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11

UNITED STATES DISTRICT COURT

12

NORTHERN DISTRICT OF CALIFORNIA

13

14 UNITED STATES OF AMERICA,

15 Plaintiff,

CR 02-0053 CRB

16 v.

REPLY TO GOVERNMENT'S RESPONSE
TO MOTION TO DISMISS ON GROUNDS
OF VINDICTIVE PROSECUTION

17 EDWARD ROSENTHAL,

18 Defendant.

19

20 Defendant Edward Rosenthal ("Rosenthal") briefly responds
21 to the United States' Opposition to defendant's Motion to
22 Dismiss on Grounds of Vindictive Prosecution, filed February 27,
23 2007 ("Opposition"), as follows.

24 Even while admitting that his re-indictment of Rosenthal
25 was a response to "the specific comments that Rosenthal and
26 others made" and was brought only because "the Ninth Circuit
27 reversed [Rosenthal's] conviction," the prosecutor contends that
28 the Superseding Indictment should not be dismissed on grounds of

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1 prosecutorial vindictiveness because he is only seeking to "put
2 to rest the accusations of unfairness that followed the first
3 trial." See Opposition at 3 & 5. In making these contentions,
4 the prosecutor overlooks that he and not Rosenthal elected what
5 charges to file at the first trial and, through the filing of a
6 motion *in limine*, selected what evidence would be presented. The
7 prosecutor cannot now bring additional charges based on the same
8 conduct because this strategy backfired and, even if successful
9 the second time around, would result in only a one-day sentence.

10 In *United States v. Goodwin*, 457 U.S. 368 (1982), the Court
11 explained that "a change in the charging decision made after an
12 initial trial is completed is much more likely to be improperly
13 motivated than is a pretrial decision," since it should be
14 presumed that the prosecution has fully assessed its case. *Id.*
15 at 381. Thus, when a prosecutor reindicts the accused after he
16 exercises a procedural right, the prosecutor "bears a heavy
17 burden of proving that any increase in the severity of the
18 alleged charges was not motivated by a vindictive motive,"
19 *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir.
20 1976), and the appearance of "prosecutorial vindictiveness can
21 be overcome only by a showing that 'intervening circumstances,
22 of which the prosecutor could not reasonably have been aware,
23 created a fact situation which did not exist at the time of the
24 original indictment,'" *United States v. Krezdorn*, 693 F.2d 1221,
25 1229 (5th Cir. 1982) (quotation omitted). Here, not only has the
26 prosecutor wholly failed to meet this burden, but he has freely
27 admitted that he reindicted Rosenthal with additional charges
28 because Rosenthal exercised his First Amendment right to

1 complain about the first trial and, also, because he success-
2 fully exercised his statutory right to appeal. Even if the
3 government ratifies such conduct, the courts do not tolerate it.

4 In *United States v. Motley*, 655 F.2d 186 (9th Cir. 1981),
5 defendants were originally indicted and tried on charges of
6 racketeering and conspiracy. After the district court declared a
7 mistrial over the government's objection, the government re-
8 indicted defendants on the underlying substantive crimes of
9 possession of drugs and firearms. The Ninth Circuit found this
10 to constitute a vindictive prosecution. The Ninth Circuit first
11 noted that "[a] re-indictment increasing the severity of the
12 charges following the exercise of a procedural right creates an
13 appearance of vindictiveness which, if not dispelled by the
14 government, constitutes a due process violation." *Id.* at 188
15 (citing *United States v. Griffin*, 617 F.2d 1342, 1347 (9th cir.
16 1980)). The Court found unpersuasive the government's
17 explanation that the reformulated indictment would involve a
18 simpler and fairer trial as dispelling the appearance of
19 vindictiveness. *Id.* At 189. It explained as follows:

20 The "appearance of vindictiveness" rule is a
21 prophylactic rule designed both to protect
22 the present defendant from vindictiveness
23 and to prevent a chilling of the exercise of
rights by other defendants in the future.
United States v. DeMarco, 550 F.2d 1224,
1227 (9th Cir.1977).

* * *

24 Our decision here rests upon the superseding
25 indictment's "appearance" of vindictiveness
which the government failed to dispel.

* * *

26 We agree with the government that the
27 decision to reformulate the charges is
justified by the factors it relies upon.
28 What the government needs to justify,
however, is not the change in the nature of
the charges in the indictment, but the

1 increase in the severity of the charges in
2 the indictment. This it has not done. The
3 government could have framed an indictment
4 charging substantive drug offenses whose
5 maximum terms were no greater than those
6 facing the defendant at the first trial. The
7 government chose to frame a more severe
8 indictment. That is the choice that raises
9 the appearance of prosecutorial
10 vindictiveness, and that is what it has
11 failed to justify.

12 ... The government must point to objective
13 factors, and not subjective good faith, to
14 justify the increase in severity. *United*
15 *States v. Andrews*, 633 F.2d 449, 456 (6th
16 Cir. 1980) (en banc).

17 *Id.* at 188-90.

18 This high profile case is even worse. While it may have
19 been permissible for the government to simplify the marijuana
20 charges against Rosenthal by not alleging any plant totals, so
21 the statutory mandatory minimum drug sentences would not come
22 into play, (See Declaration of George Bevan, ¶10); *but cf.*
23 *Motley*, 655 F.2d at 189 ("Once the government has created an
24 appearance of vindictiveness, it cannot by its own later self-
25 restraint cure the chilling effect of its original action")
26 (citation omitted), it could not permissibly add the money
27 laundering and tax counts, which would drive up the potential
28 sentence against Rosenthal. The government was aware of the
29 facts that gave rise to the new counts against Rosenthal at the
30 first trial, yet it elected to charge only a "portion" of his
31 conduct. See Reporter's Transcript of Proceedings, dated October
32 25, 2006, at 18. Its decision to try a new strategy this time
33 around to obtain more than a one-day sentence because of what
34 Rosenthal said in no way dispels the appearance of vindictive-
35 ness. *Cf. Motley*, 655 F.2d at 189-90; *Krezdorn*, 693 F.2d at 1228

1 n.21 ("Nor can the Government meet its rebuttal burden by
2 explaining that charges were reformulated for reasons of trial
3 strategy, when the effect of the reformulation is to increase
4 the potential punishment faced by defendant on retrial.")
5 (citing *U.S. v. Motley*, 655 F.2d at 189-90); see also *Krezdorn*,
6 693 F.2d at 1231 ("From the defendant's vantage point, the
7 prosecutor is attempting to turn a successful appeal into a
8 pyrrhic victory. Clearly, the prosecutor's decision has a
9 chilling, even arctic, effect on the defendant's decision to
10 avail himself of the appellate process."); 42 C.J.S.,
11 Indictments and Informations § 27, "Successive indictments--
12 Vindictive reindictment: Harassment" ("The right of the people
13 to reinstitute criminal proceedings is subject to the limitation
14 that the accused may not be harassed by the repeated reinstitu-
15 tion of criminal proceedings on the same charges; and a subse-
16 quent proceeding by indictment is barred if it reaches the point
17 of harassment, thereby violating due process.") (citing *United*
18 *States v. Fields*, 475 F.Supp. 903 (D.C.D.C. 1979); *People v.*
19 *Sahagun*, 152 Cal.Rptr. 233, 89 C.A.3d 1 (1979); *People v.*
20 *Overstreet*, 381 N.E.2d 305, 64 Ill.App.3d 287 (1978)).¹

21
22 ¹ The government relies on *United States v. Gilbert*, 266
23 F.3d 1180, 1186 (9th Cir. 2001), for the proposition that
24 Rosenthal must show that the government obtained the Superseding
25 Indictment "solely" to retaliate against him for the exercise of
26 his constitutional rights. Opposition at 5. While such showing
27 is sufficient, it is not necessary. In *United States v.*
28 *Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982), the Ninth
Circuit explained that "the appearance of vindictiveness results
only where, as a practical matter, there is a realistic or
reasonable likelihood of prosecutorial conduct that would not
have occurred *but for* hostility or a punitive animus towards the
defendant because he has exercised his specific legal rights."
Id. at 1169 (emphasis added) (citing *Goodwin*, 102 S.Ct. 2488,
2494); see *United States v. P.H.E., Inc.*, 965 F.2d 848, 858
(10th Cir. 1992) (same); cf. *Council for Periodical Distr. Ass'n*

1 Nor does the fact that the Tax Division of the Department
2 of Justice signed off on the new charges cleanse the appearance
3 of vindictiveness. Cf. Opposition at 6. As the court explained
4 in *P.H.E., Inc.*, "the court may not permit vindictiveness to be
5 hidden behind procedural cosmetics." *Id.* at 858. The
6 participation of a single untainted prosecutor who independently
7 reviews the indictment cannot render an otherwise vindictive
8 prosecution permissible. *Id.* at 858-60. Furthermore, there is a
9 factual dispute in this case about the prosecutor's true motives
10 in bringing this successive prosecution of Rosenthal. Whereas
11 one member of the bar of this Court has filed a declaration
12 suggesting prosecutorial animus, the prosecutor denies that such
13 conversation occurred. Compare Declaration of J. David Nick in
14 Support of Motion Dismiss on Grounds of Vindictive Prosecution,
15 filed herewith, at ¶¶ 2 & 3 with Bevan Declaration, ¶10. A
16 defendant is entitled to discovery on his claim of vindictive
17 prosecution where he presents "some evidence" of the essential
18 elements of the defense, see *United States v. Armstrong*, 517
19 U.S. 456, 465 (1996), and Rosenthal has done this through his
20 showing that the government sought additional charges against
21 him for prevailing on his appeal, as well as for the exercise of
22 his First Amendment rights. Cf. Opposition at 6 (conceding that
23 such showing shifts burden to government to dispel appearance of

24 _____
25 *v. Evans*, 642 F.Supp. 552, 556 (M.D.Ala.1986) (criminal
26 prosecution enjoined if plaintiff shows conduct was
27 constitutionally protected and improper purpose was "a major
28 motivating factor and played a prominent role in the decision to
prosecute"), *aff'd in relevant part*, 827 F.2d 1483 (11th
Cir.1987). In any event, Rosenthal meets any standard of
causation, as it is clear that this successive prosecution would
not have occurred if Rosenthal had kept his mouth shut and the
government freely admits this.

1 vindictiveness). Discovery and an evidentiary hearing are needed
2 to test the prosecutor's explanations for his conduct. See
3 *United States v. Adams*, 870 F.2d 1140, 1145-46 (6th Cir. 1989),
4 (quoting *United States v. Andrews*, 633 F.2d 449, 453 (6th Cir.
5 1980) (en banc)).

6 **CONCLUSION**

7 For the foregoing reasons, this Court should grant
8 defendant Rosenthal's motion to dismiss on vindictive
9 prosecution grounds, or, alternatively, order discovery and an
10 evidentiary hearing.

11 Dated: March 1, 2007

12 Respectfully submitted,

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