THE HONORABLE JOHN W. SEDWICK

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VICTOR H. KOHRING,

Defendant.

No. CR07-00055-01-JWS

DEFENDANT KOHRING'S MOTION TO PERMIT COUNSEL TO INTERVIEW A TRIAL JUROR

COMES NOW the defendant, Victor H. Kohring, by and through undersigned counsel, and moves this Court for an order permitting defense counsel to interview a juror from Mr. Kohring's trial in order to obtain information for sentencing about what the government actually proved at trial and the basis of the convictions. This motion is based on District of Alaska LR 83.1(h)(1), Federal Rule of Evidence 1101(d)(3), 18 U.S.C. § 3661, and United States Sentencing Guideline § 6A1.3.

I. FACTS

A. Presentence Report and Objections

On November 1, 2007, after an eight day trial, a jury found Mr. Kohring guilty of Counts One, Three, and Four of the Superseding Indictment. On December 28, 2007, United States Probation and Pretrial Services Office issued its presentence report. The defense then submitted objections to the presentence report, primarily addressing which acts government actually proved at trial, on January 14, 2008,

Specifically, the defense objected that the evidence at trial proved that: 1) Mr. Kohring did not deliberately stall legislation, did not lay off a legislative aide at the

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behest of Bill Allen, and Mr. Kohring's votes on versions of the PPT bill were totally independent and uninfluenced by any support by VECO (PSR pg3 ¶ 18); 2) Mr. Kohring's introduction of House Bill 198 was not an overt act as part of the conspiracy (PSR pg 4 ¶ 19); 3) Mr. Kohring's actions in relation to Senate Bill 185 are similarly non-criminal and thus irrelevant to the conspiracy charged in the Indictment (PSR pg4 ¶ 20); 4) Mr. Kohring did not fire aide Eric Musser at Bill Allen's direction; rather, Musser left the state for another job opportunity (PSR pg4 ¶ 22); 5) Mr. Kohring's decision to follow through on Rick Smith's offer of an internship for Mr. Kohring's nephew is common, not criminal conduct; the money earned by Mr. Kohring's nephew, now a petroleum engineering student at the University of Alaska Fairbanks, as a VECO intern is legal, unproven conduct outside the scope of the conspiracy (PSR pp5-6 ¶ 25-26); 6) Mr. Kohring's request for a loan to assist with his $17,000 credit card debt was completely "above board", as the recordings demonstrate (PSR pp6-7 ¶ 29-30); 7) because the loan request was legal, it cannot serve as the basis for a two level upwards adjustment pursuant to U.S.S.G. § 2C1.1(b)(1) (PSR pg 12 ¶ 61); and 8) the total benefit received by Mr. Kohring was approximately $2,100 to $2,600 so that a four level upward adjustment pursuant to U.S.S.G. § 2B1.1(b)(1) is inapplicable (PSR pp12-13 ¶ 61-62).

Probation services, relying on the testimony of already convicted Bill Allen and Rick Smith, arrived at different conclusions. For example, in regards to the issue of Mr. Kohring's release of Senate Bill 185 from committee, the presentence report states: "The probation officer believes the defendant's actions in regard to S.B. 185, at the request of Bill Allen, was the defendant's was of showing his loyalty to Bill Allen." (PSR pg2 ¶ 3). This is not what the jury decided, but rather the determination of Probation Services.

In like manner, as to the internship for Mr. Kohring's nephew, the presentence report asserts:

> The probation officer believes, based upon the testimony, that the defendant used his position to influence his nephew's hiring process, and, also, that Smith used his influence to get the defendant's nephew hired because 'they (Allen and Smith) were hoping that Kohring would continue to support their political issues' … the probation officer does not believe the defendant's actions were 'the common practice of networking.'

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(PSR pp3-4 ¶ 4). The evidence, on the other hand, demonstrates that Rick Smith initially offered the internship and Mr. Kohring merely took him up on the offer. This was neither extortion nor bribery, but rather the result of a common practice of networking. Neither the fact of the internship nor the unproven amount of money the nephew earned is thus immaterial for sentencing purposes.

Even more important is the fact that the presentence report "maintains that the defendant was found guilty, in Count 3, of the specific acts related to the defendant's request for $17,000 from Bill Allen, Richard Smith, and VECO Corporation." (PSR pp4-5 ¶ 5). For justification, the report relates: "It appears the defendant approached Allen and Smith based upon their relationship in which Allen had previously given the defendant money in exchange for the defendant performing official acts at Allen's and Smith's request." Id. However, the report fails to acknowledge that Mr. Kohring repeatedly emphasized that his loan request was premised on friendship between the parties, that any assistance must be completely "above board," and that Mr. Kohring did not wish to act improperly. This is not conduct relevant for sentencing.

B. Allegations in the Indictment, Jury Instructions, and Conviction

The government charged Mr. Kohring by Superseding Indictment with Count One- Conspiracy to Commit Extortion and Attempted Extortion under Color of Official Right and Bribery, pursuant to 28 U.S.C. § 371. The overt acts alleged as the basis for Count One include allegations from before 2006, contained in ¶¶18-26, and allegations that in 2006 Mr. Kohring received cash and other financial benefits ostensibly in return for action by Mr. Kohring in his role as legislator, contained in ¶¶27-59. Included in ¶¶ 27-59 are the following allegations: Mr. Kohring received cash from Bill Allen and thus offered his assistance as a legislator; Mr. Kohring requested assistance from Bill Allen to pay off a $17,000 credit card debt, ¶¶45-48; and that VECO hired Mr. Kohring's nephew as an intern, ¶58, and earned roughly $3,000 in that position, ¶59.

The corresponding jury instruction correctly stated that the jury need only find that Mr. Kohring participated in one overt act, with the jury agreeing upon that overt act, for culpability. Ex. A, Instruction No. 14. In order to convict on Count One, therefore, the jury only had to find that any one of the numerous allegations was true. The jury thus

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found Mr. Kohring guilty on Count One, most likely based on the videotape evidence introduced at trial that Mr. Kohring did accept approximately $1,000 from Bill Allen.

Although the jury found Mr. Kohring innocent on Count Two- Interference with Commerce by Extortion Induced under Color of Right, pursuant to 18 U.S.C §§ 1951(a) and (2)- this Count illustrates the difficulties imposed upon the jury in deciding what conduct the government actually proved. As the government incorporated the allegations from ¶¶27-59, which include the accusations about the $17,000 loan request and Mr. Kohring's nephew's internship at VECO, in all of the Counts, it is unclear what the jury decided and therefore impossible for a sentencing court to determine the precise bases for the jury's decisions.

The government alleged in Count Two that Mr. Kohring accepted a series of cash payments, which the jury obviously believed given the finding of guilty on Count One, as well as all of the other overt acts charged under Count One. The government furthermore contended that the internship for Mr. Kohring's nephew, already alleged in Count One, constituted an independent overt act. As the nephew did in fact receive the position with VECO, if the jury deemed this an overt act as part of the conspiracy, the jury would have had to convict on this Count. The jury, however, failed to return a guilty verdict so that the jury did not agree that the nephew's internship and the $3,000 he earned as a result were criminal conduct at all. Mr. Kohring's acquittal on Count Two thus precludes the government from arguing that the internship and the $3,000 earned was criminal conduct and therefore cannot be considered during sentencing as relevant underlying conduct.

With respect to Count Three- Attempted Interference with Commerce by Extortion Induced under Color of official Right, pursuant to 18 U.S.C. §§ 1951(a) and (2)- the government again incorporated the allegations from ¶¶27-59, which include Mr. Kohring's request for a loan to assist in paying his $17,000 credit card debt. The government then asserted that the loan itself constitutes a basis, but not the sole basis, for the Count. The jury thus did not have to find the loan request as criminal conduct in order to convict on Count Three.

The jury instruction for Count Three states that the jury must find that: 1) Mr. Kohring was a public official; 2) he attempted to obtain property to which he was not entitled, with the jury agreeing on what thing was; 3) there was an understanding that the

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property was given in exchange for taking some official action; 4) interstate commerce was affected; and 5) Mr. Kohring took a substantial step towards committing the crime of extortion, with the jury agreeing on what constituted the substantial step. Ex. B, Instruction No. 16. In order to convict on Count Three, therefore, the jury could rely on the videotape evidence that Mr. Kohring did in fact accept cash from Bill Allen. The jury did not have to find that the loan request was an overt act.

Finally, Count Four- Bribery Concerning Programs Receiving Federal Funds, pursuant to 18 U.S.C §§ 666(a)(1)(b) and (2)- presents an identical scenario. The government once more incorporated the allegations in ¶¶27-59, but then contended that the total amount of cash Mr. Kohring received, the loan request, and the nephew's internship provide the basis for this Count.

The corresponding jury instruction, however, merely states that the jury need only find that Mr. Kohring solicited, accepted, or agreed to accept something of value, with the jury agreeing upon the nature of the thing of value, in connection with a business in the State of Alaska. Ex. C, Instruction No. 17. Again, all the jury had to find was that Mr. Kohring accepted money from Bill Allen, which was caught on tape. The jury did *not* have to find that the loan request or the internship constituted overt acts to convict.

C. Juror Contact

Between the time when Probation Services submitted its final presentence report on January 28, 2008, and the present, one of the trial jurors contacted Mr. John Davies, a trusted confidante of Mr. Kohring. The juror had obtained Mr. Kohring's old legislative telephone number from the phone book and ended up speaking with Mr. Davies. The juror stated that he was experiencing a lot of stress as a result of his participation in Mr. Kohring's trial and that he needed to discuss his concerns with somebody in order to allay his worries. The juror asserted that he looked for Mr. Kohring after the jury read the verdict, but that the chaos and the crush of reporters made it impossible. The juror related that he was "pretty distressed" about the "disgusting" outcome of the trial and that he had lost sleep because of the situation.

While the juror described potential misconduct during the jury deliberations, his most salient observation is that Mr. Kohring was convicted for accepting $1,000 from Bill Allen. This is the conduct the government proved at trial; there is nothing more.

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The jury found Mr. Kohring guilty of accepting $1,000 and asking, as he did of all his constituents, how he could be of service. The jury did not find that Mr. Kohring's loan request or his nephew's internship related to the charged conspiracy. These unproven and unconnected allegations are thus irrelevant for sentencing purposes and form an improper basis for any upward adjustments pursuant to the federal sentencing guidelines.

Sentencing is currently scheduled for May 8, 2008, at 9:30a.m. before the Honorable John W. Sedwick.

II. APPLICABLE LAW

Given that the Federal Rules of Evidence do not apply at sentencing hearings and that hearsay testimony is allowable, this Court should permit the defense to meet with the juror in order to ascertain exactly what conduct the jury found as the basis for Mr. Kohring's convictions on Counts 1, 3, and 4.

First, District of Alaska Local Rule 83.1(h)(1) states:

> No attorney admitted to practice or appear before this court may:
> [A] seek out, contact, or interview at any time any juror of the venire of this court; or
> [B] without prior approval of the court, allow, cause, permit, authorize, or in any way participate in any contact or interview with any juror relating to any case in which the attorney has entered an appearance.

As the trial juror contacted Mr. Davies without the knowledge of defense counsel, there is no past impropriety. Furthermore, as Probation Services and the defense fundamentally disagree about the conduct underlying Mr. Kohring's convictions, the only way to resolve this issue is to hear from the jurors themselves.

Similarly, while Federal Rule of Evidence 606(b) prohibits a juror from testifying in regards to the validity of a verdict or indictment, a juror is nevertheless permitted to testify in reference to any outside influence improperly brought to bear on the juror.

On the other hand, however, 18 U.S.C. § 3661 categorically states: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." In like manner, Federal Rule of Evidence 1101(d)(3) provides an explicit exception for sentencing hearings as exempt from the rules of evidence, necessarily including FRE 606(b).

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Finally, U.S.S.G. § 6A1.3 states that when the court is confronted with "any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The Commentary to § 6A1.3 directs: "When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances."

The Supreme Court has long held that the Federal Rules of Evidence do not apply in the context of sentencing and that sentencing courts have broad discretion in deciding what materials and information to consider. See United States v. Tucker, 404 U.S. 443, 446 (1972) (before imposing sentencing, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.") (citations omitted); Williams v. New York, 337 U.S. 241, 246 (1949) (emphasizing the importance of flexibility in sentencing and holding that as due process does not require the same standards at sentencing as at trial, a sentencing judge may "exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law," including out-of-court affidavits, personal knowledge of judge, reports by probation officers).

In practice, this means that the rules of evidence do not apply in sentencing proceedings and district courts may thus consider all relevant evidence when sentencing a defendant. U.S. v. Chavaria-Angel, 323 F.3d 1172, 1176-77 (9th Cir. 2003) (citing Fed. R. Evid. 1101(d)(3); 18 U.S.C. § 3661; United States v. Petty, 982 F.2d 1365, 1367-68 (9th Cir. 1993)); see also U.S.S.G. § 6A1.3.

In addition, "[f]ederal law is clear that a judge may consider hearsay information in sentencing a defendant." United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir. 2006) (quoting United States v. Fernandez-Vidana, 857 F.2d 673, 675 (9th Cir.1988); see also Williams, 337 U.S. at 246. Such hearsay is admissible only so long as it is

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"accompanied by some minimal indicia of reliability." Id. (quoting United States v. Berry, 258 F.3d 971, 976 (9th Cir. 2001).

Here, a trial juror, moved by guilty conscience, stepped forward to allay his concerns by relating to Mr. Kohring the events in the jury room. The juror has absolutely no motivation to lie; his testimony is reliable insofar as he is not impeaching the verdict, but rather providing information about what the jury elected in terms of overt acts. Given the ambiguity in the jury instructions and the fact that the jury had to find neither the loan request nor Mr. Kohring's nephew's VECO internship to convict on Counts Three and Four, the Court should permit counsel to interview the juror for the purposes of preparing an affidavit to submit at sentencing.

Conclusion

For the reasons stated above, Mr. Kohring respectfully requests leave for defense counsel to interview the trial juror who already contacted Mr. Kohring for the purposes of preparing an affidavit to submit during sentencing.

RESPECTFULLY SUBMITTED this 30th day of April, 2008.

s/ John Henry Browne
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 30, 2008, I electronically filed Defendant Victor Kohring's Motion for Permission for Counsel to Interview a Trial Juror with the clerk of the court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendant and the government. I hereby certify that I have served any other parties of record that are non CM/ECF participants via Tele-fax/US postal mail.

DATED this 30th day of April, 2008.

s/ Lisa A. Earnest
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