UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.: H-92-152 (filed 10/28/92)
	)	
	)	
JOHN J. JOHNSON,	)	Violations:
	)	15 U.S.C. § 1
Defendant.	)	18 U.S.C. § 1001
	)	18 U.S.C. § 2(b)
	)	18 U.S.C. § 371

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR DISMISSAL OF THE INDICTMENT

The United States of America, through its undersigned attorneys, hereby responds to the Defendant's Motion for Dismissal of the Indictment (hereinafter Defendant's Motion). The defendant argues that the government interfered with his relationship with his attorney through pre-indictment consensual recording of his conversations with a co-conspirator, and thereby violated his Fifth Amendment right to due process of law. The defendant also contends that the government has shown a pattern of misconduct that warrants dismissal of the indictment.

Defendant's motion is completely meritless. The consensual recording in this case was a legitimate investigative technique clearly authorized by law, which in no way violated by the defendant's constitutional rights. In addi-

tion, the defendant has failed to demonstrate either a pattern of government misconduct or actual prejudice to his case because of the government's actions here. Consequently, dismissal of the indictment is inappropriate and unwarranted.

FACTUAL BACKGROUND

As evidenced by the attached affidavits of James Maurice Johnson, Special Agent Gerald Burkhalter, and Duncan S. Currie, the defendant mischaracterizes the basic facts surrounding the consensual recording of his telephone conversations and erroneously attributes improper motivations to actions taken by government counsel in the course of the government's investigation.

From mid-1990 through April 1991, James Maurice Johnson (hereinafter "Maurice"), one of the defendant's co-conspirators, received numerous telephone calls from the defendant. M. Johnson aff. p. 2. On March 20, 1991, as part of a plea agreement, Maurice informed the government of recent attempts by the defendant to contact him, and, after consulting with counsel, agreed to return the defendant's telephone call and cooperate with the government in recording this and a later return call. Id. at 3. (The government's transcriptions of these conversations are attached to its Response to Defendant's Motion to File Documents Under Seal, filed herewith, and identified as Ex. 1 and 2, respectively.) At all relevant times, the defendant was represented by counsel, and was clearly

aware that Maurice was cooperating in the government's criminal investigation. The recording occurred in a pre-indictment phase of the government's investigation.

I

THE GOVERNMENT UTILIZED LEGITIMATE INVESTIGATIVE TECHNIQUES CLEARLY AUTHORIZED BY LAW

The consensual recording of the two telephone conversations between Maurice and the defendant was a legitimate investigative technique clearly authorized by law and in no way violative of DR 7-104(A)(1). See United States v. Ryans, 903 F.2d 731, 740 (10th Cir.), cert. denied, __ U.S. __, 111 S.Ct. 152 (1990) (holding that DR 7-104(A)(1)'s proscriptions do not attach during the investigative process); United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (prosecutor is authorized by law to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather information against a subject frequently falls within this authorization); United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986) (DR 7-104(A)(1) does not preclude the tape recording of unindicted subjects during undercover investigations merely because they have retained counsel); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852 (1983) (pre-indictment use of informant to tape record information against represented suspect did not violate DR 7-104(A)(1)); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 452 U.S. 920

(1981) (government's use of investigative techniques such as consensual recording does not implicate the types of ethical problems addressed by the Code); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974) (use of informant to initiate and record conversations with defendant prior to arrest or indictment does not violate disciplinary rules).

The consensual recording of the two conversations was clearly authorized by law: the conversations were recorded fifteen months prior to the defendant's indictment; Maurice consented to the monitoring of the calls; both calls were made in response to attempts by the defendant to contact Maurice; and Special Agent Burkhalter monitored Maurice's side of both conversations. In addition, Maurice elicited evidence pertinent to the bid rigging conspiracy as directed. Therefore, no legal or ethical requirements were transgressed in the creation of these tapes, and they stand as legitimate evidence in this case.

II

THE DEFENDANT'S CONSTITUTIONAL RIGHTS HAVE NOT BEEN VIOLATED

Defendant contends that dismissal of the indictment is the appropriate remedy in this case because the government, through the consensual recording, attempted to interfere in his relationship with his attorney, thus violating his Fifth

Amendment due process rights. Defendant's Motion at 10. The standard for dismissal of an indictment is extremely high. "To constitute a constitutional violation the law enforcement technique must be so outrageous that it is fundamentally unfair and shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment". United States v. Ofshe, 817 F.2d 1508, 1516 (11th Cir.), cert. denied, 484 U.S. 963 (1987), citing United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643 (1973). The government conduct in this case never remotely approached this standard.

As reflected in the attached affidavits, the discussions in the tapes regarding the defendant and his attorney were never solicited or approved by the government. The government never instructed Maurice to question the defendant about his relationship with his attorney or communications between them. M. Johnson aff. at 4; D. Currie aff. at 2-3; G. Burkhalter aff. at 3-4. Indeed, the government repeatedly told him to avoid this subject area. M. Johnson aff. at 4; D. Currie aff. at 2; G. Burkhalter aff. at 2,3. Nor did the government ever direct or encourage Maurice to advise the defendant to get a different attorney, or to tell him he was receiving bad advice from his attorney. M. Johnson aff. at 4; D. Currie aff. at 2-3; G. Burkhalter aff. at 3-4. In fact, Maurice never heard the government even criticize the defendant's attorney or his advice. M. Johnson aff. at 4. Finally, the government never

directed or encouraged Maurice to persuade the defendant to cooperate with the government's investigation. M. Johnson aff. at 4; D. Currie aff. at 3; G. Burkhalter aff. at 4. The encouragement Maurice gave the defendant to cooperate was strictly his own personal advice, based on his own experience. M. Johnson at 3, 5.

To be properly understood, Maurice's advice to the defendant during the taped conversations must be considered in context. The defendant knew that Maurice had entered into a plea agreement and was cooperating with the government's criminal investigation, and contacted Maurice on at least six occasions prior to the taping to elicit information about the extent of his cooperation and the progress of the investigation. Id. at 2. Also in these earlier discussions, the defendant inquired about Maurice's relationship with his attorney, and asked Maurice for advice about his own situation. Id. at 3. During each of these earlier conversations, which were unknown to the government at the time, Maurice repeatedly gave the defendant the same advice as he did in the later taped conversations. Id. That advice was based on his own experience and consistently motivated by his concern for the defendant as a friend. Id. at 3, 5. Thus, Maurice's advice to the defendant to cooperate with the government was the same counsel he had been giving the defendant throughout a series of discussions on this topic. Id. at 5.

Although unaware of their previous conversations, the government nonetheless gave the appropriate instructions to Maurice to avoid discussions related to attorney communications, and consistently and actively directed Maurice away from this subject matter when it arose during the taping. D. Currie aff. at 2; G. Burkhalter aff. at 2, 3; M. Johnson aff. at 4. However, the defendant repeatedly steered the conversation back to this topic. See, e.g., J. Johnson-M. Johnson tel. tr., 3/20/91, pp. 6, 13, 41, 42, 46, 47; J. Johnson-M. Johnson tel. tr., 4/17/91, pp. 6, 7-8, 10, 11, 12. Rather than terminate the conversation altogether and thus lose the opportunity to collect evidence about the bid-rigging conspiracy, Maurice responded with the same personal advice he had given previously. M. Johnson aff. at 6. The government cannot be responsible for all actions taken by its cooperating witnesses. See United States v. Ryan, 548 F.2d 782, 791 (9th Cir. 1976) (holding that there was no due process violation where a government informant acting independently from the government urged an attorney to withdraw from his representation of a defendant). See also United States v. Simpson, 813 F.2d 1462, 1467 (9th Cir.), cert. denied, 484 U.S. 898 (1987); United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978). It should also be noted that on one occasion, when the defendant attempted to bring his attorney into the telephone conversation with Maurice, the government terminated Maurice's call. G. Burkhal-

ter aff. at 3; M. Johnson aff. at 6. See also J. Johnson-M. Johnson tel. tr., 4/17/91, at 12.

The facts in this case show no "outrageous government conduct" whatsoever. The actions taken by the government, in creating the consensually-recorded tapes, in instructing Maurice on the appropriate subject matter to discuss and to avoid, and in actively warning him away from potentially inappropriate subject matter as it arose during the actual discussions with the defendant, were all lawful, responsible and appropriate. It was the defendant who injected into the conversation his concerns about his legal representation and cooperation with the government. Maurice's responses were strictly personal and cannot be attributed to the government. Therefore, the defendant's constitutional rights were in no way violated by the government. As in Ryans, "any perceived threat to the integrity of the attorney-client relationship is out-weighed here by the government's interest in effective law enforcement." 903 F.2d at 740.

III

THERE IS NO PATTERN OF GOVERNMENT MISCONDUCT IN THESE PROCEEDINGS

The defendant argues that the Court should use its supervisory powers to dismiss the indictment in this case because the government is responsible for a pattern of unethi-cal conduct throughout both the criminal and related civil

proceedings. Defendant's Motion at 13. However, these supervisory powers allow the district court "to impose the extreme sanction of dismissal with prejudice only in extreme circumstances." United States v. Campagnulo, 592 F.2d 852, 865 (5th Cir. 1979). To warrant dismissal of an indictment on this basis, the defendant must show the prosecutorial misconduct is a long-standing or common problem in the district, and actual prejudice resulting therefrom. United States v. Griffith, 756 F.2d 1244, 1249 (6th Cir. 1985). No such pattern exists here.

In an attempt to demonstrate a pattern of ethical misconduct, the defendant manufactures an argument based on other actions taken by the government in this investigation to protect the grand jury investigation and the record in this case, and to validly and lawfully represent its interests. In so doing, the defendant equates conscientious representation with prosecutorial misconduct. That equation is both fallacious and irresponsible. Accusations of misconduct should not be waged so casually by those who practice and exalt mankind's "noblest and most beneficial" profession.

Defendant argues that the facts of the present case are "more egregious" than in three other cases, citing the Lopez case, United States v. Marshank, 777 F.Supp. 1507 (N.D. Cal. 1991), and United States v. Smith, Criminal No. F-9938-88 (S.C.D. 1989). Defendant's Motion at 22. In fact, each of these cases is easily distinguishable from the present one

and provide no support for his argument.

Lopez was a post-indictment case involving repeated direct and intentional contacts from the government to the defendant. The court found that these contacts deprived the defendant of his chosen counsel, and therefore dismissed the indictment under its supervisory powers. 765 F. Supp. at 1456, 1464. In the present case, the contacts were pre-indictment and part of an ongoing investigation; government personnel had no direct contact with the defendant; and the defendant has never been deprived of counsel.

The Smith case is equally inapposite, because it also involved post-indictment direct contacts.

The Marshank case, on which defendant places so much reliance, bears no resemblance whatsoever to the instant case. In Marshank, a pre- and post-indictment case, the government allegedly conspired with the defendant's own attorney to build a case against him and secure his indictment. The court found that, but for the unethical acts of defense counsel and the government in that case, the defendant would not have been indicted.

By contrast in the present case, first and foremost, there has never been any collaboration between defense counsel and the government against his client. Second, unlike the government's agent in Marshank, Maurice was repeatedly warned to avoid attorney-related discussions with the defendant. Third,

the tapes in question were never used to secure an indictment against the defendant and were never needed for that purpose. Finally, instead of concealing or ignoring possible conflicts of interest in connection with the defendant's attorney-client relationship, here the government, following the procedures outlined in United States v. Garcia, 517 F.2d 272, 276-277 (5th Cir. 1975), took every reasonable action to ensure that possible conflicts were ascertained and brought to the court's attention through its Motion for a Pretrial Hearing to Resolve Potential Conflicts of Interest, filed July 23, 1992 (hereinafter, "Garcia Motion"). This court obviously determined that a record should be made on this issue during the hearing held August 26, 1992. It is ironic that the defendant cites Marshank to criticize the government for doing in this case exactly what the Marshank court condemned the government for not doing in that case.

In this same regard, the government strenuously objects to the defendant's claim that it was attempting to create a conflict between the defendant and his counsel in this case through the consensually-recorded conversations. The government was concerned by the defendant's statements on these tapes indicating that his attorney was trying to protect the interests of his employers, Tom Glazier and Glazier Foods Company. J. Johnson-M. Johnson tel. tr., 4/17/91, p. 11. As a result, government counsel was prompted to question (1) which attorneys represented which clients connected with Glazier; and (2) what

potential conflicts might be presented by that representation. The factual concerns underlying the government's subsequent actions are set out in detail in the aforementioned government's Garcia Motion at 2-4, and need not be repeated here.

IV

DEFENDANT HAS SHOWN NO ACTUAL PREJUDICE AND THEREFORE DISMISSAL OF THE INDICTMENT IS UNWARRANTED.

Because dismissal of an indictment is an extreme remedy, a defendant seeking such a dismissal on either constitutional or ethical grounds must prove actual prejudice to his ability to receive a fair trial. United States v. Morrison, 449 U.S. 361, 365-366, 101 S.Ct. 665, reh. denied, 450 U.S. 960 (1981). See also United States v. Weeks, 919 F.2d 248, 254 (5th Cir. 1990); Bank of Nova Scotia v. United States, 487 U.S. 250, 255, 108 S.Ct. 2369, 2374 (1988); 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). 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). Further, even in cases where it is determined that the government deliberately obtained information in violation of a defendant's Fourth, Fifth or Sixth Amendment rights, the remedy

imposed is not dismissal of the indictment but suppression of evidence. See Morrison, 449 U.S. at 365-366, 101 S.Ct. at 668; United States v. Fortna, 796 F.2d 724, 732 (5th Cir. 1986). Lesser, more narrowly tailored remedies are likewise preferred over dismissal where unethical conduct has been charged. See, e.g., Bank of Nova Scotia, 487 U.S. at 255; 108 S.Ct. at 2374.

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).

In this case, the defendant has presented no facts to show government misconduct or to demonstrate that he has been prejudiced in any way. Rather, he contends that the government's conduct caused him to question whether his attorney was looking out for his best interests, and has hampered his ability to assist his counsel in preparing his defense. This argument ignores the fact that defendant's concerns about his legal representation began prior to the consensual recording and do not derive from it. Moreover, the defendant demonstrated his confidence in present counsel by continuing to retain him until

January 1992, when he was spun off to now Judge John Ackerman, and by then rehiring Mr. Androphy when Mr. Ackerman assumed the bench in early July 1992. See United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980).

CONCLUSION

The consensual recording of the defendant's conversations was a legitimate investigative technique clearly authorized by law and in no way violative of DR 7-104(A)(1) or of the defendant's constitutional rights. Moreover, defendant has failed to demonstrate a pattern of government misconduct to justify exercise of the court's supervisory authority. Finally, he has suffered no actual prejudice from the consensual recording. Accordingly, dismissal of the indictment is inappropriate and unwarranted in this case.

Respectfully submitted,

"/S/"

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"/S/"

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Response to Defendant's Motion for Dismissal of the Indictment and proposed order has been served upon and was sent via Federal Express this ____ day of October, 1992, to:

Joel M. Androphy, Esq.
Berg & Androphy
3704 Travis Street
Houston, Texas 77002

"/S/"

JANE E. PHILLIPS
Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No.: H-92-152
	)	
v.	)	
	)	Violations:
JOHN J. JOHNSON,	)	15 U.S.C. § 1
	)	18 U.S.C. § 1001
	)	18 U.S.C. § 2(b)
Defendant.	)	18 U.S.C. § 371

ORDER

Upon consideration of the Defendant's Motion for Dismissal of the Indictment and the Government's Response,

The Defendant's Motion is hereby DENIED.

DONE AND ENTERED THIS this _____ day of _____ ___, 1992.

UNITED STATES DISTRICT JUDGE