

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED May 8, 2023

CAROL L. MICHEL
CLERK

SMS Walk-In

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA	**	CRIMINAL NO: 21-98
	**	SECTION: SECT 1 MAG.4
VS	**	VIOLATION: 18 U.S.C § 1347
SHIVA AKULA,		HONORABLE JUDGE AFRICK

**MOTION TO DISMISS INDICTMENT
WITH PREJUDICE BASED ON GOVERNMENT MISCONDUCT
AND SELECTIVE PROSECUTION**

NOW INTO COURT, Defendant, SHIVA AKULA, (“Dr. Akula”), files this Motion to Dismiss Indictment Based on Government Misconduct and Selective Prosecution, and states as follows:

Defendant files this motion to preserve the deadline that was set by this Court for defendant to file a motion to dismiss by May 8, 2023 as per this Court’s Revised Scheduling Order. In doing so, Dr. Akula incorporates his previously filed motion to dismiss at *Doc 173*.

FACTS RELEVANT TO GOVERNMENT MISCONDUCT

On August 5, 2021, the 23-count indictment for alleged health care fraud was filed and signed by Assistant United States Attorney Kathryn McHugh.

Starting the following week, McHugh convened grand jury and presented falsities to the grand jury claiming that witness tampering had been committed either

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by Dr. Akula or the physician advocacy group and/or one of its Board Members, Dr. Christina Black.

There was no basis for McHugh to make a claim of witness tampering when McHugh had not yet disclosed the names of any of her witnesses as it was merely one week after the filing of an indictment. McHugh made these falsities as predicate to convene a grand jury because McHugh was ticked off from a Press Release that had been circulated at Dr. Akula's business that was uncomplimentary of McHugh. McHugh did not have a scintilla of evidence that any witness on her list was either contacted, intimidated or threatened and in spite of this, and in an act that was nothing short of subverting the powers given to her under her badge as an Assistant United States Attorney to convene grand jury proceedings, within one week of filing the indictment against Dr. Akula, McHugh did convene a grand jury on the predicate of witness tampering. This allowed McHugh to gain access to issuing grand jury subpoenas.

McHugh then issued the grand jury subpoenas under the false predicate that the physician advocacy group, Physicians Against Abuse, ("PAA"), and Dr. Black were witness tampering. In doing so, McHugh caused the meritless initiation of another judicial proceeding in which PAA and Dr. Black moved to quash the subpoenas which ultimately became the subject of an appeal before the Fifth Circuit.

All of this was based on lies and falsities presented to the grand jury. *See Exhibit 1: Affidavit of Christina Black, MD.*

McHugh also presented falsities at the First Detention Hearing of Defendant before then Magistrate Judge Dana Douglas by claiming that Dr. Akula was a flight risk because one of his family members had fled to India. *See Exhibit 2: Transcript of August 25, 2021 hearing, pg 5.* When McHugh told then Magistrate Judge Dana Douglas that a family member of Dr. Akula had fled to India, McHugh knew that she was lying because McHugh knew that family member had not fled but in reality that the family member was on his way back to the United States from his routine annual trip to India. *See Exhibit 3: Flight Schedule for Raj Biyyam showing return flight of August 28, 2021.*

McHugh repeated her lies to Judge Douglas that the family member of Dr. Akula had fled the country on November 2021 when Dr. Akula filed a motion to modify his pretrial release conditions in order to be able to attend his mother's funeral and perform his duties as a first born son according to the Hindu religion that Dr. Akula follows. On November 10, 2021, McHugh doubled down in her intentional misrepresentation to the court when she repeated her lie that family member had fled to India and that this created concern that Dr. Akula would as well. At the time when McHugh made this representation to Judge Douglas, she knew that the family member was in the United States, and in fact this family member had

fallen ill and was not even able to leave his house, yet alone the country in November 2021. *See Exhibit 1: Affidavit of Christina Black, MD.*¹

Based on McHugh's intentional misrepresentation to Judge Douglas, Judge Douglas denied Dr. Akula's motion to modify his pretrial release in order so that he could perform one of the most sacred duties as a first born son in the Hindu religion. This duty of a first son is so sacred that under the laws of India, even those who are incarcerated who are first born sons, receive an automatic furlough from prison to attend the mother's funeral to perform these duties in connection with burying the mother. McHugh's lies to the court circumvented and directly impacted Dr. Akula's ability to be able to perform this once in a lifetime duty. McHugh did not even blink an eye when she lied and intentionally made this misrepresentation knowing full well that when she repeated her lie for the second time before Judge Douglas, that Mr. Biyyam was in the United States and in fact it turns out, was even bed bound at the time in November 2021.

McHugh continued on with her falsities to drive away PAA and Dr. Black from Dr. Akula's defense when she tried to set things up ahead of time with Judge

¹ In her affidavit, under paragraph 14, Dr. Black references to the conversation she had with Mr. Biyyam's daughter wherein she was told that Mr. Biyyam is bed bound as being in connection with the first appearance hearing but in fact this conversation took place during the time period of November 2021 in connection with the motion to modify the order from the first appearance hearing. Dr. Akula could not have directed Dr. Black to investigate the whereabouts of Mr. Biyyam until after McHugh made her first lie to the court on August 25, 2021 during the first appearance hearing and then repeated these lies again when Dr. Akula filed his motion to modify the conditions of his release in November 2021.

Roby regarding the terms of a protective order for discovery by making an ex parte contact to Judge Roby's chambers for the purpose of giving heads up to Judge Roby so she could know "everything about the background" of Dr. Black. McHugh wanted Judge Roby to contact a fellow district court judge presiding over the grand jury proceeding which McHugh had initiated on again, falsities and lies. Judge Roby smelled that there was something wrong with McHugh's story and behavior and on January 26, 2022, Judge Roby entered an order making findings that McHugh lacked candor and presented falsities to the Court which McHugh failed to correct. *See Doc 66.* Judge Roby's findings were based on McHugh's false claims about witness tampering against Dr. Black and PAA when Judge Roby noted that the real issue was not one of witness tampering, but rather one where McHugh was dissatisfied with the Press Release that was critical of her.

When McHugh's efforts to exclude was thwarted by Judge Roby's immediate action to call McHugh out on her improper behavior, and when McHugh could not prevent PAA and Dr. Black from being excluded from reviewing the discovery with the enrollment of Bernard Cassidy who made it clear that he would be using the services of those whom he saw fit for purposes of medical help, which included PAA and Dr. Black, McHugh then designed another falsity.

This time, McHugh designed the falsity that every single government witness falls under Jencks material so that she could prevent Dr. Black and PAA

from reviewing the government's witness statements. In order to justify this lie, McHugh made the claim that there was the likelihood that Akula would bring civil suit against these witnesses if they were disclosed any earlier than 5 days before trial. Since Dr. Akula has the civil right to sue individuals for redress, McHugh's characterization of every single government witness as Jencks Material and thereby giving her the flimsy leeway to claim that these witness statements would not be produced until five days before trial, was nothing short of punishment of Dr. Akula for exercising his constitutional right to seek redress through civil court. "Prosecutors may not argue that a defendant should be punished for exercising his constitutional rights". *Chapman v. California*, 386 U.S. 18, 20-21 (1967). Even if Dr. Akula sues these individuals, he would be exercising a constitutional right so McHugh cannot use this as predicate to withhold government witness statements.

But, as time went by and towards the end of 2022, additional reasons surfaced as to why McHugh was so intent on not producing government witness statements. It turns out that all of McHugh's government witnesses, at least the most critical witnesses, are all criminals involved in a massive payroll fraud scheme where they have stolen hundreds of thousands of dollars from Canon Hospice and Dr. Akula ever since the criminal investigation began against Dr. Akula in 2018. It turns out that these government witnesses are all opportunistic criminals who saw a window of opportunity where Dr. Akula was preoccupied with the criminal

investigation and under the direction and guidance of former employee, Kelly Anderson, they stole hundreds of thousands of dollars through payroll fraud scheme without Dr. Akula becoming aware of this fraud until 2021. McHugh knew of this payroll fraud because there was a state criminal investigation that began into the criminal conduct of her government witnesses, like Kelly Anderson, Vaschelle Hastings, Nikita Murphy. McHugh immediately proceeded to freeze the state criminal investigation into the criminal conduct of her star witnesses, withhold the government witness statements from these opportunistic criminals who were former employees of Canon Hospice until five days before trial, get Dr. Akula convicted on lies told by these opportunistic criminals allowing McHugh to achieve her desired end result by hook or crook.

The payroll fraud scheme was extensive and cleverly designed by Anderson who operated and maintained the fraud even after her departure from Canon Hospice in 2019. Anderson's scheme involved (1) unauthorized duplicative payroll checks (2) unauthorized over time payments, and (3) payroll checks to fake employees who were paid salaries as if they were employed by Canon Hospice where the salaries paid to these fake employees were dispersed through Cash App to Anderson and her cronies, who are the rest of government's witnesses. *See Exhibit 4: Email from Agent Chadwick from the Office of Attorney General of Louisiana.* Up until McHugh interfered with this state criminal investigation and caused it to be

stopped, Agent Chadwick had uncovered payroll fraud of upwards of \$300,000 that was stolen through Anderson's scheme as described above. In fact, one of the co-conspirators of this payroll fraud scheme, Vaschelle Hastings, realized that she was caught red handed and left the criminal enterprise of McHugh and Anderson, and started to send cashier's checks to Dr. Akula for the amount of money that she had stolen as part of her participation in Anderson's scheme. *See Exhibit 5: Hastings' cashier's checks.*

In November 2022, when McHugh found out about the state criminal investigation which had as its target Kelly Anderson and the remaining government witnesses on McHugh's list, the first thing McHugh did was to shut down the Attorney General's criminal investigation in order to keep her opportunistic criminal government witnesses free of arrests as the Office of Attorney General was about to make arrests of these individuals. McHugh had to make sure that these witnesses were unencumbered and did so by engaging in obstruction of justice in the state criminal investigation.

Cumulatively, McHugh's actions has obstructed justice, she has made intentional misrepresentations to the court on multiple occasions in order to achieve her means, by hook or crook, she lied about Dr. Akula being a flight risk by lying that one of his family members had fled the country when she knew to be untrue, she lied, intimidated and threatened an important and resourceful physician

advocacy group, PAA, with criminal prosecution so she could drive them away from Dr. Akula, she lied to shut down a state criminal investigation, she lied to keep government witness statements and most importantly she lied to withhold *Brady* information about these government witnesses. All of these actions have deprived Dr. Akula from being able to prepare a defense as McHugh engaged in “make up as you go along” claims for the past 18 months while misusing the authority of her badge as an Assistant United States Attorney. “Because harm is irrelevant to the basis underlying the right of a defendant to conduct his own defense, a violation of that right is structural error”. *Weaver v. Massachusetts*, 198 L. Ed. 2d 420, 137 S. Ct. 1899 (2017).

In an indictment where there are only he-said-she said type allegations that Dr. Akula purportedly told unidentified individuals to submit unidentified fraudulent bills to Medicare, and where the government has admitted that there is no video or audio recording of any alleged instructions by Dr. Akula to cause Medicare to be fraudulently billed, and where there is a clear requirement by the government to show that Dr. Akula engaged in health care fraud knowingly and willfully, (evidence of which does not exist), where the set up at Canon Hospice was not that Dr. Akula was providing any of the health care, but rather that third party physicians were providing the care and thus certifying the Medicare billing independent of any input

by Dr. Akula, ²Dr. Akula submits that the behavior demonstrated by this prosecutor by her falsities and lies in the past 18 months of this criminal proceeding has tainted these proceedings to a degree of preventing Dr. Akula from being able to prepare his defense and for this reason this Court to dismiss the indictment.

Interfering with a state criminal investigation to get a falsely premised conviction in federal court is outrageous conduct and the government should not be allowed to use the judicial machinery to achieve an end it desires by prosecutors engaging in criminal behavior as McHugh has done in this instance. Dr. Akula requests that the Court set this matter for an evidentiary hearing so that Dr. Akula may be able to call the agents of the Office of Attorney General to establish how McHugh made them stop their state criminal investigation until after the conclusion of the trial in this case.

² McHugh knows this fact very well and the fact that even a state court judge has made the determination that the allegations of wrongdoing involving Medicare fraud can only be attributed to those physicians certifying the billing records- that was not Dr. Akula at any time at Canon Hospice. *See Exhibit 6: Transcript of State Court Proceedings*. In the absence of some audio or video recording or some under cover agent operation, that Dr. Akula instructed individuals to bill fraudulently, this Indictment is a waste of this Court's time as it has turned nothing short of tarnishing the reputation of Dr. Akula and ruining a hard working physician's life time work just because this junior prosecutor was offended by some Press Release that was a circulating draft internally at Canon Hospice to one employee that got in the hands of McHugh through her co-conspirator, Kelly Anderson.

FACTS AND LAW RELEVANT TO SELECTIVE PROSECUTION

“A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” *Fed. R. Crim. P. (b)(1)*. A party “must” raise by pretrial motion “a defect in instituting the prosecution, including ... (iv) selective or vindictive prosecution[.]” *Fed. R. Crim. P. (b)(3)(iv)*. Claims of selective or vindictive prosecution are “not ...defense[s] on the merits to the criminal charge itself, but ... independent assertion[s] that the prosecutor has [either] brought the charge [or used the charging process in retaliation] for reasons forbidden by the Constitution.” *United States v. Armstrong*, 517 U.S. 456, 463 (1996)

The Fifth Circuit has ruled that a defendant bears a heavy burden of establishing, at least prima facie, that (1) he has been singled out for prosecution while others similarly situated have not generally been proceeded against for similar conduct, and (2) the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i. e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *See United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United States v. Kahl*, 583 F.2d 1351, 1353 (5th Cir. 1978).

Dr. Akula is of Indian descent and he was *not* the health care provider at Canon Hospice who saw patients, who rendered medical treatment and then who

certified the Medicare billing. In fact, Dr. Akula had no involvement and could not have any involvement in the billing decisions because he was never the attending physician in charge of hospice patients that are subject of the indictment. It is impossible that any person would take any direction or instruction from Dr. Akula who was not the attending physician for any one hospice patient. All of the health care treatment and billing were done primarily under the direction and guidance of two white male doctors, Dr. Oren Blalock and Dr. Jason Hill who were the medical directors. *See Exhibit 7: Agreement for Health Care Services at Canon Hospice.* There has been no indictment or criminal investigation of either Dr. Blalock or Dr. Jason Hill even though all of the signatures for billing that are the subject of the indictment against Dr. Akula are under Dr. Blalock and Dr. Hill's name. In addition, the government has made it clear that it is relying on evidence from those individuals who have drawn a clear line in the sand that they are racist – almost in the category of 'white supremacist' like Sue May who was a former Administrator at Canon Hospice. As part of the evidence in the case relied upon by McHugh is an audio recording of Sue May and Kelly Anderson, the opportunistic criminal wherein Sue May and Anderson refer to Dr. Akula as "little brown man", and talk about throwing him under the bus consistent with their outlook on life that since Dr. Akula is "brown" and not "white", he could be the sacrificial lamb for the "white" people. The government has made it clear that it will be relying on such discriminatory

evidence in order to secure a conviction against Dr. Akula and in fact the government has relied on such evidence in order to prosecute Dr. Akula. Dr. Akula only has his handwritten notes that he was able to jot down from this audio recording when he listened to the recording in the FBI evidence room. The government has refused to turn this evidence over, likely so that Dr. Akula is hindered from bringing a motion to dismiss based on selective prosecution.

In general, before an evidentiary hearing will be conducted, some credible evidence must be adduced showing that the government intentionally and purposefully discriminated against the defendant. Dr. Akula offers the evidence of the audio recording of government witnesses talking about throwing Dr. Akula referring to him as the “little brown man” under the bus- evidence which the government has thus far refused to turn over. Dr. Akula also relies on the evidence that two “white men” who were certifying the billing and under whose name all of the billing records were submitted, to wit, Dr. Blalock and Dr. Hill, are not being prosecuted by EDLA, but Dr. Akula, who is of Indian descent, has been charged and being prosecuted. Together with the slew of evidence that Dr. Akula has provided under Factual Background for government misconduct, Dr. Akula has met his threshold for this Court to hold an evidentiary hearing so to allow Dr. Akula to further demonstrate that the government has engaged in selective prosecution in filing this indictment against Dr. Akula.

MEMORANDUM OF LAW

This Court's power and obligation to dismiss the indictment in this case under the circumstances presented in this motion is well rooted in case law.

“While the adversary system depends primarily on the parties for the presentation and exploration of relevant facts, the judiciary is not limited to the role of a referee or supervisor.” *United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

In his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 485, (1928) (Brandeis, J.,dissenting), Justice Brandeis stated:

If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

McHugh is a lawbreaker and her actions has been breeding contempt for law in these proceedings. She has committed crimes involving obstruction of justice even on the state side by causing the state criminal investigation to come to a halt for the sole purpose of McHugh not having impeachment material against her witnesses for purposes of this case. Halting the state criminal investigation meant no arrests for the time being against those former employees who operated and propagated this payroll fraud scheme against Canon Hospice with McHugh's full knowledge.

The Fifth Circuit has agreed that in certain situations, a defense of governmental misconduct may bar a criminal prosecution on due process grounds. *See United States v. Graves*, 556 F.2d 1319, 1324 (5th Cir. 1977), cert. denied, 435 U.S. 923, 98 (1978).

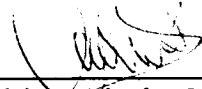
The only proper remedy is for this Court to issue the most severe sanctions and enter an order dismissing this indictment with prejudice.

While not too many, there is sufficient guidance on whether this Court should hold an evidentiary hearing in connection with this motion to dismiss the indictment based on governmental misconduct. In *United States v. Criden et al.*, Crim No. 80–166 (E.D.Pa., Aug. 18, 1980) (Fullam, J.), the court was faced with a similar motion to dismiss the indictment on grounds of governmental misconduct in one of the Justice Department's ABSCAM prosecutions. Judge Fullam conducted several days of evidentiary hearings on various motions brought by the defendants. In addition, with respect to selective prosecution, an evidentiary hearing is required once the defendant makes a prima facie showing that he is being singled out. *See United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978).

WHEREFORE, Defendant, DR. SHIVA AKULA, respectfully requests that this Court grant this Motion to Dismiss Indictment with Prejudice Based on Government Misconduct and Selective Prosecution, grant an evidentiary hearing to

allow Dr. Akula to further establish basis for said dismissal, and grant any other and further relief that the Court may deem just and proper.

Respectfully Submitted by,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to counsel of record via email on this 8th day of May, 2023.


A handwritten signature in black ink, appearing to read 'Shiva Akula', is written over a horizontal line.

Shiva Akula, MD