

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA)
)
 v.) Criminal No.: H-92-152 (filed
) 4/12/93)
)
 JOHN J. JOHNSON,)
)
 Defendant.)

**GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTION FOR RECONSIDERATION, OR, IN
THE ALTERNATIVE, FOR A STAY OF PROCEEDINGS**

The United States of America, through its undersigned attorneys, hereby responds to the defendant's Motion for Reconsideration, or in the Alternative, for a Stay of Proceedings. The defendant's present motion is premised on the erroneous contention that the Court based its March 22, 1993, Order denying the defendant's Motion to Dismiss the Indictment (hereinafter "Order") on two cases, United States v. Heinz, 983 F.2d 609 (5th Cir. 1993) and United States v. Lopez, 765 F.Supp. 1433 (N.D.Cal. 1991), vacated, 1993 U.S. App. LEXIS 4869 (9th Cir. 1993). In fact, the Court conducted an extensive legal analysis, cited numerous authorities, and clearly held that the government's consensual monitoring of the defendant's conversations on March 20, 1991, and April 17, 1991, did not violate the defendant's Fifth Amendment rights. Further, a stay of these proceedings is unwarranted, because the outcome of the Lopez case will in no way affect this Court's Order. Consequently, the present motion should be denied.

**RECONSIDERATION OF THE
COURT'S ORDER IS UNNECESSARY**

In its Order, the Court conducted an extensive legal analysis and clearly held that the government's consensual monitoring of the defendant's conversations on March 20, 1991, and April 17, 1991, did not violate the defendant's Fifth Amendment rights. In its Fifth Amendment Due Process analysis, the Court held that the defendant had failed to make the necessary showing under applicable law to warrant dismissal of the indictment. The Court stated that he "failed to show that he has been legally deprived of effective assistance of counsel" and that his "lack of confidence in the competence of his attorney is not sufficiently prejudicial to warrant dismissal of the indictment." Order, p. 4. Under its supervisory power analysis the Court held that, "Finding no prejudice to Johnson, this Court should not, within its discretion, dismiss the indictment." Order, p. 6, citing United States v. McKenzie, 678 F.2d 629 (5th Cir.), cert. denied, 459 U.S. 1038 (1982).

Additionally, the Court noted that the "majority of courts that have confronted this issue have concluded that such pre-indictment consensual tape recordings are a legitimate investigative technique by law enforcement agencies." Order, p. 6. The Court elaborated on this point by noting the Fifth Circuit's recent decision in Heinz, overturning the suppression of pre-indictment consensually-monitored conversations between a defendant and a co-conspirator and finding no violation of the defendant's Sixth Amendment right to counsel. Accordingly, the

Court found that if suppression was inappropriate in Heinz, dismissal of the indictment was clearly inappropriate in this case. Order, p. 7.

The Court also discussed the primary cases relied upon by the defendant in his Motion to Dismiss the Indictment, Lopez, and United States v. Marshank, 777 F. Supp. 1507 (N.D. Cal. 1991). Lopez was distinguished by the Court as involving post-indictment contacts with a represented defendant. Order, p. 8. However, the Court analogized the reasoning employed by the Ninth Circuit in vacating Lopez to this case, concluding that here, as in Lopez, dismissal of the indictment was inappropriate because of the absence of prejudice to the respective defendants. Order, p. 9. The Court distinguished Marshank from the present case as involving collaboration between the government and the defendant's attorney resulting in specific, identifiable prejudice to the defendant. Order, pp. 10-11. Thus, the Court's denial of the defendant's Motion to Dismiss was not based merely on Heinz and Lopez but on an extensive analysis of the applicable caselaw.

II

THE DEFENDANT'S REQUEST FOR A STAY OF THE PROCEEDINGS IS UNWARRANTED AND SHOULD BE DENIED

Throughout these proceedings, defendant in making his arguments has relied upon the Lopez decision. See Defendant's Mot. to Dis. Ind., pp. 13, 16, 18, 19, 22; Defendant's Prop. Ord., pp. 21, 23, 29, 33, 34; Tr. of Hrg. on Mot. to Dis., pp. 7, 20. Now that Lopez has been vacated by the Ninth Circuit,

defendant states, "Despite counsel's view that Lopez is distinguishable, if Lopez is the law, then Johnson requests a stay of proceedings until Lopez is final." Defendant's Motion for Reconsideration, p.4, ¶4.

As the government has noted from the outset, and as the Court recognized, Order, p. 8, Lopez involved post-indictment plea negotiations by a prosecutor with a represented defendant. The present case involves pre-indictment consensual recordings which are clearly authorized by law. In any event, it is incongruous of the defendant to initially argue Lopez's applicability, then argue its distinguishability, and finally assert it as a basis for a stay of the present proceedings. Regardless of the outcome of the Lopez appeal, the present case will not be affected. The defendant's request for a stay of these proceedings would cause unnecessary delay, is unwarranted, and should be denied.

III

THE GOVERNMENT'S CONDUCT HAS AT ALL TIMES BEEN ETHICAL

The government objects to the defendant's repeated and unsupported criticism of the government's conduct in this case. The defendant has presented no evidence to support his assertions that the government attempted to interfere with his relationship with his attorney or to coax a plea. To date, the record in this case contains the sworn affidavits of Maurice Johnson, Special Agent Gerald Burkhalter, and Duncan S. Currie, and the tapes, all of which clearly controvert the defendant's assertions of

unethical behavior by the government. It is clear from this evidence that the defendant had knowledge of and participated in the bid-rigging conspiracy, that he had prior unmonitored conversations with Maurice Johnson to gather information about the government's investigation, and that he lacked confidence in his attorney. It is also clear that the government did not in any way attempt to interfere with the defendant's relationship with his attorney. The defendant's concerns about his legal representation began prior to the consensual recording and did not derive from it.

Therefore, the government continues to maintain that the conduct of its attorneys and case agent in this investigation has been at all times ethical and proper. As recently noted by the Fifth Circuit in Heinz, 983 F.2d at 613, as well as by the numerous other courts cited in this Court's Order, United States v. Ryans, 903 F.2d 731, 734 (10th Cir.), cert. denied, 498 U.S. 855 (1990); United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) cert. denied, 464 U.S. 852 (1983); United States v. Kenny, 645 F.2d 1323 (9th Cir.), cert. denied 452 U.S. 920 (1981), pre-indictment consensual monitoring is a legitimate investigative technique, authorized by law, which does not violate the Disciplinary Rules.

CONCLUSION

Reconsideration of the Court's Order denying the defendant's Motion to Dismiss is unnecessary and should be

denied. The Court's Order concluding that the government's consensual monitoring did not violate the defendant's Fifth Amendment rights was based on an extensive review of the applicable law. Additionally, the defendant's alternative request for a stay of these proceedings pending the Lopez appeal should be denied. The present case will not be affected by the outcome of the Lopez appeal, and as such a stay is unwarranted, it would cause unnecessary delay. Finally, contrary to the defendant's repeated and unsubstantiated assertions, the government did not engage in unethical conduct.

Respectfully submitted,

"/s/"
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Response to Defendant's Motion for Reconsideration, or, in the Alternative, for a Stay of Proceedings was forwarded by Federal Express this 8th day of April, 1993, to:

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"/s/"
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Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
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ORDER

Upon consideration of the Defendant's Motion for Reconsideration, or, in the Alternative, a Stay of Proceedings, and the Government's Response,

The Defendant's Motion is hereby DENIED.

DONE AND ENTERED THIS _____ day of _____, 1993.

UNITED STATES DISTRICT JUDGE