UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL DOCKET NO. 07-103
v.	*	SECTION: "L"
JAMES G. PERDIGAO a/k/a Jamie Perdigao	*	

* * *

MOTION AND INCORPORATED MEMORANDUM IN OPPOSITION TO DEFENDANT PERDIGAO'S RECONSIDERATION MOTION

The United States of America, by and through the undersigned Assistant United States Attorneys, hereby opposes the motion filed by defendant James G. Perdigao (hereafter "Perdigao") seeking to reconsider this Court's decision issued on July 9, 2008 (Doc. 117, hereafter "Order & Reasons").

On July 9, 2008, this Court issued its Order & Reasons denying Perdigao's "Motion for Recusal of U.S. Attorney's Office Eastern District of Louisiana and Request for Evidentiary Hearing," filed on April 17, 2008 (Doc. 96). Prior to issuance of its legally and factually comprehensive Order & Reasons, this Court entertained numerous written briefings[1] as well as several status conferences, all devoted to the instant

[1] For example, this Court already has received and considered in response to Perdigao's novel request for full office-wide recusal of the government entity prosecuting him extensive pleadings and attachments which include, but are not limited to, the government's initial April 21 lengthy opposition, its more lengthy May "supplemental" opposition, and its even more lengthy "second supplemental opposition." These filings culminating in the Court's July 9 Order & Reasons span almost five months of responsive pleadings and consideration of this issue by this Court. Perdigao cannot credibly contend that the Court's ruling was abrupt or uninformed.

collateral, pretrial matter which the Court correctly, and understatedly, describes as a document "putting forth several sensational allegations against the Government…." Order & Reasons, at 2.

Perdigao was indicted well over a year ago for serious felony offenses alleging in excess of $30 million dollars of stolen money arising out of criminal conduct commencing over seventeen years ago. See Superseding Indictment, Doc. 62-3, at 3. This reconsideration motion, like Perdigao's protracted and false plea bargaining overtures, continues Perdigao's pattern of avoidance of the judicial process, and possible incarceration and substantial forfeiture of moneys relating to his charged criminal conduct.

1. Strict and Rare Standard Applied to Reconsideration Motions

Preliminarily, reconsideration of a Court's previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources. The moving party must present controlling, or intervening law, or factual matters submitted to the Court that the Court overlooked that might have materially influenced its decision. Ackermann v. United States, 340 U.S. 193, 199-200 (1950). Cf. Fed. R. Civ. P. 60(b)(6); 5th Cir. R. 40.2 (hearing petition "is not used for reargument of the issue previously presented") (Fifth Circuit emphasis in original); Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir.2005). Perdigao overlooks, however, any reference to this strict and rare standard applied to reconsideration motions nationwide by district courts. See generally Ackermann, supra, 340 U.S. at 199-200; see also United States v. Lee, 2008 WL 2937802, at *1 & n.1 (S.D.N.Y. July 30, 2008); United States v. Ogden, 2008 WL 2704539, *1 (W.D. Tenn. July 2, 2008) (quoting settled and

narrow authority that "'three situations justify a district court altering or amending its judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or to prevent a manifest injustice'") (internal citations omitted).

Above all, a reconsideration motion does not "'give an unhappy litigant an opportunity to relitigate matters already decided, nor is it a substitute for appeal…' [nor may] 'parties…use a motion for reconsideration to raise new legal arguments that could have been raised before a judgment was issued.'" Id. (internal citations omitted).

2. **Perdigao Makes No Showing of Extraordinary Character Which Would Trigger Legal or Factual Reconsdiration**

Applied to the instant case, Perdigao does not contend that reconsideration must occur because of an intervening change in controlling law. In fact, Perdigao, at last but still indirectly, acknowledges that no Circuit law supports his request for office-wide recusal. See Perdigao Office-Recusal Denial Reconsideration Memorandum, at 16-22 (seeking to distinguish caselaw already considered and applied by this Court, but not disputing its underlying correctness).[2] By contrast, this Court in its Order & Reasons, as

[2] Contrary to the aforementioned narrow reconsideration motion strictures established by caselaw, Perdigao's one new citation relating to office-wide disqualification of the government is (1) a decision that is six years old, so was available to Perdigao before the Court's Order & Reasons; (2) is not authority or even Circuit-level, by contrast to the extensive law adhered to or considered by this Court in its Order & Reasons; and (3) regardless, is a district court ruling outside the Fifth Circuit that readily is distinguishable factually and legally. See Perdigao Office-Recusal Denial Reconsideration Memorandum, at 20 (citing United States v. Dyess, 231 F.Supp. 2d 493 (S.D.W. Va. 2002). In this regard, Perdigao neglects to note that the West Virginia district court's decision in Dyess was not in a pre-trial context at all, but rather applied disqualification only "from further participation in the prosecution of all matters related to the Court of Appeals remand order [after conviction and sentencing and involving investigative agents' misconduct disclosed and confirmed by the government]," Dyess, at 498-499. More decisive, opposite to being new law, this Court in denying Perdigao's original motion cited and relied on decisional law explicitly embracing the Dyess decision and noting that even that decision held that recusal is extraordinary and drastic. See Order & Reasons, at 4 (citing United States v. Manna, 2006 WL 3063456 (D.J.J. Oct. 25, 2006)); United States v. Perdigao, Cr. No. 07-CR-103, at 6 (E.D.La. June 6, 2008) (same) (transcript of office-wide recusal denial hearing, attached hereto and referred to hereafter as Recusal Denial Oral Statement of Reasons).

well as its additional oral statement of reasons overlooked now entirely by Perdigao, explicitly cited and relied on over one dozen controlling decisions from the United States Court of Appeals for the Fifth Circuit, and also extensively considered and applied the persuasive authority from all other Circuits, and indeed, sua sponte found and discussed even pertinent district court rulings from around the country. See Order & Reasons, at 3-5; see also United States v. Perdigao, Cr. No. 07-CR-103, at 5-7 (E.D.La. June 6, 2008) (hereafter, "Recusal Denial Oral Statement of Reasons").

Second, Perdigao does not contend that reconsideration must occur based on the new availability of evidence. To the exact contrary, even at this after-the-fact point, Perdigao continues to submit no factual showing behind his sensationalist allegations that would have entitled him to an evidentiary hearing. Tellingly, he attaches as support, finally and even at this reconsideration stage, only two long pre-existing, insignificant (and government-authored items), specifically an office personnel listing and a letter to him from the government dated two years ago and confirming this Court's findings of Department of Justice quick and independent inquiry, which itself contradicts Perdigao's original innuendo that investigation into possible wrongdoing had been suppressed. See Perdigao Office-Recusal Denial Reconsideration Memorandum, Exhs. 1 & 2. In this regard, Perdigao's reconsideration motion is what is prohibited, namely reargument of speculation made before, but now with unsupported attack not on the United States Attorney's Office but against this Court. Whereas Perdigao now purports to complain that the Court's June 6 ruling was "[w]ithout any notice" to him, and speculates that "the court failed to review and summarize evidence, [and] identify and address the hotly contested factual issues," Perdigao Office-Recusal Denial Reconsideration Memorandum , at 3, the record demonstrates that these complaints

too are false. In that regard, first, Perdigao unacceptably fails to elaborate that the Court could not have been more explicit, after allowing Perdigao multiple corrective and supplemental filings, when, on May 21, 2008, it cautioned Perdigao that his pretrial motion for extraordinary relief would not proceed by "ambush" and speculation, and that that thus far Perdigao's filings had left the Court "in the blind." United States v. Perdigao, Cr. No. 07-CR-103 (E.D.La. May 21, 2008) (status conference).[3] Second and related, Perdigao ignores the fact that the Court in denying office-wide recusal relief reiterated its history in this case of patient instructions requesting showings that might warrant an evidentiary hearing, and then made clear that it had reviewed all material submitted, and then, finally, did summarize and identify factual points and distinguish them. Recusal Denial Oral Statement of Reasons, at 8-10 (repeatedly noting that allegations it had considered were "unsupported" or "weakly supported" and "[a]t best…vague or placed in [Perdigao's] comments *sub* silentio," hence did not warrant "need for any evidentiary hearing").

Perdigao made no contemporaneous objection to this review, summary and findings of weak allegations he chose never to support, despite opportunities and instructions to do so. Id. at 9 ("Based on that [submitted] information, and looking at the whole basis of the law that I've just cited, I find that there is no basis for recusing the entire office. I do deny the motion. I don't feel, in view of that, that there's any need for any evidentiary hearing."); see also Order & Reasons, at 5-6 (summarizing factual allegations and rejecting them as any basis for an evidentiary hearing into the drastic

[3] This status conference occurred, it should be clarified, without the presence either of defense counsel Wessel or defendant Perdigao himself, which may partly explain their pretense of surprise. But co-counsel Griffin was in attendance and has not contended that Perdigao therefore was put unmistakably on notice that to pursue any evidentiary inquiry into his unsupported sensationalist charges, the Court had to be given, within one week, some defense showing in the record of facts with a nexus to legally available relief.

relief requested). Third, conclusively, Perdigao overlooks in his reconsideration complaint that, opposite from overlooking facts he never substantiated, the Court, in abundance of caution, made multiple and independent findings against Perdigao even assuming his speculation was true. Order & Reasons, at 5-6 ("assuming that [Harper allegations] are true," no entitlement to office-wide recusal relief; "even if true, the Defendant's allegations do not rise to the level of warranting the disqualification of the entire United State's Attorney's office [sic] for the Eastern District of Louisiana."). More conclusive, one salient "fact" Perdigao continues to propound even in his reconsideration motion as "proof" of half a decade-old alleged misconduct he claims entitlement to explore in an evidentiary hearing, see Perdigao Office-Recusal Denial Reconsideration Memorandum, at 9-10 (citing Texas district court ruling unrelated to the instant prosecution or Perdigao at all), is one that the government has pointed out was rejected by the United States Court of Appeals for the Fifth Circuit. See United States v. Edwards, 442 F.3d 258, 266 (5th Cir. 2006) ("Our review of the record leaves us with the firm conviction that there was no clandestine, collateral plea agreement….").

And finally, Perdigao makes no persuasive showing that reconsideration rests on the need to correct a clear error or prevent manifest injustice. In fact, he continues to ignore that the only perceived injury he can identify is that he, like any other defendant, cannot compel leniency or plea negotiations in lieu of judicial resolution of charges presented against him by a federal grand jury. See Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial").

Instead, Perdigao's legal claim is that this Court overlooked Fed. R. Crim. P. 12(d) by denying him an evidentiary hearing. Yet this was precisely his request previously--and reconsideration motions may not be used to reargue an issue previously presented. And it indisputably was the substantial and first ruling by this Court in its Order & Reasons, clarified as such by boldface heading. Order & Reasons, at 3 ("**III. LAW & ANALYSIS. A. Defendant's Right to an Evidentiary Hearing**"). Stated otherwise and rebutting any valid reconsideration claim of overlooked or new law, this Court's Order & Reasons rests on settled and applied Fifth Circuit caselaw against a pretrial hearing in these circumstances. There is no basis to attack this consensus of Fifth Circuit law, or its straightforward application made by this Court. Indeed, the Court cites and applies no fewer than five Fifth Circuit decisions confirming that Rule 12 does not obligate a district court to hold an evidentiary hearing unless a defendant first has presented facts which would entitle him to the legal relief requested. Order & Reasons, at 3 (citing caselaw). Perdigao makes no effort to answer this controlling authority, either legally or factually. As the Court made clear, citing Fifth Circuit direction, "[t]o conduct a detailed evidentiary hearing into the merits of speculative and conclusory claims would be 'tantamount to a fishing expedition.'" Order & Reasons, at 3 (Fifth Circuit citation omitted). [4]

[4] In this opposition, the government again will not reply to new and unsupported sensationalist complaints, like Perdigao's expansion now of anger from individuals in the Eastern District of Louisiana to highest level Department of Justice personnel. See, e.g. Perdigao Office-Recusal Denial Reconsideration Memorandum, at 8-9 (describing Department of Justice personnel to whom Perdigao sought and obtained intercession now as giving a "whitewash" and "rubber-stamp" of United States Attorney's Office work). The government would only note that this new focus of attack presumably would mean that the Department of Justice altogether is complicit and subject to his disqualification request and evidentiary hearing. Secondly, regardless, this Court, in abundance of caution, referred to Department of Justice intervention as something Perdigao now did not contest, and additional evidence that contradicted Perdigao's insinuation that wrongdoing somehow was suppressed by prosecutors in the Eastern District of Lousiana.

Wherefore, for the foregoing reasons the defendant's reconsideration should be denied.

Respectfully submitted,

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UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2008, 2008, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to William F. Wessel, Attorney at Law. I further certify that I mailed the foregoing document and the Notice of Electronic filing by First Class Mail, postage prepaid and properly addressed to Charles F. Griffin, Attorney at Law, 802 S. Carrollton, New Orleans, Louisiana, 70118.

/s/ James R. Mann
JAMES R. MANN

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	Docket 07-CR-103-L
versus	*	New Orleans, Louisiana
JAMES G. PERDIGAO	*	June 6, 2008

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PROCEEDINGS BEFORE THE
HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

U.S. Attorney's Office
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GOVERNMENT EXHIBIT "A"

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer.

PROCEEDINGS

(June 6, 2008)

THE DEPUTY CLERK: All rise.

THE COURT: Be seated, please. Counsel, make your appearance for the record so we know who's here.

MR. MANN: Your Honor, Jim Mann for the United States. Also we have United States Attorney Jim Letten, First Assistant United States Attorney Jan Mann, Sal Perricone, and Jon Maestri, Assistant United States Attorney, all for the United States.

THE COURT: Okay.

MR. WESSEL: Good afternoon, Your Honor. Bill Wessel and Charles Griffin for the defendant, James Perdigao.

THE COURT: Okay. This is really a status conference dealing with a motion that's before me.

I received documentation from the parties on the motion. Unless they have some additional comments, other than what you have said in the motion and the cases that you have cited to me in the motion, I'll entertain any comments anyone would have, other than what you put in the motion.

MR. MANN: Nothing more from the government, Your Honor.

THE COURT: All right.

MR. WESSEL: We have nothing further, Your Honor.

THE COURT: Okay. Fine.

I have before me defendant's motion to disqualify and/or recuse the entire United States Attorney's Office for the Eastern District. Also as part of the motion, I have a request for an evidentiary hearing.

Let me first say by way of background about this matter, the motion grows out of matters related to an indictment which was brought against the defendant, James Perdigao, on March 16th of 2007.

In that indictment, the defendant is charged with some 59 counts of bank fraud, mail fraud, transportation of stolen funds, money laundering, income tax evasion, and filing false income tax returns. The amount involved is approximately $30 million.

The basis of the defendant's motion is that the office of the United States Attorney for the Eastern District of Louisiana and all of its members are biased against the defendant and that he cannot get a fair trial as a result of that bias. Some of his complaints and allegations go back to some ten years prior to this time to the trial of Governor Edwards.

When confronted with the motion, I took it very seriously, because it's a serious motion, and I felt it was appropriate to set a hearing date for the motion since the defendant took the position that he needed an evidentiary hearing.

In advance of the hearing, I instructed counsel for both sides to provide the witnesses that they anticipated calling at the hearing and give me some indication as to the areas of the testimony that they anticipated that the witness would give and, most importantly, the nexus that the testimony had to the motion filed by the defendant.

The parties have favored me with that material and I've had an opportunity to review the material and hear comments from counsel at previous status conferences. I'm now ready to discuss the matter with counsel and advise them, at least, as to the Court's position.

As I say, it seems to me that it's a serious motion. It seeks a drastic relief. I look to the law for guidance. The leading case on this matter is, of course, as I mentioned before, *U.S. v. Bolden*, a Tenth Circuit case, 353 F.3d 870. It's a 2003 case.

In that case the Tenth Circuit indicated that, and the quote is: "The disqualification of government's counsel is a drastic measure and a court should hesitate to impose it except where necessary. Further, because disqualification of government attorneys implicates a separation of powers issue, the generally accepted remedy is to disqualify a specific assistant, or more, and not the whole office."

Also the court in the Tenth Circuit fleshed out

that comment and concept in following: "In reaching this conclusion, we're strongly influenced by the fact that we can only rarely, if ever, imagine a scenario in which a district court could properly disqualify an entire United States Attorney's Office.

Indeed, the disqualification of government's counsel is a drastic measure. Thus, because disqualifying an entire United States Attorney's Office is almost always reversible error, regardless of the underlying merits of the case, a reviewing court will rarely have to delve into the underlying claim to conclude that the disqualification is warranted."

I also found a case out of the district of New Jersey, a 2006 case, in which that court also notes that: "Only the most extraordinary circumstances would justify the removal of an entire United States Attorney's Office." That case is *United States v. Manna*, M-A-N-N-A. I couldn't find a cite other than the Westlaw. 2006, Westlaw 3063456.

In addition to those two cases, I found a case out of the Third Circuit, *United States v. Whittaker*, 268 F.3d 185, Third Circuit, 2001. This case reversed the disqualification of the United States Attorney's Office for the Eastern District of Pennsylvania along, basically, the same lines.

Also there's a Seventh Circuit case, *United*

States v. Vlahos, V-L-A-H-O-S, 33 F.3d 758. Again, reversing the disqualifications of the entire United States Attorney's Office. The Sixth Circuit, *United States v. Caggino*, 660 F.2d 184. This, again, reversed the disqualification of the entire United States Attorney's Office, here, for the Western District of Tennessee.

The Fifth Circuit *In re Harris County, Texas*, 240 Fed. Appx. 644, reversing the disqualification of the entire Harris County Attorney's Office because the district court made no findings of impropriety as to the entire office. I mentioned to you *United States v. Manna*. Another, a Puerto Rican case, *In re Grand Jury Proceedings*, 700 F. Supp. 626, denying the defendant's request to disqualify the United States Attorney's Office during the pre-indictment stage.

I have not been able to locate any case in which such action was sanctioned. But in any event, if it is sanctioned, it is only for some extreme circumstance involving the entire office.

With that jurisprudence in mind, I look at the list of witnesses from which the defendant indicates that they would call, and also review the area of testimony that they would be inquiring from that witness. I have looked for some comment or nexus. Their position is weakly supported. At best, the nexus claim is vague or placed in their comments *sub silentio*.

In any event, the allegations mentioned by the defendant focused on several members of the office. One Assistant U.S. Attorney is attorney Fred Harris [sic]. He's filed an affidavit stating that he has not, will not, have any supervisory or any other role in the prosecution of the defendant.

There's no evidence to rebut that position, other than an unsupported allegation that he has made at one time some vague comment. I'm sorry. I said Harris. I meant to say Harper.

Also there's some allegations -- or unsupported allegations that the defendant provided information during a lengthy period of time, at least going back some ten years, regarding other individuals that he felt or was convinced were doing some nefarious deals and conducting themselves improperly, if not illegally, in various places in the Eastern District.

He called that to the attention of the United States Attorney's Office, and recalls that he did that on several occasions. In fact, he indicates that he volunteered to take the witness stand and did, indeed, testify. He feels that non-sufficient interest was expressed by the U.S. Attorney's Office.

In fact, he's convinced, in his own mind, that they withheld information. Information which, if disclosed,

could have resulted in different jury or judge decisions. He feels that this is evidence of misconduct.

In fact, over the years, he has made claims of this misconduct to various individuals and entities, which inspired or encouraged the investigation by a public integrity division of the Department of Justice.

This department investigated his allegations and found them to be baseless and closed their investigation in this matter and so advised the U.S. Attorney, as is indicated by the U.S. Attorney's affidavit and/or brief.

In any event, his complaints, at best, were directed to one or more of the people in the office. These individuals neither had, have, or will have any responsibility for handling the defendant's prosecution.

Based on that information, and looking at the whole basis of the law that I've just cited, I find that there is no basis for recusing the entire office. I do deny the motion. I don't feel, in view of that, that there's any need for any evidentiary hearing.

I will, however, put this in the form of a written opinion so that I can describe it in a little more detail and afford counsel for both sides an opportunity to review it and take whatever action they need to take on it.

I thank you very much for your appearance and also for the material that you've given to me. It was very

helpful.

MR. LETTEN: Thank you, Your Honor.

MR. MANN: Thank you, sir.

MR. WESSEL: Thank you, Judge.

THE COURT: Court will stand in recess.

THE DEPUTY CLERK: All rise.

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CERTIFICATE

I, Jodi Simcox, RMR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

/s/ Jodi Simcox, RMR, FCRR
Jodi Simcox, RMR, FCRR
Official Court Reporter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	**CRIMINAL DOCKET**
VERSUS	*	**NO. 07-103**
JAMES PERDIGAO	*	**SECTION "L"**

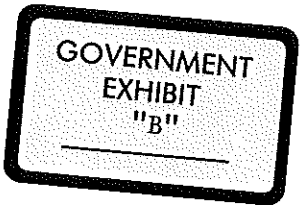
ORDER & REASONS

Before the Court is Defendant James Perdigao's Motion for Recusal of U.S. Attorney's Office and Request for Evidentiary Hearing (Rec. Doc. No. 96). In his motion, the Defendant make numerous allegations against the United States Attorney for the Eastern District of Louisiana and other members of his office that, according to the Defendant, shows that the United States Attorney's Office for the Eastern District of Louisiana cannot fairly prosecute him and he will therefore be deprived of his due process rights. The Government vigorously opposes the Defendant's motion. For the following reasons, the Defendant's motion is DENIED.

I. FACTUAL & PROCEDURAL BACKGROUND

The Defendant is a former partner with the law firm of Adams and Reese who allegedly stole approximately $30 million during his time with the firm. On March 16, 2007, the Defendant was indicted on fifty-nine (59) counts of bank fraud, mail fraud, interstate transportation of stolen funds, money laundering, income tax invasion, and filing false income tax returns; the Government also seeks forfeiture of approximately $30 million. On July 27, 2007, the Government issued a Superseding Indictment which amended the forfeiture provisions of the initial indictment.

The parties informed the Court in March of 2008 that plea negotiations had broken down



and that a new trial date needed to be selected. The Court held a status conference and a trial date of December 1, 2008 was selected. At that status conference, counsel for the Defendant informed the Court that the Defendant planned on filing a motion to recuse the U.S. Attorney's Office for the Eastern District of Louisiana from this case. The Government indicated it would likely seek to seal the motion. After further discussions, the Court instructed the Defendant to first send a draft of his motion to the Government so that it could determine whether the Government would move to seal the motion. The Defendant did so, and the Government moved to seal the Defendant's motion to recuse. The Court held a conference on April 16, 2008, and advised the parties that the Defendant's motion would not be filed under seal and directed the Defendant to file the motion as soon as practicable.

II. PRESENT MOTION

The Defendant filed his motion on April 17, 2008, putting forth several sensational allegations against the Government including charges of malfeasance, nonfeasance, and unethical conduct, all of which he alleges reflect prejudice against him and will prevent him from getting a fair trial.

The Government opposes the motion. The Government argues that, as an initial matter, the relief the Defendant seeks is unavailable. Citing multiple federal court decisions, the Government points out that recusing an entire office of federal prosecutors is an extraordinary remedy that one Court of Appeals has described as almost always reversible error. Additionally, the Government states that all of the Defendant's allegations were referred to the appropriate division of the Department of Justice for separate and independent inquiry and each time it was determined that there was no merit to the Defendant's allegations.

III. LAW & ANALYSIS

A. Defendant's Right to an Evidentiary Hearing

The Defendant requested an evidentiary hearing in support of his motion. To receive an evidentiary hearing regarding a valid legal claim, the burden is on the defendant to allege facts which, if proved, would entitle him to relief. *United States v. Metz*, 652 F.2d 478, 481 (5th Cir. 1991). A defendant seeking to show that the government has engaged in an unconstitutional prosecution against him "is not automatically entitled to an evidentiary hearing." *United States v. Webster*, 162 F.3d 308, 334 (5th Cir. 1998). Rather, a defendant must first "present facts sufficient to create a reasonable doubt about the constitutionality of [the] prosecution." *See id.* (citing *United States v. Hoover*, 727 F.2d 387, 389 (5th Cir. 1984)); *see also United States v. Cervantes*, 132 F.3d 1106, 1111 n.4 (5th Cir. 1981) (explaining that a defendant is entitled to a pretrial evidentiary hearing regarding the constitutionality of his prosecution "only if the existing record proves the likely merit of [his] specific allegations").

In order to determine the nature, scope and relevancy of the evidence the Defendant intended to offer, the Court ordered the Defendant to file with the Court a list of all of the witnesses he planned to call at an evidentiary hearing, what these witnesses would testify to, and the nexus between such testimony and the Defendant's argument that he is being deprived of due process. The Defendant submitted this list and the Government has filed its response. The Court has reviewed these filings and has determined that an evidentiary hearing is not necessary. To conduct a detailed evidentiary hearing into the merits of speculative and conclusory claims would be "tantamount to a fishing expedition." *Murphy v. Johnson*, 205 F.3d 809, 817 (5th Cir. 2000). Accordingly, it is now appropriate for the Court to consider the merits of the Defendant's

motion.

B. Recusal of the United States' Attorney's Office for the Eastern District of Louisiana

United States v. Bolden is the seminal case on the issue of recusing an entire prosecutors' office. 353 F.3d 870 (10th Cir. 2003). In that case the Tenth Circuit held that "the disqualification of Government counsel is a drastic measure and a court should hesitate of impose it except where necessary." *Id.* at 878. "Further, because disqualifying government attorneys implicates separation of powers issues, the generally accepted remedy is to disqualify a specific Assistant United States Attorney, not all the attorneys in the office." *Id.* The court noted that every circuit court that considered the disqualification of an entire United States Attorney's office has reversed the disqualification. *See, e.g., United States v. Whittaker*, 268 F.3d 185 (3d Cir. 2001) (reversing disqualification of United States Attorney's Office for the Eastern District of Pennsylvania); *United States v. Vlahos*, 33 F.3d 758 (7th Cir. 1994) (reversing disqualification of entire United States Attorney's Office); *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981) (reversing disqualification of entire United States Attorney's Office for the Western District of Tennessee). *See also, In re Harris County, Texas*, 240 Fed. Appx. 644 (5th Cir. 2007) (reversing disqualification of entire Harris County Attorney's Office because district court made no findings of impropriety as to the entire office); *United States v. Manna*, Crim No. 88-239, 2006 WL 3063456, *8 (D.N.J. Oct. 25, 2006) (denying motion to disqualify United States Attorney's Office for District of New Jersey). *Cf. In re Grand Jury Proceedings*, 700 F. Supp. 626 (D.P.R. 1988) (denying defendant's request to disqualify United States Attorney's Office during pre-indictment stage). Indeed, the Tenth Circuit has stated that it was "strongly

influenced by the fact that [it] can only rarely–if ever–imagine a scenario in which a district court could properly disqualify an entire United States Attorney's Office," and that "because disqualifying an entire United States Attorneys' Office is almost always reversible error regardless of the underlying merits of the case, a reviewing court will rarely have to delve into the underlying claim to conclude that the disqualification was unwarranted." *Bolden*, 353 F.3d at 875. The Court of Appeals for the Fifth Circuit has cited with approval the Tenth Circuit's decision in *Bolden*. *See In re Harris County, Texas*, 240 Fed. Appx. at 644.

The Defendant's allegations focus primarily on two individuals: U.S. Attorney Jim Letten and Deputy Chief Fred Harper. The Government has submitted an affidavit from the United States Attorney stating that Deputy Chief Harper has not and will not have any supervisory role in the prosecution of the Defendant. *See*, Exhibit to Rec. Doc. No. 100. The Defendant has not submitted any evidence that Deputy Chief Harper has been directly involved in the prosecution, with the exception of an unsupported allegation that the Deputy Chief participated in plea negotiations on September 1, 2006 and stated to Defense counsel that "[y]ou need to tell Jamie that I am sending him a personal message that he better take the deal; it's not going to get any better." The Defendant's allegations with respect to Mr. Harper, assuming that they are true, do not provide a basis for the relief the Defendant is seeking. These allegations, if true, could possibly support disqualifying Deputy Chief Harper but do not rise to the level of authorizing the disqualification of the entire office. Indeed, as U.S. Attorney Letten's affidavit states, Deputy Chief Harper has not and will not have any involvement in the prosecution of the Defendant.

Additionally, the Defendant's allegations that he provided information to the United States Attorney's Office which it never investigated or followed up on also prove to be

unfounded. Again, the U.S. Attorney Letten states in his affidavit that all complaints received by his office were referred to the Department of Justice, Public Integrity Section. *See*, Exhibit to Rec. Doc. No. 100. The Court has been informed that the Public Integrity Division has closed its investigation into this matter. Indeed, U.S. Attorney Letten received a letter from the Office of Professional Responsibility of the Department of Justice on April 25, 2007, stating that they investigated the Defendant's accusations and determined that further investigation was not warrant and considered the matter closed.

In fact, all of the Defendant's allegations focus on the alleged wrong doing on individual members of the U.S. Attorney's office and not on the misconduct of the entire office. The Defendant admits as much in his motion when he argues that U.S. Attorney Letten's and Deputy Chief Harper's conflicts require the recusal of the entire office. Accordingly, even if true, the Defendant's allegations do not rise to the level of warranting the disqualification of the entire United States Attorney's office for the Eastern District of Louisiana.

IV. CONCLUSION

Accordingly, IT IS ORDERED that the Defendant's Motion to Recuse is DENIED.

New Orleans, Louisiana, this 8th day of July, 2008.

Eldon E. Fallon

UNITED STATES DISTRICT JUDGE