UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	**CRIMINAL CASE NO. 1:11-CR-161-1**
JOHNNY REID EDWARDS	)	
	)	
	)	

JOHN EDWARDS' RESPONSE TO GOVERNMENT'S MOTION FOR A HEARING TO INQUIRE INTO POTENTIAL CONFLICTS OF INTEREST

INTRODUCTION

This response by Mr. Edwards and his counsel is intended to assure the Court that the potential conflict of interest issues raised by the government have been carefully considered by Mr. Edwards and the entire defense team, with the input of independent counsel. The government seeks only to "inquire" into such potential conflicts; it does not seek to disqualify any counsel because it concludes that there is no actual conflict and, accordingly, no basis for any disqualification. [1] Similarly, Mr. Edwards and his counsel have concluded that Mr. Lowell's prior representation of other witnesses does not create an actual or potential conflict in any way. Although Mr. Edwards does not believe there

[1] The government also has sought an inquiry into whether another of Mr. Edwards' counsel, Christopher Man, is subject to a conflict of interests. The only basis for the government's requested inquiry is that, because Mr. Man and Mr. Lowell work for the same law firm, any conflict of interest concerning Mr. Lowell should be imputed to Mr. Man as well. (Dkt 75 at 10 n.3.) Consequently, satisfying the Court that there is no reason to preclude Mr. Lowell from representing Mr. Edwards would satisfy any concerns the government has with respect to Mr. Man.

is any actual or potential conflict of interest in this prior representation, to make the issue clear, he has waived in writing (Ex. A) any actual or potential conflict of interest that may develop during his representation by Mr. Lowell. Because Mr. Edwards' attached letter confirms both that he understands the concerns (and potential conflicts) raised by the government and is making an informed decision to waive any actual or potential conflict, there is no need for the Court to conduct the extensive hearing suggested by the government in this matter. [2]

BACKGROUND

The government's motion repeats the allegations of the Indictment in some detail. Needless to say, Mr. Edwards has pleaded not guilty to these charges. With respect to the only issues relevant to the government's present motion for an inquiry, these are the facts:

Lisa Blue

Mr. Lowell was not counsel to nor did he provide any advice to Ms. Blue during the time that the Indictment alleges her husband provided "campaign contributions" to Mr. Edwards by providing support to Rielle Hunter. Mr. Lowell was unaware of any exchanges (such as a meeting described in the government's motion) between Ms. Blue and anyone else during that time, and learned, like everyone else, of these exchanges

[2] The six-page, 33 questions request made by the government is excessive, beyond what is required in this case, and devolves into some type of discovery event. Any inquiry tailored to meet the issue raised, especially because Mr. Edwards has other counsel involved, should be to confirm he is aware of the facts set forth in the government's motion, aware of his rights, believes his rights are protected, waives any possible conflict (even if none exists) and is satisfied with his counsel. Mr. Edwards' attached letter addresses all of those concerns directly and completely.

once they were disclosed to the public. In the Fall of 2008, when Mr. Baron had become seriously ill again and soon thereafter passed away, Mr. Lowell, a friend of Mr. Baron and Ms. Blue, put together from available sources information concerning funds Mr. Baron had given to Rielle Hunter and/or Andrew Young. All of this information was made available to the government. The purpose in doing so was to permit Ms. Blue to determine whether she had any future obligations. Any information Mr. Lowell obtained came from the same sources (e.g., Mr. Baron's records) that the government was given and has today. Mr. Lowell did not advise Ms. Blue as to how such payments should be characterized or whether gift taxes were required to be paid. When Ms. Blue was asked for an interview (in early 2010) and subpoenaed to the grand jury by the government (in early 2011), Mr. Lowell facilitated those interactions.

To the extent Ms. Blue provided Mr. Lowell with any information concerning her interview or testimony, she later repeated or reiterated that information to Mr. Lowell in his capacity as Mr. Edwards' counsel. In other words, as to any relevant issues raised in the Indictment, Mr. Lowell has no client confidences from Ms. Blue and maintains no additional information subject to the attorney-client privilege from her. He stands now in the same position as a brand new attorney would stand in having interviewed or interviewing a potential witness in the case. Indeed, because of the interview that it has conducted and testimony that it has received, the government should have the same information as Mr. Lowell. In addition, after consulting with additional counsel, Ms.

Blue has confirmed that there is no conflict, that she has no objection to Mr. Lowell representing Mr. Edwards and that, should she be called as a witness in the case, she does not object to being questioned by Mr. Lowell. (Ex. B.)

Harrison Hickman

The government does not allege that Mr. Hickman was involved in any of the allegations in the Indictment or was involved in payments made by Mr. Baron. In addition, Mr. Lowell did not represent Mr. Hickman at that time. When the government requested an interview of Mr. Hickman (in the fall of 2010), Mr. Lowell, who has nown Mr. Hickman for over 20 years, facilitated that event. To the extent Mr. Hickman provided Mr. Lowell with any information concerning his interview or events in the case, he later repeated or reiterated that information to Mr. Lowell in his capacity as Mr. Edwards' counsel. In other words, as to any relevant issues raised in the Indictment, Mr. Lowell has no client confidences from Mr. Hickman and maintains no additional information subject to the attorney-client privilege from him. Mr. Lowell stands now in the same position as a brand new attorney would stand in having interviewed or interviewing a potential witness in the case. Indeed, because of the interview it conducted, the government should have the same information as Mr. Lowell. In addition, after consulting with additional counsel, Mr. Hickman has confirmed that there is no conflict, that he has no objection to Mr. Lowell representing Mr. Edwards and that,

should he be called as a witness in the case, he does not object to being questioned by Mr. Lowell. (Ex. C.)

Rielle Hunter

The government's motion alludes to an e-mail exchange between Mr. Lowell and Ms. Hunter and another e-mail in which he provided contact information for another attorney. The first reflects the attempt, after-the-fact, to determine what funds were paid and whether Ms. Blue had any financial obligations after Mr. Baron's death, as described above. The second was no more than providing courtesy contact information as one lawyer often does when requested to do so. The government does not allege that Mr. Lowell had any attorney-client relationship with or obtained any confidences from Ms. Hunter, and he did not. Indeed, any information she provided on funds she received, she also has provided to the government.

Although the government believes this may raise "the possibility that [Mr. Lowell's] name may come up during testimony," that government acknowledges it would not pose a conflict of interest problem even if that possibility were to materialize. Mr. Edwards is doubtful that any after-the-fact exchange between Mr. Lowell or any of his counsel with Ms. Rielle should come up at the trial, because it is difficult to imagine how it would be relevant or admissible. Those issues, if they arise, will be the subject of pre-trial or trial motions should this case get that far, but, for now, as the government

acknowledges "this does not present a conflicts problem in the classic sense." (Dkt. 75 at 14.)

DISCUSSION

I. THERE IS NO CONFLICT OF INTEREST

The government is undoubtedly correct that Mr. Edwards is entitled "under the Sixth Amendment to a conflict free legal representation" (Dkt. 75 at 7), but defendants, like Mr. Edwards, "with the ability to hire their own attorney also have a right to counsel of their own choosing." United States v. Barsham, 661 F.3d 302, 324 (4th Cir. 2009) (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 151-52 (2006)); see United States v. Williams, 2011 WL 2783974, at *1 (4th Cir. July 18, 2011) ("Plainly, Williams has a Sixth Amendment right to select his own (retained) counsel."). Highlighting the significance of a defendant's right to retain counsel of their choice, the Supreme Court held that the deprivation of that right is among the very few structural errors requiring automatic reversal of a conviction -- no matter how fair the actual trial may have been. Gonzales-Lopez, 548 U.S. at 148-49; see, e.g., United States v. Sellers, 645 F.3d 830 (7th Cir. 2011) (O'Connor, J., on panel) ("Such a denial constitutes structural error and justifies reversal without inquiry into prejudice."). Just last term, the Supreme Court reaffirmed its adherence to the proposition that the denial of this guarantee is structural. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2716 (2011). Since Gonzales-Lopez, there have been several reversals based on the denial of a defendant's choice of counsel. See,

e.g., Sellers, 645 F.3d 830; United States v. Smith, 618 F.3d 657 (7th Cir. 2010); Bradley v. Henry, 510 F.3d 1093 (9th Cir. 2007) (en banc).

Although a defendant's right to counsel of his choice is not absolute, there is a "presumption" in favor of that right. Wheat v. United States, 486 U.S. 153, 159 (1988). "The government bears a 'heavy burden' in demonstrating that disqualification is justified," as disqualification "should be a measure of last resort." In re Grand Jury Proceedings, 859 F.2d 1021, 1026 (1st Cir. 1988) (internal citations omitted). Indeed, the cases cited by the government involve those types of extreme circumstances. The majority of the cases cited by the government arise in a completely different context, where an attorney is representing multiple defendants with competing interests in the same trial.[3] Those cases are not applicable outside the joint representation context. See, e.g., Chandler v. French, 252 F. Supp. 2d 219, 235 (M.D.N.C. 2003) (Tilley, C.J.); United States v. Weaver, 112 F. Supp. 2d 1, 11 (D.D.C. 2000); United States v. Gilliam, 835 F. Supp. 288, 291 & n.2 (W.D. Va. 1993).

In those cases where the government does seek disqualification based on an attorney's purported conflict of interests, that burden cannot be satisfied based "solely on tenuous inferential relationships." In re Grand Jury Proceedings, 859 F.2d 1021, 1026

[3] Those cases are Wheat, 486 U.S. at 159; Hoffman v. Leake, 903 F.2d 280 (4th Cir. 1990); United States v. Howard, 115 F.3d 1151 (4th Cir. 1997); United States v. Akinseye, 802 F.2d 740 (4th Cir. 1986); and United States v. Curcio, 680 F.2d 881 (2d Cir. 1982). Moreover, two of the other cases cited by the government involved appointed counsel, where the defendant does not enjoy a right to choice of counsel. Mickens v. Taylor, 240 F.3d 348 (4th Cir. 2001) (en banc); United States v. Basham, 561 F.3d 302 (4th Cir. 2009).

(1st Cir. 1988). Rather, "generally there must be a direct link between the clients of an attorney or at least some concrete evidence that one client, such as an immunized witness, has information about another client . . . before the right to counsel of choice is barred by disqualification." Id. at 1026. Courts are also always mindful "that the Government may seek to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side." Wheat, 486 U.S. at 163.[4]

While the government does not seek disqualification in this case, it nevertheless points to two cases where such disqualification was warranted, but acknowledges both involved far more extreme circumstances than those present here. (Dkt. 75 at 13 (citing United States v. Williams, 81 F.3d 1321 (4th Cir. 1996), and Hoffman v. Leake, 903 F.2d 280 (4th Cir. 1990).) In Williams, the government investigated a husband and wife for fraud. The wife retained counsel during the investigation and, after the husband was charged, the husband retained the same lawyer. Having "represented a significant potential witness for the government with respect to the same crime," the Fourth Circuit

[4] The government raised another conflicts-related concern with Wade Smith's representation of Mr. Edwards; as the government notes, that conflict has been resolved because Mr. Smith is no longer representing Mr. Edwards. (Dkt. 75 at 12 n.4.) This was a conflict of the government's making. The government states that it will seek to introduce a statement that it claims Mr. Smith made to a financial advisor of Ms. Mellon at trial, which the government characterizes as a "significant admission by Edwards." (Id.) Defense counsel, however, does not believe that any statement Mr. Smith made in 2009 is relevant to the charges Mr. Edwards knowingly and willfully accepted campaign contributions in 2007 and 2008, let alone the "significant admission" the government claimed in its motion. Nevertheless, because Mr. Smith believes it is important that the truth about this conversation (if relevant) be known if he is called as a witness in this case, he has agreed to end his representation of Mr. Edwards. Counsel will address this further at the hearing.

held that the lawyer was conflicted because his competing duties to his current client and the witness (former client) would prevent effective cross-examination. 81 F.3d at 1325. Hoffman, involved even more egregious facts, as the attorney in that case represented two defendants who were pointing the finger at each other. The lawyer "negotiated a plea bargain for [one defendant] that required him to incriminate [the other defendant]," while the attorney represented both defendants. 903 F.2d at 289.

Even the government concedes it "is not suggesting that either Ms. Blue or Mr. Hickman in this case rises to the level of importance of the witnesses" in Williams or Hoffman. (Dkt. 75 at 13.) But here, there is no conflict at all, reflected aw well by the fact that the government has not moved for disqualification. Any possible claim of conflict here would be based on nothing more than the sort of "tenuous inferential relationships" the First Circuit held was insufficient in In re Grand Jury Proceedings. Mr. Lowell does not possess any relevant privileged information obtained from either Ms. Blue or Mr. Hickman, and neither has any objection to Mr. Lowell questioning them as to anything they have told him if they are called as witnesses. Consequently, there is no reason for the government to fear "that his cross-examination of them may not be as thorough as otherwise might be the case." (Id.) Moreover, neither witness is particularly significant to this case, and it is doubtful that, even if called to testify, they would testify to anything that Mr. Edwards would dispute.

II. EVEN THE POTENTIAL FOR A CONFLICT HAS BEEN WAIVED

Although there is no conflict of interest in this case, the Court does not need to be concerned that the potential conflict the government speculates may materialize because Mr. Edwards has waived any such conflict. There is no question that "[a] defendant may waive his right to conflict-free representation." Akinseye, 802 F.2d at 744; see Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978) (explaining the Court previously "confirmed that a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interest"); United States v. Brown, 202 F.3d 691, 698 (4th Cir. 2000) (finding waiver of a conflict). Here, the government has exhaustively laid out what it imagines the potential conflicts in this case to be; Mr. Edwards has carefully reviewed the pleading, obtained the advice of independent counsel, understands the government's concerns and has waived any such conflict in writing. (Ex. A.)

This Court's satisfaction with that waiver should be "buttressed" by the fact that "at least one other lawyer[, Mr Cooney, will be] present throughout the trial to further assure adequate representation." Brown, 202 F.3d at 698 n.11. The Court also should be satisfied that Mr. Edwards has made this waiver intelligently, as he is a highly-regarded attorney in his own right, and the record of the case thus far should indicate that Mr. Lowell is defending Mr. Edwards' case vigorously.

In a context similar to this one, but one where disqualification was sought, the Second Circuit reversed a district court's disqualification order in United States v.

Cunningham, 672 F.2d 1064 (2d Cir. 1982). In that case, the district court had disqualified a highly-regarded criminal defense attorney, Michael Tigar, from representing a notable New York politician, Patrick Cunningham, based on a concern that Mr. Tigar may have to cross-examine a former client. In language equally applicable here, the Second Circuit explained:

> A sophisticated attorney and politician, Cunningham was questioned extensively by the district court, which concluded that he was capable and desirous of making an intelligent and knowing waiver of his right to have an attorney who has no conflicting interest. Cunningham has demonstrated that he adequately perceives the circumstances and that he is willing to have circumscribed whatever right he might otherwise have to a fuller cross-examination of [the witness], in order to retain Tigar as his counsel. In the circumstances, if Cunningham's right to counsel of his choice conflicts with his right to an attorney of undivided loyalty, we think the choice as to which right takes precedence should be left to Cunningham and not be dictated by the government.

Id. at 1073; see United States v. Curio, 680 F.2d 881, 885 (2d Cir. 1982) ("Cunningham thus establishes that where the former client does not seek disqualification and his rights can be adequately safeguarded, the interests of the former client, the interest of the public in the integrity of the judicial system, and the interests of the defendant are best protected by honoring the defendant's knowing and intelligent decision to waive his right to an attorney or undivided loyalty in order to retain the attorney of his choice.").

CONCLUSION

Mr. Edwards and his counsel appreciate why this issue was raised, but Mr. Edwards and his counsel have been careful to ensure that no actual or potential conflict of

interest exists in this case, and that Mr. Edwards has waived any such conflict should it arise. Consequently, the inquiry that the government seeks has been addressed by this response and its attachments.

Dated: October 17, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2011, I electronically filed the foregoing **Response to Motion to Inquire** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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