

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
vs.)	5:07-CR-00098-IPJ-PWG
)	
ALEXANDER NOOREDIN LATIFI,)	
and AXION CORPORATION.)	

GOVERNMENT’S MOTION TO RECONSIDER ORDER DENYING
QUASHING SUBPOENAS AND PRECLUDING DISCOVERY OR,
ALTERNATIVELY, FOR STAY OF DISCOVERY

Comes now the United States of America, by and through Alice H. Martin, United States Attorney for the Northern District of Alabama, and Jenny L. Smith, Assistant United States Attorney, and moves this Court to reconsider its March 5, 2008, order, denying the Government’s motion to quash subpoenas and preclude discovery. Alternatively, the United States moves to stay discovery concerning Latifi’s Hyde Amendment motion. In addition to the legal reasons supporting reconsideration, as to the stay, the United States respectfully advises the Court that the Solicitor General is currently reviewing the Court’s decision in order to determine whether to seek further review in the court of appeals. The United States is therefore asking the Court to stay discovery until the Solicitor General has completed his review, and, if he authorizes the filing of an appeal or a petition for a writ of

mandamus, until after that appeal or petition is resolved.

The Subpoenas and Demands to Date¹

Prior to the February 12, 2008, hearing addressing timeliness, Latifi sent a letter and affidavit advising the United States Attorney of his intention to subpoena her and Assistant United States Attorneys Angela Debro and David Estes. (Doc. 80, Att. 1). He advised that he was seeking testimony on the following subjects:

Defendant seeks to elicit the testimony of these witnesses as to the factual and evidentiary basis for the Government's indictment and prosecution of charges against Defendant in the above styled action. Specifically, Defendant believes that the testimony of these witnesses will demonstrate that the Government failed to exercise elementary case evaluation and investigative techniques, to wit, by failing to establish the *bona fides* of the signatures on documents forming the basis for its allegations, and that the Government in fact continued to prosecute its case against Mr. Latifi despite being aware of evidence that clearly tended to negate elements of the charged offenses.

(*Id.* at 3).

After that hearing, Latifi served subpoenas on the United States Attorney and Assistant United States Attorneys Debro, Estes, and James Ingram, directing them to be present to provide testimony at the upcoming April 14 and 15, 2008, hearings. In addition to seeking testimony, Latifi demanded production of the following

¹Portions of this section are identical to the comparable section in the Government's Motion to Quash, but additional information that has developed subsequently has been added where appropriate.

documents: “[a]ll correspondence files including, but not limited to, correspondence and communications, notes, and memoranda between yourself and any individual or agency relating to the above-referenced case.”

Latifi has served John S. Schlotterer, Resident Agent in Charge of the National Aeronautics and Space Administration’s Office of Inspector General, Office of Criminal Investigations, with subpoenas for hearing testimony along with demands that he bring “the entire investigative file on *U.S. v. Latifi, et al.*” Latifi has also subpoenaed Marcus Mills, a former agent of the Army’s Criminal Investigative Division, and David J. Balwinski, currently an agent with that Division, to attend the April 14 and 15, 2008, hearings and to bring their “entire investigative file[s] on *U.S. v. Latifi, et al.*” The United States anticipates that Latifi will serve additional agents from other federal agencies with similar subpoenas.

By letter delivered February 21, 2008, Latifi advised the United States Attorney of his intention to “serve broad discovery on the USA to be utilized in the . . . hearings. . . .” (Attachment 1 to Doc. 99). He advised that he “intend[s] to review all prosecutive memos and other documentation addressing these cases.” (*Id.*). He advised that he intends to examine the United States Attorney and her “staff . . . in connection with Brady material that may or may not have been produced in accordance with applicable law.” (*Id.*). He specifically declined to provide the bases

for his contention that he is entitled to the “broad discovery” that he is seeking. (*Id.*).

In the related civil forfeiture action, on March 3, 2008, Latifi served the United States with requests for admissions, requests for production, and interrogatories, which seek discovery related to his claims in this proceeding. (Attachment 1). While these documents bear the caption of the civil forfeiture case, their contents verify that Latifi is seeking the information for use in these Hyde Amendment proceedings.

On March 13, 2008, Latifi served the United States with notices for the depositions of United States Attorney Martin and Assistant United States Attorney Ingram for March 26, 2008. (Attachments 2 & 3). While the deposition notices bear the caption of the civil forfeiture case, the notices and the attached document production lists make clear that Latifi is seeking the testimony and documents for use in these Hyde Amendment proceedings. The United States has moved for a protective order in the civil forfeiture case.

Argument

I. The Court Should Not Allow Discovery Concerning Latifi’s Hyde Amendment Claims.

In its March 5, 2008, Order denying the Government’s motion to preclude discovery, the Court cited the relevant portion of the Hyde Amendment which addresses the provision of extra-record evidence in Hyde Amendment proceedings.

(Doc. 100, citing Pub. L. 105-119, Title VI, § 617, 111 Stat. 2519 (Nov. 26, 1997)). The Court appears to have interpreted this provision as a grant of discovery rights in Hyde Amendment proceedings.

The Hyde Amendment does allow a district court to “receive evidence *ex parte* and *in camera* (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before the grand jury) and evidence so received shall be kept under seal.” This provision, however, was not intended to give the defendant access to discovery. Rather, it was intended to permit the government to show the district court that it had additional support for its prosecution that it could not use at trial or that it cannot reveal to the defendant in the Hyde Amendment proceedings. *United States v. Truesdale*, 211 F.3d 898, 907 (5th Cir. 2000) (“It appears the provision for *in camera* review of evidence was included to enable the government to defend itself against Hyde Amendment motions and at the same time protect confidential information.”). *See also United States v. Schneider*, 395 F.3d 78, 91 (2d Cir. 2005) (Fifth Circuit’s observation “may have merit,” noting that rules granting discovery of the government’s files are usually explicit); and *id.* at 92 (“nothing in the words of the statute suggests that the court has the power to order the government to produce materials, either to the defendant or to the court, *ex parte* and *in camera*.”).

Latifi thus is not entitled to discovery concerning his Hyde Amendment claims. Similarly, he is not entitled to adduce testimony or proffer extra-record documents at the upcoming hearing. This Court should decide the merits of Latifi's claims using the record as it stands or as supplemented by the government, for good cause shown, in accordance with the Hyde Amendment. Thus, the Court should reconsider its order allowing discovery and refusing to quash the subpoenas.

II. Alternatively, the Court Should Stay Discovery Concerning the Hyde Amendment Claims So That the United States Can Assess its Options for Appeal.

The United States is seeking authorization from the Solicitor General to seek a writ of mandamus directing this Court to quash the subpoenas served on the government by Latifi and to deny the discovery sought by Latifi. The United States' position is that Latifi's right to discovery under the Hyde Amendment should never have become an issue, as Latifi's motion was untimely. His acquittal on all counts was final and unappealable. Thus, he had no right to proceed at all, let alone a right to discovery. Additionally, as discussed above, the Hyde Amendment does not provide for discovery.

While the United States is aware that the Court has disagreed with and may continue to disagree with these positions, it respectfully requests a stay while the Solicitor General reviews the Court's decision and determines whether review by the

court of appeals is warranted. Should further review be authorized, the United States requests that any stay be extended until the appeal or mandamus proceeding is resolved.

Conclusion

The Court should reconsider its Order refusing to quash the subpoenas directed to the United States Attorney, specific Assistant United States Attorneys, and agents of various federal agencies and to preclude discovery and other post-judgment evidence gathering in the Hyde Amendment proceedings. Alternatively, the United States requests a stay of discovery in these proceedings while the United States assesses its appellate options.

Respectfully submitted this the 13th day of March, 2008.

ALICE H. MARTIN
United States Attorney

/s/ electronic signature
JENNY L. SMITH
Assistant United States Attorney

Certificate of Service

_____ I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that a copy of the foregoing will be provided to the defendant's attorney of record, via the CM/ECF system, this the 13th day of March, 2008.

/s/ electronic signature

JENNY L. SMITH

Assistant United States Attorney