

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
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LORRAINE HENDERSON,)
Defendant.)

CRIMINAL NO. 09-10028-DPW

MEMORANDUM
June 27, 2013

The government now seeks leave of court pursuant to Fed. R. Crim. P. 48(a) to dismiss this case in which I have ordered a new trial and the government has withdrawn its appeal from that order. A discussion (I) regarding the recent travel of the case and (II) regarding the case law construing rule 48(a), including a reflection on my own doubts about whether a requirement of leave of court to discontinue a prosecution is consistent with the separation of powers between the Executive and Judicial Branch, will put in context my decision, reflected in the attached executed Dismissal, to grant the leave sought--to the degree such leave of court may be necessary and proper.

I

Immediately after I denied the government's motion for reconsideration, *United States v. Henderson*, 904 F. Supp. 2d 134 (D. Mass. 2012) ("*Henderson II*"), of the order for a new trial in this matter, *United States v. Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012) ("*Henderson I*"), the government filed a Notice of

Appeal from the grant of a new trial and the denial of reconsideration, *United States v. Henderson*, appeal docketed, No. 12-2192 (1st Cir. Oct. 2, 2012).

As successive scheduled dates for the government to file its opening brief loomed, the government twice sought extensions of time for filing the brief. In each of its motions for an extension, the government offered the following identical grounds:

Any decision to appeal is made by the Solicitor General of the United States after several layers of review--in the United States Attorney's Office, the Department of Justice's Criminal Appellate Section, and the Solicitor General's Office. This review process is not complete. Additional time is needed to complete the process and also to ensure that the United States Attorney's Office has the benefit of any insights of the DOJ and Solicitor General in the event an appeal is authorized and a brief is drafted.

Motion to Extend Time, *United States v. Henderson*, No. 12-2192 (1st Cir. Mar. 6, 2013); see also *id.* (1st Cir. Jan. 23, 2013).

The First Circuit allowed both motions; its second order doing so, however, provided an extension only until May 15, 2013, with the admonition that "[w]e are disinclined to grant a request for further enlargement of this deadline." On May 15, 2013, the government, with the assent of the defendant, moved without explanation to withdraw its appeal; the Court of Appeals entered judgment dismissing the case pursuant to Fed. R. App. P. 42(b), the following day.

The matter was then scheduled in this court for a status conference on June 24, 2013. However, the government on June 18, filed a "Dismissal of Lorraine Henderson from the Indictment" pursuant to Fed. R. Crim. P. 48(a). After the defendant submitted a notice of assent to the dismissal, I cancelled the status conference.

II

The requirement of Rule 48(a) that the government seek leave of court to dismiss a prosecution was adopted by the Supreme Court in its 1944 promulgation of the Federal Rules of Civil Procedure. Under the common law rule of "nolle prosequi," a prosecution could be dismissed without leave of court. The Advisory Committee on Rules of Criminal Procedure had initially recommended a modest deviation from the common law rule by requiring the prosecutor to file with the court a "statement of reasons" before dismissing a prosecution. FEDERAL RULES OF CRIMINAL PROCEDURE: REPORT OF THE ADVISORY COMMITTEE 54-55 (June 1944). The Supreme Court, however, was apparently dissatisfied with the lack of judicial involvement in a dismissal. See Charles E. Glatfelter, Jr., *The Nolle Prosequi under Rule 48(a) of the Federal Rules of Criminal Procedure*, 1978 DET. C. L. REV. 491, 498-99 & n.52 (1978). The Court modified the Advisory Committee's proposal and without explanation adopted a rule making "leave of court" a prerequisite to dismissal while at the

same time deleting the Advisory Committee's proposed obligation for the government to provide a "statement of reasons." See Fed. R. Crim P. 48(a) & Advisory Committee's Note to Subdivision (a) (1944 Adoption)¹; see generally 6 MARK S. RHODES, ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 48:9-48:11, at 250-51 (2d ed. 1987).

I share the view expressed in the Wright treatise that "[i]t is difficult to see any real or substantial change or benefit achieved by Rule 48(a). The court is powerless to compel a prosecutor to proceed in a case that he believes does not warrant prosecution." 3B CHARLES ALAN WRIGHT AND PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 802, at 332 (4th ed. 2013). But the plain terms of the Rule have left to each judge presented with an application for leave to dismiss the obligation to "struggle with its uncertainties as best he or she can." *Id.* at 332-33.

The Supreme Court has observed that the formal requirement in Rule 48(a) for leave of court as a condition precedent to dismissal "obviously vests some discretion in the court," but has also acknowledged that "the circumstances in which that discretion may properly be exercised have not been delineated by this Court." *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977). In *Rinaldi*, the Court found it unnecessary to decide

¹This reference is to the final Advisory Committee Notes prepared to accompany the Rules as promulgated by the Supreme Court.

what, if any, grounds would justify the exercise of such discretion to decline to grant leave to dismiss. *Id.* In any event, the Court in *Rinaldi* held that under Rule 48(a) "the salient issue . . . is not whether the decision to maintain the federal prosecution was made in bad faith but rather whether the Government's later efforts to terminate the prosecution were similarly tainted with impropriety." *Id.* at 30.

The Seventh Circuit has observed that there have been "speculations in some judicial opinions that a district judge could properly deny a motion to dismiss a criminal charge even though the defendant had agreed to it. These opinions say that such a motion should be denied if it is in bad faith or contrary to the public interest" *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) (Posner, J.). But the court also reported that "we are unaware . . . of any appellate decision that actually upholds a denial of motion to dismiss a charge on such a basis." *Id.*

In re United States discussed a more profound dimension to the "leave of court" requirement of Rule 48(a); the Rule invites the judiciary to exceed its constitutional role and breach the separation of powers by intruding upon the plenary prosecution power of the Executive Branch. "[T]he plenary prosecutorial power of the executive branch safeguards liberty, for, in conjunction with the plenary legislative power of Congress, it assures that no one can be convicted of a crime without the

concurrence of all three branches (. . . criminal contempt of judicial orders constitutes a limited exception). When a judge assumes the power to prosecute, the number shrinks to two." *Id.* at 454. In this case, I concluded, when ordering a new trial under a proper Judicial Branch instruction to the jury, that the Executive Branch had adduced "sufficient evidence, albeit barely" to support a conviction for the crime the Legislative Branch had created. *Henderson I*, 857 F. Supp. 2d at 208. Thus, here there was concurrence among the three branches, each exercising their respective but separate authority, that this prosecution could proceed.

In the absence of some objection by the affected defendant--and perhaps not even then--I find it difficult to square the remedy of withholding leave to dismiss an indictment in such circumstances with the proper role of the judicial branch.² Indeed, I question whether leave of court may properly

²The "leave of court" requirement is typically justified as protecting against "prosecutorial harassment" in the form of "charging, dismissing, and subsequently commencing another prosecution at a different time or place deemed more favorable to the prosecution." *United States v. Salinas*, 693 F.2d 348, 351 (5th Cir. 1982); see also *Rinaldi*, 434 U.S. at 29 n.15. But this concern can be addressed if necessary when and if the case is renewed. *Salinas*, for example, involved the government's dismissal of an indictment under Rule 48(a) shortly after jury selection. The defendant was later convicted on a superseding indictment. The Fifth Circuit reversed the conviction on the renewed charge upon finding that the government had misled the trial court about its good faith motive for seeking dismissal of the first indictment under Rule 48(a). In reality, the government had merely been dissatisfied with the jury selection,

be required.

The ground asserted by the government here for dismissal is that further pursuit of this prosecution "would require the expenditure of substantial additional resources. Given this, as well as the many other matters currently being handled by the U.S. Attorney's Office, the government does not believe that the continued prosecution of this case is warranted."³ As I made

and sought to re-charge "in order to get a 'better' jury, a jury more to its liking." *Id.* at 353.

Salinas demonstrates that defendants may adequately protect themselves against harassment by seeking dismissal of an indictment allegedly brought in bad faith. It is, after all, "hornbook law that a federal court may dismiss an indictment if the accused produces evidence of actual prosecutorial vindictiveness sufficient to establish a due process violation, or even if he demonstrates a likelihood of vindictiveness sufficient to justify a presumption." *United States v. Stokes*, 124 F.3d 39, 45 (1st Cir. 1997). Although an "extreme remedy," dismissal of an indictment is always available in cases of "serious and blatant prosecutorial misconduct that distorts the integrity of the judicial process." *United States v. Font-Ramirez*, 944 F.2d 42, 46 (1st Cir. 1991).

If the prosecutorial misconduct is apparent when leave to dismiss is sought, Rule 48(a) might be justified as a mechanism for a judge to "condition dismissal on its being with prejudice." *In re United States*, 345 F.3d at 453. Through this mechanism, a judge might cut off abusive superseding or successive indictments at the pass on otherwise established grounds, such as those referenced in *Stokes* and *Font-Ramirez*, without offending the separation of powers.

³ The leave of court requirement might also be justified as encouraging transparency in the operation of the criminal justice system. The prospect of public review will tend to discourage the exercise of poor judgment in charging (and re-charging) decisions. In this connection, it is unfortunate that the Advisory Committee's proposed version of Rule 48(a), requiring a "statement of reasons" as a predicate to dismissal, was abandoned in favor of "leave of court" requirement requiring no statement of reasons. Requiring the government to present a statement of its reasons for dismissal in the public record would likely do

clear in my Memorandum and Order granting a new trial, I have considerable doubt whether the pursuit of this matter as a felony was warranted in the first place. I can certainly see no reason to exercise such discretion as I may have to prevent the government, after its own reconsideration following the appeal review process, from exercising its choice to abandon the prosecution at this point with the assent of the defendant.⁴

While I continue to be of the view that this felony prosecution has been improvident from its inception, I find no identifiable bad faith--only poor judgment--in its pursuit. Turning specifically to what *Rinaldi* identified the "salient issue" now before me, 434 U.S. at 30, I can find only good judgment in the dismissal, albeit belated, of this indictment. But I emphasize this is the Executive Branch's judgment to exercise. As I noted when granting a new trial, "[i]n the larger

more to protect defendants' rights than the bare formality of obtaining leave of court. I note some courts have effectively read the "greater" leave of court requirement to include the "lesser" statement of reasons requirement. See, e.g., *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973) (in granting leave to dismiss under Rule 48(a), "the court will not be content with a mere conclusory statement by the prosecutor that dismissal is in the public interest, but will require a statement of reasons and underlying factual basis"). To its credit, the government here provided a statement of reasons for its dismissal of the indictment. It also provided a statement of reasons for its requests to extend the appellate briefing schedule (although not for the ultimate withdrawal of the appeal itself).

⁴ A different approach might be appropriate if a defendant withheld assent, seeking vindication by demanding resolution of the government charges on the merits.

scheme of criminal justice proceedings, it is for the government to make the decision whether further pursuing a prosecution like this is a fair, reasonable, and proportionate exercise of prosecutorial discretion under circumstances involving a matter of at most modest culpability." *Henderson I*, 857 F. Supp. 2d at 194.

To the degree my assessment is necessary, proper and not constitutionally supererogatory, I find the dismissal of this prosecution to be a fair, reasonable and proportionate exercise of prosecutorial discretion, and have granted the government leave to dismiss this indictment by signing the attached Dismissal on the line designated by the government.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)

v.)

LORRAINE HENDERSON)

Criminal No. 09-10028-DPW

DISMISSAL OF
LORRAINE HENDERSON FROM THE INDICTMENT

Pursuant to Fed. R. Crim. P. 48(a), the United States Attorney for the District of Massachusetts, Carmen M. Ortiz, hereby dismisses LORRAINE HENDERSON from the Indictment in this matter, which charged her with encouraging and inducing an illegal alien to reside in the United States, in violation of 8 U.S.C. §1324(a)(1)(A)(iv). In support of this dismissal, the government states that it has already expended substantial resources in this matter, and that a new trial (and any direct appeal that might follow) would require the expenditure of substantial additional resources. Given this, as well as the many other matters currently being handled by the U.S. Attorney's Office, the government does not believe that the continued prosecution of this case is warranted. Dismissal of the Indictment is therefore in the interests of justice.

Respectfully submitted,

6/18/13
Date

Carmen M. Ortiz
CARMEN M. ORTIZ
United States Attorney

Leave to File Granted:

Douglas P. Woodlock
Douglas P. Woodlock, Judge
United States District Court