

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

*Plaintiff,*

Criminal No. 06-20465  
Hon. Nancy G. Edmunds

vs.

D-1 AREF NAGI,  
D-5 MICHAEL CICHETTI,  
D-17 GARY BALL, JR.,  
D-18 LEONARD MOORE,  
D-20 JOSEPH WHITING,  
D-37 ANTHONY CLARK,

*Defendants.*

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**MOTION IN LIMINE AND ACCOMPANYING BRIEF**

The United States of America, by and through its undersigned attorneys, moves this Court to not reconsider its ruling granting a mistrial as to defendant Michael Cicchetti and to deny his motion to allow him to continue his trial *in absentia*. The government believes that allowing Mr. Cicchetti to continue *in absentia* would prejudice its ability to have a fair hearing and that there would be a high probability that an extrinsic factor, i.e. the defendant's health, could affect the jury's decision rather than the evidence presented in court. Consequently, defendant Cicchetti's motion should be denied.

**ARGUMENT**

As documented in defendant Cicchetti's motion seeking a continuance (DE 1423), Mr. Cicchetti suffered a heart attack on April 18, 2010 and is currently scheduled for open-heart surgery on April 21, 2010. Prior to resuming the trial yesterday, the Court and counsel had a colloquy about how to handle the situation. All parties agreed that time was needed to research the issue and that

the trial should not be conducted on Monday, April 19, 2010. Concerning what the jury should be told about the lack of trial, the government expressed to the Court that it had no objections to the Court telling the jury about Mr. Cicchetti's heart attack since a severance appeared necessary and that this would not be the jury deciding his case. The Court informed the jury of Mr. Cicchetti's heart attack and many jurors, in their body language and facial expressions, rightly expressed concern for Mr. Cicchetti.

Later in the afternoon, defendant Cicchetti moved to continue the trial for at least four weeks to allow for recuperation from open-heart surgery. The Court denied his motion for continuance and granted a mistrial as to Mr. Cicchetti and severed him out of the current trial. Subsequently, defense counsel contacted the Court and expressed Mr. Cicchetti's intention to waive his appearance in court and requesting that he be tried *in absentia*.

Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 43(c)(1)(A) allows for a defendant, who was initially present at trial, to waive his right to be present after the trial has begun. The determination to try a defendant in absentia is within the sound discretion of the district court. *United States v. Burnett*, 361 F.2d 1579 (6th Cir. 1992)(table decision). However, Fed. R. Crim. P. 43 cannot be read in a vacuum especially in a multi-defendant trial. In *United States v. Davidson*, 936 F.2d 856, 861 (6th Cir. 1991), the Sixth Circuit held that a defendant's ability to waive his right to appear must also be read in conjunction with Fed. R. Crim. P. 14. Rule 14 states, in pertinent part, that "if the joinder of . . . defendants . . . a consolidation for trial appears to prejudice a defendant or the government, the court may . . . sever the defendants' trials, or provide any other relief that justice requires." The government believes that there exists a substantial danger of unfair prejudice in that the jury may take certain extrinsic information, i.e. defendant Cicchetti's serious medical condition, into account when weighing the evidence against him. The Court has scrupulously guarded against

allowing extrinsic information such as pretrial publicity or the reason behind the case agent's absence during the trial to enter into the jury's consideration of the facts. The jury now knows that defendant Cicchetti has had a heart attack and will see the severity of it when they witness that he is not at trial for at least the next four weeks and, most likely, the remainder of the trial. It is only natural for the jury to feel sympathy for Mr. Cicchetti's condition and this sympathy may well play into its consideration of the evidence against Mr. Cicchetti especially in light of his defense that he is a sick, harmless older man who is only guilty of loving motorcycles and cocaine. Consequently, the government believes it would be substantially prejudiced and seeks that the Court let its decision to sever Mr. Cicchetti stand.

Furthermore, Mr. Cicchetti's election to be tried in absentia also has ramification for his co-defendants. *United States v. Murr*, 200 F.3d 895, 903 (6th Cir. 2000)(finding that co-defendants have right to raise adverse effect of co-defendant's absence). If the Court should decide to allow Mr. Cicchetti to be tried *in absentia*, it is imperative that knowing waivers from all the defendants at trial to continue without Mr. Cicchetti present. Additionally, if the Court decides to allow Mr. Cicchetti to be tried in absentia, the government would request at the following instruction:

Mr. Cicchetti has personally elected to continue the trial without him being present. The government has objected to this arrangement and does not believe continuation of the trial is either in the best interest of the United States or Mr. Cicchetti. The Court is instructing you that you may not take Mr. Cicchetti's health situation into account when determining the facts of this case. You must decide Mr. Cicchetti's guilt or innocence only on the evidence presented in court. Mr. Cicchetti's health issues may be a mitigating factor taken into account by the Court at sentencing if the proceedings should reach that point. The United States does have medical confinement facilities available to care for ailing individuals convicted of a crime. Once again, this instruction is not to say that Mr. Cicchetti has been convicted of any crime. It is only to ease your mind concerning any implications of Mr. Cicchetti's health issues. You may not use his health condition at all when weighing the evidence in this case.

**CONCLUSION**

For all these reasons, the United States moves this Court to deny Mr. Cicchetti's motion to be tried *in absentia*.

Respectfully submitted,

Dated: April 20, 2010

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