

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LAWRENCE J. LAWSON, JR.,

Defendant.

No. 3:16-cr-00121-TMB-DMS

**ORDER FOR FURTHER
BRIEFING**

The Court has concluded that serious Fed. R. Crim. Pro. Rule 16 discovery violations and *Brady v. Maryland* violations have occurred in this case, which constitute flagrant government misconduct. A Report and Recommendation with detailed factual findings will be provided.

In *U.S. v. Simpson*, 927 F.2d 1088 at 1091 (9th Cir. 1991), the Ninth Circuit stated:

The Supreme Court has recognized only three legitimate bases for the exercise of the supervisory power: to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct.

(citing *U.S. v. Hasting*, 461 U.S. 499, 505 (1983); *U.S. v. Gonsalves*, 781 F.2d 1319, 1320 (9th Cir. 1986); *U.S. v. Gatto*, 763 F.2d 1040, 1044 (9th Cir. 1985))

The Court has also concluded that the government misconduct in this case is so egregious that the Court has no alternative but to exercise its supervisory power to create a remedy or remedies designed to protect the defendant's rights and to deter future misconduct.

The parties have briefed the issue fully on whether the Indictment should be

dismissed because the misconduct will substantially prejudice the defendant at trial. However, the Court has a responsibility to consider all possible remedies. Before finalizing its decision, the Court seeks further briefing from the parties on two topics not previously researched or argued.

1.) Award of Attorney's Fees

Sovereign immunity bars a federal court from using its supervisory power to order the federal government to “pay attorney’s fees and costs as a sanction for prosecutorial misconduct in a *criminal* case.” *U.S. v. Horn*, 29 F.3d 754, 770 (1st Cir. 1994) (emphasis added) (Overturning the lower court’s award of attorney’s fees for prosecutorial misconduct discovered pre-trial); *see also Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684-85 (“Except to the extent it has waived its immunity [under statute or otherwise], the Government is immune from claims for attorney's fees”). The *Horn* Court made this ruling despite the prosecutor’s “direct defiance of the court’s order” and “series of inconsistent statements” before the court. 29 F.3d at 758.

Pursuant to the Hyde Amendment¹, the Ninth Circuit permits awarding attorney’s fees for prosecutorial misconduct in limited circumstances – only where the defendant is the “prevailing party in a criminal case” and where the court finds that the government’s position was “vexatious, frivolous, or in bad faith.” *U.S. v. Pocklington*, 831 F.3d 1186, 1187 (9th Cir. 2016).

However, as a means to “deter future prosecutorial excesses,” the Court is considering holding a prosecutor or prosecutors personally liable for the cost resulting from

1 DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS ACT, 1998, PL 105–119, November 26, 1997, 111 Stat 2440 (18 USCA § 3006A NOTE)

her/his misconduct. *Horn*, 29 F.3d at 759, 766-67 (Notwithstanding sovereign immunity, the Court could have held the prosecutor personally liable for the \$46,477.80 resulting from his misconduct); *see also U.S. v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1371 (9th Cir. 1980) (Permitting monetary sanction of \$500 imposed personally on government attorney where such sanction against the government is not statutorily authorized).

2.) Removal of Prosecutor

Removal of a prosecutor can be used as a sanction for her/his prosecutorial misconduct and as a deterrent against “future prosecutorial excesses.” *Horn*, 29 F.3d at 766-67. But the Court should weigh this dismissal against potential prejudices to the government. *Compare U.S. v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992), *rev’d in part*, 29 F.3d 754 (1st Cir. 1994) (Removing the lead prosecutor does not “unduly disadvantage” the government because the team had three other prosecutors), *with U.S. v. Sanchez*, 2004 WL 315266, at *2 (S.D.N.Y. Feb. 18, 2004) (Declining to remove the lead prosecutor “less than three months” before trial in part because he had been on the case for “over five years”).

The parties are requested to provide simultaneous briefs on these two topics by January 7, 2019.

DATED this 26th day of December, 2018, at Anchorage, Alaska.

S/ Deborah M. Smith

CHIEF U.S. MAGISTRATE JUDGE