

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-20112-Cr-GOLD
Magistrate Judge McAliley

UNITED STATES OF AMERICA)
)
v.)
)
ALI SHAYGAN,)
)
Defendant.)

_____ /

GOVERNMENT’S RESPONSE TO MOTION FOR SANCTIONS

The United States responds to defendant Ali Shaygan’s motion for sanctions pursuant to the Hyde Amendment (DE 287) and supplemental memorandum regarding motion for sanctions pursuant to 28 U.S.C. § 1927 (DE 296).¹

I.

At the conclusion of the evidentiary hearing on March 17, 2009, this Court asked for the government’s position with respect to “taking responsibility” by “paying money for [its] mistakes under the Hyde Amendment” (DE 290:199-200).² We therefore begin our response by directly addressing the Court’s inquiry.

The government acknowledges and deeply regrets that it made serious mistakes in a collateral investigation that was an offshoot of this case and stands ready to pay the additional attorneys’ fees

¹ Because Shaygan’s motion to dismiss for government misconduct (DE 250) has been “converted to Defendant’s Motion for Sanctions” (DE 289:5), we incorporate our previously-filed responses to that motion (DE 258, 270).

² The government has authorized payment for the official transcripts. As they have not yet been completed and filed, we refer to the daily draft transcripts of the evidentiary hearing on March 16 and 17, 2009, filed as DE 289 and 290.

and costs incurred by the defendant as a result. First, the United States Attorney's Office initiated a collateral investigation into witness tampering and authorized two witnesses, Carlos Vento and Trinity Clendening, to tape their discussions with members of the defense team in violation of United States Attorney's Office policy requiring the prior notification and approval of the United States Attorney (Office Circular on Attorney Investigations, Court's Exhibit 5). AUSAs Sean Cronin and Andrea Hoffman sought approval for the recordings from their immediate supervisors, Narcotics Section Deputy Chief Juan Antonio Gonzalez and Narcotics Section Chief Karen Gilbert, and consulted with the Department of Justice's Office of Enforcement Operations. However, Chief Gilbert erred, as she candidly conceded, by not seeking authorization for the investigation from the highest levels of the United States Attorney's Office (DE 290:12-16).

Second, although efforts were made to erect a "taint wall" specifically to prevent AUSAs Cronin and Hoffman from invading the defense camp and learning any defense strategy, the wall was imperfect and was breached, at least in part, because the case agent was initially on both sides of the wall and listened to Vento's recording of his December 9, 2008 telephone conversation with defense investigator Graff. Fortunately, Agent Wells did not disclose the content of the Vento recording to the trial AUSAs, and the trial AUSAs never learned the content of any of the three recordings.

Third, we acknowledge and accept responsibility for the government's violation of its discovery obligations by not disclosing to the defense (a) that witnesses Vento and Clendening were cooperating with the government by recording their conversations with members of the defense team, and (b) Vento's and Clendening's recorded statements at the time of their trial testimony. Finally, we acknowledge and regret that, in complying with the Court's pre-trial order to produce all DEA-6 reports for an in camera inspection on February 13, 2009 (Court's Exhibit 6), the

government failed to provide the Court with the two DEA-6 reports regarding the collateral investigation, specifically, Agent Wells' December 12, 2008 report (Court's Exhibit 2), and Agent Brown's January 16, 2009 report (Court's Exhibit 3).³

II.

From the moment these serious mistakes were discovered, immediate efforts were made to investigate, report, and rectify the matter. The matter came to light during the cross-examination of Clendening on Thursday, February 19, 2009, and an internal inquiry was promptly commenced on Friday, February 20, 2009.⁴ On Monday, February 23, 2009, during a recess in the trial, Chief Gilbert notified defense attorneys David Markus and Mark Seitles that they were not the subject or target of any investigation. First Assistant United States Attorney Sloman, in a letter hand delivered to defense counsel on February 23, 2009, confirmed that neither Mr. Markus nor Mr. Seitles was a subject or target of any investigation and that this matter was closed. At the same time, the government provided the defense with copies of Vento's and Clendening's recordings. At the end of that trial day, Chief Gilbert advised the Court that, with her authorization, two witnesses had recorded their conversations with the defense, that she had provided the defense with the recorded statements, and that the defense attorneys had been informed that they were not the subjects or targets of any pending investigation.

³ AUSA Cronin admitted that when he asked Agent Wells to gather all of the DEA-6 reports in compliance with this Court's order, he was thinking only about his side of the taint wall and it did not occur to him that there might be other reports; he conceded that in hindsight he should have specifically asked for any DEA-6 reports "that may have been generated in the witness tampering investigation" on the other side of the wall (DE 290:100).

⁴ There was no trial on Friday, February 20, 2009.

On Friday, February 27, 2009, after making an initial investigation into the facts, the United States Attorney determined it was appropriate to refer this matter to the Department of Justice's Office of Professional Responsibility (OPR) for its independent investigation and its recommendations regarding disciplinary actions. After gathering additional information, a formal referral was submitted to OPR one week later, on Friday, March 6, 2009.

Most recently, on Friday, March 20, 2009, the United States Attorney held a mandatory meeting with all of the supervisors in the Southern District of Florida, not only to relay what happened in this case but also to re-emphasize the seriousness of their supervisory responsibilities. AUSA Gilbert voluntarily resigned as Chief of the Narcotics Section, and AUSA Cronin voluntarily requested a transfer out of the Criminal Division.

III.

Acknowledging the seriousness of the mistakes made in this case, the United States stands ready to pay reasonable attorneys' fees and costs associated with Shaygan's motions to dismiss and for sanctions and the related proceedings. As ordered by this Court (DE 290:192), the government has arranged to pay approximately \$13,000 for the preparation of transcripts of the entire proceedings. In addition, pursuant to this Court's suggestion that the government consider its responsibility to pay money for its mistakes (DE 290:199-200), the United States Attorney extended an offer to defense attorney Markus to pay, pursuant to the Hyde Amendment, legal fees and costs incurred as a result of the collateral investigation. However, Mr. Markus did not agree to limit recovery to those fees and costs connected to the motions to dismiss and for sanctions; instead, Mr. Markus stated that he seeks recovery of attorneys' fees and costs beyond those connected to the motions to dismiss and for sanctions.

Mr. Markus's position is consistent with the position he took at the hearing on March 17, 2009. In response to the Court's inquiry as to the specific relief he was seeking, Mr. Markus responded that he "would be requesting the fees and costs associated with the trial in this matter and if the Court denies that request, [he] would be requesting, in the alternative, the fees and costs associated with litigating what was first the motion to dismiss and then this motion [for sanctions] and all of the sort of breakout litigation regarding Clendening and Vento and the recalling of those witnesses" (DE 290:174).

As more fully set forth below, the government's payment of the fees and costs associated with the entire prosecution is not warranted under the Hyde Amendment because the underlying criminal prosecution, as a whole, was not vexatious, frivolous, or pursued in bad faith. Moreover, we believe that the conduct of the individual AUSAs was not in bad faith, vexatious, or frivolous. Nonetheless, we believe that the United States should take responsibility for commencing the witness tampering investigation on the basis of the facts provided, continuing the investigation after the Vento recording demonstrated no misconduct by the defense, and failing to make the required disclosures relating to the collateral investigation. As a result, the United States Attorney has decided, on behalf of the government, to waive any legal defenses pursuant to the Hyde Amendment, and thus not contest payment pursuant to the Hyde Amendment, of the defendant's attorneys' fees and costs associated with litigating the motions to dismiss and for sanctions.

IV.

Shaygan's demand for the recovery of attorneys' fees and costs for the entire prosecution is not warranted under the Hyde Amendment.⁵ The Hyde Amendment authorizes reasonable attorney's fees and costs only where a successful criminal defendant can demonstrate that the position of the United States was "vexatious, frivolous, or in bad faith." 18 U.S.C. § 3006A. United States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999). These terms have precise definitions in the context of Hyde Amendment litigation. "Vexatious" means "without reasonable or probable cause or excuse." Id. at 1298.⁶ A "frivolous action" is one that is groundless, "with little prospect of success; often brought to embarrass or annoy the defendant." Id. at 1299. "Bad faith" is not "simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity" and "contemplates a state of mind affirmatively operating with furtive

⁵ The Hyde Amendment requires the submission of an affidavit that the defendant qualifies as a "party," defined as "an individual whose net worth did not exceed \$2,000,000 at the time the . . . action was filed." 28 U.S.C. § 2412(d)(1)(C)(2)(B)(i) (defining the term "party" in the EAJA). United States v. Adkinson, 247 F.3d 1289, 1291 n. 2 (11th Cir.2001) (applying the EAJA definition of "party" to a motion pursuant to the Hyde Amendment); United States v. Knott, 256 F.3d 20, 27 (1st Cir. 2001) (requiring fee applicants to meet net worth eligibility requirements of EAJA). Shaygan has not yet submitted an affidavit attesting that his net worth did not exceed two million dollars at the time the criminal action was filed. We anticipate that he will do so shortly.

⁶ Other Circuit Courts have defined vexatious as including not only an objective element (lacking reasonable or probable cause), but also a subjective element (intent to harass or annoy). See, e.g., United States v. Sherburne, 249 F.3d 1121, 1126 (9th Cir. 2001) ; United States v. Knott, 256 F.3d 20, 29 (1st Cir. 2001); United States v. Heavrin, 330 F.3d 723, 729 (6th Cir. 2003) (defining vexatious as including "the purpose of irritating, annoying, or tormenting the opposing party"). A definition of "vexatious" as including malice or an intent to harass or annoy distinguishes it from "frivolous" and avoids surplusage in the Hyde Amendment. Knott, 256 F.3d at 29-30. Although Gilbert did not expressly include a subjective "intent to harass or annoy" in its definition of "vexatious," it assessed the government's conduct in light of all three elements simultaneously, and, as the First Circuit noted, "it is not entirely clear how the [Eleventh Circuit] would apply 'vexatious' in isolation." Knott, 256 F.3d at 30, n. 5.

design or ill will.” Gilbert, 198 F.3d at 1299. “When assessing whether the ‘position of the United States was vexatious, frivolous, or in bad faith,’ the district court should therefore make only one finding, which should be based on the ‘case as an inclusive whole.’” Heavrin, 330 F.3d at 730.

The burden on the defendant of demonstrating that a position is vexatious, frivolous, or in bad faith is very high. It is not enough that the defendant prevailed at the pre-trial, trial, or appellate stages of the prosecution. Id. at 1299. Nor may fees be awarded to a prevailing criminal defendant “whenever the government fails to show that its position was ‘substantially justified.’” Id. at 1302. The standard of proof is much higher, precisely because of Congress’s “intent to prevent it from having a chilling effect on legitimate prosecutions, even those which ultimately result in acquittals.” Id. at 1303. The Hyde Amendment was specifically designed to place “a daunting obstacle” on a prevailing defendant, who must show that the government’s position underlying the prosecution “amounts to prosecutorial misconduct – a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.” Id. at 1299-1303. As its legislative history and language make clear, the Hyde Amendment is “targeted at prosecutorial misconduct, not prosecutorial mistake” or “prosecutorial zealalousness per se.” Id. at 1304.

With that legal framework in place, we turn to Shaygan’s specific allegations that the government’s position in this case was vexatious, frivolous, or in bad faith.

A. The Indictment and Superseding Indictment

At the conclusion of the evidentiary hearing, defense counsel conceded that the initial indictment was not filed in bad faith. Responding to the Court’s question whether “this case in its entirety was frivolous and with no good faith basis,” Mr. Markus responded, “I don’t think the initiation of the case was, the original indictment or anything like that” (DE 290:175-76).

As with the filing of the initial indictment, the government's decision to seek the return of a superseding indictment on September 26, 2008 was neither vexatious, frivolous, nor made in bad faith. AUSA Cronin testified as to the reasons for superseding the indictment. The indictment was superseded and charges were added because the government had discovered more witnesses and evidence after Shaygan's arrest and wanted to ensure that the additional evidence would be admissible at trial (DE 290:126-29).⁷ The superseding indictment was approved by AUSA Cronin's supervisors and returned by a grand jury (DE 290:130). It certainly was not sought in an effort to punish Shaygan or his counsel, and it did not expose Shaygan to an increased sentence under the Sentencing Guidelines (DE 290:125).

Shaygan has tried to forge a causal link between the return of the superseding indictment and AUSA Cronin's "seismic shift" remark. At the evidentiary hearing, however, AUSA Cronin explained what he meant when he told defense counsel, at a discovery conference on July 31, 2008, almost two months before the return of the superseding indictment, that if the defense persisted in a suppression motion that unjustifiably accused Agent Wells of lying, there would be a "seismic shift" in his "happy-go-lucky" personality (DE 290:116).⁸ AUSA Cronin admitted that it was "not the best choice of words" (DE 290:146). However, this remark, placed in proper context, by no

⁷ In fact, this Court did limit the admission of evidence to charged conduct (See 3/5/09 transcript at 71, sustaining defense objection to admission of uncharged conduct; 3/9/09 transcript at 124, limiting admission of evidence: "You did not charge it. I'm not going to hear about it").

⁸ AUSA Cronin explained: "My exact words when you [Mr. Markus] asked me to clarify what I meant by that were the happy-go-lucky Sean would go away. . . . this is the Sean who is happy to sit here in this discovery conference, answer questions about the evidence that I'm not obligated to, the guy who's willing to have a telephone conversation with you about potential plea deals, but that would change if you went into court and started accusing my agents, I believe, unjustifiably, of testifying falsely" (DE 290:114).

means demonstrates that the subsequent filing of the superseding indictment was motivated in any way by retribution, malice, or bad faith. See United States v. Schneider, 395 F.3d 78, 90 (2d Cir. 2005) (AUSA's statements to defendant in plea negotiations were "inappropriate," but it was "more likely they were innocent manifestations of bad judgment, rather than calculated malice or bad faith").

B. The Collateral Witness Tampering Investigation

There is no evidence that Agents Wells and Brown, or AUSAs Cronin, Hoffman, and Gilbert initiated or continued the witness tampering investigation with the purpose to invade the defense camp or acquire knowledge of defense strategy. Although the government mishandled the investigation, AUSA Cronin was attempting to follow up on information reported to him by the case agent, who was concerned by a Friday evening conversation he had with a potential witness. Before authorizing any tape recordings of the defense team by witnesses Vento and Clendening, AUSA Cronin consulted with the Department of Justice's Office of Enforcement Operations and specifically sought the approval of his Narcotics Section supervisors. The Chief of the Narcotics Section mistakenly believed that she had notified the Chief of the Criminal Division in compliance with office policy. We acknowledge a lack of care to the case. See United States v. Manchester Farming Partnership, 315 F.3d 1176,1186 (9th Cir. 2003) ("[t]he impropriety of the government's actions appear to be motivated more from lack of care to the case than a conscious desire to harm the defendants").

However, although Chief Gilbert's decision to authorize the witness tampering investigation without approval from her supervisors clearly violated office policy, it was not motivated by her ill will or personal animus against any members of the defense team or the defendant (DE 290:69-71).

These facts militate against a finding that the collateral investigation was motivated by the prosecutors' vexatiousness or bad faith. See United States v. Catano, 248 F.Supp.2d 1158, 1161 (S.D. Fla. 2003) (denying fees under Hyde Amendment where AUSA "may have been mistaken in his interpretation of and his arguments concerning Catano's statements to the CI, but Catano has not shown that [AUSA] committed a 'conscious . . . wrong because of dishonest purpose or moral obliquity.'").

Although Chief Gilbert specifically erected the wall to prevent the trial AUSAs from learning anything about defense strategy (DE 290:70-71), the taint wall was admittedly imperfect. However, Agent Wells was not left on both sides of the wall so that he could invade the defense camp and gather privileged or secret information and defense strategy for the trial AUSAs to use. In reality, the failure to have a taint agent from day one appears to have been the product of a combination of honest human error and poor judgment in the staffing of the agent side of that investigation. Fortunately, no defense strategy was revealed in the Vento-Graff call, and Agent Wells never discussed the call's content with trial AUSAs Cronin and Hoffman (DE 289:196, 200).

C. Discovery Violations

The government has never contested the fact that certain discovery violations, arising from the collateral investigation, occurred in this case. However, these errors were neither willful nor driven by bad faith or a desire to deny the defendant his right to a fair trial. Instead, they were unfortunate lapses that arose from the handling of the collateral investigation that was initiated to look into an allegation of possible witness tampering. Indeed, most of these issues arose from imperfect efforts to establish a wall to protect against any trial taint that might arise from that collateral matter.

AUSA Cronin admitted having primary responsibility for the government's compliance with its discovery obligations (DE 290:142). He admittedly erred by not disclosing the fact that Vento and Clendening had become cooperating witnesses in the obstruction investigation and by failing to take steps to determine if the collateral investigation had created any other discovery or Jencks material for these two witnesses that required disclosure to the defense at trial. However, these discovery violations were not done intentionally, vexatiously or in bad faith in order to deny Shaygan a fair trial (DE 290:149, 159). Instead, as Cronin admitted, he was focused on the case on his own side of the taint wall (DE 290:106-18). He admitted that in retrospect, he should have been more "proactive" in asking the AUSAs on the other side of the wall whether there was any discoverable information as a result of the collateral investigation (DE 290:117-18). However, the fact that mistakes occurred does not mean that they were made in bad faith or with intent to prejudice the defendant. Not every discovery violation rises to the level of "bad faith" or "vexatious" under Hyde. See Knott, 256 F.3d at 32 (reversing fee award; given that the exculpatory nature of the evidence was questionable, the failure to produce the evidence automatically did not amount to "vexatious" behavior under Hyde).

V.

In addition to seeking attorneys' fees pursuant to the Hyde Amendment, Shaygan has filed a "supplemental" memorandum seeking attorneys' fees and costs under 28 U.S.C. § 1927⁹ and this Court's "inherent authority" (DE 296). With respect to Shaygan's claim for fees and costs

⁹ That statute provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct" (emphasis added).

specifically under 28 U.S.C. § 1927, Shaygan has not cited, and our own research to date has not disclosed, any decision in which individual prosecutors were ordered to pay attorneys' fees incurred in a criminal case pursuant to 28 U.S.C. § 1927. The only criminal cases our research has uncovered to date involve situations where an award of fees under § 1927 has been imposed as a sanction against bad faith by defense counsel, not government attorneys. See e.g. United States v. Wallace, 964 F.2d 1214, 1217 (D.C. Cir. 1992) (reversing § 1927 sanctions against criminal defense attorney where there was negligent, sloppy performance by defense counsel, but nothing to suggest vexatiousness or bad faith); United States v. Williams, 894 F.2d 215 (7th Cir. 1990) (sanctions against defense counsel).

Prosecutors who act within the scope of their duties in initiating and pursuing a criminal prosecution are absolutely immune from liability in a civil suit for money damages. Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1976). Absolute immunity is conferred because of "concern that harassment by unfounded litigation" could both "cause a deflection of the prosecutor's energies from his public duties" and lead him to "shade his decisions instead of exercising the independence of judgment required by his public trust." Id., at 423, 96 S.Ct. at 991. Absolute immunity also extends to supervisors, for claims that the prosecution failed to disclose impeachment material due to a failure to train and supervise prosecutors. Van De Kamp v. Goldstein, ___ U.S. ___, 129 S.Ct. 855 (2009) (district attorney and chief deputy district attorney were entitled to absolute prosecutorial immunity for failure to train or supervise, resulting in discovery violations). For the same important reasons that prosecutors have absolute immunity from civil liability, individual prosecutors should not be ordered to pay attorneys' fees and costs to a prevailing defendant.

CONCLUSION

The United States takes responsibility for commencing the witness tampering investigation on the basis of the facts provided, continuing the investigation after the Vento recording demonstrated no misconduct by the defense, and failing to make the required disclosures relating to the collateral investigation. As a result, the United States Attorney, on behalf of the government, and only with respect to the collateral investigation, waives legal defenses pursuant to the Hyde Amendment, and thus stands prepared to pay, pursuant to the Hyde Amendment, the defendant's attorneys' fees and costs associated with litigating the motions to dismiss and for sanctions. However, the payment of the fees and costs associated with the entire prosecution is not warranted under the Hyde Amendment because the criminal prosecution as a whole, and the conduct of the individual AUSAs, was not vexatious, frivolous, or pursued in bad faith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 25, 2009, I electronically filed the foregoing document with the Clerk of Court using CM/ECF.

s/ Laura Thomas Rivero
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