UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V. **07 Cr. 220 (BSJ)**

PAUL BARNABA,

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO RECUSE ASSISTANT U.S. ATTORNEY HELEN CANTWELL

The Government respectfully submits this memorandum of law in opposition to the defendant's motion to disqualify Assistant U.S. Attorney Helen Cantwell. For the reasons that follow, this motion should be denied.

I. Assistant U.S. Attorney Helen Cantwell Should Not Be Disqualified

A. Background

The Government's investigation concerning Collins & Aikman was publicly disclosed by the company in 2005. From that time, until today, AUSA Helen Cantwell has been the sole prosecutor with responsibility for investigating this matter. Specifically, AUSA Cantwell attended all relevant meetings, including any proffer sessions, and conducted the Government's investigation that ultimately led to the return of Indictment 07 Cr. 220 (BSJ) by the Grand Jury in late March 2007. Even now, although the Government intends to have a second prosecutor begin working on this case, AUSA Cantwell is the only prosecutor who has worked on this investigation and it is clear that AUSA Cantwell has developed an irreplaceable familiarity with

the facts, witnesses, and legal issues of this complex case. Thus, the Government intends for AUSA Cantwell to continue to represent the Government at any trial of this matter.

Barnaba now moves to have AUSA Cantwell disqualified because AUSA Cantwell was present for three proffer sessions with Barnaba, and the statements that Barnaba made during these meetings may be introduced at trial. (Def.'s Mot. at 1). Barnaba does not allege or suggest that AUSA Cantwell is guilty of misconduct and acknowledges that three other individuals also attended the proffer sessions with Barnaba, who potentially could testify to the substance of Barnaba's statements. As AUSA Cantwell took no notes during the interviews, Barnaba also seems to concede that he will not be calling her as a witness at trial. (Def.'s Mot. at 3, n. 1). Thus, Barnaba's only basis for seeking recusal is that AUSA Cantwell may become an unsworn witness at trial because she was present at, and posed questions during, proffer sessions that may become a point of contention at trial. While Barnaba alleges that AUSA Cantwell's "veracity and integrity" will likely come before the jury (Def. Mot. at 4), he does not explain why redacting AUSA Cantwell's name from any notes and informing the jury that a "Government attorney" was present at the sessions -- without identifying that attorney -- would not fully remedy any potential unsworn witness problem. Although AUSA Cantwell's continuing involvement would be entirely appropriate, to remove any possible lingering concerns, the Government will not make any reference to AUSA Cantwell's presence at the meetings. Furthermore, the Government will instruct Government witnesses not to refer to her by name in their trial testimony as being present for these proffer sessions and will remove any mention of her

presence from any documents, should they be introduced as evidence at trial. Consequently, the circumstances of this case simply do not support the extreme remedy of disqualification.

Not only will AUSA Cantwell's pre-trial involvement in this matter fail to render her an unsworn witness at trial, the Second Circuit has clearly held that disqualification is a "drastic remedy to the unsworn witness problem." *United States* v. *Locascio*, 6 F.3d 924, 934 (2d Cir. 1993). The proposed adjustments eliminate any concern that AUSA Cantwell will become an unsworn witness and thus Barnaba's motion should be denied.

B. The Unsworn Witness Rule Neither Mandates Nor Supports Recusal of AUSA Cantwell

Barnaba contends that AUSA Cantwell should be disqualified because her participation in proffer sessions would render her an "unsworn witness" against him at trial, but this assertion is without legal merit. (Def.'s Mot. at 1). First, AUSA Cantwell's pre-trial involvement will not transform her into an unsworn witness at trial. Second, even if she was an unsworn witness, the circumstances of this case fail to support the "drastic remedy" of disqualification. *Locascio*, 6 F.3d at 934.

1. AUSA Cantwell Is Not An Unsworn Witness

AUSA Cantwell's presence at proffer negotiations with the defendant will not transform her into an unsworn witness against Barnaba if she represents the Government at trial. While the defense is correct that "the unsworn witness rule 'stands for the proposition that the prosecutor may not inject his own credibility into the trial,'" (Def.'s Mot. at 4), courts have been equally clear that "every lawyer in every trial is to some extent an 'unsworn witness,'" and "disqualification cannot be ordered every time this happens." *United States* v. *Regan*, 897 F.

Supp. 748, 758 (S.D.N.Y. 1995), *aff'd*, *United States* v. *Regan*, 103 F.3d 1072 (2d Cir. 1997). In *Regan*, the Second Circuit held that in a trial on perjury charges concerning statements the defendant made during grand jury testimony, the AUSA who questioned the defendant during the grand jury proceedings did not become an unsworn witness when she remained a lead prosecutor at the subsequent trial. *Regan*, 103 F.3d at 1083. The Court determined that even "the jury's awareness of [the AUSAs] role in the grand jury proceedings did not by itself make [the AUSA] an unsworn witness for the government." *Id.* Similarly, in *United States* v. *Sanchez*, 2004 WL 315266 (S.D.N.Y. 2004), Judge Casey held that a prosecutor who was present at a pre-trial interview with a defendant did not become an unsworn witness even though the interview of the defendant constituted central evidence at a trial on charges of obstruction of justice and false statements to federal investigators. "Even if the jury is aware of [the AUSA's] participation in the prior…interview, this fact does not make [the AUSA] an unsworn witness." *Sanchez*, 2004 WL 315266 at *2.

Regan and *Sanchez* are directly applicable to the present case, as both involved the possibility of factual disputes arising from out-of-court meetings with the defendant. (Def.'s Mot. at 8). In *Regan*, the defense specifically challenged the circumstances in which grand jury testimony had been elicited, arguing that a hostile and aggressive atmosphere had flustered the defendant. *Regan*, 103 F.3d at 1083. Just as Barnaba contends AUSA Cantwell's role at the proffer sessions will become a "key point" at trial (Def.'s Mot. at 9), the *Regan* prosecutor's prior demeanor and questioning tactics, as well as the general environment in which grand jury testimony was given, became part of the defense at Regan's trial. Similarly, in *Sanchez* the prior interview of the defendant was likely going to be a central focus for the defense at trial. *Sanchez*, 2004 WL 315266 at *1. In both cases, however, the prosecutors were not found to be unsworn

witnesses. Therefore, AUSA Cantwell's continued prosecution of Barnaba, even if the proffer session statements become a fundamental point of contention at trial, does not present an unsworn witness issue.

2. Even if AUSA Cantwell Were an Unsworn Witness, Recusal is Unwarranted

Even if AUSA Cantwell's pre-trial involvement were to qualify her as an unsworn witness, however, her disqualification would remain unwarranted. Fundamentally, there exists no *per se* bar to the trial participation of an attorney with first-hand knowledge of disputed facts, and it is clear that the mere fact that a prosecutor is witness to a defendant's prior statements, or even posed the questions that resulted in those statements, does not require disqualification of Government counsel as an allegedly unsworn witness. *See United States* v. *Bin Laden*, 91 F. Supp.2d 600, 625 (S.D.N.Y. 2000) (no disqualification necessary where any references to the identity of the trial prosecutor present for the interview of the defendant were to be eliminated); *Sanchez*, 2004 WL 315266, at 2 ("The Second Circuit has held. . . that simply witnessing the defendant's prior statements or even eliciting those prior statements does not warrant disqualification of the prosecutor."). In *Regan*, as discussed previously, the Second Circuit found no error in allowing the prosecutor who questioned the defendant in the grand jury prosecute the defendant at trial for perjurious statements made during that questioning. The Second Circuit found that even if the jury knew of the prosecutor's prior involvement, "[t]he mere fact that a prosecutor took part in grand jury proceedings in which a defendant presented false testimony should not bar that prosecutor from participating in a subsequent trial for

perjury." *Regan*, 103 F.3d at 1083. Thus, the fact that AUSA Cantwell was present at Barnaba's proffer sessions, even if the jury does learn of her role, does not require her disqualification.

Furthermore, should Barnaba testify, his cross-examination by AUSA Cantwell poses no basis for her disqualification. Courts have held it proper for the district court to permit a prosecutor to cross-examine a defendant who made incriminating statements in the prosecutor's presence. *See United States* v. *Bin Laden*, 2001 WL 30061, at *10 (S.D.N.Y. 2001) (rejecting the defendant's "concern about having to engage in 'artificial self-editing' during his testimony" if he chose to testify and was cross-examined by same prosecutor who asked questions during grand jury appearance); *see also United States* v. *Marshall*, 75 F.3d 1097, 1106 (7th Cir. 1996) ("During his examination of Marshall, [the prosecutor] made but two clear and simple references to the fact that he was present during her interview with [the FBI Agent]. However, he made no assertion that he believed Marshall was lying, rather he simply contrasted her testimony with that of [the FBI agent]."); *accord United States* v. *Dennis*, 843 F.2d 652, 655 (2d Cir. 1988) (holding that an attorney avoided becoming an unsworn witness by having a third party present during a witness interview). And while the Government does not intend to elicit that AUSA Cantwell was the prosecutor present at the proffer sessions, should this information become apparent to the jury, it still would not require her recusal. *See Regan*, 103 F.3d at 1083 ("The jury's awareness of [the prosecutor's] role in the grand jury proceedings did not by itself make [the prosecutor] an unsworn witness for the government").

This case does not resemble one of the rare instances where a court disqualified a lawyer as an unsworn witness. In such cases, either the advocate was the sole witness to the disputed events, *see United States* v. *McKeon*, 738 F.2d 26, 34-35 (2d Cir. 1984) (defense counsel recused

where defendant planned to testify at trial about conversations with that lawyer), or the lawyer was so deeply involved in a variety of crucial incidents at issue at trial as to require his pre-trial disqualification, *see United States* v. *Locascio*, 6 F.3d 924, 934 (2d Cir. 1993) ("this is an unusual case, in that [the defense lawyer] had allegedly entangled himself to an extraordinary degree in the activities of the Gambino Crime Family"); *United States* v. *Orgad*, 132 F. Supp.2d 107, 124-25 (E.D.N.Y. 2001) (recusal of defense attorney appropriate where attorney was recorded on wiretaps to be admitted at trial). No similar dilemma exists in this case, as three other witnesses, in addition to AUSA Cantwell, attended the proffer sessions, and AUSA Cantwell, rather than "entangling herself to an extraordinary degree" with the defendant, followed office protocol during the proffer sessions with the defendant by speaking with him in the presence of others.

When contemplating disqualification, courts should also consider the attorney's involvement and investment in the case, factors which further weigh against the recusal of AUSA Cantwell. The Second Circuit has held that where a prosecutor "played a significant role" and "given her [the prosecutor's] familiarity with the case," replacing her "without a compelling reason to do so would have been an unwarranted waste of resources." *Regan*, 103 F.3d at 1083. The court in *Sanchez* reiterated that "[a]nother important factor weighing against disqualification is the fact that [the AUSA] has already played a significant role in the case. He conducted the investigation regarding [the defendant's] alleged involvement in the conspiracies and has been an attorney on this case for over five years…replacing [the AUSA] after years of working on the case would be an 'unwarranted waste of resources.'" 2004 WL 315266, at *2. AUSA Cantwell has been the sole prosecutor assigned to this matter since the investigation began two years ago. Contrary to Barnaba's assertion that "the Southern District's fraud

attorneys are essentially fungible" (Def.'s Mot. at 8), given the complex nature of the case, the number of potential witnesses, and the millions of pages of documents already reviewed, replacing AUSA Cantwell and assigning an entirely new prosecution team to the case would result in considerable prejudice to the Government and waste of its resources. Such considerations reinforce the conclusion that AUSA Cantwell's disqualification is inappropriate.

Even where a potential unsworn witness problem exists, the Second Circuit and other courts have endorsed the use of curative measures to avoid the extreme remedy of disqualification, and these measures are available in the present case, as discussed above. "Any perceived 'unsworn witness' problem could . . . [be] eliminated by redacting the attorney's names . . . or by specifically instructing the jury that the attorneys may not vouch for the truth of their clients' statements." *United States* v. *Diozzi*, 807 F.2d 10, 14 n.8 (1st Cir. 1986); *see also Bin Laden*, 91 F. Supp.2d at 624-625 ("It was suggested at oral argument that any unsworn witness problem in this case might be avoided if-through redaction of documents and explicit instructions to the witnesses-the jury is not informed that [the trial AUSAs] were present for the respective interviews…We believe that if measures such as those suggested are taken, any unsworn witness problem…can be resolved"). In cases where courts have rejected such remedies, their decisions have relied in part on concerns of practicality. *Locascio*, 6 F.3d at 934 ("redaction of the [audio] tapes would have eviscerated the government's case"); *see also United States* v. *Orgad*, 132 F.Supp.2d 107, 124-125 (E.D.N.Y. 2001) ("The first proposal, [redaction], is unrealistic in the extreme…[the attorney's] voice would of course have to be redacted from the tapes."). The present case does not suffer such practical problems because only written notes from the proffer sessions exist. It would be extremely simple to ensure that no reference is made to AUSA Cantwell's presence at the proffers, with the jury only learning that a "government

attorney" was present. These curative measures would sufficiently mitigate any residual unsworn witness concerns.

Thus, the proposed remedy of disqualification is unwarranted. The general and speculative "unsworn witness" conflict claimed by Barnaba, without more, is "unconvincing, for every lawyer in every trial is to some extent an 'unsworn witness,'" and "disqualification cannot be ordered every time this happens." *United States* v. *Regan*, 897 F. Supp. at 758. In the present case, AUSA Cantwell's mere involvement in the proffer sessions does not transform her into an unsworn witness, regardless of whether the jury learns of her involvement at trial. Even if one assumed she was an unsworn witness, however, the law does not require recusal of a prosecutor who witnessed or even elicited a defendant's prior statements. Disqualifying AUSA Cantwell, given her significant responsibility since the case's inception, would entail a considerable waste of resources and prejudice to the Government.

II. Conclusion

For the foregoing reasons, the Government respectfully requests that the motion to recuse Assistant U.S. Attorney Helen Cantwell be denied.

Dated: New York, New York
August 17, 2007

Respectfully submitted,

MICHAEL J. GARICA
United States Attorney

By: Helen V. Cantwell Digitally signed by Helen V. Cantwell DN: cn=Helen V. Cantwell, c=US Date: 2007.08.17 15:48:31 -04'00'

HELEN V. CANTWELL
Assistant United States Attorney
Tel.: (212) 637-2193

CERTIFICATE OF SERVICE

HELEN V. CANTWELL deposes and says that I am employed in the Office of the United States Attorney for the Southern District of New York, and that on August 17, 2007, I served a copy of the within Government's Memorandum of Law by causing a copy of the same to be delivered by first class mail to counsel for Paul Barnaba:

Solomon L. Wisenberg, Esq.
Wisenberg & Wisenberg PLLC
1711 N Street N.W. 2nd Floor
Washington, D.C. 20036-2801

All defendants were served with this Memorandum of Law by ECF.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Helen V. Cantwell Digitally signed by Helen V. Cantwell
DN: cn=Helen V. Cantwell, c=US
Date: 2007.08.17 15:49:14 -04'00'

Helen V. Cantwell
Assistant United States Attorney
(212) 637-2193

Dated: New York, New York
August 17, 2007