UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 08-20112-CR-GOLD

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ALI SHAYGAN,
Defendant.
_____/

ALI SHAYGAN'S REPLY IN SUPPORT OF HIS MOTION FOR SANCTIONS

Ali Shaygan, through counsel, replies to the Government's Response to Motion for Sanctions [D.E. 299] as follows:

INTRODUCTION

After reviewing the government's Response, which takes responsibility for some of what has transpired and concedes that financial remuneration is appropriate, our initial reaction was to leave the determination of the appropriate sanction to the Court's judgment without further comment. We appreciate and respect the government's willingness to recognize that it made "serious mistakes" which caused harm to Dr. Shaygan. Neither Dr. Shaygan nor undersigned counsel takes any pleasure whatsoever in any of the events that have transpired or the need to continue discussing them, and we regret the consequences to those involved.

Yet while the government recognizes that it improperly executed its witness tampering investigation and committed "discovery violations," it glosses over the most critical issue entirely: the very initiation of a witness tampering investigation in the first instance. In effect, the government has taken responsibility for the coverup but not the crime. And it is the crime itself, the wrongful

commencement of a witness tampering investigation in the absence of any legitimate provocation whatsoever, that has and will continue to result in very serious damage to Dr. Shaygan and counsel.[1] Moreover, because the prosecution's vexatious and bad faith prosecution of this case commenced from the time of the superceding indictment, not merely from the time the government's errors were revealed to the Court, we respectfully submit that the government's definition of the appropriate sanction is too narrow. For these reasons, we cannot avoid a substantive response to the government's position.[2]

LEGAL STANDARD

Under the Hyde Amendment, a successful criminal defendant who can demonstrate that the position of the United States was "vexatious, frivolous, or in bad faith" can recover reasonable attorney's fees and costs. 18 U.S.C. § 3006A. Using the government's definitions, "vexatious" means "without reasonable or probable cause or excuse." And "bad faith" is a term which

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[1]Just by way of example, Dr. Shaygan's acquittal has been overshadowed by the implication that it was achieved through improper defense interactions with witnesses. Others have asked whether Shaygan was acquitted because of the misdeeds exposed at trial. Dr. Shaygan was acquitted because he is innocent. And although we would hope not to be assigned the blame for the wrongs perpetrated on us rather than by us, the existence of this dispute has damaged our relationship with many within the U.S. Attorney's office with whom we must interact on a daily basis. Moreover, the very fact that the U.S. Attorney's office commenced a "witness tampering" investigation and conducted recordings of undersigned counsel during its trial preparation has resulted in a widespread view in the legal community, not only in Miami but elsewhere, that there must have been some basis for such an investigation to be commenced.

[2]We limit further comment on those matters related to the execution and nondisclosure of the investigation for which the government has taken responsibility, resting on our previous filings, the evidentiary record, and the Court's own knowledge of what has transpired. Our reply is focused primarily on those aspects of the government's misconduct that are ignored in the government's Response, and the reasons why the record establishes that broad sanctions are appropriate from the date of the superceding indictment, the time that this prosecution got off track and became vexatious, frivolous and in bad faith.

"contemplates a state of mind affirmatively operating with furtive design or ill will." Response at 6-7. We concur that the Hyde Amendment is "'targeted at prosecutorial misconduct, not prosecutorial mistake' or 'prosecutorial zealousness *per se*.'" Response at 7, citing *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999). *See also United States v. Von Schlieffen*, 2009 WL 577720 (S.D. Fla. March 5, 2009) (Gold, J.) (awarding $356,824 under Hyde Amendment where "the Government's failure to monitor informants and its failure to disclose what it knew and had a duty to know about the informants, constituted bad faith under the Hyde Amendment.").

Likewise, pursuant to 28 U.S.C. § 1927, "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally[3] the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Finally, this Court has the inherent authority "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." *Allapattah v. Exxon*, 372 F. Supp. 2d 1344, 1373 (S.D. Fla. 2005) (Gold, J.), quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). This authority gives the Court the "ability to fashion an appropriate sanction for conduct which abuses the judicial process. One aspect of a court's inherent power is the ability to assess attorneys' fees and costs against the client or his attorney, or both, when either has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Allapattah,* 372 F. Supp. 2d at 1373 (internal quotations and citations omitted).

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[3]We understand the statute's reference to "personal" satisfaction of fees and costs to signify that the attorney or firm, as distinct from the client, would be liable. *See Allapattah v. Exxon Corp.*, 372 F. Supp. 2d 1344 (S.D. Fla. 2005). In the context of this case, we believe this would impose liability on the U.S. Attorney's office, not on the individual AUSAs and Agents involved. It is not our intent to seek fees against these individuals in their individual capacity.

ARGUMENT

As a result of the government's wrongful, vexatious, abusive, and bad faith prosecution of this case, Dr. Shaygan is entitled to recover reasonable fees and costs from the time of the government's superceding indictment to the present.[4] Such a remedy is appropriate under the Hyde Amendment, 28 U.S.C. § 1927, and the Court's inherent authority.[5]

This is one of those times when actions speak louder than words. During the evidentiary hearing, the government witnesses conceded a host of actions which constituted bad faith. In addition, the record reveals numerous other improper actions taken by the government during the course of this litigation. The inescapable conclusion drawn from the collective impact of so many

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[4]For the Court's convenience, under separate cover (and under seal to protect attorney-client privileged information) we have submitted invoices reflecting approximate hours worked. The invoice presents these hours in two ways: 1) from the time of the superceding indictment to date; and 2) only those hours related to litigation of matters related to the motion to dismiss and for sanctions. Because Dr. Shaygan was quoted and charged a flat rate for a one to two week trial on the initial indictment, undersigned counsel did not keep contemporaneous time records. The attached invoices are our good faith effort to approximate, conservatively, the hours expended based on a careful review of our calendars, emails, notes, expert bills, and the docket. We have conferred with the government regarding a stipulation as to the number of hours worked in this case, and the parties have reached an agreement on the sanctions issue. The parties stipulate that 414.5 hours were worked on the sanctions issue. As to the other requirements of the Hyde Amendment, we have attached the Affidavit of Ali Shaygan, as Exhibit 1, to this reply.

[5]Under the Hyde Amendment, which is a part of the Criminal Justice Act, "reasonable fees" are capped at $125 per hour. At the time the Amendment was passed, the rates for CJA attorneys were $60 for in-court time and $40 for out-of-court time. Those rates are now $110 per hour, but no adjustment to the Hyde Amendment rate has been made. The statute authorizes the Court to increase the per-hour amount if there has been "an increase in the cost of living." Accordingly, if the Court limits recovery to the Hyde Amendment – as distinct from recovery under section 1927 or the Court's inherent authority – we seek $229 per hour to reflect the cost of living increase from 1998 when the Act was passed. This is the same percentage increase as the CJA rate from $60 to $110/hour. No limitation on the hourly rate is mandated under 28 U.S.C. § 1927 or the Court's inherent authority; therefore, if the Court awards fees under these provisions, we request our full hourly rate.

such actions (and non-actions) is that the entire prosecution, at least from the time of the superceding indictment, was infected with ill will and misconduct.

The prosecution of this case was unusually aggressive right from the start. The event that triggered the "seismic shift" from good faith to bad was AUSA Cronin's express threat to create just such a shift. AUSA Cronin expressly warned undersigned counsel that if Dr. Shaygan pursued his motion to suppress, there would be a "seismic shift" in how he prosecuted the case. AUSA Cronin testified that what he meant by this comment was that his "happy-go-lucky" personality would "go away." [Cronin, Tr. 3/17 at 114]. Even if construed so narrowly, this threat is impossible to square with a good faith prosecution of this case. As the Court has recognized, the very underpinning of a motion to suppress is a challenge to the credibility of the witnesses, including those of the government. [Court, Testimony of Cronin, Tr. 3/17 at 133-34].

Moreover, it is evident that AUSA Cronin's comment referred not only to his attitude, but also his actions. Indeed, virtually every action he took throughout the remaining prosecution of this case demonstrated the aftershocks of the seismic shift. The first such manifestation was the filing of the superceding indictment, which took place after the commencement of the hearing on the motion to suppress. AUSA Cronin suggested in his testimony, and the government argues in its Response, that the government's decision to seek a superceding indictment was unrelated to Dr. Shaygan's motion to suppress and that the "seismic shift" was not necessary because the defense did not attack the government agents at the hearing in the same way they were attacked in the written motion. This does not ring true. All of the patients included in the superceding indictment were known to the government long before the motion to suppress was litigated, yet no superseding indictment was sought at that time, and the defense was never advised that a superceding indictment

was forthcoming (as typically we would be). Moreover, AUSA Cronin testified that he began pursuing the superseding indictment contemporaneously with the hearing on the motion to dismiss. [Cronin, Tr. 3/17 at 115-16]. Accordingly, he could not have known if the position taken by the defense at the hearing would be different than what was stated in Dr. Shaygan's papers (which, incidentally, it was not).

AUSA Cronin also suggested in his testimony, and the government again restates in its Response, that the filing of the superceding indictment was harmless to Dr. Shaygan because it did not expose him to an increased sentence. Response at 8. But the fact that the additional counts would not result in the risk of a greater sentence, if anything, *supports* the conclusion that the government's decision to add them was in bad faith. Given that the government expected to be able to put Dr. Shaygan in jail for 20 years without any additional counts, the logical inference is that the decision to supercede the indictment was done for the purpose of punishing Dr. Shaygan for the affront of pursuing his motion to suppress.

As the Court acknowledged through its questions to AUSA Cronin, the simple fact that the jury would be presented with a 141 count indictment, 115 counts more than the initial indictment, was itself highly detrimental to Dr. Shaygan's case. Moreover, it greatly increased the necessary trial preparation and resultant costs. Instead of an anticipated 1 to 2 week trial which could have proceeded in 2008, Dr. Shaygan was faced with a 4 to 5 week trial, necessarily deferred for months, involving 6 additional named patients. The government's decision to supercede, which we submit was motivated primarily by AUSA Cronin's ill will towards Dr. Shaygan and his counsel, resulted in exponentially increased costs to the defense.

AUSA Cronin also made decisions that impacted the Court. Specifically, in the course of

a hearing regarding Dr. Shaygan's motion for certain *Brady* information before Magistrate Judge McAliley, an issue arose regarding the disclosure of a witness report from Dr. Loucas. At the time of the request, the government apparently had not yet interviewed Dr. Loucas.[6] Rather than simply revealing this relatively innocuous fact to the defense, however, AUSA Cronin agreed to make an *in camera* filing regarding the report. In that filing, the government revealed that no report existed and suggested that Judge McAliley should decline to reveal that fact to the defense. In her order, Judge McAliley found that AUSA Cronin sought to enlist the Court to "engage in deception," stating "The government led the Defendant (and anyone else who might be following the public record of these proceedings) to believe that it would give the Court an interview report of Dr. Loucas, and the Court told the parties that it would inform them whether any part of that report must be disclosed as *Brady* material. . . . Thus, the Court cannot remain silent on the matter." Order at 3-4 [D.E. 103]. This unnecessary and inappropriate exercise, which was just one of a host of unnecessary skirmishes, transpired shortly after AUSA Cronin's promise of a "seismic shift" in the prosecution of the case.

Of course, the most obvious example of the government's malice in the prosecution of this case was the decision to initiate the witness tampering investigation into Dr. Shaygan's defense team. If it is true, as the government has stated, that it did not commence the investigation to invade the defense camp or acquire knowledge of defense strategy, Response at 9, the only other conclusion is that the investigation stemmed from the personal malice of the prosecution team towards Dr. Shaygan and his counsel. *Cf. Eagle Hosp. Physicians LLC v. SRG Consulting, Inc.*, 2009 WL 613603 (11th Cir. March 12, 2009) (finding "bad faith" for secretly monitoring emails from other

[6]There is contrary evidence in the record on this issue; Dr. Loucas's appointment book specifically stated that he spoke with Agent Wells in June 2008.

side, resulting in severe sanction of dismissal of civil case, which was necessary to deter future misconduct).

One thing is clear: the purpose cannot have been to follow up on a good faith concern that the defense team was engaged in witness tampering. This is evidenced by common sense and the following facts, none but the last of which is addressed in the government's Response:

- DEA Agent Wells had a conversation with Courtney Tucker on November 21, which he reported to AUSA Cronin included Ms. Tucker's statements that a defense investigator had suggested that the government might try to portray her as a drug dealer or drug abuser, and that she might be subject to criminal prosecution if she testified. [Wells, Tr. 3/16 at 166]. Yet the irrefutable evidence demonstrates that Ms. Tucker had not spoken with the defense investigator since August 20, more than two months before the November 21 call with Agent Wells. [Graff, Tr. 3/16 at 16].[7]

- Not only is it implausible that Ms. Tucker would wait two months to raise concerns about improper comments from a defense investigator, but both Ms. Tucker and Mr. Graff testified unequivocally that no such comments were ever made by Mr. Graff [Graff, Tr. 3/16 at 16-17; Tucker, Tr. 3/16 at 76, 91], and Ms. Tucker testified that she did not make a report of such

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[7]As it turns out, it appears that the statement falsely attributed to the defense investigator may have been prescient. Although none of the witnesses who testified for the government have been prosecuted for doctor shopping, Courtney Tucker and her husband Wayne McQuarrie were arrested by state law enforcement on April 1 for their purchase of pain medication – even though they were apparently assured by the government that there was no interest in such a prosecution. Defense counsel is unaware if this is retaliatory or not, but the following anonymous comment posted on the Southern District of Florida Blog (run by undersigned counsel) just two days after the arrest seems to suggest that someone in the know is involved:

Since you seem to have a case of "bloggers block," today, I have something for you to blog about: How about telling us all how you feel about your recent "star witness'" latest demise as related to your accusations of government fabrication of witness tampering?

I wonder if those plastic handcuffs hurt worse than the metal ones?

http://www.palmbeachpost.com/localnews/content/local_news/epaper/2009/04/01/0401bust.html

Sleep well, Mr. Markus, sleep well

The article referenced in the comment concerns the arrest of Wayne and Courtney.

comments to Agent Wells. [Tucker, Tr. 3/16 at 64-65].

- Agent Wells testified, credibly, that he did not interpret any of Ms. Tucker's comments to indicate witness tampering "at all", and that he did not raise this issue with AUSA Cronin. [Wells, Tr. 3/16 at 122-3, 127; see also Cronin, Tr. 3/17 at 84]. Instead, the purpose of his call to AUSA Cronin was to inform Cronin that Ms. Tucker's emotional state was not good and that further efforts should be made to ensure that she would provide testimony beneficial to the government. Wells simply believed that he had a witness "going south." *Id*.

- Yet AUSA Cronin reacted to Agent Wells' call *not* by following up with Ms. Tucker to discuss her potential testimony and rescue her from "going south," but rather by seeking to launch an investigation designed to obtain evidence to bring criminal charges against Dr. Shaygan's defense team. This seems to reflect a focus not on the merits of the case but on personal animus. This conclusion is further supported by the fact that he did not inform his superiors about the strained relations between him and the defense team in the course of recommending an investigation. [Gilbert, Tr. 3/17, at 50-51]

- Neither AUSA Cronin nor his supervisors made any effort at all to verify the accuracy of Wells' report (as defense counsel had done when the situation was reversed). A simple phone call, from any of the prosecutors who had a role in initiating the investigation, would immediately have revealed that an investigation was wholly unwarranted. Instead, AUSA Gilbert relied on AUSA Cronin's recitation, of Agent Wells' recitation, of Witness Tucker's recitation, of what Mr. Graff allegedly said, to commence a highly unusual and very serious witness tampering investigation into defense lawyers who she concedes have a good reputation in the community. [Gilbert, Tr. 3/17, at 16-19, 22]. The good faith, non-vexatious approach would have been to make the most minimal effort to follow up with at least Ms. Tucker, if not with counsel, to verify the triple hearsay report that the alleged complainant had complained, before deciding to tape record the defense team.

- Instead, based on the flimsiest of alleged complaints, which were never verified, which were entirely untrue, and which do not rise to the level of witness tampering even if true, AUSA Cronin and his supervisors authorized an investigation of not just the investigator who was accused (thirdhand) of making improper statements, but the defense lawyers as well. [Gilbert, Tr. 3/17, at 22]. This was done despite the fact that, as AUSA Gilbert has conceded, no probable cause existed [Gilbert, Tr. 3/17, at 36], and even though Wells stated that he had reservations about conducting such an investigation since it raised numerous "red flags" [Wells, Tr. 3/16, at 113].

- Finally, the required approvals from senior levels of the United States Attorney's Office were not sought or obtained. The government has acknowledged that had such approval been sought, it never would have been approved in this case.

Given the facts recited above, there simply is no good faith explanation for the decision to

embark on this investigation, the fact of which can never be erased and will always be of record.

After the commencement of the investigation, numerous actions on the part of the government in the execution and non-disclosure of the investigation further manifest the bad faith in which Dr. Shaygan's prosecution was carried out. Many of these are acknowledged by the government, and accordingly are not extensively discussed here. These include: the failure to immediately assign an agent to the investigation who was walled off from the trial team and lead case agent; the continued discussions between the trial prosecutors and Agent Wells about the collateral investigation; the failure to disclose that witnesses Vento and Clendening were cooperating with the government; the failure to turn over the copies and transcripts of the recorded statements themselves; and the failure to turn over the DEA-6s related to the investigation to the Court when ordered to do so.

Other misdeeds not addressed by the government include:

- the failure to make contemporaneous reports of critical conversations;
- the failure to disclose the existence of a cooperating witness agreement;
- the decision to continue the investigation even after the initial recording revealed no misconduct;
- the decision to use Vento and Clendening in the first place, and the decision to continue using them after they disregarded Wells' instructions by asking for money and asking to speak with Dr. Shaygan directly;
- the decision to continue the investigation, secretly, even after defense counsel brought to the attention of the trial team's superiors that there was a concern about undue animus;
- the fact that AUSAs Cronin and Hoffman called Agent Brown to ask about the status of the collateral investigation just before the trial, while still "overlooking" the obligation to disclose

the investigation to the defense and the Court;[8]

- the failure to immediately come sidebar to advise the Court of what had transpired upon such time as Clendening referenced the recording in his testimony, rather than waiting 4 days over a long weekend and then springing the news on defense counsel at the morning break just before an important cross-examination; and
- the complete failure to comply with *Brady* (the government failed to turn over any *Brady* material to the defense – not even one DEA6 – even though numerous patients, including Courtney Tucker, had positive things to say about Dr. Shaygan, which were recorded in government reports).

The government characterizes this group of misdeeds as good-faith discovery violations; this appears a gross understatement, but in any event, discovery violations of this magnitude are sufficient, in and of themselves, to merit serious sanctions. *See, e,.g., Von Schlieffen*, 2009 WL 577720 (finding that government's failure to disclose what it knew and had a duty to know about the informants constituted bad faith under the Hyde Amendment.).[9]

Moreover, the government overlooks the fact that it did not come forward to disclose what had transpired until its hand was forced by the statement that slipped out during Clendening's

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[8]Although the prosecutors were careful to explain in their affidavits that Agent Brown was assigned to the tampering investigation to reinforce the taint wall, Agent Brown testified that a week before trial, AUSAs Cronin and Hoffman called him to get an update on the investigation and to remind him that he only had a week left to make a case against the defense team. [Brown Tr. 3/16 at 262].

[9]We address the propriety of sanctions for discovery violations in detail in Ali Shaygan's Reply in Support of His Motion to Dismiss Indictment at 3-6 [D.E.264], and incorporate herein that discussion by reference. It is worth noting that the Attorney General recently moved to dismiss the indictment against Senator Ted Stevens based on comparable violations.

testimony. Even *after* Clendening revealed the existence of the tape during his testimony, this matter came to light only "by accident." AUSA Gilbert testified as follows:

> Q. [by the Court] What was your next contact? Somebody came in and said, "Ms. Gilbert, we got a problem here," right?
>
> A. I don't hear anything that's happening until February 19th which was the day my verdict came in, in the Judge Huck case, and the day that Mr. Clendening testified, I believe, here and made the comment about the tape recording existing.
>
> Q. So, why did any -- and I will get into this in a moment as to who did -- but why did any AUSA come to you? You are not responsible any more. You assign two other deputies.
>
> A. *It was merely by accident, sir. We were out at a restaurant Thursday evening talking about work and that's how it came up. It was not a, "Let me notify you as my boss." I happened to be with a group of people. Mr. Cronin and Ms. Hoffman were there and told the story. That's the first I heard of it.*

[Gilbert, Tr. 3/17, at 46-47, emphasis added]. Even after AUSAs Cronin and Hoffman were "reminded" by Clendening's testimony that he had been acting as a government informant and had made recordings of defense conversations that had not been revealed to the Court or to the defense, they not only failed to immediately bring this to the Court's attention, but they apparently did not intend to address the issue at all. It was only AUSA Gilbert's decision to follow up that resulted in the disclosures to the Court and the defense team. This is perhaps the most telling of many examples that what transpired in this case was not inadvertence or mistake. It was knowing and intentional.

If not for Clendening blurting it out on the stand, followed by AUSA Cronin's and Hoffman's passing comment to AUSA Gilbert during the telling of a war story in a dinner conversation, *none* of this would have been known to the Court. [Cronin, Tr. 3/17 at 117]. More significantly, none of this would have been known to the jury, and it might well have resulted in a wrongful conviction. The government's willingness to take responsibility now is commendable, but in attempting to

minimize what transpired, the government still has not demonstrated its recognition of the scope of the wrong or of the resulting damage.

CONCLUSION

We respectfully submit that all of the government's actions, beginning from the time of the superceding indictment, demonstrate serious prosecutorial misconduct, not mere mistake or zealousness. Although none of this misconduct was known to the defense or the Court until the near conclusion of the trial, it unfortunately began long before, and will cause harm long after. The remedy should be tailored accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served through the electronic filing system on April 6th, 2009, on AUSA Ed Stamm.

/s/ David Oscar Markus

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David Oscar Markus