UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No.: H-97-93
	)	
v.	)	Violations:
	)	
MARK ALBERT MALOOF,	)	15 U.S.C. §1
	)	18 U.S.C. § 371
Defendant.	)	FILED 6/23/97

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISQUALIFY PROSECUTORS MARK R. ROSMAN AND KAREN J. SHARP

The United States, through the undersigned attorney, hereby responds to the defendant's Motion to Disqualify Prosecutors Mark R. Rosman and Karen J. Sharp ("Defendant's Motion").

The defendant has moved to have prosecutors Mark Rosman and Karen Sharp disqualified from conducting the trial in this matter due to the ethical prohibition against a lawyer conducting a trial in which he or she will be a necessary witness. The defendant asserts that the prosecutors are material witnesses in this case because they "have personal knowledge of material, exculpatory information which is crucial to the defense." Defendant's Motion at 1.

The defendant may not call the prosecutors as witnesses unless there is a compelling need to do so. The defendant has failed to demonstrate a compelling need

to call the prosecutors as witnesses in this case. Therefore, the defendant's Motion to Disqualify the prosecutors should be denied.[1]/

Argument

A defendant cannot call a prosecutor as a witness unless he demonstrates (1) a compelling need for the testimony of the prosecutor, and (2) that he has exhausted all other sources of the information he seeks from the witness' testimony. United States v. Regan, 103 F.3d 1072, 1083 (2d Cir. 1997); United States v. Ashman, 979 F.2d 469, 494 (7th Cir. 1992); United States v. Tamura, 694 F.2d 591, 601 (9th Cir. 1982); United States v. Brothers, 856 F. Supp. 388, 391 (M.D. Tenn. 1993). A defendant seeking a prosecutor's testimony must demonstrate that the evidence is vital to his case, and that his inability to present the same or similar facts from another source creates a compelling need for the testimony. United States v. Watson, 952 F.2d 982, 986 (8th Cir. 1991); United States v. Troutman, 814 F.2d 1428, 1440 (10th Cir. 1987).

In this case, the defendant has failed to demonstrate a compelling need for the prosecutors' testimony or that the information sought cannot be obtained from an alternative source. While the government takes exception to the defendant's statement of "facts" in his Motion, it is evident that neither prosecutor Rosman nor Sharp was a witness to any events that occurred on June 21, 1995, before they met with the defendant. Defendant's Motion at 1-3. As the prosecutors have no personal

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[1]/ Employees of the U.S. Department of Justice have no authority to testify until the procedures set forth in 28 C.F.R. § 16.21 et seq. are satisfied. By letter dated June 10, 1997, the defendant made a demand pursuant to 28 C.F.R. § 16.23(c) to the U.S. Department of Justice for the testimony of Mark Rosman and Karen Sharp. The defendant's demand is presently under consideration by the Justice Department.

knowledge of the events prior to their meeting with the defendant, they are not material witnesses to those events and should not be called to testify. See Fed. R. Evid. 602.

With respect to the events that occurred during the prosecutors' meeting with the defendant, it is not essential that the prosecuting attorneys testify at trial. The government does not contest the fact that prosecutors Mark Rosman and Karen Sharp met with the defendant on June 21, 1995, and that the defendant was offered immunity, which he declined to accept. (See Defendant's Motion Exhibit 2.) Moreover, other witnesses are available to testify about the contested facts on which the defendant's Motion is based. Two Special Agents from the Federal Bureau of Investigation, Frank Eldredge and James Hawkins, were present during the entirety of the meeting between the defendant and the prosecutors and are available to testify to the events in question. Because there are other witnesses available to testify, there is no compelling need to put the prosecuting attorneys on the stand to testify. United States v. Ashman, 979 F.2d at 494; United States v. Roberson, 897 F.2d 1092, 1098 (11th Cir. 1990); United States v. Brothers, 856 F. Supp. at 391; United States v. Wallach, 788 F. Supp. 739, 744 (S.D.N.Y.), aff'd, 979 F.2d 912 (2d Cir. 1992). Cf. United States v. Prantil, 764 F.2d 548, 551 (9th Cir.), op. superceded, 764 F.2d 548 (9th Cir. 1985) (finding defendant had a compelling need for prosecutor's testimony when that testimony was the only source of vital evidence).

In Brothers, the defendants tried to disqualify the prosecuting attorneys for being potential trial witnesses because the prosecutors had participated in a meeting in which the defendant was offered immunity. 856 F. Supp. at 390-91. In denying the defendants' motion, the court relied on the fact that there were other investigating

agents present at the meeting who could testify to what occurred during the meeting. Id. at 391. Here, as in Brothers, the defendant has other sources of evidence available, namely two FBI agents, that must be exhausted before the prosecutors are called as witnesses. Id.

As another court has observed "[t]he law does not liberally permit a defendant to call a prosecutor as a witness. On the contrary, a defendant must demonstrate a compelling and legitimate need to do so. Where witnesses other than the prosecutor can testify to the same matters or conversations, no compelling need exists." United States v. Wallach, 788 F. Supp. 739, 743-44 (S.D.N.Y. 1992) (citations omitted). Here, two FBI agents were present during the defendant's meeting with the prosecutors and are available to testify as to what took place during the meeting.

Conclusion

The defendant has not shown a compelling need to call prosecutors Mark Rosman and Karen Sharp as material witnesses in this case. The prosecutors' testimony concerning their meeting with the defendant on June 21, 1995, is unnecessary and cumulative because the defendant can present testimony on this event through two FBI agents who were present during the meeting. The defendant has

identified no evidence which he has a compelling need to present through the testimony of the trial prosecutors. Therefore, the Defendant's Motion should be denied.

Respectfully submitted,

/s/

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ORDER

Upon consideration of the defendant's Motion to Disqualify Prosecutors Mark R. Rosman and Karen J. Sharp, and the response of the United States,

The Defendant's Motion is hereby DENIED.

DONE AND ENTERED THIS ____ day of _____, 1997.

_____

United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the United States' Response to Defendant's Motion to Disqualify Prosecutors Mark R. Rosman and Karen J. Sharp was sent via Federal Express this _____ day of June, 1997, to:

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/s/

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