would be proceeding to trial. The magistrate judge took the motion under submission and

[2]The Honorable Nannette A. Baker, United States Magistrate Judge for the Eastern District of Missouri, now retired.

reserved a ruling on it until after a ruling was issued on Dillon's previously filed motion to dismiss the indictment.

At Appellants' arraignment on the Fifth Superseding Indictment on February 7, 2019, it became clear that the Government might seek to try Dillon and Grady together. At the same arraignment, the magistrate judge acknowledged her prior case complexity finding, and, in a subsequent order on February 11, 2019, reaffirmed the case's complexity, finding that the ends of justice necessitated continuing the trial. Recognizing that a significant amount of time had passed since Dillon's motion to sever, the magistrate judge later ordered the Government to file a supplemental brief on the severance motion by June 28, 2019, and ordered Dillon's response by July 5, 2019.

In its supplemental brief, the Government requested severance of Appellants' trial from the other codefendants, and Appellants filed no response. Before any ruling on the motion to sever, on November 26, 2019, Appellants jointly moved to dismiss the indictment, claiming violations of the Speedy Trial Act. The district court, adopting and incorporating the report and recommendation from the magistrate judge, denied that motion and granted the motion to sever Appellants from the remaining codefendants. In recommending denial of the motion to dismiss, the magistrate judge emphasized that Appellants had never objected to any of the prior complex-case designations, and the district court highlighted "[t]he volume of motion practice and briefing" and "the need for numerous hearings" in affirming that the case remained complex. In prior findings, the magistrate judge recognized several factors contributing to case complexity, including voluminous discovery with a "high volume of electronic data" from cell phones, evidence from a two-year investigation into this drug trafficking organization, 34 defendants and 56 counts, and the general nature of the conspiracy charges.

In December 2020, about three months before trial, Grady renewed a motion he previously brought in 2017 to substitute Brindley as his counsel. The magistrate judge had denied this motion in 2017, recognizing a serious potential conflict. In

ruling on the renewed motion, the district court found the potential conflict of interest unwaivable, despite Grady's conflict waiver, as Brindley previously represented Terry—the Government's primary cooperating witness against Grady. Moreover, the events surrounding Grady's money laundering conspiracy charge concerned a retainer that had been paid to Brindley on Terry's behalf. The district court also cited case management concerns with the trial date soon approaching. Thus, the district court denied Grady's motion.

During the trial in March 2021, the district court admitted evidence about Dillon's involvement with another drug organization that occurred after the conduct alleged in this case but before he was indicted. Dillon was caught signing for a package of cocaine on September 7, 2016, during an extensive investigation into a wholly unrelated drug organization. Upon his arrest, officers seized two cell phones that contained phone call records and text messages between individuals relevant to this case, internet browser history, and downloaded court documents. The cell phones and evidence of the investigation leading to the arrest and seizure of the phones were admitted against Dillon at trial. Additionally, the district court admitted under Federal Rule of Evidence 404(b) Grady's prior heroin conspiracy conviction where he purchased a large amount of heroin for a courier to transport from California to Missouri.

Grady and Dillon were convicted by a jury, and they were sentenced to 226 and 187 months' imprisonment, respectively. Appellants jointly moved for a judgment of acquittal or a new trial, which the district court denied. This appeal follows.

II.

We first address Appellants' challenge to the district court's denial of their November 2019 motion to dismiss the indictment on Speedy Trial Act grounds. They allege that over 120 nonexcludable days passed in violation of the Act's time limit. We review the "district court's legal conclusions de novo, its factual findings

for clear error, and its ultimate [Speedy Trial Act ruling] for an abuse of discretion." United States v. Porchay, 651 F.3d 930, 935 (8th Cir. 2011). Specifically, "[a] judge's finding that a continuance would best serve the ends of justice is a factual determination" reviewed for clear error. United States v. Villarreal, 707 F.3d 942, 953 (8th Cir. 2013).

Under the Speedy Trial Act, a federal criminal trial must "begin within 70 days of the filing of an information or indictment or the defendant's initial appearance." Zedner v. United States, 547 U.S. 489, 497 (2006); 18 U.S.C. § 3161(c)(1). However, the Act allows a district court to exclude certain periods of delay from this time limit. Zedner, 547 U.S. at 497. If, after delay is properly excluded under the Act, more than 70 days have passed without a trial, the district court must dismiss the indictment on the defendant's motion. United States v. Herbst, 666 F.3d 504, 509 (8th Cir. 2012).

Three statutory exclusions are relevant to this appeal. The first exclusion is 18 U.S.C. § 3161(h)(1)(H), which allows for a maximum of 30 days' delay to be excluded where such delay is "reasonably attributable to any period . . . during which any proceeding concerning the defendant is actually under advisement by the court." Next is § 3161(h)(6), which excludes "[a] reasonable period of delay" attributable to "a codefendant as to whom the time for trial has not run and no motion for severance has been granted." The final relevant exclusion is § 3161(h)(7)(A), which permits a district court to exclude:

> Any period of delay resulting from a continuance granted by any judge . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

The Act provides a non-exhaustive list of factors for a district court to consider in making its ends-of-justice finding, including:

> Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits . . . .

18 U.S.C. § 3161(h)(7)(B)(ii).

Appellants assert that a period of 120 nonexcludable days had passed between the Government's request to sever and Appellants' motion to dismiss the indictment based on Speedy Trial Act violations, after excluding 30 days under § 3161(h)(1)(H) while the magistrate judge took the Government's request under advisement. The Government asserts that this 120-day period was excludable based on both the then-extant ends-of-justice continuance granted under § 3161(h)(7) and the ongoing pretrial motion practice of codefendants, excludable under § 3161(h)(6). Appellants maintain, however, that neither § 3161(h)(6) nor § 3161(h)(7) could justify excluding those days.

Regarding § 3161(h)(6), Appellants explain that when the Government requested to sever Appellants' cases from the remaining codefendants, delay could not be excluded under § 3161(h)(6) because it was no longer reasonable to attribute any delay caused by those codefendants to Grady and Dillon. We address only the ends-of-justice continuance, as we find it dispositive, saving for another day the issue raised by Appellants with respect to § 3161(h)(6). Their argument against excluding time under § 3161(h)(7) is twofold: (1) when the Government requested to sever, the case was no longer complex, and thus, any reliance on the *prior* complexity of the case to justify excluding time under an ends-of-justice continuance was clearly erroneous, and (2) even if it was not clearly erroneous, the Speedy Trial Act does not permit the kind of open-ended ends-of-justice continuance issued by the district court; rather, there must be a defined end date. Thus, they maintain that 120 nonexcludable days had passed, in violation of the statute's 70-day limit.

This Court has never addressed whether ends-of-justice continuances granted under § 3161(h)(7) may be open ended, but we see no need to address the issue now. The continuances, while accompanied by no express end date, were effectively limited in time, as they were regularly reevaluated. Cf. United States v. Wasson, 679 F.3d 938, 948 (7th Cir. 2012) (finding no speedy trial violation for multiple ends-of-justice continuances because district court reassessed complexity and the need for a continuance throughout the case); United States v. Hill, No. 17CR310, 2020 WL 4819457, at *7 (E.D. Mo. July 27, 2020) (excluding delay from initial complex-case finding through trial commencement because the court "continued to evaluate whether the case continued to be appropriately designated as complex as well as the propriety of continuing the exclusion of delays due to complexity"); United States v. Lattany, 982 F.2d 866, 875-76, 880 (3d Cir. 1992) (finding no Speedy Trial Act violation with an open-ended continuance that was "extended" six months later with no additional explanation other than that given with the grant of the original continuance). Throughout this case, the district court reaffirmed the complexity, and thus the need for an ends-of-justice continuance, including two months after the Fifth Superseding Indictment, and again in ruling on the motion to dismiss.[3] Cf. Wasson, 679 F.3d at 948 (rejecting Appellant's argument that the district court relied on prior complexity finding in granting additional continuance and upholding multiple ends-of-justice continuances where the district court "assured itself not only that the case remained complex, but that the complexity and the changing nature of the case warranted the [additional] continuance").

We disagree with Appellants' contention that this was no longer a complex case, and we find no clear error with the district court's findings in this respect.

[3]Moreover, the district court continued, after denying Appellants' motion to dismiss, to acknowledge the need for an ends-of-justice continuance. Indeed, just one week after denying this motion, the district court set a trial date. The trial was continued again because of the threat to public health posed by the COVID-19 pandemic. While the issuance of these later continuances was not objected to or raised on appeal, they further highlight the district court's continuing consideration of whether ends-of-justice continuances were necessary and an understanding that ends-of-justice continuances require on-the-record factual findings.

While the district court certainly referenced its previous complexity findings, its reasons for finding that the case remained complex in its denial of Appellants' motion to dismiss—a high volume of discovery, motions, and hearings—reflect its understanding that a complicated trial would likely ensue. Indeed, this prediction was correct. Appellants' trial lasted 12 days and involved around 400 exhibits outlining Appellants' multi-year involvement in Terry's extensive drug operation—evidenced by the several dozen individuals initially indicted in this case, some with death-penalty eligibility—that sourced its drugs internationally. See, e.g., United States v. Fogarty, 692 F.2d 542, 546 (8th Cir. 1982) (agreeing with district court that a case was complex because it included several codefendants, unindicted coconspirators, and overt acts occurring in multiple states and countries); cf. United States v. Cooke, 853 F.3d 464, 472 (8th Cir. 2017) (suggesting, in the Sixth Amendment speedy trial context, that a case was complex where it involved "several coconspirator defendants, voluminous discovery, several requests from defendants for continuances, and motions for both [appellants'] counsel to withdraw"). Accordingly, the district court did not clearly err in designating this case as complex, and therefore its issuance of an ends-of-justice continuance was appropriate under these unique circumstances. Thus, the period of delay with which Appellants take issue was excludable under § 3161(h)(7). Finding no abuse of discretion, we affirm the district court's denial of the motion to dismiss on Speedy Trial Act grounds.

III.

Dillon and Grady both assert that the district court erred in admitting certain "bad act" evidence at trial. We review the district court's admission of this evidence for an abuse of discretion, United States v. Dorsey, 523 F.3d 878, 879 (8th Cir. 2008), and "will reverse only when the evidence clearly had no bearing on the case and was introduced solely to show defendant's propensity to engage in criminal misconduct," United States v. Walker, 428 F.3d 1165, 1169 (8th Cir. 2005).

A.

We turn first to Dillon's challenge. On September 7, 2016—after the conduct that led to his conviction in this case, but before he was indicted—Dillon was arrested for receiving a package of cocaine during an investigation into an unrelated drug operation. During a search incident to his arrest, officers found cell phones containing information pertinent to this case: call records, internet search history, and text messages to several individuals involved in the Terry organization, including Grady and Terry. Before he was tried in the instant case, Dillon was acquitted of the charges relating to his September 7 arrest.

The district court admitted exhibits and testimony about the investigation as well as relevant information obtained from the cell phones as intrinsic evidence, or alternatively under Federal Rule of Evidence 404(b) as probative of Dillon's knowledge and intent regarding drug conspiracies. Dillon argues that the evidence from the September 7 arrest was neither intrinsic nor admissible under Federal Rule of Evidence 404(b) because it was irrelevant, used for an improper propensity argument, and was unfairly prejudicial under Federal Rule of Evidence 403. While we agree that the evidence concerning the September 7 arrest is not intrinsic, we disagree with Dillon's Rule 404(b) and 403 arguments.

Other bad act evidence is generally admissible so long as it is intrinsic or being offered for a non-propensity purpose under Federal Rule of Evidence 404(b). United States v. Vaca, 38 F.4th 718, 720-21 (8th Cir. 2022). A bad act is intrinsic where the "act itself is part of the 'charged offense.'" Id. (citation omitted). Intrinsic evidence is that which "completes the story" of the charged crime, "logically . . . prove[s] any element," or in some cases, "shows consciousness of guilt." Id. at 721 (first alteration in original). Dillon's September 7 arrest for his involvement with an unrelated drug organization does not complete the story of the crime charged here, and it is therefore not intrinsic evidence.

Nevertheless, under Federal Rule of Evidence 404(b), extrinsic bad act evidence is admissible for a non-propensity purpose—that is, for any reason other than "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Rule 404(b) allows for admission of "other act" evidence "if it is (1) relevant to a material issue; (2) similar in kind and close in time to the crime charged; (3) proven by a preponderance of the evidence; and (4) if the potential prejudice does not substantially outweigh its probative value." United States v. Vega, 676 F.3d 708, 719 (8th Cir. 2012) (citation omitted). Dillon challenges only the first and fourth elements.

Dillon briefly suggests that the September 7 cocaine delivery is irrelevant to his knowledge and intent because the delivery occurred after the conduct charged here. But the fact that Dillon's September 7 arrest occurred later is of no consequence because Rule 404(b) embraces not only prior acts but subsequent conduct. See United States v. Thomas, 593 F.3d 752, 758-59 (8th Cir. 2010) (permitting admission of subsequent drug activity occurring four years after the charged conduct because "[c]onsidering the similarities . . . we cannot say the mere passage of four years' time renders the evidence irrelevant to show knowledge or intent"); United States v. Johnson, 934 F.2d 936, 939-40 (8th Cir. 1991) (permitting the admission under Rule 404(b) of two drug transactions that occurred weeks after the charged conduct as probative of the defendant's knowledge and intent). Specifically, subsequent drug activity may be probative of an individual's knowledge or intent regarding a drug trafficking organization. Johnson, 934 F.2d at 940 (explaining that a subsequent drug deal could counter a defendant's assertion that he had no knowledge of drug distribution or did not possess the requisite intent).

Here, the evidence relating to Dillon's September 7 arrest was relevant to his knowledge of drug conspiracies and law enforcement investigations and his intent to participate in these types of organizations. While Dillon claims that his involvement in the unrelated organization was irrelevant because his roles were entirely different (i.e., on September 7, he signed for a drug shipment, and in this

case, he helped conduct intelligence operations), the evidence still largely reflects his general knowledge of drug distribution schemes and intent to join these organizations.

Indeed, the facts of this case show why. Dillon's defense was that he was a paralegal who assisted Terry but did not know about the drug operation itself. By signing for a drug shipment, even though it was unconnected to Terry's conspiracy, he showed that he knew about drug dealing, was involved in it personally, and knew that he was not assisting Terry with innocent activities. See United States v. Croghan, 973 F.3d 809, 824 (8th Cir. 2020) ("The threshold for relevance is quite minimal." (citation omitted)). In other words, it went to his knowledge that he was a participant in a drug conspiracy and he intended his actions to further it.

Finally, the prejudicial effect of the evidence surrounding Dillon's September 7 arrest did not substantially outweigh its probative value.[4] After a careful articulation of the probative value of this evidence, the district court determined that the potential prejudice did not outweigh the probative value. We agree, and "[t]he district court was in the best position to make this determination, particularly in light of its familiarity with the facts surrounding the subsequent transaction[]." Johnson, 934 F.2d at 941. Moreover, the district court's recitation of a limiting instruction to the jury "reduc[ed] the likelihood that such evidence would be improperly used." Id. (approving of a limiting instruction that "cautioned the jury to consider the subsequent act evidence only to evaluate [defendant's] state of mind or intent, not to determine his innocence or guilt of the charged offense"). Accordingly, the district

[4]We note that "[t]he same analysis applies to [Dillon's] claim that the evidence should be excluded under Federal Rule of Evidence 403 because its probative value is substantially outweighed by the danger of unfair prejudice." Johnson, 934 F.3d at 941 n.7; see also United States v. Maxwell, 643 F.3d 1096, 1102 (8th Cir. 2011) ("In cases in which a defendant argues that both rules prohibit the admission of certain evidence, there is no practical difference whether we analyze the Rule 403 claim separately or instead as a subpart of Rule 404(b).").

court did not abuse its discretion in admitting evidence relating to Dillon's September 7 arrest.

B.

Grady also challenges the admission under Rule 404(b) of his heroin conspiracy conviction in 2000, arguing that it was irrelevant, not similar in kind to the charged conduct, and too remote in time. We disagree.

First, Grady's prior conviction is relevant because "[i]t is settled in this circuit that 'a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs.'" United States v. Robinson, 639 F.3d 489, 494 (8th Cir. 2011) (citation omitted). Grady's prior conviction is similar in kind to the current offense because it also involved a cross-state drug conspiracy with participants of varying responsibility. His argument at trial was that he innocently provided services to Terry without appreciating the true nature of the business, which his prior drug trafficking conviction made less believable. Cf. United States v. Cassiere, 4 F.3d 1006, 1022 (1st Cir. 1993) (holding that evidence of "mastermind[ing]" a land flip was admissible under Rule 404(b) in a trial for fraudulent land flips in which the defendant played a different role). Introducing it, in other words, had a non-propensity purpose.

Regarding remoteness, while Grady was convicted 16 years before he was charged in the instant case, he had been out of prison for less than seven years when he began aiding Terry's drug organization, and thus we find the prior offense was not too remote in time to be admitted. See United States v. Walker, 470 F.3d 1271, 1275 (8th Cir. 2006) (finding that conduct occurring 18 years prior to the currently charged conduct not too remote where, after discounting the time defendant spent in prison, there were only eight years "separating the prior offense and the charged offense").

Finally, while all Rule 404(b) evidence may, by its nature, be prejudicial, United States v. Cook, 454 F.3d 938, 941 (8th Cir. 2006), Grady's prior conviction is not so prejudicial as to substantially outweigh its probative value. See United States v. Gaddy, 532 F.3d 783, 789-90 (8th Cir. 2008). Moreover, the district court instructed the jury that it should only consider this prior conviction for the limited purposes of intent, knowledge, or absence of mistake. United States v. Halk, 634 F.3d 482, 488 (8th Cir. 2011) (explaining that limiting instruction immediately before introduction of 404(b) evidence minimized risk of unfair prejudice). Accordingly, the district court did not abuse its discretion in admitting Grady's prior heroin conspiracy conviction in the instant case involving a drug conspiracy.

IV.

Appellants further argue that the district court erred in denying their joint motion for a judgment of acquittal because the evidence was insufficient to support their convictions. We address each of Appellants' convictions separately, reviewing the evidence de novo and "in the light most favorable to the verdict." United States v. Muhammad, 819 F.3d 1056, 1060 (8th Cir. 2016). Notably, though, we do not review the credibility of witnesses on appeal from the denial of a judgment of acquittal. Id.

A.

To be guilty of conspiracy to distribute drugs, the Government was required to prove "(1) that there was a conspiracy, i.e., an agreement to distribute the drugs; (2) that the [Appellants] knew of the conspiracy; and (3) that the [Appellants] intentionally joined the conspiracy." United States v. Polk, 715 F.3d 238, 246 (8th Cir. 2013) (citation omitted). Conspiracies may be proven with wholly circumstantial evidence or by inference from the parties' actions. United States v. Sparks, 949 F.2d 1023, 1027 (8th Cir. 1991).

Appellants assert that there was insufficient evidence to support their convictions for conspiracy to distribute cocaine and heroin. They specifically argue that the Government failed to prove that they intentionally joined Terry's conspiracy because they had no stake in the drug organization; their provision of information to Terry was merely a buyer-seller agreement insufficient to tie them to the conspiracy. We disagree.

First, Appellants' reliance on precedent regarding buyer-seller agreements is misplaced. In those cases, we have specifically explained that evidence of a single *drug* sale, "without more, is inadequate to tie the buyer to a larger conspiracy." United States v. Conway, 754 F.3d 580, 591 (8th Cir. 2014); see also United States v. Shelledy, 961 F.3d 1014, 1019 (8th Cir. 2020) ("[W]e have emphasized that such 'buyer-seller' cases 'involve[] only evidence of a single transient sales agreement and small amounts of drugs consistent with personal use.'" (second alteration in original) (citation omitted)). Appellants' involvement with Terry was not a buyer-seller relationship as contemplated in Conway because documents and information were being exchanged for money, not drugs. Further, we disagree with Appellants' assertion that they had no stake in the drug organization because Terry paid them for their services, which aided him in his relationships with other dealers. Thus, Appellants had a pecuniary interest in the organization's outcome. See United States v. Bewig, 354 F.3d 731, 736 (8th Cir. 2003) (finding that defendant had a stake in the organization's outcome sufficient to tie him to the conspiracy where he "made the supplying of a necessary ingredient to illegal drug production a continuing part of his business").

"[G]uilt may exist even when the defendant plays only a minor role and does not know all the details of the conspiracy." Polk, 715 F.3d at 246 (citation omitted). Moreover, "[a] drug conspiracy may involve ancillary functions (*e.g.*, accounting, communications, strong-arm enforcement), and one who joined with drug dealers to perform one of those functions could be deemed a drug conspirator." Id. (citation omitted). "[A] variety of conduct, apart from selling [drugs], can constitute participation in a conspiracy sufficient to sustain a conviction." Id. at 244, 246-47

(alterations in original) (citation omitted) (finding sufficient evidence for defendant's marijuana-conspiracy conviction where he "obtained and rented homes according to [the manufacturer's] specifications to sustain the [drug] operations" and assured the manufacturer that the owner of one of the homes "was cool" and could be trusted). Here, the evidence showed that Appellants provided Terry with information about individuals through various court documents and proceedings to counsel Terry on which individuals he could trust. In turn, this helped Terry cultivate important relationships to sustain the organization's drug distribution. Viewing this evidence in the light most favorable to the verdict, a reasonable jury could conclude that Appellants intentionally joined the conspiracy in ancillary, intelligence-gathering roles. Thus, there was sufficient evidence to support their drug conspiracy convictions.

B.

We turn next to Appellants' convictions for conspiracy to launder money. A money laundering conspiracy conviction requires the Government to show that Appellants "knowingly joined a conspiracy to launder money and that one of the conspirators committed an overt act in furtherance of that conspiracy." United States v. Pizano, 421 F.3d 707, 725 (8th Cir. 2005) (citation omitted). This requires a conspiratorial agreement that "need not be formal; a tacit understanding will suffice." Id. at 725-26 (citation omitted). Money laundering requires proof of four elements:

> (1) [D]efendant conducted, or attempted to conduct a financial transaction which in any way or degree affected interstate commerce or foreign commerce; (2) the financial transaction involved proceeds of illegal activity; (3) defendant knew the property represented proceeds of some form of unlawful activity; and (4) defendant conducted or attempted to conduct the financial transaction knowing the transaction was "designed in whole or in part [] to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity."

United States v. Phythian, 529 F.3d 807, 813 (8th Cir. 2008) (second alteration in original) (quoting 18 U.S.C. § 1956(a)(1)(B)(i)).

Appellants argue that there was insufficient evidence to prove part of the fourth element—that the transaction's purpose was to conceal an attribute of the unlawful proceeds. See United States v. Slagg, 651 F.3d 832, 845 (8th Cir. 2011) ("[T]he statute's 'design' element 'requires proof that the purpose—not merely effect—of the [transaction] was to conceal or disguise a listed attribute' of the funds." (quoting Cuellar v. United States, 553 U.S. 550, 567 (2008))). Specifically, they allege that the Government's case rested entirely on the fact that Terry gave Appellants cash to pay Brindley's retainer.

Appellants correctly acknowledge that the use of cash alone is insufficient to establish the designed-to-conceal element and that the money laundering statute risks becoming a "money spending statute" if construed too broadly. See id. (citation omitted). Importantly, though, the statute explains that "concealment need not be the sole purpose of the transaction." Id. at 845 n.9 (citing 18 U.S.C. § 1956(a)(1)(B)). Our analysis in Slagg is helpful here. In Slagg, a bail-posting transaction using illicit funds was at issue. Id. at 844. We found that there was sufficient evidence for a reasonable jury to infer that the designed-to-conceal element was met, and we rejected the defendant's argument that the evidence only allowed an inference that the "purpose of the agreement was to bail him out of jail." Id. at 845-46. Specifically, there was evidence of recorded phone calls during which the defendant discussed the risks of the money disappearing, i.e., being seized as drug proceeds, and the use of a bail bondsman to post bail. Id. We found this evidence was sufficient to support an inference that the defendant "knew that his cohorts planned to conduct the transaction in such a way as to 'conceal or disguise the nature, . . . the source, the ownership or the control' of the money," id. at 846 (alteration in original), citing a First Circuit case that held "the use of a third party to disguise the true owner" was sufficient to prove intent to disguise or conceal, United States v. Cruzado-Laureano, 404 F.3d 470, 483 (1st Cir. 2005).

Here, Terry testified that the Government would seize drug money if it knew of its illicit nature and that he wanted to give the cash to Appellants before it could be seized. He also testified that he did not think Grady would tell police that the money came from him. Appellants were aware of Terry's indictment and need for an attorney, evidenced by the Applebee's meeting at which they discussed methods for Terry to evade law enforcement. Appellants then accepted multiple cash advances from Terry to pay Brindley, the chosen attorney. This evidence is sufficient for a reasonable jury to infer that Appellants knew that the purpose of their receipt of cash sums from Terry to be paid to the attorney was to conceal. Accordingly, we uphold their money laundering conspiracy convictions.

C.

Appellants were also convicted of attempting to obstruct an official proceeding, in violation of 18 U.S.C. § 1512(c)(2). This statute "makes it a crime to corruptly 'obstruct[], influence[], or impede[] any official proceeding, or attempt[] to do so.'" United States v. Petruk, 781 F.3d 438, 444 (8th Cir. 2015) (alterations in original) (quoting 18 U.S.C. § 1512(c)(2)).

Section 1512(c)(2) requires that Appellants knew their conduct would likely affect an official proceeding. See id. at 445; cf. United States v. White Horse, 35 F.4th 1119, 1122-23 (8th Cir. 2022) (holding that under § 1512(c)(1), which is analogous to § 1512(c)(2), a defendant must "know[] that he is likely to accomplish his intention to 'impair [an] object's integrity or availability for use in an official proceeding'" (second alteration in original) (citation omitted)). Implicit in this mens rea requirement is that their conduct would have the "natural and probable effect" of "obstruct[ing], influenc[ing], or imped[ing] any official proceeding." See Petruk, 781 F.3d at 444-45 (citing United States v. Aguilar, 515 U.S. 593, 599 (1995)); White Horse, 35 F.4th at 1122-23 ("[A] person cannot *know* that his action is likely to affect an official proceeding unless his action is, in fact, likely to affect an official proceeding.").

Appellants allege that the evidence was insufficient to prove that their conduct would impact an official proceeding. Specifically, they claim that because Terry was a sophisticated drug dealer with independent knowledge of methods to evade his criminal indictment, Appellants' advice to flee St. Louis could not have had the probable effect of causing Terry to flee. We disagree, as we have upheld a jury conviction under § 1512(c)(2) in circumstances analogous to those here. See United States v. Mink, 9 F.4th 590, 610 (8th Cir. 2021) (finding sufficient evidence for jury conviction where defendant instructed his father to destroy evidence in his home after a law enforcement search and to sign a false affidavit, and defendant "expressly acknowledged that the government was building a case against him . . . [and] explained how the affidavit would detrimentally affect the Government's case").

Terry testified that he learned about his indictment shortly before meeting Appellants at Applebee's. Prior to the meeting, Terry explained, he was so distraught by the charges that he planned to avoid criminal prosecution by engaging in gunfire with officers, hoping that he might be killed. At the Applebee's meeting, though, Appellants explained to Terry that he could fight the charges in court. They advised that it would be advantageous for Terry to leave town for 18 to 24 months to allow time for his numerous codefendants to enter into plea agreements with the Government. Moreover, Appellants advised that if Terry was not in the Government's custody, fewer witnesses might cooperate against him for fear that Terry might harm their families. Terry testified that upon Appellants' advice, he left town. Appellants also met with Stanford Williams, a close associate of Terry, and discussed this plan.

With this testimony in mind, Appellants' advice to Terry was not only likely to affect an official proceeding, but it ultimately *did* impact an official proceeding: the advice caused Terry flee St. Louis, which allowed him to initially evade arrest. Moreover, Appellants showed up to the meeting with Terry's indictment and explained in detail the rationale for why Terry should leave St. Louis. Just as the defendant in Mink explained how signing a false affidavit would negatively impact the Government's case, Appellants explained how Terry absconding would

negatively impact the Government's case. Thus, we are persuaded that when viewed in the light most favorable to the verdict, Appellants' advice to Terry to abscond indicated that they knew their actions were likely to affect an official proceeding. Accordingly, there was sufficient evidence for the jury to convict Grady and Dillon.

V.

Finally, Grady asserts that the district court impermissibly denied him his constitutional right to counsel of his choice in denying his renewed motion to substitute counsel because of a serious potential conflict. We disagree and find that the district court did not abuse its discretion. See Wheat v. United States, 486 U.S. 153, 163-64 (1988) (suggesting deferential, abuse-of-discretion standard on review of a district court's denial of a substitution motion because of a conflict of interest).

While the Sixth Amendment guarantees a defendant the right to counsel of his choice, this right "is circumscribed in several important respects." Id. at 159. One such limitation arises with conflicts of interest. Id. at 159-60, 164 ("District [c]ourt[s] must recognize a presumption in favor of [defendant's] counsel of choice, but that presumption may be overcome . . . by a showing of a serious potential for conflict."). Where there are possible conflicts of interest, a court "must take adequate steps to ascertain whether the conflicts warrant separate counsel." Id. at 160. While a defendant may waive his right to conflict-free counsel, United States v. Edelmann, 458 F.3d 791, 807 (8th Cir. 2006), district courts are afforded "substantial latitude" to refuse a waiver when faced with a serious potential conflict, Wheat, 486 U.S. at 163-64 (finding that the district court did not abuse its discretion in refusing representation by counsel who represented or previously represented two coconspirators and would have likely needed to cross-examine a former client and noting that district courts must pass on the waiver issue without the "wisdom of hindsight after the trial has taken place"). This evaluation is "left primarily to the informed judgment of the trial court." Id. at 163-64 (concluding that the district court acted within its discretion to deny substitution of counsel where it "was confronted not simply with an attorney who wished to represent two coequal

defendants in a straightforward criminal prosecution" but instead "proposed to defend three conspirators of varying stature in a complex drug distribution scheme"). In evaluating the particular circumstances, a district court should "carefully balance" the right to counsel of choice with the "interest in 'the orderly administration of justice.'" United States v. Cordy, 560 F.3d 808, 815 (8th Cir. 2009) (citation omitted). Importantly, "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat, 486 U.S. at 160.

After previously being denied counsel of his choice, Grady renewed his motion to substitute Brindley as his counsel. In denying his motion, the district court recounted much of the magistrate judge's initial denial because several important facts remained relevant. Specifically, the nature of the money laundering conspiracy charges directly related to the payments Appellants made to Brindley as a retainer to represent Terry. Indeed, Brindley had represented Terry in the instant case for several months before Grady was indicted. Naturally, then, Terry's testimony at trial about the money-laundering charge repeatedly referenced Brindley by name. Brindley was eventually disqualified from representing Terry because of an unwaivable, serious potential conflict—namely, his and Grady's "long-standing professional relationship" in which Grady would refer clients to Brindley and Brindley would outsource investigative work to Grady. Shortly after that disqualification and Grady's eventual indictment, Brindley sought to represent Grady. He maintained that, despite representing Terry for several months and never returning his substantial retainer, he learned no confidential information that would impact his ability to represent Grady. Exactly one week after the hearing on the motion to represent Grady, Brindley entered his appearance in a separate case in which Grady was indicted, but this time for a different codefendant. Noting this "tangled web," the magistrate judge disqualified Brindley from representing Grady, despite Grady's conflict waiver.

In addition to the ongoing potential conflict, the district court also acknowledged the practical difficulties with counsel substitution so close to trial where Grady had been appointed counsel. Because the trial was near and the case involved numerous defendants, some of whom might testify, and due to the need to expeditiously resolve the case because of the COVID-19 pandemic, substitution would interfere with the "orderly administration of this case." Grady makes much of the district court's discussion about the possibility of this attorney being called as a witness, explaining that the Government clarified that it had no intention to call him. But, as the Second Circuit noted:

> Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question. . . . Moreover, his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination.

United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993). We see no abuse of discretion with the district court's refusal to allow Grady to substitute counsel for Brindley, an attorney who was involved in the events leading to Grady's criminal charge. Evidence at trial suggested that Brindley accepted money that was proceeds of a drug trafficking organization. It appeared, therefore, that Brindley's loyalties were divided: his plan was to defend Grady at trial, yet he also needed to protect himself from accusations that might, at a minimum, affect his license to practice law. We echo the sentiments of the district court that "[a]n outsider looking at the proceedings thus far may query why [the attorney] so strenuously seeks to continue representation of [Grady]."

Relatedly, Grady argues that the district court could have alleviated any concern about attorney conflict by allowing the attorney to represent him, but accepting independent, conflict-free counsel to cross-examine Terry. But the district court was well within its discretion to deny this alleged "prophylactic" measure. While Grady is correct that we have previously held that "the chosen method for

dealing with a potential conflict . . . is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel," United States v. Agosto, 675 F.2d 965, 970 (8th Cir. 1982), we are skeptical that his proposed solution would truly alleviate all effects of the serious potential conflict. Indeed, given the potential conflict with Terry, the Government's primary cooperating witness, multiple phases of the trial could be impacted, not simply cross-examination. See, e.g., United States v. Bikundi, 80 F. Supp. 3d 9, 20-21 (D.D.C. 2015) (rejecting the proposition to employ independent co-counsel for cross examination because the "conflict extend[ed] beyond just the cross-examination . . . and infect[ed] every aspect of the trial presentation"). Brindley would likely have had to factor Terry's anticipated testimony into the overall defense, and it is implausible that he could have walled himself off from all trial strategy involving Terry. In sum, because of the attorney's myriad entanglements in this case, the district court was within its discretion to deny Grady's motion for substitution of counsel.

VI.

For the foregoing reasons, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2415

United States of America

Appellee

v.

Michael Grady

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:15-cr-00404-HEA-29)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 09, 2024

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA

v.

MICHAEL GRADY

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **4:15-CR-00404-HEA(29)**
§ USM Number: **25943-044**
§ **Quinn A. Michaelis**
§ Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**Thirty One, Thirty Two, and Thirty Four of the Fifth Superseding Indictment on April 7, 2021.**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 846 Conspiracy To Distribute and Possess With Intent To Distribute Cocaine and Herion	12/20/2018	31rs
18 U.S.C. § 1512(c)(2) Obstruction Of Justice	07/27/2016	32rs
18 U.S.C. § 1956(a)(1)(B)(i), 18 U.S.C. § 1956(h) Conspiracy To Commit Money Laundering	12/20/2018	34rs

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 35

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 23, 2022
Date of Imposition of Judgment

Signature of Judge

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

June 23, 2022
Date

DEFENDANT: MICHAEL GRADY
CASE NUMBER: 4:15-CR-00404-HEA(29)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

226 months.

This term consists of a term of 226 months on each of counts 31, 32, and 34, all such terms to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the defendant by placed at a facility as close in proximity to Jacksonville, Florida.

While in the custody of the Bureau of Prisons, it is recommended the defendant be evaluated for participation in an Occupational/Educational program, specifically, in legal studies. Such recommendations are made to the extent they are consistent with the Bureau of Prisons policies.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

MARSHALS RETURN MADE ON SEPARATE PAGE

DEFENDANT: MICHAEL GRADY
CASE NUMBER: 4:15-CR-00404-HEA(29)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **five (5) years.**

This term consists of a term of 5 years as to Count 31, and a term of 2 years as to Counts 32 and 34, all such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: MICHAEL GRADY
CASE NUMBER: 4:15-CR-00404-HEA(29)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: MICHAEL GRADY
CASE NUMBER: 4:15-CR-00404-HEA(29)

SPECIAL CONDITIONS OF SUPERVISION

While on supervision, the defendant shall comply with the standard conditions that have been adopted by this Court and shall comply with the following additional conditions. If it is determined there are costs associated with any services provided, the defendant shall pay those costs based on a co-payment fee established by the probation office.

You must participate in a cognitive-behavioral treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). Such programs may include group sessions led by a counselor or participation in a program administered by the probation office.

You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation.

DEFENDANT: MICHAEL GRADY
CASE NUMBER: 4:15-CR-00404-HEA(29)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	**$300.00**	$.00	$.00		

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MICHAEL GRADY
CASE NUMBER: 4:15-CR-00404-HEA(29)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of **$300.00** due immediately, balance due

☐ not later than , or

☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $300.00 for Counts 31rs, 32rs and 34rs , which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: MICHAEL GRADY
CASE NUMBER: 4:15-CR-00404-HEA(29)
USM Number: **25943-044**

UNITED STATES MARSHAL
RETURN OF JUDGMENT IN A CRIMINAL CASE

I have executed this judgment as follows:

Date defendant was delivered with certified copy of this judgment:_____

Name and location of facility:_____

☐ Defendant was sentenced to Time Served and was released on:_____

☐ Defendant was sentenced to _____ months/years of Probation and was released on:_____

☐ Defendant was sentenced to _____ months/years of Supervised Release and was released on:_____

_____
NAME OF US MARSHAL/WARDEN

_____
By: NAME OF DEPUTY US MARSHAL/CSO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:15CR404 HEA
	)	
MICHAEL GRADY,	)	
	)	
Defendant.	)	

OPINION, MEMORANDUM AND ORDER

This matter is once again before the Court on Defendant Michael Grady's Motion for Substitution of Counsel, [Doc. No. 2887]. The Government filed a response opposing the motion, Defendant filed a reply thereto, and the Government filed a sur-reply with leave of Court, and Defendant filed a sur-reply to the Government's sur-reply. For the reasons set forth below, the Motion is denied.

Defendant's Previous Motions For Substitution of Counsel

Defendant filed this motion seeking to substitute attorney Beau Brimley as his attorney in lieu of Court appointed counsel. The instant motion is in essence Defendant's challenge to Judge Baker's finding that a potential conflict exists in counsel's representation of Defendant Grady.

In her order of March 22, 2017, Judge Baker detailed Mr. Brindley's involvement with several defendants involved in this matter and another matter in which Defendant Grady was involved:

> Brindley has a history with this case. On August 26, 2016, he was admitted pro hac vice to represent defendant Derrick Terry. At that point, Grady had not yet been indicted. On December 1, 2016, a Fourth Superseding Indictment was filed charging Grady and Oscar Dillon, III as codefendants with Terry. [Doc. #680.] Grady and Dillon hold themselves out as "paralegals" and Brindley has had a long-standing professional relationship with Grady who has referred cases to Brindley, performed investigative services for him, and, in this case, facilitated Terry hiring Brindley. Following a conflict hearing on December 2, 2016, the undersigned disqualified Brindley from representing Terry based on a serious, unwaivable potential for conflict.
>
> On February 3, 2017, Brindley filed the instant motion seeking to represent Grady. The undersigned held a hearing on February 24, 2017 where both Brindley and Grady testified about the nature of their relationship and about Brindley's prior representation of Terry. Although Brindley stated that the only work he did on Terry's case was related to the conflict issue, he further testified that he did not return the substantial retainer that he received from Terry. Grady testified that he wished to waive any potential conflict of interest and signed a waiver form. Grady and Dillon were later indicted in a separate case, along with a Roy William Burris, Jr. (4:17-cr-95 RWS PLC). [Doc. #2.] On March 3, 2017, Brindley entered his appearance in that case on behalf of Burris.
>
> Brindley's attempts to represent Terry and Grady consecutively and Grady and Burris simultaneously weave a tangled web indeed. Having been retained and then disqualified from representing Grady's codefendant in this case, Brindley now seeks to represent Grady in this matter, while attempting to represent another of Grady's codefendants in a separate case. "[T]he district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat v. United States*, 486 U.S. 153, 163,

108 S. Ct. 1692, 1699, 100 L. Ed. 2d 140 (1988). Having conducted an inquiry into the propriety of Brindley's representation of Grady, the undersigned finds that there is a "serious potential for conflict," *Wheat*, 486 U.S. at 164, and that a waiver would not adequately protect the interests of Grady and Terry, the "integrity of the judicial proceeding," and "public confidence in the legal profession," *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir. 1982). Therefore, the undersigned will deny Defendant's Motion to Substitute Counsel.

Analysis

Federal courts have an independent interest in ensuring that criminal trials are conducted within ethical standards of the profession and that legal proceedings appear fair to all who observe them. A district court is given substantial latitude in refusing conflict waivers. *Wheat,* 486 U.S. at 163.

"The Sixth Amendment to the Constitution guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.'" *Id*, at 158. As a general rule, "defendants are free to employ counsel of their choice and the courts are afforded little leeway in interfering with that choice." *United States v. Edelmann*, 458 F.3d 791, 806 (8th Cir. 2006).

However, this right of a criminal defendant to retain counsel of his choice is not absolute. "[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat*, 486 U.S. at 159 (citing *Morris v. Slappy*, 461 U.S. 1, 13-

14 (1983); *Jones v. Barnes*, 463 U.S. 745 (1983)). Although a defendant is entitled to waive his right to conflict-free counsel, the court may disqualify a conflicted attorney despite a defendant's voluntary, knowing, and intelligent waiver if the court finds that allowing the representation to proceed would obstruct orderly judicial procedure or deprive the court of its inherent power to control the administration of justice. *See Edelmann*, 458 F.3d at 806, *see also Wheat*, 486 U.S. at 163 ("district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses). Therefore, courts must balance the defendant's right to counsel of his own choosing against the court's interest in the administration of justice. *Edelmann*, 458 F.3d at 806.

In *Wheat*, the Court addressed a question similar to that presented in the present case—"the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy." *Id*. at 159. In that case, the Court rejected the proposition that "waivers by all affected defendants [necessarily] cures any problems created by the multiple representation." *Id.* at 160. Rather, the Court affirmed a district court's discretion

to reject or accept a waiver of a conflict of interest, based on the informed judgment of the court, after an evaluation of the facts and circumstances of a particular case. *Id.* at 164. The Court noted trial courts have a duty to inquire into potential conflicts of interests in the context of multiple representation situations, and in so doing, "face the prospect of being 'whip-sawed' by assertions of error no matter which way they rule." *Id.* at 161. If a district court permits the representation to proceed, despite a potential conflict, and counsel's advocacy is impaired as a result, a defendant may claim he received ineffective assistance of counsel. *Id.* (citing *Burger v. Kemp*, 483 U.S. 776 (1987)). "On the other hand, a district court's refusal to accede to the multiple representation may result in a challenge" to a defendant's right to counsel of his choice, under the Sixth Amendment. *Id.* Therefore, "where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of a waiver...." *Id.* at 162.

In *Wheat*, the Court recognized that, in the pretrial context, the relationships between defendants "are seen through a glass, darkly" and the "likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials." *Id.* The Court further recognized, "[a] few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants.

These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics." *Id.* at 162-63. Therefore, district courts are given "substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or not burgeon into an actual conflict as the trial progresses." *Id.* at 163.

Further, a court may, in its discretion, disqualify attorneys for case-management considerations. Courts have "wide latitude" in balancing a defendant's right to choice of counsel against the needs of its calendar, fairness to all parties, and the parties' and the public's interest in the efficient administration of justice.

A court may also need to inquire if separate counsel is needed when an attorney represents more than one codefendant. *Id*. at 160 (citing *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978)). The Supreme Court rejected Wheat's argument that a waiver by all affected codefendants cures any problems created by multiple representation, instead finding that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* "Not only the interest of a criminal defendant but the institutional interest in the

rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." *Id*.

Wheat further held a district court must be allowed "substantial latitude" in refusing waivers of conflicts of interest in cases with actual conflicts and also those where a potential for conflict exists. *Id*. at 163. Although prosecutors may seek to "manufacture" a conflict, the Supreme Court found that "trial courts are undoubtedly aware of this possibility and must take it into consideration along with all of the other factors which inform this sort of a decision." *Id*. Thus, the Supreme Court held "the District Court's refusal to permit the substitution of counsel in this case was within its discretion and did not violate [Wheat's] Sixth Amendment rights." *Id*. at 164. It further stated there is a presumption in favor of a defendant's counsel of choice, but that presumption "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id*.

Judge Baker found a serious potential for conflict in this case. Attorney Brindley's protestations to the contrary do not alleviate Judge Baker's or this Court's concerns. All involved in any criminal trial must diligently protect the integrity of the judicial system. An outsider looking at the proceedings thus far may query why Attorney Brindley so strenuously seeks to continue representation

of Defendant Grady, when Judge Baker observed a potential conflict in this case with his desire to represent two other defendants associated with Defendant Grady.

Moreover, the Court has appointed counsel to represent Defendant Grady in the soon approaching trial. The matter is set for trial in March. The case involves numerous defendants; some defendants may testify in the case, and there is a need to resolve this case in the most expeditious manner as possible in light of the COVID-19 pandemic. Substitution of Attorney Brindley may hinder the orderly administration of this case.

Although Defendant Grady argues that there *is* no conflict, based on the record and facts before the Court, the Court is unpersuaded that substitution is appropriate with respect to this defendant in this case at this time. While Defendant Grady questions the Government's late disclosure that Attorney Brindley may be called as a witness, the Court cannot say that the Government has misrepresented that it may call him as a witness. Indeed, the decision of whether to call witnesses and the time when that decision is made is within the trial strategy of trial counsel. Defendant Grady's suppositions are unpersuasive.

Accordingly,

IT IS HEREBY ORDERED that Defendant Grady's Motion for

Substitution of Counsel, [Doc. No. 2887] is denied.

Dated this 13th day of January, 2021.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:15-CR-404 HEA NAB
	)	
MICHAEL GRADY,	)	
	)	
Defendants.	)	

ORDER

All pretrial matters in this cause have been referred to the undersigned pursuant to 28 U.S.C. §636(b). This matter is before the undersigned on Defendant Michael Grady's Motion to Substitute Counsel filed February 3, 2017 requesting that newly retained counsel Beau B. Brindley and his associate Michael J. Thompson be substituted for appointed counsel Larry D. Hale [Doc. #855].

Brindley has a history with this case. On August 26, 2016, he was admitted pro hac vice to represent defendant Derrick Terry. At that point, Grady had not yet been indicted. On December 1, 2016, a Fourth Superseding Indictment was filed charging Grady and Oscar Dillon, III as codefendants with Terry. [Doc. #680.] Grady and Dillon hold themselves out as "paralegals" and Brindley has had a long-standing professional relationship with Grady who has referred cases to Brindley, performed investigative services for him, and, in this case, facilitated Terry hiring Brindley. Following a conflict hearing on December 2, 2016, the undersigned disqualified Brindley from representing Terry based on a serious, unwaivable potential for conflict.

On February 3, 2017, Brindley filed the instant motion seeking to represent Grady. The undersigned held a hearing on February 24, 2017 where both Brindley and Grady testified about the nature of their relationship and about Brindley's prior representation of Terry. Although Brindley stated that the only work he did on Terry's case was related to the conflict issue, he further testified that he did not return the substantial retainer that he received from Terry. Grady testified that he wished to waive any potential conflict of interest and signed a waiver form. Grady and Dillon were later indicted in a separate case, along with a Roy William Burris, Jr. (4:17-cr-95 RWS PLC). [Doc. #2.] On March 3, 2017, Brindley entered his appearance in that case on behalf of Burris.

Brindley's attempts to represent Terry and Grady consecutively and Grady and Burris simultaneously weave a tangled web indeed. Having been retained and then disqualified from representing Grady's codefendant in this case, Brindley now seeks to represent Grady in this matter, while attempting to represent another of Grady's codefendants in a separate case. "[T]he district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat v. United States*, 486 U.S. 153, 163, 108 S. Ct. 1692, 1699, 100 L. Ed. 2d 140 (1988). Having conducted an inquiry into the propriety of Brindley's representation of Grady, the undersigned finds that there is a "serious potential for conflict," *Wheat*, 486 U.S. at 164, and that a waiver would not adequately protect the interests of Grady and Terry, the "integrity of the judicial proceeding," and "public confidence in the legal profession," *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir. 1982). Therefore, the undersigned will deny Defendant's Motion to Substitute Counsel.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Substitute Counsel [Doc. #855] is **DENIED**.

Dated this 22nd day of March, 2017.

/s/ Nannette A. Baker
NANNETTE A. BAKER
UNITED STATES MAGISTRATE JUDGE