UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No.: H-97-93
	)	
v.	)	Violations:
	)	
MARK ALBERT MALOOF,	)	15 U.S.C. §1
	)	18 U.S.C. § 371
Defendant.	)	FILED 6/23/97

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR PROSECUTORIAL MISCONDUCT IN GRAND JURY PROCEEDINGS

The United States of America, through its undersigned attorney, hereby responds to Defendant's Motion to Dismiss Indictment for Prosecutorial Misconduct in Grand Jury Proceedings ("Defendant's Motion"). In his Motion, the defendant alleges a "pervasive pattern of prosecutorial misconduct prejudicing the Defendant in underlying grand jury proceedings." Def. Mot. at 1. Specifically, he claims that:

a) government attorneys had a conflict of interest in conducting the grand jury investigation;

b) government attorneys conducted abusive and misleading questioning of witnesses before the grand jury; and,

c) government attorneys and agents interfered with defense counsel's access to a government witness.

Defendant's Motion lacks merit. First, defendant fails to demonstrate a pattern of government misconduct. In fact, the conduct of government attorneys has been at all times ethical and appropriate. Secondly, defendant has failed to show he has been

prejudiced in any way. Therefore, dismissal of the Indictment is inappropriate and unwarranted, and defendant's Motion should be denied.

DISMISSAL OF INDICTMENT IS AN EXTREME REMEDY WHICH REQUIRES A FINDING OF ACTUAL PREJUDICE

As a sanction for alleged misconduct, the standard for dismissal of an indictment is extremely high. The Supreme Court held that a district court may not exercise its supervisory powers to dismiss an indictment for prosecutorial misconduct in such a way that by-passes the harmless error rule of Fed.R.Crim.P. 52(a). Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369 (1988). Thus, dismissal is appropriate only "'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from substantial influence of such violations." Id. at 256, 108 S.Ct. at 2374, quoting United States v. Mechanik, 475 U.S. 66, 78, 106 S.Ct. 938, 946 (1986). A district court has "no authority to dismiss an indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct." Id. at 263, 108 S.Ct. at 2378. See also United States v. Williams, 504 U.S. 36, 47, 112 S.Ct. 1735, 1742 (1992) (further restricting supervisory power of a court to its own procedures).

Because dismissal of an indictment is an extreme remedy, a defendant seeking a dismissal on either constitutional or ethical grounds must prove actual prejudice. United States v. Morrison, 449 U.S. 361, 365-66, 101 S.Ct. 665, reh. denied, 450 U.S. 960 (1981); Bank of Nova Scotia, 487 U.S. at 255, 108 S.Ct. at 2374. See also United States v. Weeks, 919 F.2d 248, 254 (5th Cir. 1990), cert. denied, 499 U.S. 954 (1991) ; United States v. McKenzie, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982);

United States v. Acosta, 526 F.2d 670 (5th Cir.), cert. denied, 426 U.S. 920 (1976). There is a strong presumption of regularity surrounding a grand jury proceeding. United States v. Ruppel, 666 F.2d 261, 268 (5th Cir.), cert. denied, 458 U.S. 1107 (1982). Prosecutorial misconduct, no matter how egregious, does not provide grounds for dismissing an indictment without a showing of actual prejudice. United States v. Merlino, 595 F.2d 1016, 1018 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980).

As evidenced in the above-cited cases, courts have routinely refused to dismiss indictments for want of actual prejudice. The United States Supreme Court in the Morrison case articulated the public interest underlying this policy:

> So drastic a step [as dismissal] might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

449 U.S. at 366 n.3; 101 S.Ct. 668 n.3, quoting United States v. Blue, 384 U.S. 251, 255, 86 S.Ct. 1416, 1419 (1966).

DEFENDANT HAS NOT DEMONSTRATED PROSECUTORIAL MISCONDUCT NOR SHOWN ACTUAL PREJUDICE AND THEREFORE DISMISSAL OF THE INDICTMENT IS UNWARRANTED

On June 21, 1995, FBI agents met with defendant and sought his cooperation in the price-fixing investigation of the metal building insulation industry. On this day, government attorneys also met briefly with defendant to offer him immunity in exchange for his cooperation, which he declined. Defendant claims that the failure of the government attorneys to later withdraw from the grand jury investigation prejudiced him. He asserts that "personal involvement . . . destroyed" the ability of government attorneys to evaluate evidence objectively. Def. Mot. at 7. The government attorneys in this case had no

"personal involvement" in any of the events forming the basis of the charges against the defendant. Defendant's assertion that the objectivity of government attorneys was affected by meeting with him relies solely on actions taken by the government attorneys while performing their normal, every day, investigative duties as prosecutors. In any event, the Indictment of defendant was not returned by the government attorneys, but by the defendant's peers and fellow citizens, the grand jurors.

Defendant asserts that because of "personal involvement", government attorneys will be trial witnesses. However, the government attorneys in this case are not witnesses because the defendant has not shown a compelling need for their testimony. See United States v. Brothers, 856 F.Supp. 388 (M.D.Tenn. 1992). See also United States' Response to Defendant's Motion to Disqualify Prosecutors Mark R. Rosman and Karen J. Sharp. While defendant provides his version of events leading up to his meeting with government attorneys, none of these events, nor the meeting itself with government attorneys, has any relevance to the grand jury proceedings and the resulting indictment brought against him.[1] He fails to make a connection between the meeting and the grand jury proceedings leading to the Indictment, and thus fails to show how, if at all, he was prejudiced.

Defendant also claims that the government attorneys did not inform the grand jury that defendant declined the offer of immunity made to him. Defendant asserts his refusal to cooperate with the investigation is somehow exculpatory. The fact he declined the offered immunity is ambiguous at best. He could have chosen not to accept it for any

[1]The government strongly disputes defendant's description of the events of June 21, 1995. See Attached letters, dated August 12 and September 5, 1997.

number of reasons, most of which are not exculpatory. In any event, defendant purely speculates as to what grand jurors were told or not told about the case. In fact, the grand jury was aware that immunity was offered to defendant and that he declined to accept it. Thus, defendant has suffered no prejudice.

Defendant claims next that "abusive and misleading" questioning of several witnesses "biased and deceived" the grand jury. Def. Mot. at 8. He concludes that the prosecutors "broadcast" to grand jurors their personal opinions of the credibility of witnesses, and that repetitive questions were designed to communicate an erroneous proposition of law, thus somehow deceiving grand jurors regarding the applicable law. Id. These conclusions are without support as well.

The evidence submitted by defendant fails to support allegations that the government attorneys repeatedly "denigrated" witnesses, or that grand jurors were much more likely to discredit the testimony of such witnesses. Id. at 9. Defendant's affidavits from his co-workers do not come close to supporting such bald assertions. The affidavits of Byrd, Gilchrest, Hren, Nabors, and Watson merely say that each was questioned "several times" on a subject. The affidavit of Nancy Jensen says nothing about being questioned in the grand jury. Mark Novak is the only witness who claims to have been "upset" by the undersigned attorney "yelling" at him. The government questioned Mr. Novak in a proper and appropriate manner. As was stated to Mr. Novak's attorney on April 3, 1996, the government has an obligation to get straight answers from non-responsive, evasive witnesses for the record and for the benefit of the grand jurors. If the Court desires, the government will make a transcript of Mr. Novak's testimony, or that of any other

witness, available for in camera inspection to prove that the witness was not subject to abusive questioning and that defendant was not prejudiced.

Significantly, neither Mr. Novak nor any other witness has claimed that they were intimidated into testifying falsely on any question, so again the defendant has not shown prejudice resulting from such alleged conduct.

There is simply no evidence that prosecutors "broadcast" their personal opinions which allegedly biased jurors. Likewise, there is no evidence that the grand jurors were erroneously instructed on applicable laws. In short, defendant again relies on conclusory and speculative allegations of misconduct to support his Motion. The strong presumption of regularity in grand jury proceedings cannot be outweighed by conclusory or speculative allegations of misconduct. U.S. v. Morgan, 845 F.Supp. 934, 941 (D.Conn. 1994), citing United States v. Abcasis, 785 F.Supp. 1113, 1119 (S.D.N.Y. 1992). Because defendant relies on conclusions without supporting facts, he has not shown a substantial likelihood of influence or actual prejudice. There is no evidence that he suffered any prejudice at all, much less the evidence needed to meet the high standard that grand jurors were "substantially influenced" by such conduct. Bank of Nova Scotia, 487 U.S. at 256, 108 S.Ct. at 2334.

In his last argument, defendant claims that the prosecution made efforts to preclude his attorneys from gaining access to a government witness, Janne Smith. As seen in the accompanying Affidavit of Special Agent Frank Eldredge, the government made no efforts to prevent Ms. Smith from meeting with or disclosing her cooperation to defense counsel. Eldredge Aff. at 1-2. Moreover, defendant fails to mention several important facts. First, Ms. Smith has been represented by independent counsel since June 1995. Id.

at 2. Presumably, she has been following and acting on the advice of her counsel in deciding whom she would talk to about her knowledge of events and cooperation with the grand jury investigation. If defendant's attorneys wanted to speak with Ms. Smith, they could have contacted her counsel. This fact negates defendant's assertion that her testimony was in some way influenced by the government.

Another important fact not mentioned by defendant is that Ms. Smith actually met with counsel for Bay Insulation, Keith Rounsaville, and was questioned at length about her knowledge of defendant's activities and her cooperation with the grand jury investigation. Id. at 2. The government believes that defendant's attorneys are party to a joint defense agreement with other targets of the grand jury investigation, and their respective counsel, including defendant's employer, Bay Insulation Supply Co., and corporate counsel, Mr. Rounsaville. Thus, there is every likelihood that Mr. Rounsaville shared the notes and/or content of his lengthy debriefing of Ms. Smith with defendant's attorneys, as well as with the attorneys for other targets of the grand jury investigation. Indeed, during a pre-indictment meeting with government counsel, defendant's attorneys represented that they had already learned what Ms. Smith had to say. To date, the government has witnessed much evidence of the sharing of information between the defendant's attorneys and his employer's attorneys. See Attached letter, dated April 10, 1997 (indicating Bay counsel has seen government correspondence sent to defendant's attorney.) See also Affidavits of Mark Novak and Keith Rounsaville, attached to Def. Mot. to Preserve Grand Jury Tapes. (Mr. Rounsaville represented Mr. Novak at the grand jury.). Defendant's argument that he had no access to Ms. Smith is insincere at best. At a

minimum, he has had indirect access to her information, and has suffered no prejudice at all.

CONCLUSION

Defendant has failed to demonstrate any government misconduct that would justify exercise of the Court's supervisory authority, or that he has suffered any actual prejudice. The conduct of the government attorneys has been at all times ethical and appropriate. Accordingly, dismissal of the Indictment is unwarranted in this case, and his Motion should be denied.

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the United States' Response to Defendant's Motion to Dismiss Indictment for Prosecutorial Misconduct in Grand Jury Proceedings was sent via Federal Express this __ day of June, 1997, to:

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Defendant.	)	

ORDER

Upon consideration of the defendant's Motion to Dismiss Indictment for Prosecutorial Misconduct in Grand Jury Proceedings,

The Defendant's Motion is hereby DENIED.

DONE AND ENTERED THIS ____ day of _____, 1997.

_____

United States District Judge