

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
UNITED STATES OF AMERICA)	
)	
v.)	
)	Crim. No. CR-08-360 (RMU)
PAUL A. SLOUGH,)	
NICHOLAS A. SLATTEN,)	Judge Ricardo M. Urbina
EVAN S. LIBERTY,)	
DUSTIN L. HEARD,)	
DONALD W. BALL,)	
)	
Defendants.)	
_____)	

**DEFENDANTS’ RESPONSE TO GOVERNMENT’S NOTICE TO COURT
REGARDING POTENTIAL CONFLICT-OF-INTEREST ISSUE**

The Defendants, jointly and through undersigned counsel, respectfully submit this response to the “*Government’s Notice to the Court Regarding Potential Conflict-of-Interest Issue.*” The Government’s Notice purports to advise the Court of potential conflicts of interest that may arise in this case for two reasons: (1) The existence of a joint defense agreement that at one time included counsel for Jeremy P. Ridgeway, who has pled guilty in a separate case and agreed to cooperate as a Government witness against these Defendants, and (2) The claim that Mr. Ridgeway was represented for a very short period of time by William F. Coffield, who currently represents defendant Evan S. Liberty. Because these are two discrete and separate issues, defense counsel will file two separate responses addressing each of the Government’s claims. In this response, filed on behalf of all five defendants, we show that there is no conflict based upon the existence of a joint defense agreement that at one time included Mr. Ridgeway and his counsel.

INTRODUCTION

In its “*Notice to the Court Regarding Potential Conflict-of-Interest Issue*,” the Government claims that the Defendants’ intent to call Mr. Ridgeway¹ as a witness at a motions hearing (and presumably cross-examine Mr. Ridgeway should he testify at trial as a Government witness) creates a potential for certain conflicts of interest that should be addressed by the Court.² The Government’s concern is misplaced.

In this case, each member of the oral Joint Defense Agreement (“the JDA”) agreed at the outset that participating in the JDA would *not* create a basis to disqualify any other counsel from continuing to represent his client in this matter *nor* would any attorney who entered into the JDA be disqualified from or in any way limited in cross-examining any other client who had been a member of the JDA, but who later withdrew and cooperated with the Government. Moreover, even if the JDA had been less explicit in these particular terms, case law establishes that the withdrawal of a member from a joint defense agreement as a result of an agreement with the Government to cooperate and testify waives any privilege of the withdrawing defendant that may have applied to information disclosed by that defendant during the existence of the JDA. *United States v. Almeida*, 341 F.3d 1318 (11th Cir. 2003). For these reasons, and contrary to the Government’s suggestion, there is no need for further inquiry by the Court into any conflict of interest based on the JDA.

¹ As this Court knows, in November 2008, Mr. Ridgeway reached an agreement with the Government and pled guilty to manslaughter and attempted manslaughter charges in connection with the incident at Nisour Square. Mr. Ridgeway subsequently pled guilty a second time to a superceding information that did not change the plea, but merely added verbiage to bolster the Government’s attempt to establish venue in the District of Columbia. The Government has announced that as part of his agreement, Mr. Ridgeway is cooperating with the Government and is expected to testify as a Government witness at the trial of these five defendants.

² Counsel for the Defendants have advised both counsel for Mr. Ridgeway and the Government that they intend to call Mr. Ridgeway as a witness at the February 17, 2009 motions hearing with respect to factual issues related to venue.

ARGUMENT

I. THE FACTS RELEVANT TO THE JOINT DEFENSE AGREEMENT

The Justice Department began investigating potential criminal charges in this matter in September 2007. In late 2007, each of the defendants in this case, along with Mr. Ridgeway, retained separate counsel to represent them in connection with the investigation. Early in the course of the representation and prior to sharing any privileged information, counsel for these defendants and Mr. Ridgeway, acting on behalf of their respective clients, entered into an oral joint defense agreement (“the JDA”). Counsel entered into the JDA based on the belief that communications among the Joint Defense Group would involve matters of common interest, the discussion and analysis of which was essential to the effective representation of their individual clients. As part of the JDA, all counsel agreed, *inter alia*, to the following:

- If any client ceased to have a common interest with the other members of the Joint Defense Group, *i.e.*, by entering into negotiations with the Government to cooperate and testify against other members of the JDA or to enter a guilty plea to the matters under investigation, that client, through his counsel, would withdraw from the JDA immediately, but continue to protect all communications and information covered by the JDA;
- If any client became a witness for the Government in connection with this matter, nothing in the JDA would create a conflict of interest so as to disqualify any other counsel from continuing to represent their respective clients in the this case;
- If any client withdrew from the JDA and became a witness for the Government in this matter, nothing in the JDA, including the sharing of privileged information, would in any way disqualify the remaining counsel from cross-examining that cooperating client or in any way limit the ability of any other attorney to cross-examine the cooperating client,

including cross-examination using information his counsel shared with the Joint Defense Group during his participation in the JDA;

- The existence of the JDA did not create an attorney-client relationship between any counsel and anyone other than the client of that counsel.³

All counsel communicated and shared information under the terms of the JDA until November 2008. On November 14, 2008, counsel for Mr. Ridgeway informed the other members of the Joint Defense Group that Mr. Ridgeway was negotiating a plea agreement with the Government and that he had met with the Government to provide information about the incident as part of those plea negotiations. At this point in time, Mr. Ridgeway and his counsel were no longer part of the Joint Defense Group and withdrew from the JDA based on the fact that Mr. Ridgeway's interests obviously had diverged from those of the Joint Defense Group.

Each lead attorney involved in the JDA in this case is an experienced criminal defense lawyer. Each of us has approximately twenty years of experience in criminal law, most of us as both prosecutors and defense counsel and most of us have practiced criminal law as a defense lawyer for over a decade. We have participated in numerous joint defense agreements prior to this case. The terms of this JDA were well-established, accepted, and standard terms used in all joint defense agreements in which we have been involved. See, e.g., *Joint Defense Agreement*, Am. Law Institute – Am. Bar Ass'n, *Trial Evidence in the Federal Courts: Problems and Solutions*, at 35 (1999) (the ABA's model joint defense agreement includes provisions under which all defendants waive (1) any right to disqualify any other attorney as a result of participating in the joint defense agreement, (2) any duty of confidentiality for purposes of cross-

³ In this regard, each counsel understood that the JDA did not require him to share any particular piece of information, and that it was always the option of counsel, acting with the client's authority, to contribute or withhold any particular information from other members of the Joint Defense Group.

examining testifying defendants and (3) any right to object to the use of any and all materials obtained in the course of the joint defense agreement.)

From the outset of the JDA, it was clear that one or more members might decide to strike a deal with the Government and withdraw from the JDA. Counsel, therefore, clearly agreed that if any member of the JDA were to take that course, that member would notify the others of his decision to withdraw from the JDA and not share with the Government or any other third party what had been learned in the course of the JDA. More important to this matter, each member of the JDA agreed and understood that if one member withdrew, it would not serve as a basis for disqualifying the other counsel who had participated in the JDA from continuing to represent our clients, nor would it in any way limit the ability of the remaining counsel to cross-examine the cooperating defendant. In light of this possibility, counsel agreed that the JDA did not require any attorney to share any particular information with the joint defense group. Recognizing the possibility that privileged information might at some future point be used to cross-examine our clients if one or more cooperated with the Government, counsel agreed that it was within each attorney's discretion, acting with the client's authority, whether to disclose any particular information to other members of the Defense Group.

II. THERE IS NO CONFLICT BASED UPON THE TERMS OF THE JDA.

The Government's Notice suggests that the existence of a joint defense agreement may give rise to a potential conflict of interest. Specifically, the Government contends that a potential conflict may arise in the event that privileged information was shared with the group by counsel for Mr. Ridgeway and might now be used by remaining counsel in cross-examining Mr. Ridgeway.⁴ The Government is incorrect in this regard. Based on the express terms of the JDA in this case, there is no actual or potential conflict.

⁴ We note that counsel for Mr. Ridgeway has not sought disqualification of any counsel in this case based upon a potential conflict nor has he sought to restrict cross-examination of Mr. Ridgeway based upon his participation in

As an initial matter, federal courts have long recognized both the validity and the necessity of joint defense agreements. “In criminal cases where discovery is limited, such collaboration is necessary to assure a fair trial in the face of the prosecution’s information advantage gained through the power to gather evidence by searches and seizures.” *United States v. Stepney*, 246 F. Supp. 2d 1069, 1086 (N.D.Cal. 2003). “[P]ersons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.” *In re Grand Jury Subpoenas*, 89-3 and 89-4, 902 F.2d 244, 249 (4th Cir. 1990). Further, it is well-established that no written agreement is necessary to invoke the joint defense privilege. *See Minebea Co.,v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005) (stating that “an oral agreement whose existence, terms and scope are proved by the party asserting it” may be enforceable); *United States v. Hsia*, 81 F. Supp. 2d 7, 14-5 (D.D.C. 2000) (finding the existence of a joint defense agreement based upon oral representations of the parties); *United States v. Stepney*, 246 F.Supp. 2d 1069, 1079, n.5 (N.D.Cal. 2003). Moreover, in its Notice, the Government does not contest the validity of the JDA in this case. Just as with a written JDA, the terms of the oral JDA are established by the understanding and agreement of its members.

Here, the JDA provided for precisely the situation we now encounter. The JDA included a specific understanding among its members that: (1) nothing in the JDA would create a conflict of interest so as to require the disqualification of any of the remaining counsel from the continued representation of their clients based upon the sharing of privileged joint defense material; and (2) the JDA did not restrict any counsel in his cross-examination of any defendant who withdrew from the JDA. Given those terms, neither the Government nor Mr. Ridgeway can

the JDA. In fact, to the contrary, counsel for Mr. Ridgeway has previously and expressly acknowledged that the information he elected to share with the defense group under the JDA could be used by remaining counsel in cross-examining Mr. Ridgeway.

assert any grounds for the disqualification of defense counsel or otherwise impose any limitation upon defense counsel in cross-examining Mr. Ridgeway.

Moreover, even if the express waivers in the JDA did not resolve this issue, Mr. Ridgeway waived any privilege he may assert when he agreed to plead guilty and testify against his former colleagues. In *United States v. Almeida*, 341 F.3d 1318 (11th Cir. 2003), two codefendants entered into an oral joint defense agreement that existed for over two years, during which they shared “countless volumes” of attorney-client and work product information. One month before trial, defendant Fainberg entered into an agreement with the Government to plead guilty and testify against Almeida. *Id.* at 1320. At trial, the district court precluded Almeida’s counsel from utilizing privileged communications in cross-examining Fainberg that Fainberg made to Almeida’s attorneys during the existence of the joint defense agreement. *Id.* at 1321. In reversing the conviction and finding that the district court’s ruling was an abuse of discretion, the Eleventh Circuit held that “Fainberg waived the privilege when he agreed to plead guilty and testify against Almeida in exchange for the Government’s dismissal of several counts in the indictment.” *Id.* at 1323. The Court went on to explain:

When a defendant conveys information to the lawyer of his co-defendant, as opposed to his own lawyer, the justification for protecting the confidentiality of the information is weak. The policy of fostering frank communication with an attorney is already facilitated by privileging those communications made to the defendant’s own attorney; little can be gained by extending the privilege to those communications made to attorneys that do not represent the defendant.

Id. at 1324.

We hold that when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, ***such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence.*** The district court’s error prevented the introduction of crucial evidence that would have significantly undermined the credibility of three of the Government’s key witnesses.

Id. at 1326 (emphasis added); *see also United States v. LeCroy*, 348 F. Supp. 2d 375, 382, n. 7 (E.D. Pa. 2004) (acknowledging the Eleventh Circuit ruling in *Almeida*).

The cases cited by the Government in its Notice are inapposite to the JDA in this case and, in fact, support our position. In stark contrast to this matter, each of those cases arises out of situations in which the trial court was concerned about defense attorneys being able to disqualify *themselves* from representation on the eve of trial based upon a purported conflict arising from a joint defense agreement. For example, *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000), involved a situation where on the eve of trial, the *defense attorneys* themselves requested that they be disqualified from representing their clients when they had been part of a joint defense agreement with a defendant who later entered into a plea agreement with the government and agreed to testify against their clients. The trial court denied the motion, but was reversed by the Ninth Circuit. *Henke* is distinct from this case for several reasons. First, the joint defense agreement, by defense counsel's own acknowledgment, did not provide for unlimited cross-examination in the event one member became a cooperating witness, as the JDA does in this case. Second, it was the attorneys for the defendants facing trial who moved to withdraw based upon the conflict arising from the sharing of privileged information. In finding the trial court's decision to be erroneous, the Ninth Circuit noted:

Nothing in our holding today is intended to suggest, however, that joint defense meetings are in and of themselves disqualifying. We stress that it was defense counsel in this case that timely moved for disqualification. As the Supreme Court said in *Holloway v. Arkansas*, the attorney "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial, 435 U.S. 475, 485, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978). There may be cases in which defense counsel's possession of information about a former co-defendant/government witness learned through joint defense meetings will not impair defense counsel's ability to represent the defendant or breach the duty of confidentiality to the former co-defendant.

Id. at 638.

Similarly, in *United States v. Stepney*, 246 F. Supp. 2d 1069 (N.D.Cal. 2003), a case involving nearly thirty defendants and seventy substantive counts related to the operation of a drug organization, the trial court actually directed all defense attorneys to submit for the court's approval any joint defense agreements to ensure they contained the necessary and appropriate terms (such as those contained in this JDA) that would prevent defense attorneys from being conflicted out of representing their clients or limiting their ability to cross-examine government cooperating witnesses in the event that witness withdrew from the joint defense group. These cases provide no support for the Government's suggestion that a potential conflict exists in our case.

Finally, in addressing any potential conflict, this Court must begin with the fundamental premise that the Sixth Amendment right to counsel includes the right to counsel of choice.

We have previously held that an element of the [Sixth Amendment right to counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988); *cf. Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (“It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.”). The Government here agrees, as it has previously, that “the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant . . .

United States v. Gonzalez-Lopez, --- U.S. ----, 126 S.Ct. 2557, 2561 (2006).

The Sixth Amendment right to effective assistance of counsel has been construed to include the right to secure counsel of choice. . . . The right to counsel of choice is founded in the right of a criminal defendant to control the conduct of his defense because “it is he who suffers the consequences if the defense fails.” *Faretta v. California*, 422 U.S. 806, 820, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).. . . **[T]here is a presumptive right to counsel of choice. . .**

/s/ Mark Hulkower

Mark Hulkower
Michael Baratz
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 429-6221
Facsimile: (202) 429-3902
Email: mhulkower@steptoe.com
Email: mbaratz@steptoe.com

Counsel for Paul Slough

/s/ Thomas Connolly

Thomas G. Connolly
Steven A. Fredley
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth St., N.W.
Washington, D.C. 20036
Telephone: (202) 730-1300
Facsimile: (202) 730-1301
Email: tconnolly@harriswiltshire.com
Email: sfredley@harriswiltshire.com

Counsel for Nicholas Slatten

/s/ William Coffield

William F. Coffield
COFFIELD LAW GROUP LLP
1330 Connecticut Ave., N.W., Suite 220
Washington, D.C. 20036
Telephone: (202) 429-4799
Email: wcoffield@coffieldlawgroup.com

Counsel for Evan Liberty

/s/ Steven McCool

Steven McCool
MALLON & MCCOOL, LLC
1776 K Street, N.W., Suite 200
Washington, DC 20006
Telephone: (202) 680-2440
Facsimile: (410) 727-4770
Email: smccool@mallonandmccool.com

Counsel for Donald Ball

