

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DENIS CARLSON	:	NO. 04-370-09

MEMORANDUM

Baylson, J.

November 2, 2005

I. Introduction and Procedural History

The issue presented is whether the government should be required to pay defendant Denis Carlson’s attorneys fees and costs pursuant to 18 U.S.C. § 3006A, commonly known as the “Hyde Amendment.” On June 29, 2004, the government indicted Carlson (“defendant”) along with eleven other defendants in a 48-count indictment¹. Two of those counts charged Carlson with making false statements to the FBI in violation of 18 U.S.C. § 1001. The Court severed for trial Carlson (and two other defendants, who pled guilty). See U.S. v. Kemp, 2004 WL 2757867.

Carlson’s trial commenced on January 18, 2005. After several days of testimony, the Court denied the defendant’s motion for acquittal under Rule 29. On February 1, 2005, after several days of deliberation, the jury returned a verdict of acquittal on both counts against Carlson.

18 U.S.C. § 3006A², commonly known as the Hyde Amendment, provides that attorneys’

¹A summary of the indictment will be found in United States v. White, 2004 WL 2617017 (10/29/04). Several defendants pled guilty. All five defendants who went to trial beginning February 14, 2005 were convicted of some charges. See United States v. Kemp, 379 F. Supp. 2d 690 (E.D. Pa. 7/20/05).

²18 U.S.C. § 3006A provides: “During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel

fees may be awarded to a prevailing criminal defendant where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the Court finds that special circumstances make such an award unjust. As a threshold matter, a successful criminal defendant must comply with the procedures and limitations of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, to ensure that his application is timely and properly filed. United States v. Ranger Electronic Communications, 210 F.3d 627, 632 (6th Cir. 2000) (noting in a case where the Court of Appeals reversed the district court's award of attorneys fees that the plaintiff failed to file the Hyde Amendment motion within the thirty-day time limit for filing claims).

There are no Supreme Court or Third Circuit cases that address the Hyde Amendment, therefore this Court will look to other circuits' decisional law. In consideration of these precedents, and for the reasons discussed below, Defendant Carlson's Motion for Payment of Attorneys Fees and Costs will be denied.

II. Contentions of the Parties

A. Denis Carlson

Carlson contends that his prosecution was both vexatious and frivolous. However he cites no case precedents at all, thus confirming the Court's own research that there is no

paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision." (Emphasis added).

precedential support for his claim under his facts. He claims that the government did not have sufficient evidence to warrant the false statement charges. Moreover, he asserts that the government was aware that it lacked sufficient evidence and decided to pursue the indictment for purposes of coercing him to become a witness against other defendants in the corruption investigation. To support this assertion, Carlson points to the government's conflicting statements concerning their intention to charge him with a crime. After government counsel interviewed Carlson for a second time, they informed his counsel that they had no desire to prosecute Carlson. The government later changed its position and sought to indict Carlson. The government purportedly offered a lenient plea agreement in an attempt to induce Carlson to substantially assist in the investigation of the other defendants. When Carlson refused the plea agreement, the government allegedly responded by threatening to add the additional charges of theft of honest services, conspiracy, extortion, perjury, and tax evasion to his existing indictment for making false statements. (Defendant's Motion, p. 10). Carlson alleges that when it became clear that the government did not have a case for the additional charges, it attempted to postpone his trial until after the trial of the five conspiracy defendants. He also alleges facts that, if proven, would allow a fact finder to conclude that the government tried to pressure Carlson into pleading guilty to some charges. He claims that this series of events proves that the government unjustifiably attempted to force him into a compromising position, and this constituted vexatious conduct.

Carlson further argues that the government's actions at trial reflect the vexatious nature of the prosecution. He asserts that despite their cursory and incomplete investigation, the government continued to press the false statement charges knowing that it lacked sufficient

evidence. Carlson requests the Court allow to a 90-day discovery period to enable him to conduct further investigation into his claims. Because of the improper government action, Carlson asks the Court to award him attorneys' fees and costs, which have totaled more than \$307,466.91.

Defendant Carlson does not charge the government with acting in bad faith, so the Court need not address this prong of the legal standard.

B. United States

The government contends that Carlson failed to meet the burden of proof necessary to award attorneys' fees and other costs pursuant to the Hyde Amendment. It asserts that the prevailing party is required to demonstrate that the prosecution was vexatious, frivolous, or in bad faith, and that courts have narrowly interpreted the Hyde Amendment to ensure that the award of attorneys' fees is reserved for truly abusive prosecutorial conduct that amounts to affirmative prosecutorial misconduct. To assess whether the government's conduct constituted prosecutorial misconduct the government notes that it is necessary to judge the "position of the United States as a whole, not as an amalgam of discrete instances of supposedly wrongful conduct by the prosecutors." (Government's Response, p. 5).

The government insists that it was properly motivated in their prosecution of Carlson, and that their actions do not amount to vexatious, frivolous, or bad faith conduct. The government asserts that the evidence of the offenses with which Mr. Carlson was charged was sufficient to put the case before the jury. It contends that the prosecution cannot be vexatious since this Court ordered there was sufficient evidence to submit the case to a jury. (Government's Response, p. 12). Moreover, the government claims that Carlson presented no evidence that it acted

improperly, and instead, he relies solely on “information and belief.” (Government’s Response, p. 7). Carlson accuses the government of threatening additional charges if he declined the plea offer. In response, the government stresses that these assertions amount to nothing more than evidence that the prosecution was considering its options, and changed its mind with respect to the charges filed. It notes that aggressive bargaining tactics do not constitute improper or vexatious conduct.

Finally, the government contends that this case presents special circumstances that would make an award unjust, that any award of fees in this type of case would have an “extraordinary chilling effect on law enforcement, particularly in the highly sensitive environment surrounding political corruption investigations.” (Government’s Response, p. 15). Moreover, the government claims that Carlson is not a proper party to bring suit under the Hyde Amendment because he failed to follow the limitations and procedures as outlined by the Equal Access to Justice Act, specifically the provisions relating to proper standing and the specificity standards. (Government’s Response, p. 16).

III. Legal Standard

Patterned after the EAJA, which applies to civil disputes, the Hyde Amendment pertains to criminal prosecutions and demands a high burden of proof. Under the Hyde Amendment, a defendant may recover attorneys’ fees only after a showing that the prosecution was “vexatious, frivolous, or in bad faith.” See United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999) (noting that a defendant 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). In Gilbert, the defendant filed a

motion to recover attorneys' fees with the district court after the Eleventh Circuit reversed his conviction for fraudulently concealing assets in a bankruptcy. The district court denied his motion for attorneys' fees and the Court of Appeals affirmed that decision. Gilbert claimed that the government's position in prosecuting him was "vexatious, frivolous, or in bad faith" because it withheld exculpatory evidence from the grand jury. The Eleventh Circuit ruled that the prosecution is not required to include exculpatory evidence in its presentation to the grand jury and went on to conclude that Gilbert failed to establish that the government's position was "vexatious, frivolous, or in bad faith;" thus, it denied his motion for attorneys' fees. Gilbert 198 F.3d 1293, 1304-1305. See also United States v. Schneider, 395 F.3d 78, 86-88 (2nd Cir. 2005).

The statutory language, reinforced by the legislative history of the Hyde Amendment, places a daunting obstacle before defendants who seek to obtain attorneys' fees and costs, and ensures that a remedy of attorney's fees is reserved for "prosecutorial misconduct, not prosecutorial mistake." Gilbert, 198 F.3d at 1304; see United States v. Knott, 256 F.3d 20, 29 (1st Cir. 2001) noting different circuits' definition of "vexatious" and concluding that Congress intended to limit Hyde Amendment awards to cases of affirmative prosecutorial misconduct rather than simply any prosecution which failed. In Knott, the defendants moved to recover reasonable attorneys' fees under the Hyde Amendment after the United States dismissed the charges against them. The district court granted the defendants' motion for attorneys' fees. The Court of Appeals reversed that decision, holding that the district court applied an incorrect legal standard for determining vexatiousness under the Hyde Amendment. It held that the government's conduct, when viewed objectively, did not manifest maliciousness or an intent to harass or annoy. Knott

256 F.3d at 35.

The Hyde Amendment expressly states that it is subject to the procedures and limitations of the EAJA. The Gilbert Court adhered to the procedures and limitations provided by the EAJA and focused on the “position of the United States as a whole.” Thus, it assessed the government’s position in light of all three elements – frivolousness, vexatiousness and bad faith – without attempting to apply each of the three prongs individually.³ Accordingly, even if a specific “part of the government’s case has merit, the movant might still be entitled to a Hyde Amendment award if the court finds that the government’s “position” as a whole was vexatious, frivolous, or in bad faith.” See United States v. Heavrin, 330 F.3d 723, 730, (6th Cir. 2003) (noting that to determine whether the prosecution’s position as a whole was frivolous requires the court to inquire into the merits of the entire case). In Knott, the Court of Appeals remanded the decision by the district court, which awarded attorneys’ fees on the basis that three of the fourteen counts against the defendants were frivolous. The appellate court held that the district court applied the wrong legal standard in determining if the case was frivolous because it only examined each count individually, as opposed to the “position” of the prosecution as a whole. Additionally, the Hyde Amendment adopts the EAJA procedures and limitations that address issues such as proper standing and provide guidelines for filing Motions. These issues will be addressed below.

IV. Discussion

A. Vexatiousness

Circuit courts disagree over the proper interpretation of the term “vexatious.” Since the

³Other courts analyze the Hyde Amendment differently. See United States v. Manchester Farming Partnership, 315 F.2d 1176, 1181 (9th Cir. 2003) (reasoning that the elements are disjunctive; thus, the defendant need only prove one of the three elements to recover).

Hyde Amendment provides no statutory definition of “vexatious” the Eleventh, Fourth and Sixth Circuits have applied its “ordinary meaning.” United States v. Gilbert, 198 F.3d 1298. Black’s Law Dictionary defines “vexatious” as meaning “without reasonable or probable cause or excuse; harassing; annoying.” Black’s Law Dictionary 1596 (8th ed. 2004). A “vexatious suit” is “instituted maliciously and without good cause.” Id. Other circuits, such as the Ninth and First, have held that a finding of “vexatious” under the Hyde Amendment “requires both a showing that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and a showing that the government’s conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy. ”

In United States v. Manchester Farming Partnership, 315 F.3d at 1182 (9th Cir. 2003), the appellants alleged that the government pursued an investigation based on a vengeful tipster’s advice, presented false and distorted testimony to the grand jury, and wrongfully ignored exculpatory evidence when it presented its case to the grand jury. In its opinion, the Court concluded that the government acted with “deliberate indifference” in pursuing the investigation. The court also stated that the government presented evidence to the grand jury that was deeply slanted in “a light most favorable to its position.” However, the court ruled that this was not enough to support a finding that the government’s prosecution was vexatious. It held that while the government’s performance was significantly below desirable standards, there was not enough evidence to prove that the government abused its discretion. The prosecution was entitled “to present evidence with a ‘spin’ and its actions did not suffice for recovering fees and costs under the Hyde Amendment.” See Manchester Farming 315 F.3d at 1183 (quoting United States v. Lindberg, 220 F.2d 1120, 1125 (9th Cir. 2000)).

Carlson fails to meet the burden necessary to establish that the government's prosecution was vexatious under any of the standards articulated above. The Court disagrees with the defendant's claim that the false statement charges were not meritorious and that the government's actions were indicative of vexatious conduct. The Court finds that the evidence at trial establishes that Carlson made statements to the FBI which were at material variance from facts that he knew. As charged in the indictment, Carlson made statements to the FBI about Philadelphia City Treasurer Kemp's use of his vacation home in the Poconos, which was shown to be a variance with his own knowledge, as proven at trial, largely by recorded telephone conversations.

Also, the government proved that Carlson personally had dealings with Ronald White to help Denis Carlson get city business, which Carlson denied in statements to the FBI. The various conversations that were recorded by the FBI, coupled with the other evidence, presented a prima facie case to the jury, which warranted the Court's denial of Carlson's Rule 29 Motion.

The prosecution did rely on some circumstantial evidence as well as direct evidence, but this is not germane to the analysis of whether the government engaged in vexatious conduct. See United States v. Gugnani, 178 F. Supp. 2d 538, 544 (D. Md. 2002)(noting in a case in which the district court denied the defendants' petition for attorneys' fees after they were acquitted, the government's decision to issue an indictment on the theories that the defendants' knowingly submitted false statements to the FDA, despite based more on circumstantial evidence than direct evidence, did not lead to the conclusion the indictment was pursued vexatiously).

The government's decision to prosecute Carlson, despite allegedly assuring his counsel otherwise, is merely an example of how the "trial process is fluid and involves multiple strategic and evidentiary decisions." See United States v. Sherburne, 249 F.3d 1121, 1127 (9th Cir. 2001)

(noting in a case in which the Court of Appeals vacated the district court's award of attorney's fees that the test for granting fees under the Hyde Amendments should not be an exercise in hindsight based solely on reasonableness). Assuming *arguendo* the accuracy of Carlson's claim that the prosecution assured his counsel that it would not indict Carlson, several weeks later the government advised Carlson's counsel it had a sufficient case to seek his indictment. This could account for new evidence or just a change of decision. Obviously, Carlson's allegations taken in the context of the evidence at trial are insufficient to show that the prosecution was vexatious. See United States v. Oliver, 787 F.2d 124 (3d Cir. 1986), where the Court discusses whether negotiations to induce a guilty plea are improper, and holds the issue is whether vindictiveness by the government has been shown. There has been no such showing in his case.

B. Frivolousness

Like "vexatious, the Hyde Amendment does not define "frivolous," so most courts use its ordinary meaning. A "frivolous suit" has no "legal basis, often filed to harass or extort money from the defendant." Black's Law Dictionary 1475 (8th ed. 2004). The Sixth Circuit defines "frivolous" for the purposes of the Hyde Amendment as a position "lacking a reasonable legal basis or where the government lacks a reasonable expectation of attaining sufficient material evidence by the time of trial." United States v. Heavrin, 330 F.3d 723, 729 (6th Cir. 2003). The Eleventh Circuit has defined a frivolous action as "one that is groundless ... with little prospect of success; often brought to embarrass or annoy the defendant." Gilbert, 198 F.3d at 1299. To present a successful Hyde Amendment claim, it is necessary for the defense to provide evidence that there was more than just prosecutor mistake. The defense needs to prove affirmative prosecutorial misconduct. Id.

The government's lack of direct evidence does not demonstrate that its case was baseless. As long as it was reasonable for a jury to infer guilt, it was a legitimate action. United States v. Lindberg, 220 F.3d 1120 (9th Cir. 2000). Carlson's acquittal does not necessarily mean that the prosecution was frivolous. Gilbert, 198 F.3d at 1299. Carlson has failed to present any evidence proving that the government was motivated with intent to embarrass him or ruin his reputation. They merely inferred this conclusion from prosecution statements in pre-trial meetings and the trial proceedings. These comments merely reflect the government's "spin on the evidence;" they do not indicate any improper conduct. Lindberg, 220 F.3d at 1125. Moreover, the Court denied Carlson's Rule 29 motion. While this is not dispositive on its own, it is relevant that in construing the evidence in the light most favorable to the government, the court determined that a prima facie case had been established. Gugnani, 178 F. Supp 2d at 542. In determining that there was sufficient evidence to go to trial, the Court necessarily found that the prosecution was not groundless. For all these reasons, the government's position cannot be characterized as frivolous.

C. Special Circumstances

The Court agrees with the government's position that the case presents special circumstances that would make any award unjust. (Government Response, p. 15). The Hyde Amendment states that a prevailing party may recover reasonable attorneys' fees and cost's "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." 18 U.S.C. § 3006A. If the Court awarded attorneys' fees to Carlson, it would expand the application of the Hyde Amendment beyond the intent of Congress. Congress wanted to prevent prosecutorial abuse and misconduct that impinged on defendants' rights, but it never intended to restrict the abilities

of the prosecution to be “zealous advocates” that carry out their duties with “earnestness and vigor.” Gilbert, 198 F.3d at 1303. This is evident by Congress’ decision to move away from the “substantially justified” standard developed under the EAJA to the more onerous burden embodied in the “vexatious” and “frivolous” standards of the Hyde Amendment. The Hyde Amendment requires defendants to prove more than that the prosecution lacked factual foundation. They now must establish that the prosecution was completely groundless and without reasonable or probable cause. A narrow interpretation ensures that prosecutors will not be deterred from pursuing litigation out of fear of facing liability in the event of an acquittal.

This concern is particularly pertinent to the specific circumstances of Carlson’s investigation. The FBI investigated Carlson as part of a larger public-corruption investigation that involved many private citizens and public officials with a high degree of public attention. Law enforcement should be encouraged to pursue allegations of public corruption with vigor and earnestness, without fear that aggressive strategies and prosecutorial decisions will lead to paying costs if a trial results in an acquittal. A not guilty verdict is not a finding of vexatiousness or frivolousness. The Court cannot allow an expansive reading of the Hyde Amendment, as the defense insists, because it would have a “chilling effect” on law enforcement by providing a disincentive to investigators to discover the truth. Gilbert, 198 F.3d at 1303.

D. Whether Carlson should be Entitled to Discovery

As noted above, Carlson seeks discovery to help prove his allegations. The Hyde Amendment provides that the Court, “for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an information or undercover agent or matters occurring before a

grand jury) and evidence or testimony so received shall be kept under seal.” 18 U.S.C. § 3006A. Various decisions interpreting this language are summarized in U.S. v. Schneider, *supra.*, but the Court does not make any definitive decision.

Carlson argues that a 90-day discovery period will enable him to collect evidence providing that the prosecution was vexatious, frivolous, or pursued in bad faith. He asserts that a discovery period will establish that the government knew that it had insufficient evidence, and that the primary reason the government chose to prosecute was to induce a plea agreement, as part of which Carlson would testify against the conspiracy defendants. The above-quoted language does not, in this Court’s opinion, authorize discovery of the government’s file, which is a foreign concept in the administration of criminal justice in federal courts. For many years Congress has consistently refused to authorize broad discovery of the government’s investigation files. The above provision for ex parte and in camera review of evidence only enables the government to defend itself against Hyde Amendment motions and at the same time protect confidential information. This Court would expect a more explicit statement by Congress in the statute if Congress intended to allow a defendant in a criminal case to have discovery of government files in connection with a Hyde Amendment petition.

Carlson’s requests for discovery will be denied; even if the Court has discretion to order discovery, Carlson has not shown any factual basis to allow discovery.

E. Applicable EAJA Procedures and Limitations

The government also asserts Carlson’s motion should be denied on procedural grounds. The Hyde Amendment provides that awards pertaining to attorneys’ fees will be “granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award” under the

EAJA. 18 U.S.C. § 3006A. The EAJA, 28 U.S.C. § 2412, authorizes the award of attorneys' fees and costs to private parties who prevail against the government in civil actions. Ranger Communications, 210 F.3d at 628. Several provisions of 28 U.S.C. § 2412 present a challenge to Carlson's attempt of recovering attorneys' fees.

First, it is unclear if Carlson has proper standing to bring a Hyde Amendment claim due to a failure to qualify as a proper "party." Section 2412(d)(2)(b)(I) states that to be considered a proper "party," a party's net worth may not exceed \$2,000,000 at the time of the filing of the charges. Carlson failed to submit any evidence to the Court establishing that his net worth is below the required \$2,000,000 threshold, and the Court cannot speculate as to his personal wealth. Although the government agreed to allow discovery into his net worth to determine if he is a proper party, this is unnecessary since Carlson failed to establish that the prosecution was vexatious or frivolous.

Section 2412(d)(1)(b) of the EAJA also bars Carlson's attempt to recover attorneys' fees. This section requires the prevailing party to submit an itemized statement from his attorney or expert stating the actual time spent and the rate at which the fees and expenses were computed at the time that the motion is filed. 28 U.S.C. § 2412. Carlson failed to include an itemized statement in his motion. He alleged that his attorneys' fees amounted to \$307,466.91, but did not offer any evidence that supported this amount. Once again, this issue is not determinative because Carlson lacks adequate evidence establishing that the prosecution was vexatious or frivolous, and if he had, the Court would allow him time to submit the relevant details.

V. Conclusion

For the foregoing reasons, defendant Carlson's Motion for Payment of Attorneys' Fees and

Costs Pursuant to 18 U.S.C. § 3006A will be denied.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DENIS CARLSON	:	NO. 04-370-09

ORDER

AND NOW, this 2nd day of November, 2005, for the reasons stated in the foregoing Memorandum, the Motion of Defendant Dennis Carlson for Payment of Attorneys' Fees and Costs Pursuant to 18 U.S.C. §3006A (Doc. No. 488) is DENIED.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.