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

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

THE UNITED STATES' SUGGESTIONS IN OPPOSITION TO DEFENDANT SOLOMON'S AND DEFENDANT JOHNSON'S APPEAL TO THE DISTRICT COURT OF THE MAGISTRATE JUDGE'S ORDER DISQUALIFYING ATTORNEY ANTHONY BANNWART

The United States of America submits the following suggestions in opposition to the appeal taken to the District Court by defendants Solomon and Johnson of the Magistrate Judge's order disqualifying attorney Anthony Bannwart:

Suggestions in Opposition

FACTUAL 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 charged them with crimes arising out of their participation in a conspiracy to distribute controlled substances (hydrocodone, alprazolam, and Promethazine with Codeine). The Indictment alleges that Elder wrote unlawful and invalid prescriptions for thousands of dosage units of Schedule III, IV and V controlled substances. Count One charges all five defendants with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. Counts Three through Six charge defendants Elder, Rostie, and Solomon with aiding and

abetting the illegitimate distribution of Schedule III and IV controlled substances, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Counts Seven through Ten charge defendants Elder, Rostie, 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) 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 Troy R. Solomon and Delmon L. Johnson.(Doc. No. 28). The Clerk of the Court approved Mr. Bannwart's request the same day. (Doc. No. 29). On April 2, in appearance before the Magistrate Judge, Solomon and Johnson each tendered a Waiver of Right to Separate Counsel, (Doc. No. 34, 35, and 36), and Mr. Bannwart entered his appearance for each of them. (Doc. No. 32).

On August 21, 2008, attorneys Chip Lewis and Mary Grace Ruden, also of Houston, Texas, filed motions to appear pro hac vice for Solomon only. (Doc. Nos. 91 and 92). On August 22, the Court entered an order approving their appearances on August 22. (Doc. No. 94).

On April 14, 2009, the United States formally extended a plea offer to defendant Johnson, the terms of which were memorialized in a written draft plea agreement and an accompanying side letter. The offer extended an opportunity to defendant Johnson to cooperate with the United States. If the United States deemed the cooperation to be entirely truthful and helpful, defendant Johnson would stand to benefit from a potential reduction in his sentence. The cooperation would encompass testimony against defendant Solomon, who is considered by the government to be the organizer and leader of the charged conspiracies.

Moreover, in interviews, a number of witnesses have mentioned Mr. Bannwart in regard to matters of substantive relevance to this case. On November 5, 2008, both Ada Johnson and

Pleshette Johnson, the owners and operators of South Texas Wellness Center ("STWC") were each separately interviewed. Both Ada and Pleshette Johnson said that Solomon had provided them with about $25,000 total in cash in 2004 to assist with the payment of STWC's expenses. Solomon made these contributions without any written agreement being in place. Solomon later sought to acquire a formal ownership interest in STWC and he had his attorney, Mr. Bannwart, draft a proposed written agreement. Ada and Pleshette Johnson met with Solomon and Mr. Bannwart at Mr. Bannwart's office to discuss the proposed agreement, but they ultimately rejected Solomon's proposal and did not sign the agreement. At the hearing held before the Magistrate Judge, Pleshette Johnson testified as to these matters.

THE MAGISTRATE JUDGE'S DECISION

By an Order filed July 13, 2009, Magistrate Judge Sarah W. Hays disqualified attorney Anthony Bannwart from representing either defendant Johnson or defendant Solomon. (Docket Entry 246). The Magistrate Judge's Order rested primarily on the conflict created by the plea offer to defendant Johnson. The Order noted that a defendant's right to counsel is not absolute, and that whether to disqualify an attorney requires a balancing of opposing interests. Order at 4-5 (quoting *Wheat v. United States*, 486 U.S. 153, 158-60 (1988).

The Magistrate Judge compared the facts of this case to those in *United States v. Dalton-Robinson*, 2007 WL 4592187 (E.D.N.C. Dec. 14, 2007), a mail fraud conspiracy case. The *Dalton-Robinson* court noted that there is "the serious potential for a conflict to arise pretrial in the course of plea bargaining," where, as here, one defendant is offered the opportunity to reduce his sentence but may be required to implicate the other defendant in order to do so. Order at 6. The Magistrate Judge concluded that, "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." Order at 6-7.

The Magistrate Court then took up Mr. Bannwart's suggestion on the record at the hearing that Mr. Lewis could advise defendant Solomon "if Mr. Bannwart is providing proper advice." Order at 7. This suggestion "highlights the problem facing defendant Johnson who has no other counsel with whom to consult." Order at 7. The Magistrate Judge explained that:

> 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.

Order at 7. Consequently, the Magistrate Judge disqualified Mr. Bannwart from representing either defendant.

ARGUMENT

The District Court should affirm the Magistrate Judge's Order disqualifying Mr. Bannwart from representing defendants Johnson and Solomon.

A. The Magistrate Judge properly concluded that the conflict created by the plea negotiation process warranted disqualification.

The Magistrate Judge properly determined that the conflicts inherent in the plea negotiation process between the interests of defendant Johnson and defendant Solomon mandated Mr. Bannwart's disqualification. The District Court should therefore affirm the Order below.

A waiver of separate representation may cease to be effective as circumstances change during the course of a proceeding. *United States v. Migliaccio*, 34 F3d 1517, 1528 (10th Cir. 1994). A district court therefore has a continuing obligation to guard against worsening conflicts of interest. *Id.*

In this case, the United States has determined that defendant Delmon Johnson is not similarly situated with defendant Solomon with regard to any potential plea agreement. That is to say, defendant Delmon Johnson's role in the conspiracy and the other charged offenses differs from defendant Solomon's, such that defendant Delmon Johnson would have an opportunity for a more advantageous resolution of the charges against him than defendant Solomon. *See id.* at 1526-27 (government's offer of informal immunity to one defendant for testimony against another defendant created an actual conflict interest where the two defendants were jointly represented). A formal offer of a plea agreement by the United States to Delmon Johnson would create a conflict of interest between the two defendants' interests. *See 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)).

It is simply impossible for attorney Bannwart to fully advise defendant Johnson concerning the merits of the government's plea offer, as the cooperation required by the offer is directly antithetical to the interests of defendant Solomon. Any consideration by defendant Johnson, now or in the future as circumstances change, immediately creates an irreconcilable conflict with defendant Solomon's interests. The Magistrate Judge was therefore correct to conclude that only Mr. Bannwart's disqualification would be sufficient to cure the conflict, allowing defendant Johnson to be represented entirely independently from defendant Solomon.

The sole argument made in the appeal[1] is that the Magistrate Judge should have conducted a second Rule of Criminal Procedure 44(c)(2) hearing at the time of the disqualification hearing. This argument does not address the fundamental point of the Magistrate Judge's Order. The question in this case was whether the conflict created was so fundamental as to no longer be subject to waiver, which is the point made the Order's discussion

[1] The bringing of the appeal itself presents a conflict issue. Defendant Solomon has a strong interest in preventing defendant Johnson from cooperating with the government, and therefore would wish to pursue the appeal. Defendant Johnson is best served by acquiring independent counsel. The appeal is brought nominally by both defendants, but that begs the question of whose interests are actually served by the appeal, and whether defendant Johnson should have had the benefit of independent counsel even as to the decision to appeal.

of the *Wheat* case. ‘‘‘If the court discovers that the attorney suffers from a severe conflict—such that no rational defendant would knowingly and intelligently desire the conflicted lawyer’s representation—the court is obligated to disqualify the attorney.’’’ *United States v. Edelman*, 456 F.3d 791, 807 (8th Cir. 2006) (quoting *United States v. Levy*, 25 F.3d 146, 153 (2d Cir.1994)); *Wheat v. United States*, 486 U.S. 153, 162 (1988). The Order correctly concludes that the conflict created by the offer made to defendant Johnson is not one that the defendants can waive. The appeal contains no argument against the Order’s conclusions.

Moreover, for the reasons discussed in Section B1 below, any waiver in this case is totally ineffective as to defendant Johnson because defendant Solomon has separate representation.

B. Additional grounds support the affirmance of the Order.

1. Defendant Solomon’s independent representation nullifies defendant Solomon’s and Johnson’s waivers of joint representation, and constitutes a serious process error.

Defendant Solomon’s engagement of separate counsel who owe no duties to defendant Johnson renders the waivers of joint representation a nullity, and creates a gravely serious process error which endangers the legitimacy of the outcome of the trial. The Magistrate Judge’s disqualification order can also be affirmed on this ground.

As demonstrated at the attorney disqualification hearing, where both Mr. Bannwart and Mr. Lewis questioned witnesses as argued on behalf of defendant Solomon, Mr. Lewis’s independent representation of defendant Solomon creates a procedural issue of some significance. No party has the right to have two attorneys each examine witnesses during a trial. Nor would it be clear how far defendant Solomon intended to take this dual representation

during the trial. Would he ask for each attorney to have their own strikes from the jury panel? Or to be allowed to give opening statements and closing arguments? The United States would absolutely oppose any such requests, and any procedure in which both Mr. Lewis (or Ms. Ruden) and Mr. Bannwart both examined the same witness.

The procedural issue illustrates at a fundamental level the substantive conflict issues raised by the representation of defendants Solomon and Johnson. Defendants who share representation are required to enter waivers because the joint representation inherently limits the scope of an attorney's representation of each individual client. The attorney cannot pursue defenses for either client that conflict with the interests of the other. The attorney gives one opening statement and one closing argument for both defendants. If one or both defendants testify, the attorney cannot cross-examine on behalf of his or her other jointly represented client.

Defendant Solomon's engagement of his own counsel rendered these waivers meaningless. If allowed to have independent representation, defendant Solomon waives nothing. His attorney can, indeed, must if so instructed, pursue defenses that are inconsistent with defendant Delmon Johnson's interests. If defendant Delmon Johnson testifies, then defendant Solomon's attorney can cross-examine him.

By the same token, defendant Delmon Johnson gained nothing by his waiver. Defendant Johnson's attorney cannot pursue any defense inconsistent with defendant Solomon's interests, and he cannot cross-examine his own client, defendant Solomon, on defendant Johnson's behalf.

In short, had the representation situation been allowed to continue would be a process error of the first magnitude would have occurred, and the result of any trial infected by such an error must be in serious doubt on appeal or on collateral attack. As far as government counsel

can ascertain, this type of representation arrangement is unprecedented, and the government would submit that such arrangements do not occur because it is obvious upon reflection that they eviscerate the whole purpose of waivers pursuant to Fed. R. Crim. P. 44(c) and create such inherent risks of unwaivable conflicts that they cannot be allowed.

2. Mr. Bannwart needed to be disqualified because he may become a fact witness.

As detailed in the factual statement, Mr. Bannwart has been mentioned by several witnesses in connection with events that will be mentioned in the trial testimony. Moreover, Mr. Bannwart may have testimony to offer relevant to the defense stemming from his representation of Solomon concerning Solomon's business dealings. Mr. Bannwart's status as a potential witness constitutes a second alternative basis for the Magistrate Court's disqualification Order.

An attorney may not represent a party in a proceeding where the attorney is likely to become a witness, or act as an unsworn advocate to facts. *United States v. Anderson*, 319 F.3d 1218, 91 A.F.T.R.2d 2003-867 (10th Cir. 2003). In *Anderson*, an attorney was disqualified because he had represented the defendant earlier in a related civil case, and where there was the possibility of an advice of counsel defense.

As noted, both Ada Johnson and Pleshette Johnson said that Solomon had provided approximately $25,000 in cash to assist the Johnsons in paying the bills of STWC, and that Solomon sought an interest in STWC by presenting a contract drafted by Mr. Bannwart and then having a discussion of the proposal in a meeting in Mr. Bannwart's office at which Mr. Bannwart was present. Solomon's provision of the cash, in concert with his substantial cash payments for the narcotics obtained from The Medicine Shoppe Pharmacy in Belton, is highly

significant to the case because there is no known source for this cash other than from the diversion and street sale of controlled substances. In addition, Solomon's relationship with STWC and Ada and Pleshette Johnson is inextricably intertwined with his relationship with defendant Elder, who was aligned with Solomon in the negotiations with Ada and Pleshette Johnson. Mr. Bannwart's testimony as to these events, in which he was deeply involved, may well become relevant at trial.

In addition, it appears that Mr. Bannwart served as Solomon's attorney throughout the period of the conspiracy charged in the indictment. The United States will elicit testimony concerning the illegality or irregularity of several aspects of Solomon's acquisition of narcotics from the Belton Medicine Shoppe Pharmacy. To the extent that Solomon intends to rely on an "advice of counsel" defense, whether presented through his testimony, another person's testimony, or documents, and that counsel was Mr. Bannwart, the United States will call Mr. Bannwart to testify as to that advice. It also foreseeable that Mr. Bannwart may become a witness as to other matters related to his representation of Solomon during this period, or to matters that he witnessed..

CONCLUSION

The United States respectfully requests that this Court affirm the Magistrate Court's Order disqualifying attorney Anthony Bannwart.

Respectfully submitted,

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By

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on July 30, 2009, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record:

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