

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRACI GRAY and
SAMANTHA JOHNSON,

Defendants.

FINAL PRETRIAL
CONFERENCE ORDER

11-cr-13-bbc

On June 3, 2011, the court held the final pretrial conference. Defendant Traci Gray was present with her attorney, Kim Zion. Defendant Samantha Johnson was present with her attorney, Patrick Stangl. The government was represented by AUSA Daniel Graber.

I. The Remaining Pretrial Motions

Not later than Monday, June 6, 2011, the court will file its order ruling on Gray's motion for transcripts (dkt. 28), motion to disclose the destruction of evidence (dkt. 35) and motion for severance (dkt. 37). The court advised the parties that the motion to disclose the destruction of evidence actually filed with the court requested relief much narrower than the issues raised in the briefs and told them that if they wanted to be heard further on this before trial, then they had better let the court know as soon as possible. Briefly, the dispute is not really about whether the government should disclose the destruction of evidence, although that technically is the relief Gray's motion requests. Rather, Gray contends that back during plea negotiations, the government showed her a document that she had prepared that had exculpatory information on it, and now the government has lost or destroyed it. The government responds that the

document described by Gray never existed, so it never could have been shown to her and it could not have been destroyed.

Neither side has presented any evidence on this factual dispute. Thus, to the extent that the parties argue in their briefs whether there has been a due process violation, that issue is not before the court and will not be part of any ruling on the pending motion.

Johnson, by counsel, confirmed that she no longer seeks a court ruling on her Third *Brady* Demand (dkt. 43) or her *Bruton* Motion (dkt. 54) based on the government's representations following the pretrial motion hearing. Johnson's motion to produce coconspirator statements (dkt. 51) remains before the court.

II. The Voir Dire

All parties proposed additional voir dire questions to the court. See dkts. 96, 101 and 105. The court advised the defendants that it would not use their written juror questionnaire. Otherwise, the court accepted some of the questions and rejected others for reasons stated during the hearing. The court will provide a copy of the revised voir dire questions in a separate filing along with the revised jury instructions.

At Gray's request, I am flagging one of her denied requests for the trial judge. In both Question #3 (dkt. 105 at 2) and Question #19, (*id.* at 3) Gray asked that the court advise the venire panel that if a defendant were to testify, the jury was to treat her as it would treat any other witness. The court declined to do this, first because such an instruction does not assist the parties move to strike for cause or exercise peremptory strikes (even with regard to #3, since the concept there is a defendant's absolute right *not* to testify). Second, this instruction is contained

in the preliminary jury instructions, so that the jury will be aware of this requirement before it hears opening statements or any evidence. The issue is framed for the court.

III. The Jury Instruction Packets

All parties proposed additional instructions for the court's jury instruction packet. *See* dkts. 95, 100 and 106. As it always does, the government advocated its first three instructions on conspiracy as preferable to those used by the court. The court has declined to accept these in previous cases, although I promised the government that I would flag its third proposed instruction (dkt. 95 at) as perhaps encompassing a concept not entirely contained within the court's instruction packet.

I added the government's proposed instructions Nos. 3 - 9 to the court's packet because they accurately state the law. Whether they are necessary in this case remains to be seen; both defendants vigorously contend that they are *not* necessary and should *not* be given. All the parties will have a chance to be heard on these disputes following the close of the evidence.

Johnson proposed a series of pattern instructions, all of which are included in the courts packet.

Gray proposed three instructions in place of court's instructions and offered four more instructions from O'Malley. *See* dkt. 106. For reasons stated at the hearing I declined to replace or edit the court's instructions. I saw no need to add the four O'Malley instructions but provided Gray the opportunity to explain with more specificity why these instructions would be needed in this case. Any such explanation is due by June 7, 2011 and may be part of any other submission Gray makes on the other issues.

The court will provide the edited preliminary and post-trial instructions in a separate filing along with the revised voir dire questions.

IV. The Motions in limine

Every party filed in limine motions, and almost all of the motions are disputed. Not later than June 7, 2011, the parties may, if they wish, provide written opposition to an opponent's motion in limine, but the court will allow argument at the final hearing on June 9, 2011.

As for the government's notice of intent to offer evidence, the defendant's object to the government's intent to offer the allegedly false HUD-1 form into evidence as Rule 404(b) evidence. *See* dkt. 92 at 1-2. This issue is flagged for the district judge. The government has agreed not to use in its case in chief any mortgage documents from EMC, so that issue no longer is disputed. The issue of coconspirator statements will be addressed during the government's *Santiago* proffer.

The government filed an omnibus motion in limine asking the court to exclude evidence on 13 different topics. *See* dkt. 94. The defendants object to parts (1) through (6) inclusive, as well as parts (12) and (13), and they wish to be heard on their objections at the final hearing. Neither defendant objects to parts (8) through (11) of the government's motion.

Johnson filed two motions in limine to exclude evidence regarding two different referral fees she allegedly received. *See* dkts. 104 and 110. The government objects to both and wishes to be heard on its objections at the final hearing.

Gray's first motion in limine (dkt. 104) is moot because it addressed the EMC documents, which the government has agreed not to use. Gray's second motion is to exclude

a \$5000 payment and a second mortgage she allegedly received from the builder. *See* Dkt. 111. The government objects and wishes to be heard on its objections at the final hearing.

V. Housekeeping, Loose Ends

The parties predict a three day trial, although to be cautious, they suggest that the venire panel be told the trial might last until Thursday. The court will seat two alternate jurors. The defendants promptly must advise the court if they will be exercising their peremptory strikes jointly (which would allow them to confer, share the 10 peremptory strikes against the jury and share one strike against the alternate pool) or singly (which would give each defendant her own five peremptory strikes and her own strike against the alternate pool, but would forbid conferring on the strikes). The parties are aware that they must use the ELMO to present evidence. Both defendants are free on conditions and have access to civilian clothes for trial.

The defendants have asked the court to release the list of venire person names by Tuesday, June 7, 2011. This request was forwarded to the trial judge on June 3, 2011.

The parties had no other matters to bring to the court's attention in open court. Johnson, by counsel, then raised one additional issue ex parte and will be following through early next week.

Entered this 3rd day of June 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge