IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

MARY HELEN QUAINTANCE,

Defendant.

DEFENDANT MARY QUAINTANCE'S MOTION TO STRIKE PRO SE PLEADINGS [DOCS. 45, 46] AND ANY STATEMENTS MADE BY MS. QUAINTANCE IN SAID PLEADINGS AND AT MAY 17, 2007 HEARING, AND TO ISSUE ORDER EXCLUDING USE OF SAID MOTIONS AND STATEMENTS FROM TRIAL

COMES NOW the Defendant Mary Quaintance, by and through her attorney John F. Robbenhaar, and pursuant to the Fifth and Sixth Amendments to the United States Constitution, respectfully moves the Court to issue an Order striking Ms. Quaintance's pro se pleadings [Docs. 45, 46] and excluding the Government from presenting statements contained in these pro se pleadings or made at related hearing, in its case-in-chief at trial.

The Government, by and through its Assistant United States Attorney Luis Martinez, opposes the relief requested herein.

As grounds in support, Ms. Quaintance states as follows.

BACKGROUND AND INTRODUCTION

1. The Defendants Mary Helen Quaintance, and her husband Danuel Dean Quaintance, have been charged in a *Superseding Indictment* with Count 1, Conspiracy to Possess with the Intent to Distribute 100 Kilograms or More of Marijuana, contrary to 21 U.S.C. § 841(a)(1) and 21 U.S.C. § (b)(1)(B), and Count 2, Possession with the Intent to Distribute 50

Kilograms or More of Marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846. Doc. 25.

2. Formerly, Ms. Quaintance was provided an attorney, pursuant to the Criminal Justice Act, to represent her in these proceedings. Subsequent to that appointment, and during the pendency of these proceedings, Ms. Quaintance filed a *Waiver of Separate Counsel*, Doc. 45, and a *Motion to Dismiss and Substitute Counsel and Incorporated Memorandum*. Doc. 46. The purpose of these pleadings appears to have been two-fold: first, Ms. Quaintance sought dismissal of her former counsel, and second, she requested that the Court authorize joint representation of both her and her husband/co-defendant by her husband's attorney. Said pleadings came before the Court for hearing on May 17, 2007, at which time the Court granted Ms. Quaintance's motion to disqualify her former counsel. Rather than authorizing joint representation by Mr. Quaintance's attorney, the Court signed an Order appointing undersigned counsel to provide representation to Ms. Quaintance.

3. In her pro se pleadings, Ms. Quaintance asserts that she had informed prior counsel that she did not want to raise "any technicality defense routes where she would have to pretend ignorance or anything less than the truth." Doc. 46, at 3. Ms. Quaintance asserts that she desires to retain her "honest integrity by pursuing what she believes a viable 'religious defense'". *Id*. at 3. Ms. Quaintance asserts that "[t]o switch now to begin to pursue a 'mere presence defense' appear [sic] to her as a shade of dishonesty." *Id.* at 3. Importantly, Ms. Quaintance states:

> "Defendant and co-defendant husband were together in the same vehicle, sharing the same knowledge of circumstances and involvement, were under the same belief they were doing nothing illegal at the time of arrest, that they are factually

> innocent persons by the 'fundamental human right' to liberty of conscience and religious freedom."

Id. at 6.

4. At the time Ms. Quaintance filed her two pro se pleadings, she was still technically represented by former counsel. Nonetheless, said pleadings were filed without the knowledge or consent of former counsel. Furthermore, this Court had not authorized Ms. Quaintance to proceed pro se or otherwise represent herself in a "hybrid" relationship with former counsel.

5. Trial is scheduled to commence on or about August 18, 2008. Upon information and belief, the Government intends to use statements contained in the pro se pleadings at trial, in an attempt to prove its case against Ms. Quaintance.

ARGUMENT

A. INTRODUCTION OF STATEMENTS MADE IN THE PRO SE MOTIONS WOULD HAVE THE EFFECT OF IMPROPERLY FORCING MARY QUAINTANCE TO SURRENDER ONE CONSTITUTIONAL RIGHT (RIGHT TO REMAIN SILENT) IN ORDER TO ASSERT ANOTHER (SIXTH AMENDMENT RIGHT TO COUNSEL)

6. By filing her motion to have former counsel removed, Ms. Quaintance was clearly attempting to vindicate her Sixth Amendment right to counsel. Regardless of the actual merits of the motion, Ms. Quaintance felt aggrieved enough to seek redress in Court regarding the perceived deficiency of former counsel. Consequently, all statements made by Ms. Quaintance in furtherance of her efforts to obtain new counsel were made in her effort to seek vindication of her Sixth Amendment right. As such, it would represent a miscarriage of justice to allow the Government to use statements made by Ms. Quaintance against her at trial, when such statements were made in her earlier attempt to change counsel.

7. *Simmons v. United States*, 390 U.S. 377 (1968), holds that statements made by a criminal defendant during a suppression hearing to establish standing are not admissible at a later trial. In *Simmons*, the defendant Garrett testified at a suppression hearing regarding his standing to challenge the admissibility of evidence, in that case a suitcase that contained evidence of an earlier bank robbery. In spite of the fact that the Government "might have found it hard to prove that he [Garrett] was the owner of the suitcase", 390 U.S. at 391, Garrett testified as to his ownership of the suitcase. At trial, the Government introduced Garrett's prior testimony at the suppression hearing (thereby linking Garrett to evidence of the bank robbery) and Garrett was convicted.

8. The rule announced in *Simmons* provides protection to criminal defendants who must testify–and thereby provide incriminating evidence–in order to exercise their Constitutional rights. As the Court noted, "a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence." 390 U.S. at 393.

9. In the present case, Mary Quaintance previously filed a pro se motion to dismiss former counsel and be jointly represented by then-counsel for her co-defendant, and has made what the Government may assert are inculpatory statements. By doing so, Ms. Quaintance has asserted her Sixth Amendment right to counsel, but in order to do so was obligated to make statements that implicated her Fifth Amendment right to remain silent. Ms. Quaintance should not be punished at trial by having earlier made these statements. As the Supreme Court in *Simmons* noted, "in this case Garrett was obliged either to give up what he believed, with advice

of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, *we find it intolerable that one constitutional right should have to be surrendered in order to assert another*." *Id.* at 394 (italics added). Similarly, Ms. Quaintance should not be forced into making the intolerable choice of either foregoing her constitutional right to effective counsel by exercising her Fifth Amendment right to remain silent, or seeking vindication of her Sixth Amendment right by making potentially inculpatory statements.

B. THE STATEMENTS MADE IN THE PRO SE PLEADINGS ARE NOT ADMISSIBLE UNDER FED. R. EVID. 801(d)(2) or 804(b)(3)

10. The Government may be tempted to argue that Mary Quaintance's statements in the pro se pleadings are admissible at trial pursuant to an exception to the hearsay rule. As demonstrated below, under either "Admission of a Party Opponent", Rule 801(d)(2), or "Statements Against Interest", Rule 804(b)(3), the afore-mentioned statements are not admissible.

11. A number of issues arise if the statements are described as admissions of a party opponent. Despite being Ms. Quaintance's own statements and ones that she has ostensibly manifested an adoption or belief in their truth, the statements must not be introduced at trial, for to do so would run roughshod over Ms. Quaintance's Sixth Amendment right. That is to say, evidence that otherwise might be admissible by a Rule of Evidence cannot be admissible if doing so would result in a violation of the party's Constitutional rights. *See e.g. Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 1370 (2004) (holding that the Sixth Amendment's Confrontation Clause is a rule of procedure, not of evidence, and accordingly, the constitutional

admissibility of statements that declarants would reasonably expect to be used for evidentiary purposes no longer turns in any way on the vagaries of the rules of evidence, much less [on] some amorphous notions of reliability); *see also United States v. Cromer,* 389 F.3d 662, 679 (6th Cir. 2004) ("If there is one theme that emerges from *Crawford,* it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements."). Thus, because the statements were originally made in Ms. Quaintance's exercise of her Sixth Amendment right to assistance of counsel, they are not otherwise admissible because they may qualify as an "admission of a party opponent".

12. Additionally, the "admissions" were made while Ms. Quaintance was represented by counsel, but without the concurrence or knowledge of former counsel. As such, the "admissions" do not bear sufficient indicia of trustworthiness to be admitted in trial. Further, given the circumstances under which these statements were made, it appears evident that the statements were not made knowingly, voluntarily or intelligently.

13. Similarly, the statements would not be any more admissible because they may qualify under a different provision of the Rules of Evidence. Labeling Ms. Quaintance's statements as ones "against interest" per Rule of Evidence 804(b)(3) can not surmount the obvious constitutional problems that arise, as argued above. But even in the absence of the very strong Constitutional implications of admitting Ms. Quaintance's statements in her pro se pleadings during the Government's case in chief, courts have demonstrated a reluctance to admit a defendant's statements in the absence of a searching inquiry. *See United States v. Dolah*, 245 F.3d 98, 105 (2d Cir. 2001) (admitting prior statements of defendant is a practice "embraced

cautiously"); Mary Cecilia Sweeney-Kwok, Note, An Argument Against the Arbitray Acceptance of Guilty Pleas as Statements Against Interest, 71 Fordham L. Rev. 215, 216 (2002).[1]

14. Accordingly, whether qualified as "admissions of a party opponent" or "statement against interest", Ms. Quaintance's unverified assertions made in her pro se pleadings are not admissible in the Government's case in chief at trial.

C. THIS COURT HAD NOT AUTHORIZED MS. QUAINTANCE TO PROCEED PRO SE OR IN A HYBRID RELATIONSHIP WITH HER COUNSEL, AND THEREFORE SHOULD STRIKE HER PRO SE PLEADINGS

15. Finally, at the time Ms. Quaintance filed her pro se pleadings, she was still represented by counsel. At that time, this Court had not authorized Ms. Quaintance to proceed pro se, nor had it authorized Ms. Quaintance to function side-by-side her attorney in some form of "hybrid" relationship. As such, the Court should treat the pleadings as a legal nullity.

16. A criminal defendant should not be entitled to proceed simultaneously pro se and with the assistance of counsel, and when this situation arises, the Court may refuse to consider the defendant's pro se motions. *See United States v. Agofsky*, 20 F.3d 866, 872 (8th Cir. 1994);

[1] Indeed, for a criminal defendant's plea allocutions to be admissible at trial as a statement against interest, the declarant must (1) be unavailable to testify (such as by refusal to testify on constitutional grounds); (2) have been aware that the statement was contrary to his penal interest; and (3) have competent knowledge of the underlying facts. Further, (4) there must be sufficient, independent evidence to assure the statement's trustworthiness and reliability. *People v. Thomas*, 507 N.Y.S.2d 973, 975, 500 N.E.2d 293 (1986). In addition, courts look to whether (5) the allocution was given under oath and (6) the trial court provided an adequate limiting instruction warning jurors not to consider a co-defendant's statement as evidence of a defendant's participation in the crime. *United States v. Moskowitz*, 215 F.3d 265, 269 (2d Cir. 2000). These are not exclusive factors, but the "operation [of the exception] must be rooted in reliability." *People v. Blades*, 93 N.Y.2d 166, 689 N.Y.S.2d 1, 5-7, 711 N.E.2d 187 (1999) (calling it a "limited circumstances exception" and cautioning that the "rubrics must not be extended and applied as a blueprint for generalized admission of guilty plea colloquies into evidence, in lieu of live, confronted, cross-examinable trial testimony").

Hoggard v. Purkett, 29 F.3d 469, 472 (8th Cir. 1994). *Also see United States v. Betancourt-Arretuche,* 933 F.2d 89, 92 (1st Cir.1991) (waiver of right to counsel must be, inter alia, knowing and intelligent as well as clear and unequivocal).

17. Parties may litigate in federal court "personally *or* by counsel", 28 U.S.C. § 1654 (2006) (italics added), and district courts have "discretion to deny hybrid representation outright." *United States v. Nivica,* 887 F.2d 1110, 1121 (1st Cir.1989); *see also Betancourt-Arretuche*, 933 F.2d at 95 (stating that defendant could have "utilize[d] some sort of hybrid representation if it were approved by the court" (emphasis added)). In *Nivica*, the court explained:

> "An indigent defendant has a sixth amendment right to appointed counsel, and a corresponding right to proceed without counsel, but these are mutually exclusive. A defendant has no right to hybrid representation. That is not to say that hybrid representation is foreclosed; rather, it is to be employed sparingly and, as a rule, is available only in the district court's discretion."

887 F.2d at 1121 (citations omitted). Moreover, even if Ms. Quaintance sought leave to act as her own co-counsel, this court would have had discretion to "place reasonable limitations and conditions upon the arrangement." *Id.*; *see also United States v. Gomez-Rosario*, 418 F.3d 90, 96-99 (1st Cir. 2005). As such, this Court was not required to accept Ms. Quaintance's pro se pleadings.

CONCLUSION

18. Pursuant to the Fifth and Sixth Amendments to the United States Constitution, the Defendant Mary Quaintance respectfully moves the Court to issue an Order striking the pro se pleadings [Docs. 45, 46] and excluding the Government from presenting statements contained therein or made at the May 17, 2007 hearing, in its case-in-chief at trial.

Respectfully submitted:

Filed Electronically
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 31, 2008 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing: LUIS MARTINEZ, Assistant U.S. Attorney; JERRY DANIEL HERRERA, Attorney at Law.

Filed Electronically
JOHN F. ROBBENHAAR