

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff

v.

ADALBERTO BRITO,

Defendant

Crim. No. 03-146 (DRD)

PUERTO RICO ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

Intervener

MOTION TO INTERVENE

The Puerto Rico Association of Criminal Defense Lawyers (PRACDL), through the undersigned counsel, respectfully moves this Court to permit its intervention in support of the Motion to Vacate Order for Hearing and Other Relief filed by Ms. Esther Castro Schmidt, attorney for defendant Adalberto Brito. PRACDL also moves the Court to reconsider its order conditionally disqualifying Ms. Castro Schmidt from representing defendant Brito and setting a hearing at which she is required to present evidence.

PRACDL seeks to intervene in order to protect the right of Ms. Castro Schmidt and all of its members to zealously advocate for our clients, and specifically, her right to

represent Mr. Brito without interference by the government into Mr. Brito's Sixth Amendment right to counsel of choice.

Intervenor Puerto Rico Association of Defense Lawyers is composed of members of this Bar who represent defendants in criminal proceedings. PRACDL has been in existence since 1991. During this time we have endeavored to create and foment an organization dedicated to promoting the education, training and mutual cooperation among criminal defense lawyers in the District. Our aim is to elevate the standards of practice of criminal defense lawyers, to defend and protect the right to counsel, and to assist attorneys subject to retaliation, harassment or incursions on the attorney-client privilege.

PRACDL is affiliated with the National Association of Criminal Defense Lawyers (NACDL), the preeminent association of criminal lawyers in the United States. As such, we join NACDL's mission to ensure justice and due process for persons accused of crime; foster the integrity, independence and expertise of the criminal defense profession and promote the proper and fair administration of criminal justice.

PRACDL is gravely concerned with the implications and ramifications of the government's attempt to interfere with Ms. Castro Schmidt's representation of defendant Brito. PRACDL is also gravely concerned about the serious consequences of the Court's Order of June 24, 2004 upon the Sixth Amendment rights of defendants and upon criminal defense attorneys' ethical and constitutional duties to our clients and

our right to practice our profession free from gratuitous harassment and interference from the government.

If the Court's order persists and the government's position is allowed to proceed, every defense lawyer in this district could be forced, before representing a client in a criminal matter, to prove to the satisfaction of the Court and the government the source of the funds and the identity of the payor, in effect creating a litmus test for obtaining permission to engage in his/hers duty to represent a defendant and to practice our chosen profession.

In the alternative, PRACDL moves this court for leave to appear as Amicus Curiae to attorney Esther Castro Schmidt in support of her Motion to Vacate Order for Hearing and Other Relief.

I. PRACDL HEREBY ADOPTS IN ITS ENTIRETY THE MOTION TO VACATE ORDER FOR HEARING AND OTHER RELIEF AND ITS INCORPORATED MEMORANDUM OF LAW FILED BY ESTHER CASTRO SCHMIDT ON THIS SAME DATE.

Of particular concern to PRACDL is the attempt by the government to generalize the use of *Nebbia* hearings as a wedge to interfere with a defendant's right to counsel of choice and an attorney's right to practice his/her profession.

As ably stated by counsel for Ms. Castro Schmidt, the Sixth Amendment right to counsel is of paramount value. Courts have to be very mindful to prevent any use of its power to facilitate for the government a means to disrupt the attorney-client relationship. See *Motion to Vacate Order*, pp. 8-9 and cases cited therein.

The inquiry authorized by **Nebbia** is specifically and solely for the District Court to inquire into the source of funds or property offered to guarantee a defendant's appearance. 18 U.S.C. §3142(g)(4).

PRACDL is aware that during the past few months there have been several attempts in other cases in this district to use **Nebbia** hearings as a vehicle to gather information as to the source of fees and the attorney-client relationship. No one denies the right to a legitimate government or grand jury investigation into illegal activity. But this type of unfounded government inquiry into the attorney client-relationship, based on speculation and contrary to law can not be allowed by the Court. The resulting chilling effect on the Sixth Amendment right to counsel is impermissible.

II THE REQUEST FOR AN INQUIRY AND THE COURT'S ORDER SHOULD BE SET ASIDE SINCE IT WAS IMPROPERLY MOTIVATED BY THE GOVERNMENT'S VINDICTIVE DESIRE TO PUNISH THE DEFENDANT FOR EXERCISING HIS CONSTITUTIONAL RIGHTS AND AGAINST ATTORNEY CASTRO-SCHMIDT' ABLE REPRESENTATION

It has been well established by our Supreme Court that a prosecutor's actions directed at punishing a defendant's exercise of his clearly established rights, violate the Due Process Clause of the Fifth Amendment of our Constitution **See *United States v. Goodwin*, 457 U.S. 368, 372 (1982), *North Carolina v. Pearce*, 395 U.S. 711, 724-725 (1969)** (citations omitted). If a prosecutor retaliates against a defendant's successful appeal by bringing a more serious charge against him, that conduct amounts to vindictive prosecution and is therefore unconstitutional. **See *Blackledge v.***

Perry, 417 U.S. 21, 28 - 29 (1974) (citations omitted). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a cause of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional."

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citations omitted).

To establish a due process violation because of vindictive prosecution a defendant must either provide objective evidence that shows (1) the prosecutor's vindictive animus toward the defendant and (2) that the defendant would not be prosecuted but for that animus, or the defendant may show that the circumstances "pose a realistic likelihood of vindictiveness" that warrant a presumption of vindictiveness. **See Goodwin, 457 U.S. 368,376 (1982). Blackledge v. Perry, 417 U.S. 21, 25 (1974), United States v. Wilson, 262 F.3d 305, 321 (2001)**. When the defendant succeeds in showing that the circumstances pose a realistic likelihood of vindictiveness, the burden shifts to the prosecutor who must show objectives reasons for the additional charges that were not present when the original charge was brought. **See Goodwin, 457 U.S. at 376 (1982)**.

In **Thigpen v. Roberts, 468 U.S. 27 (1984)**, the Supreme Court held that a presumption of prosecutorial vindictiveness arises when a defendant is indicted on more serious charges after pursuing collateral relief on original charges, and both offenses arise from the same incidents. The situation in this case, although it does not

present the filing of a new indictment, it certainly is akin to a new prosecution. The government has announced its intention to pursue enhancements to Mr. Brito's sentence, disputes the veracity of the safety valve debriefing and has moved to disqualify, with no basis, his counsel of choice. Clearly the intent is to punish. As stated by counsel for Attorney Castro-Schmidt "*The absence of any facts to sustain the alleged basis for the inquiry, in addition to the absence of any independent basis for the exercise of the Court's power, point to the heart of the elephant in the living room: the prosecution's discontent with Mr. Brito's role in Mr. De la Cruz' trial, and its desire to retaliate for the acquittal obtain by movant for her prior client.*" See Motion to Vacate Order, pp.11-12.

It is disconcerting to see the reaction of the government in this case because a jury of twelve citizens believed Mr. Brito and found defendant not guilty.

A defendant need not, however, prove actual vindictiveness, but may instead put forth sufficient facts and circumstances to enable the conclusion that a presumption of vindictiveness has arisen. ***Blackledge v. Perry, 417 U.S. 21 (1974), North Carolina v. Pearce, 395 U.S. 711 (1965)***. In determining whether a presumption exists, the Supreme Court has counseled that the timing of the determination to bring additional charges is critical:

"There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting... In contrast, once a trial begins - **and certainly by the time a conviction has been obtained** - it

is much more likely that the State has discovered and assessed all of the Information against an accused and has made a determination, on the basis of that information, of the extent of which he should be prosecuted. Thus a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

... [A] change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision " because " the prosecutor's assessment of the proper extent of prosecution may not have crystallized" until after a pretrial investigation of a case is fully completed." (*United States v. Goodwin*, 457 U.S. 368, 380-381 (1982)).

In ***Goodwin, supra***, the prosecutor's decision to add additional charges to an indictment was made before trial but after the defendant failed to plead as expected. Here the government is pursuing a course directed at disqualifying defendant's attorney of choice, without any statutory or factual basis, with the obvious objective of punishing defendant for exercising his constitutional rights.

The government's requests to disqualify Ms. Castro- Schmidt constitute not only a serious threat to her professional and personal reputation, her ability to defend Mr. Brito and other clients before this Court, but also a threat to every conscientious criminal defense lawyer in this district who chooses to vigorously represent his/hers clients.

WHEREFORE, we respectfully request that the Puerto Rico Association of Criminal Defense Lawyers (PRACDL) be permitted to intervene in support of the Motion to Vacate Order for Hearing and Other Relief filed by Ms. Esther Castro Schmidt,

attorney for defendant ADALBERTO Brito. PRACDL also moves the Court to reconsider its order conditionally disqualifying Ms. Castro Schmidt from representing defendant Brito and setting a hearing at which she is required to present evidence.

In the alternative, PRACDL moves this court for leave to appear as Amicus Curiae to attorney Esther Castro Schmidt in support of her Motion to Vacate Order for Hearing and Other Relief.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this November 11, 2004.

CERTIFICATE OF SERVICE. I hereby certify that on November 11, 2004, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: **Atty. Jennifer Y. Hernandez-Vega** (jenifer.hernandez@doj.gov) ; **Atty. Ms. Rachel Brill** (rabrill@attglobal.net) ; **Atty. Ms. Esther Castro-Schmidt** (ecastrolaw@prtc.net) ; **Atty. Ramon Gonzalez-Santiago** (rmgonzalezsq@aol.com). Atty Linda Backiel (backiel@coqui.net) .

**PUERTO RICO ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

Jorge Arroyo, Esq.-President
Suite 201, Metroparque VII
Metro Office Park,
San Juan, PR 00968
787-783-0505

S/Juan R. Acevedo-Cruz _____

JUAN R. ACEVEDO-CRUZ (120701)
ATTORNEY for PRACDL
174-A O'NEILL STREET
SAN JUAN PR 00918
TEL. (787) 751-2341
FAX. (787) 751-2795
Email: [jracedo@coqui.net](mailto:jracevedo@coqui.net)