IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 08-00026-03,05-CR-W-FJG
	)	
TROY R. SOLOMON, and	)	
DELMON L. JOHNSON,	)	
	)	
Defendants.	)	

ORDER

Pending before the Court is the United States' Motion for Determinations Concerning the Representation of Defendants Solomon and Johnson (doc. #190). The motion raises a number of issues concerning the joint representation of defendants Solomon and Johnson by Anthony Bannwart and questions whether the defendants' prior waivers of their right to separate counsel should be reconsidered. The government suggests that a number of developments which have occurred since the original waivers were executed may create an actual conflict of interest which cannot be waived.

Defendants Solomon and Johnson filed a joint response asking the Court to find that no conflict of interest prevented Mr. Bannwart's joint representation of them (doc. #209). Each defendant also filed a Second Waiver of Right to Separate Representation (docs. #203 and #204).

I. BACKGROUND

On February 6, 2008, a federal grand jury returned a twenty-four count indictment against defendants Mary Lynn Rostie, Cynthia Martin, Troy Solomon, Christopher Elder and Delmon Johnson. The indictment charges defendants with crimes arising out of their participation in a conspiracy to distribute controlled substances (hydrocodone, alprazolam and promethazine with

codeine) and a conspiracy to commit money laundering. Count One charges all five defendants with conspiracy to distribute controlled substances in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), 841(b)(2), 841(b)(3) and 846. Count Two charges defendants Rostie, Martin, Solomon and Johnson with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). Counts Three through Six charge defendants Rostie, Solomon and Elder with aiding and abetting the illegitimate distribution of Schedule III and IV controlled substances in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D) and 841(b)(2) and 18 U.S.C. § 2. Counts Seven through Ten charge defendants Rostie, Elder, Solomon and Johnson with aiding and abetting the illegitimate distribution of Schedule III, IV and V controlled substances in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), 841(b)(2) and 841(b)(3) and 18 U.S.C. § 2. Counts Eleven and Twelve charge defendants Rostie and Solomon with aiding and abetting the illegitimate distribution of a Schedule V controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(3) and 18 U.S.C. § 2.

On April 2, 2008, Anthony L. Bannwart, an attorney in Houston, Texas, filed a motion to appear *pro hac vice* for defendants Solomon and Johnson (doc. #28). The Clerk of Court approved Mr. Bannwart's request the same day (doc. #29). On April 2, 2008, at the initial appearance before the undersigned, defendants Solomon and Johnson each tendered a Waiver of Right to Separate Counsel (see docs. #34, #36 and #37) and Mr. Bannwart entered his appearance for each of them (see docs. #30 and #32). On August 21, 2008, attorneys Chip Lewis and Mary Grace Ruden, also of Houston, Texas, filed motions to appear *pro hac vice* for defendant Solomon only (docs. #91 and #92). On August 22, 2008, the Court entered an order approving their requests (doc. #94).

The government's Motion for Determinations Concerning the Representation of Defendants Solomon and Johnson alleges that a conflict of interest may arise because Solomon has both

independent and shared representation and because Solomon and Johnson are not similarly situated with respect to a potential change of plea. In addition, the government raises the possibility that Mr. Bannwart may need to be disqualified as he may become a fact witness at trial and/or because of his possible involvement in a telephone conversation with Cynthia Martin.[1]

With respect to the government's allegations concerning possible conflicts of interest, defendants contend they have made knowing, voluntary and intelligent waivers of their right to be represented by separate counsel, that the addition of separate counsel of record for defendant Solomon did not create a conflict and that as no plea offer had been made to defendant Johnson, as of the filing of the government's motion, that issue was not ripe for consideration. (See Defendant Solomon and Johnson's Joint Response (doc. #209)) Thereafter, government counsel made a plea offer to defendant Johnson, but not defendant Solomon. The plea offer to defendant Johnson required Johnson's cooperation in providing information concerning his knowledge of the offenses charged in the indictment.

During a further hearing to discuss this issue, Mr. Bannwart contended that the plea offer did not mandate his disqualification because: (1) his clients had waived the issue;[2] (2) the plea offer was "hollow" and made for the "sole purpose" of excluding Mr. Bannwart;[3] (3) his clients both maintain their innocence, and thus, "there hasn't been much of a conflict in deciding how to present their

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[1]The Court need not address these additional arguments since it finds that Mr. Bannwart must be disqualified based on the conflict of interest in representing both defendants Solomon and Johnson.

[2]Tr. of June 30, 2009 at 73.

[3]Tr. of June 30, 2009 at 73.

defense;"[4] and (4) "Mr. Lewis is there as a backup in the event that there is some kind of issue regarding whether or not I am giving Mr. Solomon proper advice, he has Mr. Lewis to consult with."[5]

The Government took the position that factually the two defendants are in "very different situations." (Tr. of June 30, 2009 at 75)

> And we believe the evidence will show that Mr. Solomon has a major role, the major central role in the conspiracy. That he is the, essentially the center of the conspiracy. And Mr. Johnson is in no way situated like that. That he is someone who helps Mr. Solomon, that he has a discrete role in the conspiracy but is not the major planner and organizer in the same way that Mr. Solomon is. So, we see these two defendants as being situated very differently. I don't think this is a hollow plea offer in any sense. This is made because we do believe that there are distinct differences. While we are confident that Mr. Johnson has information that he can impart if he were to speak to us truthfully, that would be helpful to the Government's case in a substantial way. And Mr. Johnson would benefit substantially from this participation if it came out, as the government believes it might, in that, he could earn himself a 5K.

(Tr. of June 30, 2009 at 75-76)

II. LEGAL ANALYSIS AS TO CONFLICT OF INTEREST

As set forth in Wheat v. United States, 486 U.S. 153, 158 (1988), "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 defence.'" The Court goes on to state:

> ... [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. ...
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> The Sixth Amendment right to choose one's own counsel is circumscribed

[4]Tr. of June 30, 2009 at 72.

[5]Tr. of June 30, 2009 at 72.

> in several important respects. ... Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party .... The question raised in this case is 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.
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> ... Federal 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. ...
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> * * *
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> ... The District Court must recognize a presumption in favor of petitioner'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. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.

Id. at 159-60, 164. In a criminal case, the court must balance "individual constitutional protections, public policy and public interest in the administration of justice, and basic concepts of fundamental fairness" in assessing the merits of a disqualification motion. See United States v. Agosto, 675 F.2d 965, 970 (8th Cir. 1982). See also United States v. O'Malley, 786 F.2d 786, 790 (7th Cir. 1986)("the decision to disqualify an attorney in a criminal case requires an evaluation of the interests of the defendant, the government, the witness and the public in view of the circumstances of each particular case").

In a similar situation, the court in United States v. Dalton-Robinson, 2007 WL 4592187 (E.D.N.C. Dec. 14, 2007), concluded that joint representation of two defendants in a mail fraud conspiracy constituted an irreparable conflict of interest which warranted the disqualification of their counsel. In that case, based upon the defendants' differing roles in the alleged conspiracy, the court found:

> More apparent is the serious potential for a conflict to arise pretrial in the course of plea bargaining. Conflict-free counsel, acting for either defendant, would have a strong incentive on behalf of his or her client to explore a plea bargain that would minimize potential jail time in return for cooperation against the other defendant. Yet, such a plea bargain, by requiring the pleading defendant to maximize his or her cooperation with the government, would likely require the defendant to implicate the co-defendant. Indeed, courts have recognized that joint representation of conflicting interests is suspect for Sixth Amendment purposes precisely because it might prevent an attorney from exploring fully the opportunity for plea negotiations.

(Id. at *3) See also Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978)(recognizing that joint representation might have prevented attorney from "exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable"); United States v. Tatum, 943 F.2d 370, 376 (4th Cir. 1991)("Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client, and this part is easily precluded by a conflict of interest.")(quoting Mannhalt v. Reed, 847 F.2d 576, 582 (9th Cir. 1988)). Similarly, in a case where it was alleged that two co-defendants were not similarly situated, the court found that even though the defendants at that time did not intend to pursue conflicting factual defenses, that did not establish that no conflict existed or would not arise. See United States v. Balsirov, 2005 WL 1185810 (E.D. Va. May 18, 2005). In part, because of the serious potential for a conflict to arise pre-trial in the context of plea bargaining, the court in Balsirov concluded that one counsel could not represent both defendants. Id. at *4-6.

Given the information before the Court, it would appear that an actual conflict has arisen which would prevent Mr. Bannwart from jointly representing both defendants. While Mr. Bannwart asserts that defendant Johnson does not desire to plead guilty and continues to assert his innocence, the difficulty is that Mr. Bannwart is not in a position to give defendant Johnson independent advice

about the plea offer or to negotiate further on his behalf since to do so would likely require defendant Johnson to implicate or provide information as to defendant Solomon.

Mr. Bannwart's suggestion that Mr. Lewis can advise defendant Solomon if Mr. Bannwart is providing proper advice highlights the problem facing defendant Johnson who has no other counsel with whom to consult. Mr. Lewis seems to suggest that independent counsel could be appointed for defendant Johnson to advise him with respect to the plea offer. However, this proposal fails to provide defendant Johnson with the effective assistance of counsel required by the Sixth Amendment. If the plea agreement is rejected by defendant Johnson after consulting with independent counsel, Johnson would have no opportunity to reevaluate that position as additional facts or evidence become available. Additionally, this proposal would not begin to address the conflict caused by the defendants' allegedly different roles in the alleged conspiracies during jury selection, examination and cross-examination of witnesses at trial and at sentencing, if both defendants were convicted.

III. CONCLUSION

Based on the foregoing, it is

ORDERED that the United States' Motion for Determinations Concerning the Representation of Defendants Solomon and Johnson (doc. #190) is granted. Mr. Bannwart is disqualified from any further representation of defendants Troy Solomon or Delmon Johnson in this action.

/s/ *Sarah W. Hays*
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE