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

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

DEFENDANTS' MOTION TO DISMISS INDICTMENT
FOR PROSECUTORIAL MISCONDUCT AND BRIEF IN SUPPORT

Defendants Jeff Henderson and Bill Yelton move to dismiss the Indictment with prejudice because of prosecutorial misconduct. An evidentiary hearing is requested.

The misconduct is the actions of Special Prosecutor Jane Duke and her prosecution team which have made a fair trial irretrievably impossible, thereby depriving Defendants of their Constitutional rights to Due Process of Law and their Sixth Amendment rights to a fair trial by jury.

I. Background

This case arises out of a long-running investigation of corruption in law enforcement, which began with allegations of misconduct by former Alcohol, Tobacco and Firearms Agent Brandon McFadden. Because McFadden had investigated and testified in numerous drug cases in the Northern District of Oklahoma, the United States Attorney's Office for the Northern District of Oklahoma recused. The Department of Justice appointed Jane Duke, acting United States Attorney for the Eastern District of Arkansas, to be Special Prosecutor in charge of the

investigation and prosecution.

During the investigation of McFadden, Ms. Duke and her prosecution team also decided to investigate possible corruption in the Tulsa Police Department (hereafter "TPD").

During the course of the Grand Jury investigation, which began in early 2009, 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.

The Grand Jury issued a four count Indictment against McFadden in Case No. 10-CR-58-JHP. A copy of the McFadden Indictment is attached hereto as Exhibit 1.

On May 6, 2010, McFadden pled guilty to Count One of the indictment returned against him. McFadden, in pleading guilty, said he understood his sentence- on Count 1 only- could be from 5 to 40 years. McFadden agreed to cooperate with the Government, and this cooperation was the basis for him not to be detained. *See* Exhibit 2.

Several present and former officers of TPD were indicted. Defendant J.J. Gray has entered a plea of guilty.

On July 19, 2010 the Grand Jury returned the Indictment in this case. Both Defendants have entered pleas of not guilty. Each was ordered detained by Magistrate Judge Paul Cleary. Both Defendants have very recently filed motions to have the order of detention revoked because there are adequate safeguards should they be released.

Each Defendant is incarcerated in the Tulsa County Jail, on 23 hour lockdown.

Defendant Yelton is a 25-year veteran of the TPD, and has received extraordinary awards, including being named National Policeman of the Year in 1994. Defendant Henderson is a 15-year veteran of the TPD, and has received numerous commendations.

II. The Prosecutorial Misconduct

A. Special Prosecutor Jane Duke Will File Obstruction of Justice Charges Against Any TPD Officer Who Talks to Henderson or Yelton or Does Anything Which Would Constitute Assistance to Henderson or Yelton's Cases

The charges in the Indictment involve the work of Defendants as officers of the TPD. In their work which is at issue in the Indictment, Defendants have interacted with scores of other officers. The Indictment names several prosecutions which are alleged to have been the result of unconstitutional actions by one or both Defendants. It is intuitively obvious that the proper defense of the charges in the Indictment must include substantial discussions with officers of the TPD who have relevant information.

Following several weeks of threats, Special Prosecutor Jane Duke has directly caused the TPD to forbid ALL of its personnel from having "communications of any kind with anyone other than Federal Law Enforcement Officers or Prosecutors regarding any aspect of the current federal criminal investigation of current or former Tulsa Police officers." This prohibition came about on August 3, 2010 in the form of an Interoffice Correspondence from the Chief of Police, Chuck Jordan, to "All Police Employees." A copy of the Interoffice Correspondence is attached as Exhibit 3.

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. On information and belief, on August 3, 2010 she 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.

On August 3, 2010, Special Prosecutor Jane Duke told Chief Jordan and the other assembled officials of the TPD that she was "tired" of the TPD investigating witnesses in the prosecution of

Henderson and Yelton. Of course, it goes without saying that Ms. Duke and her prosecution team should have conducted investigations of Government witnesses before the Indictment was issued. Any work which is known to have been done by the TPD in connection with witnesses in the Government's case against Henderson and Yelton came about because of the views of members of the TPD that certain witness(es) to be used by the Government either were currently engaged in criminal activity, or were actively committing perjury by making the charges against Henderson and Yelton in the Indictment. In the August 3, 2010 meeting, Special Prosecutor Jane Duke demanded that no one in the Tulsa Police Department talk to Henderson or Yelton.

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.

B. Special Prosecutor Jane Duke Has Threatened the Captain of the SID[1]

Larry Barnes was released from prison upon motion of Special Prosecutor Jane Duke, based on evidence she alleges, among others, that shows Henderson committed perjury in order to falsely convict Barnes. Counts 19-30 of the Indictment charge Henderson with acts concerning the Barnes investigation. Subsequent to Barnes' release from prison and the dismissal of charges against him, the TPD, through the SID, made a controlled drug buy from Larry Barnes (and his daughter Kelli).

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1 **(Special Investigations Division) of the TPD with Indictment for Obstruction of Justice because SID made a controlled buy from Larry Barnes (one of the principal government witnesses in this indictment, and who was released from prison on the Motion of Ms. Duke) after Mr. Barnes was released from prison.**

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 Barnes' illegal possession of drugs which had nothing to do with the federal investigation. 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.

C. Special Prosecutor Jane Duke Is Using the Grand Jury to Intimidate TPD Personnel

1: Tulsa Police Department Officer Gene Watkins provided to the FBI the TPD police reports showing that Rochelle Martin had been a confidential informant for TPD officers for a decade. These reports contradict her affidavit wherein she made statements regarding her participation in controlled drug buys. These reports were also provided to Officer Henderson. Instead of being appreciative of having knowledge that Ms. Martin was not truthful in her affidavit, Ms. Duke and her prosecution team caused this officer to be interrogated twice before the Grand Jury. Before the first appearance of this officer before the Grand Jury, his counsel was assured his client was not suspected of any criminal activity whatsoever. Before the second appearance, this was reversed. As a result, the officer declined to testify. An immunity agreement was offered, and accepted.

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."

2: 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. Officer Foust has always maintained that he didn't hear any discussion of any threats made to ATF agent McFadden by Officers Henderson and Yelton while at the Coney Island restaurant with several other officers[2]. AUSA Harris was evidently upset with Officer Foust for that reason. 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."

3: 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. That evening, the officer went to the hospital with chest pains and substantial other stress issues.

D. Special Prosecutor Jane Duke and Her Prosecution Team Threatened Rochelle Martin With Drug Trafficking Charges With a Ten Year Mandatory Minimum If She Did Not Testify Against Henderson

Martin has severe kidney problems; she requires regular dialysis. 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. She was told by FBI Agent Gary Graff that unless she gave evidence against Officer Henderson, she is "going down" with him.

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2 Part of the government's case as revealed in the detention hearings includes allegations that Officer Nick DeBruin made a statement to several TPD Officers at an informal meeting at the Coney Island restaurant that Officers Yelton and Henderson had threatened Brandon McFadden to ensure his silence.

On February 2, 2010 Rochelle Martin appeared at the Grand Jury, pursuant to a subpoena. When she arrived for the appearance, she was ushered into a meeting with Special Prosecutor Jane Duke, FBI agent Kevin Legleiter and FBI agent Gary Graff. Martin said she was going to invoke her rights under the Fifth Amendment, not to testify. Special Prosecutor Jane Duke became furious, telling Martin that she would join Henderson in prison, and if she did not testify she would be served with an arrest warrant for drug trafficking (with a 10 year mandatory minimum). Martin asked what she and Henderson would be arrested for. Special Prosecutor Jane Duke said Martin's boyfriend, Demarrio Oates, had said he saw Officer Henderson come to Martin's residence on several occasions and saw him drop off 60 pounds of marijuana in a black bag. Martin responded that Oates had never known Officer Henderson until Oates had already been locked up in jail on drug trafficking charges. Further, she said, if Agent Graff had not gone to see Oates where he was incarcerated (Lawton Correctional Facility), and told him that Martin had been a confidential informant for Officer Henderson, Oates would never even have known that fact. Despite these statements, Special Prosecutor Jane Duke and the two FBI agents continued to tell her that she would be going to jail if she did not give evidence against Officer Henderson, and would be sitting next to him at trial the following month.

The threats and intimidation of Martin are reflected, in part, by these excerpts of telephone conversations between Martin and her boyfriend Demarrio "Rio", and between Martin and Rio's mother:

1. On January 26, 2010 Mario Oates' mother told Mario over the telephone, "well he [FBI Agent Gary Graff] told me he said either she [Rochelle Martin] can play with me or she is going down with him [Officer Henderson].
2. On February 2, 2010 (the day Martin first appeared at the Grand Jury), Martin told

Demarrio Oates over the telephone: "The DA confused me, cause she told me, she, they, she was uh going to file drug trafficking on me."

3. On February 2, 2010 Demarrio Oates' mother [who went to the Grand Jury with Martin] told Demarrio Oates over the telephone: "That woman [Special Prosecutor Jane Duke] said, do you realize you [Martin] going to be looking at ten years, uh huh. At first they was talking about locking her up today."

4. On February 2, 2010 Demarrio Oates' mother told Demarrio Oates over the telephone: "He [presumably agent Graff] said before it's over with everybody going to break, but it's going to be too late, that's what she said. She said she just did a trial in Arkansas...saying uh the girl the same shape Chell [Martin] was in, and in the end she kept her loyalty to everybody they say she got more time than anybody."

III. The Legal and Ethical Requirements

The Special Prosecutor and her prosecution team are subject to the rules governing lawyers in the State of Oklahoma. ***Those rules prevent not just the intimidation of witnesses, but specifically prohibit asking any person to refrain from voluntarily giving relevant information to another party.***

As noted above, 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. Her conduct went even further, resulting in the Interoffice Correspondence of August 3, 2010 from Chief Jordan, forbidding all Tulsa Police Department personnel from communicating with anyone about the case of Officers Henderson and Yelton (except for federal prosecutors, federal law enforcement, and internal TPD discussions). This conduct of Special Prosecutor Jane Duke

violates Rule 3.4(a) and (f) of the Oklahoma Rules of Professional Conduct. Rule 3.4(a) provides: "A lawyer shall not: (a) unlawfully obstruct a party's access to evidence." Rule 3.4(f) provides: "A lawyer shall not: (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

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. As noted in Comment (1) to Rule 3.4: "(1) The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

More generally, it is universally recognized that a prosecutor in a criminal case is a "minister of justice." Special Prosecutor Jane Duke has acted as a "minister of injustice," by shutting off the ability to present a defense in this case, and by outrageous intimidation of Rochelle Martin. In the process, she has jettisoned not just the Oklahoma Rules of Professional Responsibility, to which she is subject, but also the requirements of the United States Attorneys' Manual, which defines as a "basic responsibility" of a federal prosecutor to make "certain" that "the rights of individuals are scrupulously protected." *United States Attorneys' Manual*, 9-27.110, Comment B. It is not just the Oklahoma Rules of Professional Conduct which govern the conduct of Special Prosecutor Jane Duke and her defense team—so does the Supreme Court of the United States.

The Supreme Court has long since held that prosecutors are ministers of justice whose aim is not to "win a case, but that justice shall be done," and that "[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

In addition to her outrageous actions in threatening Tulsa Police Department officers with obstruction of justice, it must not be overlooked here that Rochelle Martin was threatened with drug trafficking charges carrying a ten year mandatory minimum sentence unless she testified against Officer Henderson. Comment 12 to Rule 3.4 provides in relevant part: "(12) Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness...."

In short, Special Prosecutor Jane Duke has "distorted the truth-finding process and compromised the integrity of the trial," and "[t]o submit this case to the jury would make a mockery of [Officer Henderson's and Officer Yelton's] constitutional right to compulsory process and a fair trial." *United States v. Ruehle*, Case No. SACR 08-00139-CJC (Tr., Dec. 15, 2009 at 5195) (dismissing the indictments).

As the Court knows, there have been a number of dismissals of prosecutions in the past few years, as the result of prosecutorial misconduct. The most prominent examples are the trials of former United States Senator Ted Stevens and of the five Blackwater guards. In response to the number of dismissals of federal prosecutions because of prosecutorial misconduct, on January 4, 2010 the Department of Justice issued a series of memos concerning discovery. While those memos did not deal in explicit language with improper prosecutorial threats and intimidation or with preventing discovery by defendants, the principles enunciated in those memos demonstrate

beyond peradventure of doubt that the actions of Special Prosecutor Jane Duke and her prosecution team seriously pervert the very mission of the Justice Department. In one of the memos, the Deputy Attorney General said this:

> Justice Sutherland's observations regarding the role of a prosecutor are as true today as they were when he wrote them over 70 years ago. He wrote:
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> > The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
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> *Berger v. United States*, 295 U.S. 78, 88 (1935). In the alcove outside the Attorney General's Office here in Washington, an inscription that rings the space reads: "The United States wins its point whenever justice is done its citizens in the courts."

Special Prosecutor Jane Duke, through preventing the defense in this case from communicating with Tulsa Police Department employees who are indispensable to the jury's finding the truth, has struck blows of the foulest kind, undermining the very integrity of the American judicial process.

Unfortunately, prosecutorial misconduct requiring dismissal of cases with prejudice is not new in the Northern District of Oklahoma. In *United States v. Richard Gardner*, on the morning of the hearing on the defense motion to dismiss for vindictive, bad faith prosecution, the Government announced dismissal of the case with prejudice. The Government later was required to pay attorney fees under the Hyde Amendment. In *United States v. Brady*, the Government indicted the defendant after a promise not to do so and receiving grand jury testimony from the defendant. After a hearing, the district court dismissed the indictment with prejudice. This case, as well, resulted in the Government paying attorney fees under the Hyde Amendment. Indeed, in

the latter case, the Government admitted liability for fees, after Main Justice stepped in to conduct post-dismissal proceedings.

IV. The Due Process and Sixth Amendment Violations

A. Defendants Cannot Prepare a Defense

Defendants Henderson and Yelton simply cannot prepare a defense. Their primary witnesses are members of the Tulsa Police Department. Ms. Duke's threats have, of course, paid off. The dozens and dozens of officers whose testimony either is, or may be, vital to the defense of Henderson and Yelton will not talk to their defense teams. It is that simple. And that is fundamentally, outrageously, unfair. Thanks to Ms. Duke the TPD personnel may talk to federal prosecutors and investigators, but will be indicted if they do the same with Defendants' defense team.

Instead of seeking justice, Ms. Duke and her prosecution team have become a lynch mob, interested only in a win at any cost.

To say that foreclosing a defense through threats of filing obstruction of justice charges for talking to and/or cooperating with the defense team constitutes a Due Process violation merely states the obvious. Fortunately, that provision of the United States Constitution, as well as the independence of the federal judiciary through Article III, serves as a bulwark when the Government runs amok, as it has in this case.

While the search is certainly not exhaustive at this point, the Court is advised that counsel have thus far been unable to find a comparable case. This is, of course, as it should be, since the outrageousness of the conduct here is, we hope, sui generis.

B. The Damage to the Defendants Cannot Be Repaired

1. Threats to Tulsa Police Department Personnel

Special Prosecutor Jane Duke's threats to indict Tulsa Police Department personnel for obstruction of justice for providing what could be deemed helpful to the defense of Officers Henderson and Yelton, or even for just talking to them, is a bell which cannot be un-rung. That threat of prosecution overhangs this entire case, until its dismissal. This Court, unfortunately, does not have the authority to order Ms. Duke or the Justice Department not to indict anyone. The Court does have the authority to dismiss any indictments brought against Tulsa Police Department personnel who are wrongly indicted. But that is not exactly large solace to Tulsa Police Department personnel, who (1) do not want the worry and stress of being indicted for obstruction of justice; (2) do not want the stigma of being indicted for obstruction of justice; and (3) do not want the extraordinary expense of paying for a defense against such charges.

Accordingly, the bell of fear and intimidation which Special Prosecutor Jane Duke has loudly rung in the ears of every person in the Tulsa Police Department cannot be un-rung. Officers Henderson and Yelton simply cannot present a defense which helps the jury arrive at the truth, because they are prevented from properly preparing for trial. This violates their rights under the Due Process Clause and under the Sixth Amendment. The only way to solve the dilemma is for the Court to hold the Government responsible for the incredible situation it has created, and to dismiss the Indictment with prejudice.

2. Threats to Rochelle Martin

There is no way to "un-ring" the bell which Special Prosecutor Jane Duke has rung in respect of the testimony of Rochelle Martin. This testimony was procured via threats to Ms. Martin that she would be indicted for drug trafficking, with a ten year minimum mandatory sentence. This, also, has unfairly prevented a fair trial and has violated the due process rights of Officers Henderson and Yelton. Dismissal with prejudice of the Indictment is, also, the only remedy here.

3. Chief Jordan's Memo

First, since neither Chief Jordan nor the Tulsa Police Department is a party in this case, it would seem that the Court does not have authority to order Chief Jordan to rescind his memorandum and send out a new one saying it is perfectly appropriate for Tulsa Police Department personnel to communicate with Officers Henderson and Yelton and their defense teams. Second, an order of the Court to Chief Jordan to undo the damage done seriously implicates federal and state relations.

Assuming *arguendo* that the Court does have the authority to order Chief Jordan to take remedial action (or any voluntary action by Chief Jordan to rescind the memo), any such action by Chief Jordan has absolutely nothing to do with Special Prosecutor Jane Duke and indictment of Tulsa Police Department personnel, as threatened by her. Her threat remains. And, nothing can undo the threat to Rochelle Martin that she would be charged with drug trafficking with a ten year mandatory minimum, which produced her testimony.

V. Conclusion

The Court is requested to set this matter for an evidentiary hearing, and at the conclusion thereof, dismiss the charges in the Indictment with prejudice, as to both Officer Henderson and Officer Yelton.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was submitted to the CM/ECF filing system for electronic filing and distribution to the following CM/ECF registrants appearing in this case on the 9th day of August 2010:

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