

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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WAYNE WHITTAKER : NO. 01-107

MEMORANDUM

Dalzell, J.

July 11, 2001

Defendant Whittaker was indicted for mail fraud, in violation of 18 U.S.C. § 1341, on the theory that he participated in the "insurance give up" of his leased 1998 Jeep Cherokee to a vehicle chop shop. By a Memorandum and Order dated June 12, 2001, we granted Whittaker's motion to disqualify the Eastern District of Pennsylvania United States Attorney's Office from further participation in this prosecution as a result of certain ethical breaches associated with the fact that one Assistant United States Attorney sent Whittaker a letter stating that he was a "victim" of the same chop shop operation that he is here accused of criminally associating with. The Government has now moved for reconsideration of that disqualification Order.

The Government's Motion

The Government raises four separate arguments in seeking reconsideration of our disqualification Order. First, it argues that, contrary to our findings, the Government's conduct did not violate Pennsylvania Rules of Professional Conduct 4.1, 4.3(c), or 8.4(d). Second, it contends that even to the extent that there was any Rule violation, disqualification is not warranted here, as the actions surrounding the "victim letter"

did not create trial prejudice for Whittaker. Third, the Government maintains that the fact that an Assistant United States Attorney may be a witness in this action does not create a ground for disqualification. Finally, the Government contends that, as a fundamental matter, we may not direct which prosecutor presents a case, because to do so would violate the Constitutional scheme of separation of powers.

Standard for Reconsideration

While the Federal Rules of Criminal Procedure do not contain a rule specifically discussing motions for reconsideration, particularly not from the Government, our Local Rule of Criminal Procedure 1.2 adopts for use in criminal cases Local Rule of Civil Procedure 7.1(g), which states that "[m]otions for reconsideration or reargument shall be served and filed within ten (10) days after the entry of the judgment, order, or decree concerned"; see also, e.g., Rankin v. Heckler, 761 F.2d 936, 942 (3d Cir. 1985) ("Regardless how it is styled, a motion filed within ten days of entry of judgment questioning the correctness of a judgment may be treated as a motion . . . under Rule 59(e)."). Absent guidance under the criminal rules, we look to the jurisprudence under Fed. R. Civ. P. 59(e) for guidance in considering this motion.

The purpose of a motion under Fed. R. Civ. P. 59(e) is to "correct manifest errors of law or fact or to present newly discovered evidence," Harsco Corp. v. Zlotnicki, 779 F.2d 906,

909 (3d Cir. 1985), though a motion for reconsideration is not to be used as a means to reargue a case or to ask a court to rethink a decision it has made, e.g. Wayne v. First Citizen's Nat. Bank, 846 F. Supp. 310, 314 (M.D. Pa.), aff'd, 31 F.3d 1175 (3d Cir. 1994)(table); Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993). Indeed, reconsideration of a previous order is an extraordinary remedy to be given sparingly in the interests of finality and conservation of scarce judicial resources, e.g. Pennsylvania Ins. Guar. Ass'n v. Trabosh, 812 F. Supp. 522, 524 (E.D. Pa. 1992); see also Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1231 (3d Cir. 1995). Under Rule 59(e), a party must rely on one of three grounds to alter or amend a judgment: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued the earlier order]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice", Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999); see also, e.g., Nissim v. McNeil Consumer Products Co, Inc., 957 F. Supp. 600, 601 (E.D. Pa.), aff'd, 135 F.3d 765 (3d Cir. 1997)(table); Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994).

It seems clear from the content of the Government's motion that it does not purport to bring to our attention any change in the controlling law or any new evidence. Therefore, the question we must here address is whether the Government has identified a "clear error of law or fact" in our Memorandum and

Order of June 12, 2001 or has demonstrated that "manifest injustice" would arise from our failure to reconsider.¹ We will consider the Government's arguments in turn.²

¹We observe that the Government, in seeking reconsideration, failed to discuss the standards for reconsideration or to consider how the arguments it presents fit into this scheme.

We also note that most of the Government's arguments seem exclusively related to the legal or factual correctness of our June 12, 2001 Memorandum and Order, and are not directed at any injustice that may arise from our decision. The Government, however, does raise several points seemingly associated with "manifest injustice", and we will briefly note them here.

First, the Government contends that our findings will compel the Justice Department's Office of Professional Responsibility to conduct an investigation of AUSA Reed, who the Government represents has compiled an exemplary record in seventeen years of service, and that this presents an injustice under the circumstances of this case. While we can certainly appreciate that investigations such as the Government describes may be unpleasant, we cannot find that this concern presents an injustice sufficient to require reconsideration of our Order. We do state clearly in our Memorandum our findings, inter alia, that AUSA Reed's actions were not motivated by bad faith and that the victim letter was not sent to Whittaker with any specific intent to deceive, and we have every confidence that the Department of Justice's investigation will come to a similar conclusion. Also, it would be a bit odd to reach a finding of "manifest injustice" based on what a court's decision "forced" a party to do, essentially, to itself.

Second, the Government seems to argue, although primarily sub rosa, that a disqualification here, on the grounds of a purportedly mis-sent letter, would work an injustice given the power of today's word processing technology, Gov't's Mem. of Law at 8 n.2, and given the requirements of the Mandatory Victim Restitution Act, Gov't's Mem. of Law at 4 (referring to "hundreds of chop shop victims"). Again, while we appreciate the difficulties the United States Attorney's Office faces here, we cannot find our Order compounds them to the extent that an injustice arises. Indeed, the realities of such technology would seem to us to cut precisely the opposite way, so that the Government -- which has resources limited only by Congress's annual appropriation -- redoubles its effort to prevent the cavalier conduct that occurred here.

²We note at the outset our concern that the
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Violation of the Pennsylvania Rules of Professional Conduct

A. Rule 4.1

Pennsylvania Rule of Professional Conduct 4.1 provides in part:

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person. . . .

In our June 12, 2001 Memorandum, we found that the Government's conduct violated Rule 4.1(a), since the Government's subsequent

²(...continued)

Government's briefing of its motion for reconsideration is much more extensive than the materials it submitted to us earlier when we were considering Whittaker's motion to disqualify. Following the evidentiary hearing on May 24, 2001 we afforded both parties the opportunity to supplement their briefs on the issue of disqualification, recognizing that our colloquy with counsel at the hearing might have served to sharpen the parties' focus on the disqualification question. The Government's subsequently-filed brief on the issue of disqualification (and the associated question of dismissal) was eight and one half pages in length. In contrast, the Government's brief in support of its motion for reconsideration is thirty-six pages in length.

While the greater volume of the Government's instant brief is perhaps understandable, to a certain extent, with respect to arguments associated with particular Rules of Professional Conduct (whose salience may not have been clear to the Government until it considered our Memorandum), other arguments, particularly those associated with the question of this Court's power to disqualify the United States Attorney's Office, could well have been made earlier. Naturally, to the extent that the Government has withheld arguments from our consideration until after we have decided a motion, we find this practice at a minimum troubling. Of course, the trade-off is that we do not consider the Government's new arguments on a tabula rasa; rather, we must evaluate them in light of the previous Order under the somewhat strict standard for a motion for reconsideration, which, as set forth in the text, requires that the Government demonstrate a clear error of law or fact in our prior decision.

arguments and statements demonstrate that the January 29, 2001 "victim letter" sent to Whittaker by AUSA Robert Reed was "a palpable falsehood", Mem. of June 12, 2001 at 10.

In seeking reconsideration of this finding, the Government argues that AUSA Reed's conduct cannot constitute a violation of Rule 4.1(a) because Reed's conduct was not "knowing". In support, the Government observes that the "Terminology" section of the Pennsylvania Rules of Professional states that "'Knowingly', 'Known', or 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The Government goes on to argue that there is no evidence that AUSA Reed specifically knew that he was sending a letter to Whittaker, and that his action was therefore not "knowing". The Government also points in this regard to our findings that AUSA Reed had no "specific intent to deceive", Mem. of June 12, 2001 at 12, and that the Government did not have "bad faith or malintent", Mem. of June 12, 2001 at 21.³

We cannot find that the Government has identified a clear error of law or fact with respect to Rule 4.1(a). We begin

³The Government also cites in support of its argument three cases from other jurisdictions: Continental Ins. Co. v. Superior Ct., 37 Cal. Rptr.2d 843, 851 (Cal. App. 1995), In the Matter of Disciplinary Proceedings Against Rajek, 499 N.W.2d 671, 672-73 (Wis. 1993), and In the Matter of the Petition for Disciplinary Action Against Olkon, 324 N.W.2d 192 (Minn. 1982). None of these cases involves factual circumstances remotely related to those we consider here, and also none contains any extended analysis of the concern that the Government addresses. We therefore will not further discuss these cases.

by rehearsing some of the evidence. At the May 24, 2001 hearing, AUSA Reed testified that he knew, from his ongoing investigation into chop shops, that twenty percent of all vehicles "chopped" were in fact "insurance give ups", vehicles whose owners turned the vehicles over to the chop shop, N.T. at 23-24. In the process of preparing the "victim letters", which were sent to those individuals whose vehicles had been chopped, AUSA Reed told the paralegal who was working on the victim letter project not to send victim letters to those identified as potential insurance fraud perpetrators, and in furtherance of this showed the paralegal a list of the possible "insurance give up" individuals N.T. at 34-35. After the victim letters were prepared, AUSA Reed did not examine the names on each letter, N.T. at 36.

While it is certainly true that the "Terminology" section of the Pennsylvania Rules contains the definition of "knowing" discussed above, this definition does not clearly place AUSA Reed's conduct outside Rule 4.1(a)'s purview. First, and as the Government concedes, the definition contained in the "Terminology" section notes that "knowledge can be inferred from circumstances". More significantly, the Supreme Court of Pennsylvania, in considering whether an attorney may be properly disciplined for a misrepresentation, has found that "the requirement is met where the misrepresentation is knowingly made, or where it is made with reckless ignorance of the truth or falsity thereof. . . . [R]ecklessness may be described as the deliberate closing of one's eyes to facts that one had a duty to

see or stating as fact, things of which one was ignorant," Disciplinary Counsel v. Anonymous Attorney A, 714 A.2d 402, 407 (Pa. 1998) (discussing elements of a prima facie violation of Pennsylvania Rule of Professional Conduct 8.4(c)).⁴ Applying this standard⁵, we observe that on AUSA Reed's own testimony, he was in possession of a list of those people who were suspected of being perpetrators of "insurance give up" schemes. AUSA Reed also testified that he subsequently failed to consult that list prior to transmitting the "victim letters"; indeed, he testified that he never reviewed the names on the letters that were actually sent. On these facts, we cannot conclude that finding a

⁴Pennsylvania Rule of Professional Conduct 8.4(c) provides that it is "professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

⁵We recognize that the language of Rule 8.4(c) does not track with that of Rule 4.1(a), and in particular 8.4(c) contains no requirement of "knowing" misrepresentation. On the other hand, the Pennsylvania Supreme Court's discussion in Anonymous Attorney A was specifically concerned with the level of scienter necessary for the imposition of discipline as the result of a misrepresentation, and we therefore construe its discussion as applying more generally. See also Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 445 (Pa. 2000) (holding that standards applicable to Rule violations with a requirement of intention also apply to Rule 8.4(c)). Moreover, we observe that the Pennsylvania Bar Association's Ethics Handbook imports the discussion from Anonymous Attorney A into its discussion of Rule 4.1(a), Pennsylvania Bar Association Ethics Handbook (Laurel S. Terry et al. eds., rev. ed. 2000) § 8.2a. While this Handbook is of course not authoritative, we do consider it in determining whether the application of such a standard to Rule 4.1(a) would be a clear error of law.

violation of Rule 4.1(a) on the "recklessness" standard discussed above was a clear error of law or fact.⁶

B. Rule 4.3(c)

Pennsylvania Rule of Professional Conduct 4.3 provides in part:

Rule 4.3 Dealing [with] the Unrepresented Person and Communicating with One of Adverse Interest

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- (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

In our June 12, 2001 Memorandum, we found that the false nature of the "victim letter" also constituted a violation of this Rule, Mem. of June 12, 2001 at 10-11.

In seeking reconsideration of this finding, the Government argues that the evidence shows that the Government attorneys did indeed comply with this Rule. In particular, the Government relies on the undisputed fact that when Whittaker's counsel contacted AUSA Miller concerning the victim letter, AUSA Miller advised him to disregard the letter, as it was "a mistake" that had been "inadvertently sent", N.T. at 55-56. While the Government goes on to concede that a formal written retraction

⁶This is not to say that it is not a close case, but as discussed in the margin above, we must consider this motion on the standard for a motion for reconsideration. After Anonymous Attorney A and Surrick, however, one may query how close this question remains.

might have been the "better practice", it contends that Rule 4.3 is "most often" invoked where a party has attempted to elicit information through a pretense and never clarified the matter.⁷ The Government maintains that because it, upon contact from Whittaker's counsel, immediately stated that the letter was an error, its conduct cannot be in violation of Rule 4.3(c).

To the extent that the Government contends that this episode was not in fact an effort to inveigle information from Whittaker, we agree, as we stated in our earlier decision, Mem. of June 12, 2001 at 19 n.13. However, as we detailed in our earlier Memorandum, we cannot agree that the oral representation to counsel that the victim letter was a mistake amounts to a "reasonable effort to correct the misunderstanding" given the unqualified nature of the statements in the letter. Of course, it bears noting that the Government initiated no effort, much less a reasonable one, to correct anything here.

Other than the argument detailed above, the Government offers no authority to demonstrate that the conduct at issue here is not within the purview of Rule 4.3(c). Its arguments therefore do not amount to a showing that our finding was a clear error of law or fact.⁸

⁷In support of this contention, the Government cites to a single case from the District of South Dakota.

⁸That is, merely because this Rule does not perhaps typically cover circumstances such as those we consider here, this atypicality does not logically mean that these actions clearly do not in fact fall under the Rule.

C. Rule 8.4(d)

Pennsylvania Rule of Professional Conduct 8.4(d) provides that "[i]t is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice." In our June 12, 2001 Memorandum we found that the Government's behavior here constituted a violation of that Rule, since "its repeated⁹ unprofessional conduct" "has here prejudiced the administration of justice and undermined public confidence in a most sensitive part of our legal institutions," Mem. of June 12, 2001 at 18.

The Government raises a series of arguments to support the contention that its behavior did not in fact violate Rule 8.4(d). The Government first argues that the commentary to the Rule demonstrates that the Rule does not address conduct such as that seen here, and it then goes on to discuss a case from the Pennsylvania Supreme Court and one from our Court of Appeals that the Government maintains equally demonstrate the inapplicability of Rule 8.4(d).¹⁰ We consider these authorities.

The commentary to Rule 8.4 states, inter alia, that:

⁹As we noted in our June 12, 2001 Memorandum, AUSA Reed testified that Whittaker was not the only "insurance give up" investigation target who was sent a victim letter.

¹⁰At the outset, the question of whether reconsideration of our finding with respect to Rule 8.4(d) is in fact warranted may be moot. As we have above found that there is no cause to reconsider our findings with respect to Rules 4.1(a) and 4.3(c), there is no question that a disqualification analysis is warranted in this case, irrespective of whether Rule 8.4(d) was technically violated.

Traditionally, the distinction [between illegal conduct reflecting adversely on the fitness to practice law and that which did not so reflect] was drawn in terms of offenses involving "moral turpitude." . . . [A] lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

As an officer of the court, a lawyer should be particularly sensitive to conduct that is prejudicial to the administration of justice. An example of a type of conduct that may prejudice the administration of justice is violation of an applicable order of court.

The Government also cites to Office of Disciplinary Counsel v. Price, 732 A.2d 599, 604 (Pa. 1999).¹¹ There, the Pennsylvania Supreme Court considered a disciplinary case involving an attorney who had himself signed Department of Public Welfare forms that were supposed to have been completed by a physician¹² and who also had filed court documents containing false allegations of wrongdoing against two District Justices and

¹¹In addition to Price, the Government cites to a number of cases from other jurisdictions that it contends demonstrate that Rule 8.4(d) is only invoked for "egregious conduct and/or the knowing presentation of false statements", Gov't's Mem. of Law at 17 n.6. As the Government also makes reference to Pennsylvania and Third Circuit cases, we will consider only those and will not discuss those cases from other states and circuits.

¹²The attorney signed these forms "Dr. Neil Price, J.D.", and argued that this was not inaccurate because he did hold the degree of juris doctor. The court was not convinced by this line of argument, Price, 732 A.2d at 606.

an Assistant District Attorney. In discussing the standard for assessing whether conduct violates Rule 8.4(c)¹³, the court adopted the analysis from Anonymous Attorney A discussed above:

When the alleged misconduct is misrepresentation in violation of Rule 8.4(c), a prima facie case is made where the record establishes that the misrepresentation was knowingly made, or made with reckless ignorance of the truth or falsity of the representation. Office of Disciplinary Counsel v. Anonymous Attorney A, [714 A.2d 402, 407 (Pa. 1998)]. Recklessness may be described as "the deliberate closing of one's eyes to facts that one had a duty to see or stating as fact, things of which one was ignorant." Id.

Price, 732 A.2d at 604.

The Government also refers us to United States v. One 1973 Rolls Royce, 43 F.3d 794 (3d Cir. 1994). In that case, a panel of our Court of Appeals was required to interpret, as a matter of first impression, the "willful blindness" language in 18 U.S.C. § 881(a)(4)(C), the drug forfeiture statute. The panel found that:

¹³The court discussed the Anonymous Attorney A standard in its analysis of whether attorney Price violated Rule 8.4(c). The Disciplinary Board had also found that Price had violated Rule 8.4(d), but the court did not extensively discuss that finding. Instead, the court merely concluded that "[a]dditionally, based on the foregoing [discussion, where the court found that Price violated Rules 3.3(a)(1), 8.2(b), and 8.4(c)], we concur with the Board's finding of violations of Rule 3.1, which precludes the assertion of frivolous issues, and Rule 8.4(d), concerning misconduct prejudicial to the administration of justice." Price, 732 A.2d at 606. It is therefore not clear in the first instance that the standard from Anonymous Attorney A, which explicitly addresses Rule 8.4(c), in fact pertains to violations of Rule 8.4(d).

In our leading case on willful blindness, United States v. Caminos, 770 F.2d 361, 365 (3d Cir. 1985), we held that the deliberate ignorance requirement is met only if "the defendant himself was subjectively aware of the high probability of the fact in question, and not merely [if] a reasonable man would have been aware of the probability." Id. at 365. Under this definition, willful blindness is a subjective state of mind that is deemed to satisfy a scienter requirement of knowledge. Although courts and commentators have yet to come to a consensus on a definition of willful blindness, the Caminos formulation basically adopts the mainstream conception of willful blindness as a state of mind of much greater culpability than simple negligence or recklessness, and more akin to knowledge.

One 1973 Rolls Royce, 43 F.3d at 807-08 (footnotes omitted). The Government appears to argue that One 1973 Rolls Royce demonstrates "the familiar recognition that sanction for misconduct is warranted only where the offense was committed knowingly or with willful blindness," Gov't's Mem. of Law at 18.

We cannot find that the Government's arguments demonstrate any clear error in our finding of a violation of Rule 8.4(d). To begin with, the commentary to Rule 8.4 makes no statement that would foreclose application of Rule 8.4(d) here. While the commentary, as quoted above, points out that not all improper conduct by an attorney should be imputed to his professional fitness, it would not seem that this caveat applies here, where we address actions directly associated with the prosecution of a case. To the extent that the commentary does directly address the "conduct . . . prejudicial to the administration of justice" that is the subject of Rule 8.4(d),

the commentary merely gives one example of violative conduct, and does not contain any discussion that would show our application to be in clear error.

Moving to the Pennsylvania Supreme Court's decision in Price, and as we have discussed above in connection with Rule 4,1(a), we find that AUSA Reed's conduct does not clearly fall outside the "recklessness" standard, given his possession of the list of investigation targets and his decision not to review the names on the victim letters that were sent out. Similarly, to the extent that its analysis of the standards applicable to 18 U.S.C. § 881(a)(4)(C) are relevant to our inquiry, we cannot find that One 1973 Rolls Royce demonstrates that Rule 8.4(d) does not apply here. Further, none of the materials that the Government cites relate to prosecutorial conduct; we find this significant, since our concerns for prejudice to the administration of justice in this case arise from the fact that it was an Assistant United States Attorney who engaged in the behavior.¹⁴

¹⁴The Government also contends that we erred in concluding that the United States Attorney's Office, rather than an individual attorney, violated Rule 8.4(d), Mem. of June 12, 2001 at 18, arguing that the Rules apply to individual attorneys and that we cannot hold an Office vicariously liable for information held separately by different attorneys, Gov't's Mem. of Law at 20. This argument does not require us to reconsider our findings; as discussed above, we find that AUSA Reed's conduct itself falls under Rule 8.4(d). Similarly, the Government argues that there has been no showing of any prejudice to the administration of justice, since "Whittaker was informed of the error as soon as the government was cognizant of it," Gov't's Mem. of Law at 21. As we discussed in our June 12, 2001 Memorandum, we simply do not agree that there was no prejudice to justice here, and the Government's argument regarding notice does
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We now move to consider the Government's arguments that, irrespective of whether a Rule violation occurred, disqualification is not proper here.

Absence of Trial Prejudice to Whittaker

The Government first maintains that an ethical violation does not support disqualification "absent prejudice to the opponent or to the integrity of the justice system," Gov't's Mem. of Law at 22. In particular, the Government argues that it is not our function to enforce disciplinary rules, but instead we may only disqualify counsel where the misconduct has affected the matter before the court. In support of this contention, the Government cites In re Estate of Pedrick, 482 A.2d 215 (Pa. 1984), in which the Pennsylvania Supreme Court held that while trial courts could disqualify counsel "in order to protect the rights of litigants to a fair trial", trial courts were not to "use the [Rules of Professional Conduct] to alter substantive law or to punish attorney misconduct," Pedrick, 482 A.2d at 221.

We cannot find that this argument demonstrates clear error in our findings. As we stated in our June 12, 2001 Memorandum, our power to disqualify counsel arises not from the Pennsylvania Supreme Court or the Pennsylvania Rules of Professional Conduct¹⁵ but rather from the "inherent powers of

¹⁴(...continued)
not demonstrate clear error in that conclusion.

¹⁵Though of course these Rules are applicable to
(continued...)

any federal court" to supervise "the admission and discipline of attorneys practicing before it," In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 160 (3d Cir. 1984).¹⁶ The Government's reliance on the standards applicable to Pennsylvania state courts is therefore misplaced.¹⁷

Effect of Possible Testimony at Trial
By a United States Attorney's Office Employee

The Government next argues that the fact that AUSA Reed may be called to testify at trial does not support disqualification pursuant to Rule 3.7, citing, inter alia, to United States v. Aponte, No. 96-137-01, 1996 WL 612839 at *2-*3 (E.D. Pa. Oct. 25, 1996). The references to Rule 3.7 in our June

¹⁵(...continued)
Assistant United States Attorneys pursuant to 28 U.S.C. § 530B.

¹⁶Similarly, our Memorandum and Order detailed the factual predicate for the sanction and discussed how alternative sanctions were insufficient, as required by Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74 (3d Cir. 1994).

¹⁷The Government goes on to argue that the only possible prejudice that could have accrued to Whittaker as a result of the victim letter would have occurred if he had, in response to the letter, made statements to the Government, and that it is undisputed that no such statements were made. The Government further contends that to the extent that Whittaker was, as we found, placed on a "roller coaster" by the Government's conduct, Mem. of June 12, 2001 at 18 & 20 n.14, his ride was "of exceedingly short duration," and this neither prejudiced Whittaker nor aided the Government, Gov't's Mem. of Law at 25. As discussed above, the Government fails to cite any controlling authority for the principle that a substantial level of actual trial prejudice must exist to warrant disqualification. Leaving that aside, however, the Government continues, in our view, seriously to underestimate the effect of its cavalier conduct and the systemic prejudice that arises thereby.

12, 2001 were restricted to one in a description of Whittaker's contentions, Mem. of June 12, 2001 at 4, and to a remark that any Rule 3.7 problem was avoided by our decision to disqualify the United States Attorney's Office, Mem. of June 12, 2001 at 22 n.17. As our decision to disqualify was not predicated on the Rule 3.7 issue, we cannot see how the Government's argument here serves to demonstrate clear error of law or fact in our holding, and we will therefore move on.

Separation of Powers

The Government's last argument in seeking reconsideration is that "except in the most extraordinary circumstances," we "may not disqualify a prosecutor absent actual prejudice to the defendant, lest separation of powers be offended," Gov't's Mem. of Law at 29.¹⁸ The Government contends that our concerns that an independent review of the case is necessary to ensure that this action should be prosecuted, Mem. of June 12, 2001 at 20, 22, do not permit us to order the disqualification of the United States Attorney's Office. In particular, the Government argues¹⁹ that the United States

¹⁸We note as an initial matter that the Government's argument here is premised on "the absence of any ethical misconduct by any government lawyer regarding the inadvertent letter," Gov't's Mem. of Law at 29. As the discussions above and in our June 12 Memorandum show, we do not agree that this premise has been met, and that the Government's conduct here did indeed violate several Rules of Professional Conduct.

¹⁹The Government also "challenge[s] the notion that the error here would invite public disrepute" on the ground that "no
(continued...)

Attorney is in fact committed to prosecuting this case and that this decision is properly left to the sole discretion of the United States Attorney. The Government cites to several Supreme Court decisions in support of this, including Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 668 (1978), Wayte v. United States, 470 U.S. 598, 607, 105 S. Ct. 1524, 1530 (1985), and Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807, 107 S. Ct. 2124, 2137 (1987), arguing that "so long as the prosecutor has probable cause to believe that the accused committed an offense . . . the decision . . . to prosecute and what charge to file or bring before a grand jury, generally rests entirely in his discretion," Bordenkircher, 434 U.S. at 364, 98 S. Ct. at 668, that "the decision to prosecute is particularly ill-suited to judicial review," Wayte, 470 U.S. at 607, 105 S. Ct. at 1530, and that decisions such as those regarding targeting of investigations and the bringing of charges are "made outside the supervision of the court," Young, 481 U.S. at 807, 107 S. Ct. at 2137. The Government further notes that there may be disputes within a United States Attorney's Office regarding a case, but that this process is not subject to judicial review and a court

¹⁹(...continued)

reasonable member of the public could conclude that this office acted to undermine the orderly prosecution of a criminal case," Gov't's Mem. of Law at 30. As the Government does not tie this contention in with its broader argument, and since, as detailed in our June 12, 2001, we arrive at a different conclusion about the possible perception of the Government's actions here, we will not analyze this line of argument further but will instead proceed to the Government's primary contention regarding interference with prosecutorial discretion.

may not second-guess the United States Attorney's final decision.²⁰

These arguments do not demonstrate clear error in our prior holding. Most fundamentally, our disqualification Order, which directs the Government to appoint a special attorney to evaluate and prosecute the case, does not invoke any type of judicial review over the discretionary functions of the prosecutors. Rather, we seek to ensure that this discretion is properly exercised by an attorney unconnected with the breaches that have occurred in this case. This could be accomplished by

²⁰In this regard, the Government cites to United States v. Abuhouran, 161 F.3d 206, 216 (3d Cir. 1998) for the proposition that there are "substantial restrictions on judicial review of nonconstitutional challenges to prosecutorial decision making." While this is doubtless true as a general principle, Abuhouran's holding does not compel reconsideration of our prior Order here. In Abuhouran, the panel considered whether a district court could sua sponte grant a defendant a downward departure at sentencing for substantial assistance to the Government even where the Government itself had not moved for such a departure, Abuhouran, 161 F.3d at 207-08. The panel found that this was not permissible, in part because in order to assess the nature and extent of a defendant's cooperation, a court would need to examine the prosecutor's confidential case files and conduct an inquiry into ongoing prosecutorial and investigative decisions, actions which would be inappropriate given the deference extended by courts to prosecutorial decisionmaking, Abuhouran, 161 F.3d at 215-16. These concerns are not at all implicated in the circumstances of this case. Our disqualification Order does not require or mandate any court examination of prosecutors' files or any further inquiry into their decisions. Rather, we have found -- through the most superficial of inquiries -- evidence of irregularities and ambiguities in the decisionmaking process associated with Whittaker's prosecution and have directed that an independent attorney appointed by the Attorney General conduct an independent examination. This decision does not involve the sort of intrusion into the internal affairs of the United States Attorney's Office that the Abuhouran panel described.

the Attorney General's appointment of a special prosecutor from a United States Attorney's Office from, say, one of the Districts contiguous with this one -- hardly an act of judicial intrusion into the Article II Branch. While it is true that the deliberative process inside the United States Attorney's Office remains generally outside judicial review, in this case we face the unusual situation where an evident difference of opinion within the office²¹ has become a matter of the public record, and this circumstance warrants some level of judicial attention and the limited relief we have imposed here.²²

Finally, the Government argues that through our disqualification order we wrongly take on "the executive's prerogative to prosecute crime as it sees fit," and "upset[s] the common and beneficial practice in which prosecutors who have pursued a broad set of crime continue to pursue all related

²¹The Government repeatedly insists that there was in fact never any difference of opinion, as the victim letter was an error and Whittaker was always a target. However, evaluating the victim letter and its meaning we must take the language of the letter, even though subsequently disavowed by the Government, to be true -- or, at least, to have been true at the time the letter was sent. The point here is that the United States Attorney's Office cannot erase the content of the victim letter by subsequently claiming that it was sent in error or that it contained false statements; definitionally, the transmission of the letter raises substantive questions about the United States Attorney's position on the matter.

²²We also observe that if one takes the Government's position here to its logical conclusion, it would leave courts with only one option in the face of ethical breaches by the prosecutors: dismissal. We cannot believe that the Government would truly wish to so restrict the options available to trial courts.

matters to their conclusion," Gov't's Mem. of Law at 32, and that consequently our Order violates the Constitutional separation of powers. In support of this position, the Government cites a number of federal cases from other Circuits and Districts. It argues that disqualification "is a drastic measure which courts should hesitate to impose except when absolutely necessary," Matter of Grand Jury Subpoena of Rochon, 873 F.2d 170, 176 (7th Cir. 1989), and that "[a] federal court that imposes sanctions on executive conduct that is otherwise permitted by the Constitution, a federal statute or a rule will most likely be invading the executive sphere," Rochon, 873 F.2d at 174 (quoting United States v. Gatto, 763 F.2d 1040, 1046 (9th Cir. 1980)). The Government also cites to several district court cases for the proposition that a showing of actual prejudice is necessary to trigger disqualification, e.g. United States v. Santiago-Rodriguez, 993 F. Supp. 31 (D.P.R. 1998), Bullock v. Carver, 910 F. Supp. 551 (D. Utah 1995).

While we would not dispute that the instant situation raises separation of powers concerns at the margin, the Government's argument on separation of powers grounds fails to demonstrate clear error in our prior holding. First, the cases the Government cites certainly do not hold that a district court may never disqualify a United States Attorney's Office, but instead mandate that caution is warranted in such circumstances. In this vein, none of the cases the Government cites addresses a situation where the Court found that an Assistant United States

Attorney had violated state rules of professional conduct, as we have here. Consequently, our decision to disqualify is not clearly at odds with the principles set forth in Rochon and the other cited cases.

Moreover, all of these cited cases predate the enactment of 28 U.S.C. § 530B, the statute that renders Government attorneys subject to state disciplinary rules. While this legislation does not of course serve to mitigate Constitutional separation of powers concerns, its provisions will doubtless increasingly give rise to cases, like this one, in which the tension between Court's inherent power to discipline attorneys and those Constitutional concerns is more apparent than it has been previously. We might therefore expect the McDade Amendment to alter the playing field with respect to such concerns, and consequently pre-McDade Amendment jurisprudence on the disqualification of Government attorneys is not clearly applicable to the post-McDade Amendment landscape.

Finally, we observe that none of the cases the Government cites is controlling precedent from our Court of Appeals or the Supreme Court. Therefore, to the extent our decision cannot be completely reconciled with their holdings, this fact alone does not demonstrate the existence of clear error in our prior holding.

Conclusion

We reiterate that the conduct of the United States Attorney's Office in this episode was extraordinary. Indeed, it was the first incident of its kind involving that Office that we have seen in the hundreds of criminal cases entrusted to us. It may be that since in general the conduct of the United States Attorney's Office is exemplary, and is on the whole better than that of the standard run of counsel appearing before us, those instances in which the Office falls short, like that we face here, are perhaps thrown into sharper relief. However, we do not find this possibility troublesome given the responsibilities of that Office and the weight that this Court typically accords to representations of Assistant United States Attorneys. Indeed, as implied in our June 12 Memorandum, the enviable record of those prosecutors, coupled with the high stakes their cases invariably involve, subject them in the post-McDade ethical world to the highest standards under state professional conduct rules, a result we should think the Government, on reflection, would welcome.

We will deny the Government's motion for reconsideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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WAYNE WHITTAKER : NO. 01-107

ORDER

AND NOW, this 11th day of July, 2001, upon consideration of the Government's motion for reconsideration (docket number 49), and defendant's response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that the Government's motion is DENIED.

BY THE COURT:

Stewart Dalzell, J.