

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 10-CR-117-BDB
)	
JEFF M. HENDERSON and)	
WILLIAM A. YELTON)	
)	
Defendants.)	

**RESPONSE TO
MOTION TO DISMISS FOR
ALLEGED PROSECUTORIAL MISCONDUCT
AND BRIEF IN SUPPORT**

AND

**MOTION TO SHOW CAUSE AS TO WHY SANCTIONS SHOULD NOT BE
IMPOSED AGAINST DEFENSE COUNSEL
AND BRIEF IN SUPPORT**

COMES NOW the United States of America, by and through counsel, Jane W. Duke, Special Attorney, and Patrick Harris and Patricia S. Harris, Special Assistant United States Attorneys, and files this responsive pleading to defendants’ joint motion to dismiss for alleged prosecutorial misconduct (Docket Number 41). For the reasons stated below, the motion should be summarily denied. Furthermore, the United States requests that the Court

issue an order to defense counsel R. Thomas Seymour, Chad Adrian Greer, Anthony L. Allen, and Scott A. Graham, directing them to individually and collectively show cause as to why each should not be sanctioned for filing the motion to dismiss in bad faith.

I. Defendants’ Motion to Dismiss

A. Background

On August 9, 2010, just three days after entering an appearance as counsel for defendant Henderson, R. Thomas Seymour filed the instant motion to dismiss. While actually submitted by Seymour on the Court’s CM/ECF filing system, the motion specifically reflects that it was also filed by Chad Greer, Scott Graham, and Anthony Allen.¹ In that motion, Seymour makes multiple baseless allegations of prosecutorial misconduct, which he alleges to have occurred throughout the entirety of this “long-running investigation.” (Defendants’ Motion to Dismiss Indictment for Prosecutorial Misconduct and Brief in Support (“Defendants’ Motion”, p. 1)). The pleading includes the word “threat” or “threatened” 23 times when referring to purported acts of the Special Attorney and/or members of the prosecution team. The requested relief is dismissal of the indictment. As more fully set forth below, not only should the motion be summarily denied, but defense counsel should also be required to show cause as to why each should not be sanctioned for filing such a malicious and baseless pleading.

¹Each signature block states that it was being signed “by R. Thomas Seymour w/permission”.

B. The Allegations Contained in the Defense Motion

While too numerous to quote all of the allegations in the motion, some of the more substantive passages are as follows:

1. “Following several weeks of threats, Special Prosecutor Jane Duke has directly caused the TPD to forbid ALL of its personnel from having communications with anyone other than federal law enforcement officers or prosecutors.” (Defendants’ Motion, p.3).
2. “On August 3, 2010, and prior thereto, Special Prosecutor Jane Duke threatened to indict TPD personnel who did anything that could be deemed to be of assistance to the defense of Henderson or Yelton, on charges of obstruction of justice.” (Defendants’ Motion, p.3).
3. “On information and belief, on August 3, 2010, she [Jane Duke] directly threatened Chief Jordan himself if TPD officers took any action that could be deemed to be of assistance to the defense of Henderson or Yelton.” (Defendants’ Motion, p.3).
4. “In the August 3, 2010 meeting, Special Prosecutor Jane Duke demanded that no one in the Tulsa Police Department talk to Henderson or Yelton.” (Defendants’ Motion, p.4).²
5. “On August 3, 2010, Special Prosecutor Jane Duke told Chief Jordan and the other assembled officials of the TPD that she will be having federal agents making sure that no TPD officer has contact with Henderson or Yelton or does anything which could be deemed to be of assistance to their cases.” (Defendants’ Motion, p.4).

²Seymour states that the Special Attorney “directly caused” Chief Jordan to issue the prohibition on communication contained in his August 3, 2010 memorandum. (Defendants’ Motion, p.3). However, the Special Attorney did not even know of this prohibition until seeing the memorandum as an attachment to Seymour’s pleading.

6. “Following the controlled drug buy from Larry Barnes, Special Prosecutor Jane Duke threatened the Captain of the SID, Nick Hondros, with indictment for obstruction of justice because of this investigation of the Barnes’ illegal possession of drugs which had nothing to do with the federal investigation.” (Defendants’ Motion, p.5).
7. “Assistant United States Attorney Pat Harris threatened to imprison Tulsa Police Officer David Foust if Officer Foust didn’t change his testimony to coincide with the Government’s theory. When Officer Foust was leaving the courthouse following his grand jury appearance, AUSA Harris used his hand to prevent the elevator doors from closing and told Foust, if he didn’t change his testimony, ‘I will throw your ass in jail.’” (Defendants’ Motion, pp.5-6).
8. “Special Prosecutor Jane Duke sent another very loud and broad message to TPD officers when she threatened another officer by telling him words to the effect she was ‘just itching’ to file obstruction of justice charges on officers who provided assistance to Henderson or Yelton.” (Defendants’ Motion, p.6).
9. “In Martin’s fragile state, she has been threatened with drug trafficking charges by Special Prosecutor Duke’s prosecution team, with a ten-year minimum sentence, unless she gives evidence against Officer Henderson.” (Defendants’ Motion, p.6).
10. “. . . Special Prosecutor Jane Duke has not just ‘asked’ members of the Tulsa Police Department to refrain from voluntarily giving relevant information to Officers Henderson and Yelton, she has threatened them with federal indictment for obstruction of justice if they do so.” (Defendants’ Motion, p.8).

Undersigned counsel has attempted to distill the allegations contained in the defense motion to specific categories of alleged misconduct. While somewhat difficult given the repetitive and unfocused nature of the allegations, they generally can be categorized as

follows: (1) Alleged threats to Tulsa Police Chief Chuck Jordan; (2) Alleged threats to TPD Special Investigations Division Captain Nick Hondros; (3) Alleged threats to other TPD employees; and (4) Alleged threats to Rochelle Martin. Each will be addressed in turn.

C. The Allegations Versus the Facts

1. Alleged Threats to Chief Chuck Jordan

Seymour repeatedly asserts in the defendants' motion that on August 3, 2010, the Special Attorney met with Chief Jordan and other TPD officials and directly threatened the Chief and "other assembled officials of the TPD." In fact, no such meeting between the Special Attorney and any TPD official even occurred on that date, either in person or telephonically.

The first and only time any of the Special attorneys met with Chief Jordan occurred on July 28, 2010, in a meeting that took place at the FBI office in Tulsa, Oklahoma. Present for that meeting were the following: Jane Duke; Pat Harris; Chief Jordan; Tulsa City Attorney Gerald Bender; Supervisory Special Agent Kristen Slater; and Special Agent Kevin Legleiter. Without getting into specific content, the meeting was very cordial and professional and absolutely no threats were made by anyone, including undersigned counsel. Notably, multiple things demonstrate the falsity of the representations contained in the defense filing and, most shockingly, defense counsel's knowledge of the falsity and/or reckless disregard for the truthfulness of the representations.

First, the day after the defendants' motion to dismiss was filed, and without any contact having occurred between the Special Attorney and Chief Jordan, Chief Jordan issued a statement to the press regarding the allegations of threats contained in the defense pleading. In that statement, Chief Jordan said, "I will say unequivocally that I was not threatened by Jane Duke or any member from the Department of Justice." Chief Jordan further stated, "We will continue to cooperate with the U.S. Attorney's Office during the entirety of these investigations." Further, on August 11, 2010, Supervisory Special Agent Slater spoke with Chief Jordan on the telephone at the request of the Special Attorney to determine whether, prior to filing the defendants' motion, any member of the defense team had contacted Chief Jordan to verify the accuracy of the factual information included in the filing. Chief Jordan advised SSA Slater that no such contact had occurred prior to the filing of the pleading. Chief Jordan further stated that the only contact he had with any defense attorney after the defendants' initial appearances occurred on August 10, 2010 after Chief Jordan had issued his media statement. This contact occurred when Seymour called Chief Jordan and expressed displeasure with Chief Jordan for having publicly stated that no threats were made. Chief Jordan reiterated to Seymour that no threats were made by the Special Attorney. Defense counsel's failure to verify the accuracy of its information with Chief Jordan prior to filing such a serious pleading constitutes reckless indifference as to whether the facts represented to the Court were true.

Not only was there reckless indifference to the truthfulness of the factual representations, there was blatant knowledge of their falsity prior to filing the motion. On August 10, 2010, the undersigned Special Attorney contacted City Attorney Gerald Bender by telephone to inquire whether any member of the defense team had contacted Bender to verify the accuracy of the factual matters that were contained in the motion to dismiss. Much to the Special Attorney's dismay, Mr. Bender stated that at least 5 days prior (so at least as early as August 5th), defense attorney Anthony Allen contacted him to ascertain whether undersigned counsel had made threats to Chief Jordan. Mr. Bender unequivocally told Allen that no threats were made by the Special Attorney or members of her team. However, despite having been told by a person who was actually there (Mr. Bender was present for the meeting between undersigned counsel and Chief Jordan), the defense team filed a pleading in direct contravention to the known facts. Seymour and the other defense attorneys blatantly ignored what a witness with first-hand knowledge told Allen actually happened.

It is important to note that there were six people in attendance at that July 28th meeting. The defense attorneys only talked to one of those people and then falsified what that person told them occurred.

2. Alleged Threats to SID Captain Nick Hondros

Seymour and the defense team contend that the Special Attorney threatened SID Captain Hondros with prosecution for obstruction because of a separate TPD investigation of Larry Barnes and his daughter for drug trafficking. This allegation is also completely

untrue. On August 10, 2010, the Special Attorney contacted Captain Hondros to determine whether any member of the defense team had contacted Captain Hondros to verify the accuracy of this allegation before putting it in a pleading. Captain Hondros stated that no one had contacted him to verify the accuracy of such an allegation. Captain Hondros further stated that he had not been threatened by the Special Attorney. Captain Hondros recalled a telephone conference with the Special Attorney in which he was told that if the TPD had developed independent cases against any person involved in the federal investigation, TPD should proceed with “business as usual.” The Special Attorney reiterated that she was not asking TPD to extend any special favors to anyone simply because they may be a federal witness. The only request made by the Special Attorney was that if TPD investigated criminal conduct of a witness, that the Special Attorney would have to be notified at some point of that fact in order to make appropriate *Giglio* disclosures to defense counsel in this case.³

3. Alleged Threats to Other TPD Personnel

Seymour’s motion contains allegations that threats were also made to TPD Officer Gene Watkins, David Foust, and an unnamed third officer who went to the hospital over the stress of the purported threat. With respect to Officer Watkins, it would be inappropriate for

³What is truly remarkable about the defendants’ allegations is the reference to a “controlled drug buy from Larry Barnes (and his daughter Kelli).” Assuming such a controlled buy occurred, the defense counsel has now made public what was formerly a non-public TPD investigation.

the Special Attorney to comment as to whether a particular person appeared before the grand jury or to comment on the substance of any grand jury testimony. Suffice it to say, however, that documentation furnished by Officer Watkins to the FBI regarding Rochelle Martin's statement in her affidavit has been thoroughly reviewed by the Special attorneys and Watkins. This documentation does not conflict with the statement in her affidavit that she never made a controlled drug buy for any TPD officer. Furthermore, if, in fact, Officer Watkins received immunity from criminal prosecution, one can only assume that Officer Watkins permitted defense counsel to publicly disclose that fact inasmuch as it now could present *Giglio* issues for Officer Watkins.

As to Officer Foust, the allegations are that Special Assistant United States Attorney Pat Harris threatened Officer Foust by stating that Harris would "throw [his] ass in jail" if Foust did not change his testimony to suit Harris. This absolutely did not happen. Again, it would be inappropriate for the Special Attorney to comment on a person's appearance before the grand jury and what, if any, testimony might have been given. It is worth noting, however, that the defense pleading apparently confuses a statement made by former TPD Officer Callison Kaiser (as testified to at the detention hearing) with what the defense believes Officer Foust testified to at the grand jury.

Regarding the unnamed person to whom the Special Attorney stated that she was "just itching" to file obstruction of justices charges on officers who provided assistance to Henderson or Yelton, it just did not happen. Without anything more specific alleged, that

is simply all the Special Attorney can say in response to this baseless allegation.

4. Alleged Threats to Rochelle Martin

Defense counsel claims that Rochelle Martin was threatened with drug trafficking charges carrying a ten-year mandatory minimum sentence unless she gave evidence against Henderson. First, the motion never once states that any incriminating evidence offered by Rochelle Martin against Henderson and Yelton is false. Not once. What they do say is that Martin was threatened and intimidated into telling the truth. What they don't say is that Martin is represented by Federal Public Defender Julia O'Connell and has been since approximately April 2, 2010. FPD O'Connell was appointed by Chief Judge Claire Eagan to represent Martin in her dealings with the Special Attorney. This representation is well known to defense counsel. In fact, on the first day of O'Connell's representation of Martin, Martin told Henderson who Martin's lawyer was, to which Henderson responded that Martin needed to get a different lawyer. This action is strikingly similar to the allegations in Count 61 of the indictment involving Brandon McFadden. As further proof that defense counsel was aware of Martin's legal representation when dealing with the Special Attorney, O'Connell sent Greer a letter on May 7, 2010, advising him of O'Connell's representation of Martin and that he should not have contact with Martin without going through O'Connell. Seymour is also aware of this representation because he has recently spoken with O'Connell and inquired about Martin's fear of Henderson.

To be clear, Martin was never threatened by the Special attorneys. Martin's status

relative to this investigation and prosecution has been reached with full benefit of legal counsel. Martin's actions were taken presumably upon the advice of her court-appointed counsel. Perhaps defense counsel should have inquired of O'Connell as to whether Martin was threatened by the Special Attorney. To reiterate, defense counsel never allege that any incriminating statements Martin has made against Henderson and Yelton are false.

D. Inconsistency of Position Taken by Seymour and Its Relation to Conflict of Interest Issue

In the motion to dismiss, Seymour complains that "Special Prosecutor Jane Duke moved to have a number of felons convicted in the Northern District of Oklahoma released from prison and their charges dismissed, based on evidence obtained during the investigation." (Defendants' Motion, p.2). First, the Special Attorney has not taken any action with respect to criminal cases with the exception of the *Barnes* and *Haley* cases. These are only two of the many cases impacted by the wrongful actions of these law enforcement officers in Tulsa. And, the action in these two cases was taken after pleadings were filed and a federal judge found the requested relief to be appropriate. The vast majority of the cases (which currently number more than 14) that have been dismissed or had charges dropped have been acted upon by Tulsa County District Attorney Tim Harris or Northern District of Oklahoma United States Attorney Scott Woodward. The actions of these prosecuting authorities have been independent of any influence by the Special Attorney.

The real irony of this complaint by Seymour is that the day after he filed this motion

to dismiss, he spoke with United States Attorney Scott Woodward on behalf of Jose Angel Gonzalez (the civil rights victim described in Count 37 of the indictment). The August 10th conversation with United States Attorney Woodward concerned a resolution of the *Gonzalez* case. In that conversation, Seymour stated that he was “confident” that the gun case against Gonzalez should be dismissed by the Northern District of Oklahoma United States Attorney’s Office because of the law enforcement misconduct underlying that conviction. That misconduct includes actions of Seymour’s other client, Jeff Henderson.⁴ This is yet another example of the bad faith demonstrated in the motion. On the one hand, Seymour complains in his motion that wrongful convictions are being set aside. However, Seymour then attempts to benefit from the federal investigation by having Gonzalez’ conviction set aside.

E. Legal Standards Governing Dismissal for Prosecutorial Misconduct

Pursuant to the Tenth Circuit’s holding in *United States v. Thompson*, 518 F.3d 832, 861 (10th Cir. 2008), dismissal of an indictment on the basis of law enforcement officials’s pre-indictment conduct is appropriate only where such conduct “is outrageous enough to shock the conscience of the court.” *Thompson*, 518 F.3d at 861; *see also United States v. Kennedy*, 225 F.3d 1187, 1194 (10th Cir. 2000)(“Misconduct by law enforcement officials in collecting incriminating evidence may rise to the level of a due process violation when the misconduct is outrageous enough to shock the conscience of the court.”). Examples of

⁴The conflict of interest issue has been raised by separate pleading filed on August 10, 2010. During this conversation with United States Attorney Woodward, Seymour even referenced the United States’ filing on the conflict of interest issue.

conscience-shocking conduct include: pumping a defendant's stomach for evidence, *Rochin v. California*, 342 U.S. 165, 172-74 (1952), and pervasively intruding on a defendant's attorney-client privilege before indictment, *United States v. Schell*, 775 F.2d 559, 562-63, 566 (4th Cir. 1985).

For purposes of determining whether post-indictment, pre-trial conduct rises to the level of prosecutorial misconduct, most courts apply a two-prong test. *See United States v. Epps*, 2010 WL 3063331, at *6 (11th Cir. 2010). In order for a court to find prosecutorial misconduct in general, law enforcement officials' conduct must (1) be improper and (2) prejudicially affect the substantial rights of the defendant. *Id.*

The defendants' motion fails to satisfy any of the above criteria.

II. Motion for Sanctions

The Special Attorney and Special Assistant United States Attorneys take the allegations in the defense motion extremely seriously. None of the three prosecutors on this case has ever been reprimanded by a court for engaging in unethical behavior or prosecutorial misconduct. However, the bad faith demonstrated by the defense pleading is apparently not an uncommon tactic used by Seymour.

It is an ethical obligation of an attorney not to file pleadings which he or she knows to be false or misleading. As stated by the Tenth Circuit Court of Appeals:

Rule 11 sanctions serve to punish a knowing filing of a false and misleading pleading. It ensures that an attorney observes his duty as an officer of the court, as well as an advocate for his client. Rule 11 requires that the pleading

be, to the best of the signer's knowledge, well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose. *The attorney has an affirmative duty to inquire into the facts and law before filing a pleading.* His inquiry must be reasonable under the circumstances.

Coffey v. Healthtrust, Inc., 1 F.3d 1101, 1104 (10th Cir. 1993)(emphasis added).

Interestingly, Seymour cites the case of *United States v. Brady* in his motion as evidencing prosecutorial misconduct. Notably, Seymour's representation of that same defendant in bankruptcy litigation resulted in the following pronouncement from United States Bankruptcy Judge Dana Rasure:

The Court is very disturbed by Ms. Brady's counsels' representation on the face of the motion to compel that counsel met and conferred on several occasions in a good faith and sincere attempt to resolve the issues underlying this motion. The Court finds this representation to be false. . . . Mr. Seymour may also be heard in connection with statements made to the district court mischaracterizing this Court's finding in imposing the temporary restraining order, an issue raised by Mr. Geller [counsel for plaintiff] at the hearing, and an issue for which Mr. Seymour has previously been admonished by this Court.

CFS v. Gertrude Brady, Case No. 99-0038-R, United States Bankruptcy Court, Northern District of Oklahoma.

In another case, *Watson v. United States*, CIV-04-537-C from the Western District of Oklahoma, United States District Judge Robin Cauthron stated in a memorandum opinion that:

Plaintiff's counsel's [Tom Seymour's] closing and reply briefs are full of speculation, misstatements, unwarranted assumptions, accusations, and vitriol with the argument and revised proposed findings and conclusions based on

evidence that was not introduced or a mischaracterization of that which was introduced. Because it would not be productive to explain the rejection of each of plaintiff's proposed findings and conclusions, the Court rejects them in their entirety except where they are consistent with the findings and conclusions stated herein.

Finally, in *Fidelity Bank v. First National Funding, Inc., et al*, Case No. 4:95CV143-E from the Northern District of Texas, United States District Judge Eldon Mahon wrote in an order that:

[i]n a motion to proceed without local counsel, defendants' attorney, R. Thomas Seymour, proudly informed the Court that he attended Harvard College and Law School, and that he recently had won a RICO action resulting in a multi-million dollar verdict. In light of such a resume, the Court can only conclude that counsel's pleadings reflect an educated and deliberate exposition of the relevant facts. Regrettably, it appears that neither Harvard nor his impressive experience has taught counsel the art of drafting concise, unrepetitive documents. For example, where counsel could have used a single paragraph to describe conduct equally affecting each of his clients, he instead drafted five paragraphs identical save for the name of the defendant affected. While counsel may have intended such verbosity to bog down his opponent, he apparently failed to consider that the Court, too, would be required to review his drivel.

Vigorous representation of one's client is certainly an admirable trait in any attorney—whether prosecutor or defense counsel. Likewise, the prosecution does not take issue necessarily with the filing of pleadings based on counsel's "information and belief." However, what the prosecution does take great issue with is the filing of pleadings containing facts known to be false and pleadings that contain allegations for which no attempt at verification has been made. The United States also takes issue with the inclusion of venomous and personal attacks on counsel.

The prosecutors on this case take their responsibilities to pursue justice very seriously. We represent the people of the United States and we understand the ramifications of what we do on behalf of the federal government. That is why the allegations addressed above, as well as the many unnecessary comments contained in the defense counsel's motion, are so disappointing. The most substantial allegations have been addressed above and will not be repeated here. However, the many unnecessary and inflammatory comments include:

1. "It does not take a rocket scientist to conclude from the foregoing that Special Prosecutor Jane Duke used the harassment of this officer to send a very loud and broad message to TPD officers: 'You help out the defense, and we will make your life miserable.'" (Defendants' Motion, p.5).
2. Accusing the Special Attorney of committing state and federal crimes. Specifically, on page 5 of the defense pleading, it states, "This action, of course, constituted obstruction of justice under the laws of the State of Oklahoma, because of the state-nature of the TPD investigation of Barnes. Under the circumstances, it should also be viewed as obstruction of justice under the United States Code because of its impact on this case."
3. "Special Prosecutor Jane Duke's conduct in threatening federal indictment on obstruction of justice charges if the very witnesses who are indispensable to the defense of Officers Henderson and Yelton communicate with the defense team of those officers explodes the essence of the American system of justice into thousands of tiny pieces." (Defendants' Motion, p.9).
4. Referring to the Special Attorney on page 9 as the "Minister of injustice" and accusing her of "outrageous intimidation."
5. Implying that the prosecution exploited the medical condition of Rochelle Martin to force her cooperation (Defendants' Motion, p.6) and further stating that "Jane Duke became furious" with Martin when

Martin invoked her Fifth Amendment privilege. (Defendants' Motion, p.7).

6. Stating that the prosecution has “[d]istorted the truth-finding process and compromised the integrity of the trial.” (Defendants' Motion, p.10).
7. “[T]he actions of Special Prosecutor Jane Duke and her prosecution team seriously pervert the very mission of the Justice Department.” (Defendants' Motion, p.11).
8. Stating that the prosecution team has “. . . struck blows of the foulest kind, undermining the very integrity of the American judicial process.” (Defendants' Motion, p.11).
9. “Ms. Duke and her prosecution team have become a lynch mob, interested only in a win at any cost.” (Defendants' Motion, p.12).

Clearly, these personal accusations are intemperate and unwarranted.

It is a basic tenet of American jurisprudence that a court has the power to sanction attorneys appearing before it. In describing a court's power to sanction attorneys, Tenth Circuit Court of Appeals Judge Baldock, in the case of *United States v. Collins*, 920 F.2d 619, 634 (10th Cir. 1990), stated:

Those who use the tools of the legal profession to prostitute its high standards of ethical and moral conduct serve only to destroy the admirable goals and aims of our criminal justice system. While the power to disqualify an attorney from a case is one which ought to be exercised with great caution, it is incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession.

(Citations omitted).

WHEREFORE, the United States prays that the motion to dismiss be denied and that the Court issue an order directing each defense attorney to show cause as to why he should not be sanctioned for filing the motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2010, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Scott A. Graham
Anthony L. Allen
Chad Adrian Greer
R. Thomas Seymour

/s/ Jane W. Duke
Jane W. Duke
Special Attorney