

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 10CR-117 BDB
)	
JEFF M. HENDERSON and)	
WILLIAM A. YELTON)	
)	
Defendants.)	

MOTION FOR HEARING ON CONFLICTS OF INTEREST

COMES NOW the United States of America, by and through counsel, Jane W. Duke, Special Attorney, and Patrick Harris and Patricia S. Harris, Special Assistant United States Attorneys, and files this motion requesting that this Court hold a hearing to determine if conflicts of interest on the part of defense counsel require their disqualification.

1. An Indictment filed on July 19, 2010, charged defendant Jeff M. Henderson with federal offenses including conspiracy to distribute controlled substances, possession of controlled substances with intent to distribute, distribution of controlled substances, possession of a firearm in relation to a drug trafficking offense, conspiracy to suborn perjury, conspiracy to deprive another of civil rights, deprivation of civil rights, conspiracy to commit perjury, perjury, conspiracy to commit witness tampering, and attempted bribery of a witness. The same Indictment charged defendant William A. Yelton with federal offenses including

conspiracy to suborn perjury, conspiracy to deprive another individual of civil rights, deprivation of civil rights, and conspiracy to commit witness tampering. During the investigative stage to present, defendant Henderson has been represented by Chad Greer. On August 6, 2010, attorney Seymour Thomas filed an entry of appearance as retained lead counsel of record for Henderson. Presumably, Chad Greer will remain on the case, but will assume the role of “second chair”. After indictment, the United States learned that defendant William M. Yelton was represented by Scott Graham and Tony Allen.

2. Count 37 of the Indictment charges Jeff M. Henderson with conspiring with others to deprive Jose Angel Gonzalez of his civil rights. Specifically, Count 37 claims that Henderson utilized his position as a law enforcement officer with TPD to obstruct justice through providing false information in an affidavit submitted in support of a search and seizure warrant for the residence of Jose Angel Gonzalez. In addition, Count 37 alleges that Henderson, Brandon Jay McFadden, and other individuals known to the Grand Jury utilized their positions as law enforcement officers to obstruct justice through the illegal search of Jose Angel Gonzalez’s residence, and intentionally deprived Jose Angel Gonzalez of rights and privileges secured by the Constitution and laws of the United States.

The Indictment states that in furtherance of the conspiracy and to effectuate the objects of it, Henderson, Brandon J. McFadden, and other TPD officers known to the Grand Jury illegally entered the residence of Jose Angel Gonzalez in September 2007 without a search warrant. While in the residence, one of the conspirators moved a gun from the closet of the residence to a vent in the residence. In addition, the Indictment states that on or about

September 25, 2007, Henderson prepared and obtained a Tulsa County search warrant in which he falsely represented that a Reliable Confidential Informant (RCI) had observed Jose Angel Gonzalez selling drugs from his residence. That search warrant was executed on September 26, 2007, and the gun that had earlier been placed in a vent at Gonzalez's residence was found. On September 27, 2007, Henderson caused another individual to falsely document the identity of the RCI in internal TPD intelligence reports. Gonzalez was later charged with and pled guilty to possession of an unregistered sawed-off shotgun in Case No. 08CR-025 TCK filed in the Northern District of Oklahoma.

3. In addition, in Case No. 08CR-098 TCK, filed in the Northern District of Oklahoma, Gonzalez was charged with and pled guilty to distribution of methamphetamine related to his sale of the drug to an informant for the TPD.

4. In both federal cases, Gonzalez was originally represented by Federal Public Defender Julia O'Connell. The United States anticipates that Gonzalez and O'Connell would testify that when Gonzalez agreed to plead guilty in the two cases, it was with the understanding that he would complete some law enforcement controlled buys of illegal drugs for Brandon J. McFadden of the ATF, and therefore potentially earn a decrease in his sentence under either 5K1.1 of the United States Sentencing Guidelines or Rule 35 of the Federal Rules of Criminal Procedure. However, after completing a number of what Gonzalez believed to be controlled buys for McFadden, Gonzalez and O'Connell were informed that Gonzalez had not provided any substantial assistance to the United States (based on information provided by McFadden) and would not be receiving a downward

departure.

5. Based on perceived irregularities with the Gonzalez cases, O'Connell recused herself from them. Upon information and belief, in mid-March 2009, Thomas Seymour and Scott Graham began to represent Gonzalez specifically for the purpose of negotiating a downward departure in light of Gonzalez's cooperation. It is further believed that this change in legal representation was made known to the Court via a non-public method in order to protect the integrity of the ongoing public corruption investigation. Upon information and belief, Seymour and Graham continue to represent Gonzalez.

6. In mid-March 2009, undersigned counsel participated in a telephone conference with Seymour and Graham in which these attorneys made reference to the fact that the law enforcement misconduct involving Jose Angel Gonzalez (of which they had learned through their representation of Gonzalez) was so unconscionable and disturbing that they felt compelled to bring these matters to the attention of the Chief Judge for the Northern District of Oklahoma. Seymour and Graham indicated that the illegal conduct of the law enforcement officers involved in Gonzalez's case impacted the integrity of numerous judicial proceedings and that the Chief Judge should be alerted. Counsel for the United States explained that this was an ongoing investigation and that information would be provided to the Court as it was sufficiently developed and that premature disclosure could compromise the investigation.

7. Counsel for the United States also spoke with Thomas Seymour on October 5, 2009, in his capacity as counsel for Gonzalez in a matter in which Gonzalez testified.

8. Jose Angel Gonzalez will be a witness for the United States in the trial of this case against Henderson. Gonzalez is alleged to be a victim of civil rights deprivation at the hands of Jeff Henderson and other law enforcement officers. Gonzalez is currently represented by Thomas Seymour. Henderson is also currently represented by Thomas Seymour. Seymour will be responsible for representing the interests of both Gonzalez and Henderson, which he cannot do without conflict. Seymour will be put in the position of cross-examining and attempting to discredit his own client, Gonzalez, at the same time he has undertaken the duty to negotiate for Gonzalez to obtain a reduced sentence, or to even seek a dismissal of the cases due to the illegal actions of Henderson and other officers. In addition, Seymour presumably has obtained attorney-client privileged information from Gonzalez that could be used against Gonzalez by Seymour in Seymour's representation of Henderson.¹

9. Rule 1.7(b) of the Oklahoma Rules of Professional Conduct provides that "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: ... (2) the client consents after consultation."

10. This conflict of interest is clear. There is no indication that Jose Angel Gonzalez has waived it. In addition, the United States contends that for Seymour to obtain

¹In order to adequately defend Henderson, Seymour will be required to vigorously cross-examine Gonzalez, Seymour's own client. Further, in order to negotiate effectively on behalf of Gonzalez, Seymour will be required to discredit the law enforcement tactics used in obtaining Gonzalez's conviction.

a valid waiver, Gonzalez would be entitled to have independent counsel appointed to explain to him a waiver and the repercussions of one. And finally, even if Gonzalez validly and intelligently waived the conflict, the appearance of impropriety in and of itself should weigh in favor of Seymour being disqualified from representing Henderson.

11. In addition to the conflict concerning Gonzalez and Seymour, the United States requests that the Court consider a potential conflict regarding the representation of defendant William A. Yelton. Specifically, Yelton is represented by Scott Graham and Tony Allen. Upon information and belief, Tony Allen is currently representing Yelton's co-defendant, Jeff M. Henderson, in a civil suit brought against him related to the allegations in this case. While this representation does not constitute joint representation of co-defendants as contemplated by Rule 44, the United States asserts that it raises similar concerns about conflicts that should be communicated to Yelton so that he can make an informed decision about continuing to retain Tony Allen when his co-defendant is also being represented by Allen in a civil matter stemming from the offenses charged in the indictment.

12. Rule 1.7(a) of the Oklahoma Rules of Professional Conduct provides that a lawyer may not represent a client if the representation of that client will be directly adverse to another client, unless each client consents after consultation. Similarly, Rule 44 recognizes the Court's responsibilities in cases in which two defendants in a case are represented by one attorney or firm. In essence, the Court is obliged to "promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there

is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel."

13. Henderson and Yelton may not believe that there is a conflict in Allen's representation of Henderson in civil litigation and of Yelton in criminal litigation arising from the same circumstances. However, what if Allen learns from Henderson in the civil litigation information that could be used to Henderson's benefit but would cause damage to Yelton? Likewise, what if Allen learns from Yelton in the criminal litigation information that is beneficial to Yelton but harmful to Henderson, and that could be used by Allen to negotiate a favorable result for Yelton? The United States asserts that although the facts of the joint representation do not fit squarely within the definition of Rule 44, the joint representation in this instance, and the Court's duty to ensure fairness and justice to the parties, dictates that the Court inquire about its propriety.

14. Finally, the United States recognizes that pursuant to the Sixth Amendment, an accused has a right to an effective advocate, and generally to an attorney of his choosing. However, "a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." See *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988).

Therefore, the United States respectfully requests that the Court hold a hearing on its motion concerning the conflicts of interest set forth above.

Respectfully submitted,

JANE W. DUKE
SPECIAL UNITED STATES ATTORNEY

/S/ Jane W. Duke

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2010, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Scott Graham
Tony Allen
Chad Greer
Thomas Seymour

/S/ Jane W. Duke

Jane W. Duke
Special United States Attorney