UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CRIMINAL ACTION NO. 3:00CR-123-H

UNITED STATES OF AMERICA, PLAINTIFF

V.

W. ANTHONY HUFF, et al. DEFENDANTS

MEMORANDUM OPINION

Defendant W. Anthony Huff has moved the Court to disqualify from his prosecution all attorneys in the Office of the United States Attorney for the Western District of Kentucky. He argues that the Supreme Court of Kentucky's interpretation of its own ethical rules, as explained in *Whitaker v. Commonwealth*, 895 S.W.2d 953 (Ky. 1995), requires such action. Interpreting that case in the context of the Ethical Standards for Prosecutors Act, 28 U.S.C. § 530B, presents considerable difficulty. The parties have each made convincing arguments both in memoranda and in conference with the Court.

I.

The material facts are undisputed. A federal grand jury indicted Huff on November 16, 2000, on charges of mail fraud, money laundering and criminal forfeiture, all of which arose from many complex transactions surrounding the financing of insurance risks and policies. Soon thereafter, attorney Stephen B. Pence entered an appearance as Huff's counsel and for approximately nine months was personally and substantially involved in the preparation of Huff's defense. On August 3, 2001, President Bush nominated Pence for the position of U.S. Attorney for the Western District of Kentucky. On August 8, Pence moved to withdraw as

counsel for Huff. On August 13, acting U.S. Attorney Monica Wheatley established a "fire wall" separating Pence from any involvement in the Huff case. Pence was sworn in as U.S. Attorney the following month. Joseph M. Whittle represented Huff until February 12, 2002. Thereafter, Rob Eggert took over the representation. On June 21, 2002, Eggert filed the pending motion to disqualify Pence and his entire office.

II.

In 1998, Congress enacted the Ethical Standards for Prosecutors Act, better known as the McDade Act, which applies state court rules to federal government attorneys as follows:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. § 530B(a). Moreover, pursuant to this law, the Department of Justice has promulgated a rule that its attorneys must "comply with state and local federal court rules of professional responsibility . . ." 28 C.F.R. § 77.1(b). Consequently, the Kentucky court's interpretation of Kentucky Supreme Court Rule 3.130(1.11(c)(1)) becomes this Court's primary concern.

The central case at issue is *Whitaker v. Commonwealth*, which Huff contends requires disqualification of the entire U.S. Attorney's Office from this case. In *Whitaker*, a public defender representing the appellant on a murder charge had resigned and immediately moved to a position with the Commonwealth Attorney's office. At a pretrial hearing, the trial judge had denied the appellant's motion to disqualify the Commonwealth Attorney's office, upon assurance that the former public defender had neither discussed nor been involved in the appellant's prosecution after she moved to that office. *See id*. at 954-55.

Under then-existing precedent, the trial court's refusal to disqualify had been proper,

because the accused had not proved actual prejudice. *See Summit v. Mudd*, 679 S.W.2d 225, 225-26 (Ky. 1984) ("[A]ctual prejudice must be shown before the Commonwealth Attorney's entire staff is disqualified. The mere possibility of the appearance of impropriety is not sufficient to disqualify the entire staff of the Commonwealth Attorney's office . . . ."). On appeal, the *Whitaker* court considered the application of Supreme Court Rule 3.130 (1.11(c)(1)), which mirrors Rule 1.11(c)(1) of the American Bar Association's Model Rules of Professional Conduct. That rule states in pertinent part:

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not . . . [p]articipate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.

Applying this rule, the *Whitaker* Court refashioned the standard for disqualification from one requiring proof of prejudice to one requiring only proof of personal and substantial involvement by the former advocate. Kentucky's highest court explained as follows:

> Having considered this matter at length, we have decided that a remand is the appropriate step to take on this issue, but we believe the focus of the evidentiary hearing must be slightly different than as was set forth in *Summit v. Mudd*. We begin our consideration with Supreme Court Rule 3.130 (Kentucky Rules of Professional Conduct, Rule 1.11), which is applicable to successive government and private employment:
>
> > (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
> >
> > (1) Participate in a matter [in] which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.
>
> It is clear from the language of this rule that it is the relationship between the lawyer and client that must be the focus of the conflict examination. The trial court must

> examine the depth to which the attorney/client relationship was established. . . .
>
> We are mindful that the commentary to [this rule] specifically states that: "Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated." However, commentary provides merely a guide to interpretation of the rules as set forth, but does not have the force of law. Given that the case at bar involves the very delicate and important issue of client confidentiality in the context of a criminal trial, we believe that the Sixth Amendment to the United States Constitution requires a careful inquiry by the trial court and disqualification of the entire office of the Commonwealth's Attorney if the attorney has engaged in a substantial and personal participation in the defendant's case, for to do otherwise would be to ignore the potentially chilling effect of any future attorney/client relationships.

895 S.W.2d at 955-56 (citations omitted).

To understand *Whitaker's* relevance here one must divine whether the decision requiring disqualification of an entire prosecutorial office rests upon Rule 1.11(c)(1) or an interpretation of the Sixth Amendment. The answer is unclear. The Supreme Court has twice referenced its holding in *Whitaker*, without shedding further light on its basis. In *Savage v. Commonwealth*, 939 S.W.2d 325, 329 (Ky. 1996), a case in which a public defender had "switched sides," the Supreme Court cited *Whitaker* for the need to determine the depth of the attorney-client relationship involved, but affirmed the trial court's decision not to disqualify the entire Commonwealth Attorney's office because the defender had not been involved personally and substantially in the appellant's defense. Later, in *Commonwealth v. Maricle*, 10 S.W.3d 117 (Ky. 1999), the Supreme Court applied *Whitaker's* holding to a case which raised no Sixth Amendment issues whatsoever. The Assistant Commonwealth's Attorney who had formerly prosecuted the appellee had resigned her office and joined the law firm defending him. The Court determined, however, that she had remained involved in the prosecution after negotiating her new employment, raising an inference that she had not screened herself from participation in

the case with her new employer. The Court applied *Whitaker* to disqualify not only the former Assistant Commonwealth's Attorney but her entire firm. *See Maricle*, 10 S.W.3d at 118-21.

Both *Savage* and *Maricle* cite *Whitaker* and Rule 1.11(c)(1), but neither case offers much further insight to the court's reasoning. Had the *Whitaker* court predicted – three years before the McDade Act – that federal courts in the Commonwealth would question whether *Whitaker* merely applied the Supreme Court Rules or had added an interpretation of the Sixth Amendment, undoubtedly that court would have been more precise. In any event, its imprecision raises many questions.

It is not clear that the Kentucky Supreme Court meant to suggest that the Sixth Amendment alone requires disqualification of an entire prosecutorial office in these circumstances. If it so intended, that view is entirely misplaced. Federal courts have uniformly concluded that where an attorney leaves private practice for service in government, absent a showing of actual prejudice the Sixth Amendment does not mandate the disqualification of other government lawyers in the new office from handling matters in which that attorney was involved in his former practice. *See United States v. Caggiano*, 660 F.2d 184, 190-91 (6th Cir. 1981); *see also United States v. Goot*, 894 F.2d 231, 233-37 (7th Cir. 1990); *United States v. Schell*, 775 F.2d 559, 566 (4th Cir. 1985). Moreover, if one reads *Whitaker* as interpreting Model Rule 1.11(c)(1) to require *per se* recusal of an entire governmental office, Kentucky literally stands alone among the states. *See*, *e.g.*, *In re R.B.*, 583 N.W.2d 839, 841 (S.D. 1998); *Johnson v. State*, 675 N.E.2d 678, 682 (Ind. 1996); *State ex rel. Tyler v. MacQueen*, 447 S.E.2d 289, 291-93 (W. Va. 1994); *State v. Pennington*, 851 P.2d 494, 499-500 (N.M. Ct. App. 1993); *Turbin v. Superior Court*, 797 P.2d 734, 736-38 (Ariz. Ct. App. 1990); *State v. Cote*, 538 So.2d 1356, 1357-58 (Fla.

Dist. Ct. App. 1989).[1]

Ultimately, this Court must decide whether existing Kentucky law requires disqualification of the U.S. Attorney's Office, or, if that law is unclear, then it must predict how Kentucky's highest court would rule in these circumstances. *See Dinsmore Instrument Co. v. Bombardier, Inc.*, 199 F.3d 318, 320 (6th Cir. 1999). Whatever the precise rule and rationale in *Whitaker*, this Court doubts that Kentucky's Supreme Court would apply it with the same result to a U.S. Attorney's Office. Such an office covers half the state, rather than a single county, and contains full-time prosecutors with direct oversight from the Justice Department, rather than employing some part-time lawyers under an elected head as in *Whitaker*. As to a large office such as the U.S. Attorney for the Western District of Kentucky, the Court concludes that Kentucky courts would look for any evidence of actual prejudice or a more apparent probability of prejudice. None of the facts here demonstrate the possibility of either. Consequently, this Court doubts that Kentucky courts would take the drastic action of disqualifying the entire office of a U.S. Attorney from involvement in such a case.

A final factor is relevant in a close case such as this. Uniformity of interpretation throughout the Western District is important on such an issue. Misunderstandings are likely if various federal judges within the district apply different criteria or standards to this sensitive issue. Judge Russell has recently considered this issue and concluded that disqualification of the U.S. Attorney need not be imputed to his entire office. *See United States v. Burks*, No. 3:99CR-138-R (W.D. Ky. Aug. 10, 2001). That ruling is not binding on this Court. However, the Court

[1]Further, federal courts have concluded that Model Rule 1.11(c)(1) does not impute disqualification of one lawyer in a governmental office to all lawyers therein. *See In re Grand Jury Investigation of Targets*, 918 F. Supp. 1374, 1378 (S.D. Cal. 1996); *Euell v. Rosemeyer*, 153 F.R.D. 576, 578-79 (W.D. Pa. 1993).

is comfortable with much of its analysis and finds value in a consistent rule within the District.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

Defendant W. Anthony Huff has moved the Court to disqualify the Office of the United States Attorney for the Western District of Kentucky from prosecuting him in this matter. The Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion to disqualify is DENIED.

This ____ day of August, 2002.

_____
JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record