

MICHELE L. KOHLER
MICHELE L. KOHLER, P.C.
205 SE Spokane Street, Suite 300
Portland, Oregon 97202
[503] 219-9300
[503] 345-9622
michele.kohler@comcast.net
OSB #94359

Attorney for Defendant Duane Leo Ehmer

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,

No. 3:16-CR-00051-10-BR

Plaintiff,

DECLARATION OF
MICHELE L KOHLER IN
SUPPORT OF MOTION
TO RECUSE JUDGE FOR
BENCH TRIAL ON CLASS B
MISDEMEANORS

v.

DUANE LEO EHMER,

Defendant.

I, Michele L. Kohler, declare:

1. I am a member of the Criminal Justice Act panel of attorneys and was appointed pursuant to 18 U.S.C. §3006A to represent Duane Leo Ehmer in the above-captioned case on or about May 16, 2016 as substitute counsel.

2. Mr. Ehmer is charged by Superseding Indictment dated March 8, 2016, charging him with one (1) count, Conspiracy to Impede Officers of the United States in violation of 18 U.S.C. § 372. The Superseding Indictment charged twenty-six defendants

with Conspiracy to Impede Officers of the United States; twenty defendants charged with Possession of Firearm and Dangerous Weapons in Federal Facilities; three defendants charged with Theft of Property and one defendant charged in Depredation of Government Property.

3. The Court has declared this a complex case.

4. On September 7, 2016, a trial for seven (7) of the defendants commenced.

5. The trial resulted in the acquittal of all seven defendants on the Conspiracy to Impede Officers of the United States, Possession of Firearms and Dangerous Weapons in Federal Facilities and one count of Theft of Government Property on October 27, 2016. There was one count of Theft of Government Property in which a mistrial was declared as the jury was unable to reach a verdict.

6. The remaining seven (7) defendants are scheduled to begin trial on February 14, 2017. The trial will be on the charges alleged in the Superseding Indictment as well as seven (7) misdemeanor offenses filed by Information on December 19, 2016 (Dkt. No. 1628) and Indictment in Case No. 3:16-cr-00493-BR filed December 22, 2016, which the Court ordered on January 30, 2017 to be joined to the present matter for trial.

7. On December 14, 2016, the Court had ordered the parties to submit a joint status report by January 4, 2017 which in part sets out “any additional, jointly-proposed elements-instructions as to charges that are different from those that were at issue in the trial that began September 7, 2016.” Thereafter, the parties drafted and conferred concerning jury instructions for all seven misdemeanor offenses.

8. At the January 6, 2017 Status Conference, the Court sua sponte suggested to the government that the offenses alleged in the Information did not provide the defendants with a right to a jury trial. The parties were ordered to confer and submit their legal positions regarding the right to a jury trial on the misdemeanors in a subsequent filing to the Court. The defendants argued that the misdemeanor offenses contained in the Information were Class A misdemeanors as they were pled with a “knowing” mens rea. 16 U.S.C. § 668dd(f)(1) provides that a “knowing” violation of any regulations issued thereunder, including 50 C.F.R. 28.31, “shall be fined under title 18 or imprisoned not more than 1 year or both” thereby giving the defendants a right to a jury trial.

9. The Court ruled the offenses to be Class B misdemeanors and “therefore, qualified as petty offenses to which the right to a jury trial does not attach.” Dkt. 1756. The Court ordered that there will be no jury trial on the misdemeanors, instead the matter will be tried to the Court in connection with the jury trial of the felony counts, but evidence specific to the misdemeanors counts will be received outside the presence of the jury. Dkt. No. 1775.

10. The defendant moves for the Court to recuse itself from being the trier of fact as to the misdemeanor offenses on the grounds that the Court’s impartiality can be called into question. 28 U.S.C. §455(a). This motion is based upon a private meeting the Court held with the September 7, 2016 jurors after the verdict was received. The Court not only answered questions the jurors had, but also discussed the merits of the case with specific reference to potential misdemeanor offenses that could have been used by the

government, including trespass and the perceived inadequacy of a sentence to the government for misdemeanor criminal trespass in reference to the acquitted defendants' conduct.

11. Further, during this private meeting which lasted over an hour, the Court invited "advice for the prosecution" knowing that there still remained seven (7) defendants whose trial was scheduled to begin just a few months thereafter and a trial over which the Court was scheduled to preside.

12. The defendant believes that the actions of the Court in discussing the merits of potential misdemeanor offenses with the discharged jurors, over which the Court has now ruled do not afford the defendants a right to a jury trial and, particularly seeking information from the jury that would "aid" the government in the subsequent trial calls into question it's ability to be impartial.

13. The Ninth Circuit has provided an objective test for determining whether recusal is required: "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010)(citing *Clemens v. U.S. District Court for the Cent. Dist of Cal.*, 428. F.3d. 1175, 1178 (9th Cir. 2005).

//

//

//

//

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 1st day of February, 2017.

Respectfully submitted,

by: /s/ Michele L. Kohler
MICHELE L. KOHLER, OSB No. 94359
Attorney for Duane Leo Ehmer