

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

UNITED STATES OF AMERICA,

Plaintiff,

FINAL PRETRIAL
CONFERENCE ORDER

v.

GERARDO VALTIERRA,
TIMOTHY CLARK and
DARIOUS T. KELLY,

06-CR-126-C

Defendants.

On October 27, 2006, this court held the final pretrial conference. Defendant Gerardo Valtierra did not participate personally but was represented telephonically by his attorney, Ralph Meczyk. Defendant Timothy Clark was present with his attorney, Joseph L. Sommers. Defendant Darious T. Kelly was present with his attorney, David Mandell. The government was represented by Assistant United States Attorney Timothy O'Shea.

First we discussed the voir dire questions. After obtaining input from the parties, I added to the court's draft some of the requested questions and rejected others for reasons stated on the record. A copy of the final version of the voir dire is attached to this order.

Next we discussed the universe of jury instructions. After incorporating minor edits and changes, three material disputes remained: first, although the parties agree that a jury instruction on venue is necessary, the parties disagree as to what this instruction should say. Not later than close of business Monday, October 30, 2006, defendants will submit a written

version of their proposed edits to the venue instruction. Not later than close of business Tuesday, October 31, 2006, the government will submit any written reply. I will then prepare a redrafted venue instruction for the parties' consideration and discussion at the final hearing, if that is necessary.

Second, the parties agree that an instruction on a witness's present drug addiction should be in the packet, but they disagree whether it should encompass past addiction, particularly past addiction at the time the witness made a previous statement to the government. This court has used witness drug addiction instructions in the past, so I will check the computer and review the case law to draft an appropriate instruction for the parties' consideration and discussion at the final hearing if necessary.

Third, defendants want to modify the pattern instructions on aiding and abetting to include the notion that trivial assistance does not equal aiding and abetting. The government contends that this notion is captured adequately in the pattern instructions. I took the dispute under advisal and will present the court's conclusion along with the other redrafted instructions prior to the final hearing on November 2. (I will wait to provide a copy of the universe of jury instructions until I have drafted proposals on the three disputed instructions).

In limine issues were next on the hearing agenda. The government's notice of intent to offer certain types of evidence begins on page 8 of its final pretrial notice and trial brief, dkt 85. The government has offered Rule 609 criminal record proffers for all three

defendants, and all three defendants take exception. Clark claims that his 1993 conviction and sentence of incarceration ended before November 1996, the 10-year limit of Rule 609; the government will research this claim. Kelly invokes Rule 403 to block his impeachment with his convictions for felony possession of controlled substances on January 17, 1997, January 5, 2001, April 1, 2004 and February 14, 2005. Valtierra claims that his November 3, 2005 felony drug conviction has been vacated; the government will research this claim.

Second, the government intends to make a *Santiago* proffer at the time directed by the court. Now that Judge Crabb holds final hearings, the government should be prepared to offer this proffer on Thursday, November 2, 2006.

Third, the government has proffered its intent to offer during its case in chief evidence that it claims is “intricately related” to the direct evidence of the charged conspiracy and drug distributions. Interestingly, Clark not only endorses the government’s proffer against him, *see* dkt. 85 at 10-11, he wishes to expand on it and offer even *more* evidence of other events. At the conference Clark filed a motion in limine to this effect which has not yet been docketed. Clark’s theory is all of this evidence will show that he had nothing to do with the larger conspiracy centered in Chicago. The government is chary of this approach; at the final hearing the court will need to provide guidance on the limits. More predictably, Kelly objects under Rule 403 to the government’s proffer of an “intricately related” 2004 traffic stop in which police found on Kelly three small bags of crack and \$2,124 cash. Kelly

claims that the crack was for personal use and the cash was proceeds from a car sale. The government has not proffered any “intricately related” evidence against Valtierra.

The government proffered its proposed Rule 404(b) “other acts” evidence for each defendant. *See* dkt. 85 at 11-14. Kelly objects to the acts proffered against him, deeming it unvarnished propensity evidence that violates Rule 403. Attorney Meczyk was excused from the hearing prior to addressing the government’s Rule 404(b) proffer for Valtierra; given the nature of the acts proffered (police discovery of \$189,030 cash bundled in foil and plastic, 114 grams of cocaine, and two electronic scales), I predict that Valtierra will wish to be heard in opposition at the final hearing.

Next we engaged in a somewhat circular discussion of the government’s announced impeachment strategy under Rule 806 if any defense witness attempts to report a defendant’s hearsay. *See* dkt. 85 at 14. Everyone seemed to understand the government’s point; the parties’ resulting tactical decisions do not require court input.

The government filed eight motions in limine, which we discussed in order:

(1) No one disagrees with the government’s motion to exclude evidence or argument regarding “reasonable doubt.”

(2) The defendants wish to be heard on the government’s motion to exclude evidence or argument regarding penalties that they face. Actually, their point is a bit different: they contend that it is fair and necessary for them to impeach government witnesses with the

witnesses' knowledge of the charges and penalties they faced if they did not cooperate. The issue is framed for the court.

(3) Kelly disputes the government's "reverse 404(b)" motion which seeks to exclude defense witness testimony that attempts to prove a negative, specifically, that the witnesses never saw Kelly engage in other illegal acts. The issue is framed for the court.

(4) Clark wishes to be heard on the government's motion to exclude evidence of government witness Amy Hill's sexual history. One aspect of Clark's defense is his contention that Hill intentionally played the role of *femme fatale*, enticing Clark with sexual favors in order to set him up in this criminal case. The issue is framed for the court.

(5) The defendants wish to be heard on the government's motion to exclude evidence regarding DEA Agent Louis Gade's 2002 conviction for operating while intoxicated/first offense, a civil offense. Defendants actually are more interested in eliciting any background facts that would undermine Agent Gade's credibility: did he obstruct the investigating officers, falsely deny relevant facts, or attempt to use his official position to avoid a ticket? No one yet has developed any information on these points. If the parties wish to pursue this, then they must first present it to the court outside the jury's presence.

(6) As a corollary of the parties' venue dispute, Kelly, and perhaps Valtierra, object to the government's motion to exclude evidence that related criminal drug charges are pending in the State of Illinois. (The government does not dispute its obligation to prove that venue for the federal charges is proper in this court).

(7) The defendants wish to be heard on the government's motion to exclude the fact that government witness Amy Hill has refused to disclose her medical records relating to treatment she received after her alleged beating at the hands of Clark, Kelly (and absconded co-defendant Gregory Bennett). Defendants are not claiming this court can force Hill to divulge these records; rather, they want to cross examine and impeach Hill with the fact that she refuses to disclose.

(8) Defendants oppose the government's motion to exclude evidence or argument regarding previous investigations of witness Lawrence Green for murder. Not only is this disputed, Clark will be submitting an ex parte, in camera motion to the court (due by close of business October 30, 2006) explaining how and why he should be allowed to employ this evidence to "spring a trap" during his cross-examination of Green at trial. I promised that the court would approach Clark's ex parte request incrementally so as not to spoil the surprise at trial without first giving Clark notice and an opportunity to be heard. The issue still may require some discussion at the final hearing.

The defendants also raised in limine issues. Kelly filed a notice of intent to offer the pretrial proffer of absconded co-defendant Gregory Bennett. *See* dkt. 69. Prior to fleeing, Bennett had made a proffer statement to the government. Both Kelly and Clark believe that Bennet's proffer is useful to them at trial, but they've got a hearsay problem. Kelly's theory of admissibility is that even though Bennet's proffer agreement prevents the government from using the proffer against him, the proffer still qualifies as a statement against Bennett's

penal interest because Bennett faces tort liability in a civil lawsuit by admitting that he beat Amy Hill, Bennett exposed himself to a tort lawsuit. Clark urges admission of Bennett's proffer because it dovetails with his theory of defense: Bennett's narrative of the alleged conspiracy omits Clark. The government opposes any use of Bennett's proffer at trial. The issue is framed for the court.

Kelly filed a four-part motion in limine. *See* dkt. 68. First, he moves to exclude any photographs of the injuries received by Amy Hill as a result of her beating. The government opposes this motion.

Second, Kelly moves under Rule 403 to exclude any evidence that the beating may have caused Amy Hill to suffer a miscarriage. Clark, on the other hand, wants this evidence admitted because he claims that he can impeach Hill by proving that she actually was *not* pregnant when she was beaten. According to Clark, Hill fabricated this claim as part of her Machiavellian machinations against him. The government is not taking sides in this one. The parties will need the court's input.

Third, Kelly moves pursuant to Rule 403 to exclude any evidence that he or someone else held Amy Hill at gunpoint while beating her. The government contests this motion.

Finally, Kelly's asks that the court not allow the government to play tape recordings of conversations without laying an adequate foundation. No court action is necessary because all parties must lay foundations for their evidentiary submissions before the evidence will be admitted.

The parties had no other substantive issues to bring to the court's attention.

Our final topic was housekeeping. The parties now predict a four day trial. Although no one thinks a fifth day is likely, counsel have expressed concern that because Friday, November 10, is a federal holiday, in the event a fifth trial day is necessary, at least two defense attorneys would not be available on Monday, November 13. Counsel have asked that the court announce its plan at the final hearing.

The parties jointly suggested that if any jurors live outside of Dane County, then the court should start late on Tuesday, November 4, 2006 to give everyone sufficient time to vote before coming to court.

The parties asked for two alternate jurors. Clark and Kelly chose to exercise their peremptory strikes separately. Each defendant will receive four peremptory strikes against the jury panel and one peremptory strike against the alternate pool. By choosing this option, defendants and their attorneys may not discuss or share their peremptory challenges.

All defense counsel are aware of their obligation to provide street clothes for their clients and to present their evidence on the court's ELMO.

Finally, Attorney Meczyk predicted that he will file a motion for another continuance of the trial date. Mr. Meczyk should file whatever motion he deems necessary, but the odds of the court postponing this trial yet again are infinitesimally small. Everyone should be prepared to pick and go on Monday, November 6, 2006, at 9:00 a.m. as scheduled.

The parties had no other substantive or procedural matters to bring to the court's attention on the record.

Entered this 30th day of October, 2006.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

Voir Dire: United States v. Valtierra, *et al.* 06-CR-126-C

Statement of the case: This is a criminal case, in which the defendants, Gerardo Valtierra, Timothy Clark and Darious Kelly are charged with conspiring to distribute cocaine and crack cocaine. Defendant Clark also is charged with possessing cocaine with intent to distribute it. Defendant Kelly also is charged with possessing marijuana and MDMA, also known as “ecstasy,” with intent to distribute them. Each defendant has entered a plea of not guilty to the charges against him.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

1. Scheduling: this case will begin today and should conclude by this Thursday. Are any of you actually unable to sit as jurors because of this schedule?

2. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?

3. The court reads Pattern Jury Instructions of the Seventh Circuit:

Presumption of Innocence. Each defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that a defendant is guilty.

Burden of Proof. The government has the burden of proving the guilt of each defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. A defendant is not required to prove his innocence or to produce any evidence.

Each defendant has an absolute right not to testify. The fact that a defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Even though the defendants are being tried together, you must give each of them separate consideration. In doing this, you must analyze what the evidence shows about each defendant. Each defendant is entitled to have his case decided on the evidence and the law that applies to that defendant.

Would any of you be unable or unwilling to follow these instructions?

4. Ask counsel to introduce themselves, the defendants and the case agent. Ask whether jurors know them.

5. Invite each juror, in turn, to rise, and provide the following information:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you have bumper stickers on your vehicles and what they say.

Whether you regularly listen to talk radio, and if so, to which programs.

6. Do any of you in the jury box know each other from before today?

7. Mr. Valtierra is Latino and Mssrs. Clark and Kelly are African American. Would any of you find it difficult to serve as an impartial juror in a case in which Latino and African American men are charged with a conspiracy to traffic in cocaine and crack cocaine?

8. Have any of you or your relatives, ever had any unpleasant experiences with anyone who was Latino or who was African American? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

9. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense, or any offense involving cocaine, marijuana or ecstasy? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

10. Have any of you, your relatives or close friends ever needed, sought, or obtained any sort of counseling or treatment for a problem related to alcohol or any other drug? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

11. Have any of you, your relatives or any close friends ever belonged to any group that is concerned in any way with marijuana, alcohol, or other drugs, either for or against them? What is the name of that group, and what is your involvement in it? Would this affect your ability to be impartial in this case?

12. Do any of you think that the drug laws in this country or the enforcement of the drug laws are either too harsh or too lenient?

13. Do any of you believe that a person charged with drug crimes probably is a dangerous person simply because he is charged with a drug crime?

14. Do any of you, your family or close friends work in a health related field which treats or counsels people who have problems related to alcohol or other drugs? Would this affect your ability to be impartial in this case?

15. Do any of you, by virtue of past dealings with the United States government, or for any reason, have any bias for or against the government in a criminal case?

16. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?

17. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement, investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?

18. Have any of you ever belonged to any organization or group that excluded people because of their race, gender, or religion?

19. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?

20. Would any of you judge the testimony of a witness who was Latino or Latina differently from other witnesses solely because of the witness's ethnic heritage?

21. Would any of you judge the testimony of a witness who was African American differently from other witnesses solely because of the witness's race?

22. Would any of you judge the testimony of a witness who was white differently from other witnesses solely because of the witness's race?

23. If a defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was the defendant who was testifying?

24. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?

25. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?

26. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

27. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

28. If at the conclusion of the trial you were to be convinced of a defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty as to that defendant?

29. If at the conclusion of the trial you were not to be convinced of a defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty as to that defendant?

30. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

31. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

JUROR BACKGROUND INFORMATION

When asked to do so by the court, please stand and provide the following information about yourself:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you have bumper stickers on your vehicles and what they say.

Whether you regularly listen to talk radio, and if so, to which programs.

