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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. 3:07-cr-00055-01-JWS
	)	
Plaintiff,	)	**GOVERNMENT'S OPPOSITION**
	)	**TO DEFENDANT'S MOTION FOR**
vs.	)	**EVIDENTIARY HEARING**
	)	
VICTOR H. KOHRING,	)	
	)	
Defendant.	)	
	)	

COMES NOW the United States of America, through counsel, and hereby files this opposition to defendant Victor H. Kohring's request for an evidentiary hearing relating to his prior motion to dismiss or grant a new trial and for the recusal of the presiding trial judge (see Dkt. 155).

ARGUMENT

Kohring's motion for an evidentiary hearing (like his post-trial motion to dismiss) can and should be seen for what it is: a belated attempt by a criminal defendant to postpone sentencing and interpose delay.[1] What is most remarkable in the government's view is the means by which Kohring has chosen to implement this strategy. Confronted by the fact that he received extensive discovery in this matter, that he was given a full opportunity to be heard on his pre-trial motions, and that he was convicted by a fair and impartial jury after a thorough presentation of evidence, Kohring resorts instead to impugning the reputation of a well-respected trial judge.

Kohring specifically contends that he is entitled to an evidentiary hearing before a new judge because the representations in the Court's prior order (see Dkt. 158 at 2) are inherently unreliable given that they were not under oath and were

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1/ As previously noted by the government (see Dkt. 162 at 15), the decision to hold an evidentiary hearing is a matter of discretion for the trial court. Such hearings, however, are only necessary where the motion papers are sufficiently definite, specific, detailed, and nonconjectural to enable the Court to conclude that there are contested issues of fact relating to the motion's resolution. United States v. Kohring, No. 3:07-cr-00055, 2007 WL 3131153 at *3 (citing United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986) (motion to suppress)); United States v. Cheely, 814 F. Supp. 1430, 1436 (D. Alaska 1992), aff'd, 36 F.3d 1439 (9th Cir. 1994); United States v. Batiste, 868 F.2d 1089, 1091 (9th Cir. 1989).

supposedly gratuitous. See Def. Motion for Evidentiary Hearing ("Def. Mot.") at 3 ("the Court should in no manner grant any credence to the unsworn statements in Judge Sedwick's Order"); see also id. ("it seems unrealistic to blindly accept that Judge Sedwick had no knowledge of the antagonism that characterized Ms. Sedwick's relationship with Mr. Kohring"); id. ("it seems likewise impossible that the Sedwicks would not discuss their neighbor [Bill Allen] . . . and what was happening in Judge Sedwick's courtroom"). Kohring also claims that, absent an opportunity to "confront[] and cross exam[]" witnesses regarding the trial judge's alleged bias, his constitutional rights will somehow be violated. Def. Mot. at 3; see also id. (seeking disqualification of the trial judge "from participation in any future proceedings in this case on account of the appearance of impropriety, and perhaps actual impropriety as well").

Kohring's accusations are misplaced. As officers of the Court, counsel for the parties must accept in good faith the representations made by the Court's Chief Judge, just as the Court accepts in good faith the representations made by counsel to it. Thus, when the Court represented to the parties that it has "no recollection of any conversations with [Mrs. Sedwick] relating to the actions defendant Kohring says he took or the responses he alleges she made" (see Dkt. 158 at 2), that representation should be accepted by the parties on its face. Government counsel

does so not on blind faith (as Kohring suggests), but because we recognize – as the Court surely does – that counsel and the presiding trial judge are subject to a higher standard of duties and obligations, including the duty of candor and fairness. For the same reason, then, the parties should further accept the Court's additional representations that it: (1) has no recollection of any conversations with others relating to the actions defendant Kohring says he took or the responses he alleges [Mrs. Sedwick] made;" and (2) it has no recollection of Kohring's involvement with respect to the legislation which Kohring characterizes as having eliminated Mrs. Sedwick's position. See Dkt. 158 at 2. The notion that the case must be transferred for an evidentiary hearing concerning the veracity of the trial judge's own representations is unwarranted, to say the least.

I. Kohring's Motion Is Untimely

Kohring's request for an evidentiary hearing should be denied, too, because it was not raised in a timely manner. His motion to dismiss was filed on February 1, 2008 – nearly eight months after the trial judge was assigned to this matter, a full three months after Kohring reportedly saw Mrs. Sedwick in the courtroom on October 31, 2007, and just days before Kohring's sentencing hearing. Given that Kohring's motion to dismiss is belated (see Dkt. 162 at 4-7), it logically

follows that his separate request for an evidentiary hearing on that motion is time barred as well.

Kohring nonetheless argues that there is no per se time limit to a recusal motion filed pursuant to 28 U.S.C. § 455(a). See Dkt 166 at 9 (citing E&J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280 (9th Cir. 1992)). E&J Gallo, however, supports the government's position, not Kohring's. The Ninth Circuit plainly stated there that "a party having information that raises a possible ground for disqualification can[not] wait until after an unfavorable judgment before bringing the information to the court's attention. It is well established in this circuit that a recusal motion must be made in a timely fashion."[2] Id. at 1295 (emphasis added); see also United States v. Rogers, 119 F.3d 1377, 1380 (9th Cir. 1997) ("28 U.S.C. § 144 expressly requires that a motion to disqualify must be "timely," and we have judicially required as much under 28 U.S.C. § 455."); Davies v. Commissioner, 68 F.3d 1129, 1131 (9th Cir. 1995) ("Recusal motions [under § 455(a)] 'must be made in a timely fashion.'"). Without a timeliness requirement, parties would be

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2/ The defendant's post-trial recusal motion in E&J Gallo was deemed untimely because the defendant possessed information forming the basis of his motion, yet waited eight months and then filed the motion after receiving an adverse ruling. Id. at 1295; see also Rogers, 119 F.3d at 1380 (recusal motion untimely where the defendant failed to make a formal motion until more than 18 months after he was aware of the grounds for disqualification and nine months after his resentencing).

encouraged "to withhold recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke section 455 in order to get a second bite at the apple." E&J Gallo, 967 F.2d at 1295-96; see also Rogers, 119 F.3d at 1380; United States v. Branco, 798 F.2d 1302, 1304-05 (9th Cir. 1986); United States v. Conforte, 624 F.2d 869, 879-80 (9th Cir.), cert. denied, 449 U.S. 1012 (1980).

Kohring is in fact seeking a second bite at the apple. Both of his motions were filed without reasonable promptness and for strategic purposes. Thus, whether this threshold issue is reviewed by the Court pursuant to Fed. R. Crim. P. 33(b) or 28 U.S.C. § 455, the result should be no different.

II. The Court Should Reject Kohring's Request To Transfer The Case

Kohring further claims that the case must be transferred to another judge for purposes of deciding the recusal issue, including his request for an evidentiary hearing. Def. Mot. at 2. The fallacy underlying this argument is Kohring's assertion that his present motion and his original motion to dismiss are "premised on both 28 U.S.C. §§ 144 and 455(a)." Def. Mot. at 2. The reasoning behind Kohring's argument is apparent – a motion seeking recusal pursuant to 28 U.S.C. § 144 must be transferred to another district judge, while a motion pursuant to section 455 must be decided by the judge whose recusal is sought.

Kohring's argument, however, is belied by the express language of his original motion to dismiss, which states: "This motion is based upon . . . 28 U.S.C. § 455." Dkt. 155 at 1. Thus, contrary to Kohring's assertion, it is the law of the case that the motion to dismiss (and any request for an evidentiary hearing) must be decided in the first instance by the individual judge whose recusal is sought. Cf. Def. Mot. at 3 ("the Court should not accept the disingenuous arguments by the government that Judge Sedwick's Order somehow constitutes the law of the case"), with Dkt. 159 (Judge Holland's 2/6/08 Order); Dkt. 161 (Chief Judge Sedwick's 2/7/08 Order) ("Judge Holland's decision constitutes the law of the case on this issue, and so the motion must now be determined pursuant to 28 U.S.C. § 455.") (emphasis added); see also In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994).

Because the Court is not permitted at this juncture to reassign the case, an evidentiary hearing is unnecessary. Section 455 requires the potential conflict to be resolved exclusively on the views of the presiding judge. With respect to the central allegation here – that Kohring and Mrs. Sedwick had an antagonistic relationship over a decade ago – the Court has already stated that it has no recollection of conversations or discussions regarding this supposedly hostile relationship. This should be the end of the Court's inquiry.

Finally, Kohring has known for a considerable amount of time (ostensibly at the time of his initial filing, and certainly since Judge Holland's February 6th Order) that his recusal motion would be decided pursuant to section 455. If Kohring had truly believed his motion was also premised on 28 U.S.C. § 144, and truly sought the relief potentially available under a section 144 claim, then, at that point in time, Kohring could have filed a motion for reconsideration or a supplemental motion seeking recusal pursuant to that statute. Kohring chose to do neither. Instead, he waited more than a month before contending that his original motion was actually based on both statutes – a suggestion which (as noted above) is flatly inconsistent with Kohring's initial motion.

When viewed collectively, the form and timing of Kohring's recusal filings and the substance proffered in their support lead the government to a single, inescapable conclusion: that Kohring's motions are neither meritorious nor serious, but are instead the strategic maneuverings of a defendant who had his day in court, was convicted by his peers, and will grasp at anything to postpone his seemingly-inevitable incarceration. It is time for this process to conclude and Kohring's sentence to be imposed.

CONCLUSION

Recusal motions cannot be supported by subjective fears, unsupported accusations, or unfounded surmise. Kohring's motions are based on all three and, accordingly, the government respectfully requests that the Court enter an Order denying Kohring's motion for an evidentiary hearing and a transfer of the case regarding Kohring's recusal-related motions.

RESPECTFULLY SUBMITTED this 20th day of March, 2008, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2008,
a copy of the foregoing Government's
Opposition to Defendant's Motion for
Evidentiary Hearing was served electronically on:
John Henry Browne.

s/ Joseph W. Bottini