



an order substituting Thomson as counsel, and the order was entered by Chief Judge Glen E. Conrad of this court.

A few days later, Magistrate Judge James G. Welsh informed Judge Conrad that the government suspected Thomson of attempting to buy drugs from Salvatierra-Jovel and therefore there was a problem with Thomson representing Salvatierra-Jovel. Based on a conversation with Salvatierra-Jovel, it was determined that Hebllich should be reappointed as counsel. However, AUSA Terrien contacted Judge Conrad and asked that the judge not enter the order substituting Hebllich because it would alert Thomson to the government's suspicions. Judge Conrad permitted AUSA Terrien to make a formal application asking the court to appoint Hebllich as "shadow counsel" for Salvatierra-Jovel. Judge Conrad determined that appointing "shadow counsel" was inappropriate and appointed Hebllich in an unsealed order.

Generally, whether to enforce or quash a subpoena is left within the district court's broad discretion. *United States v. Guild*, No. 1:07cr404 (JCC), 2008 WL 169355, at \*1 (E.D. Va. Jan. 15, 2008). When considering a party's subpoena of opposing counsel, the court should consider (1) whether the subpoena was issued primarily for purposes of harassment, (2) whether there are other viable means to obtain the same evidence, and (3) to what extent the information sought is relevant to the moving party's case. *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55,

56 (1st Cir. 2003); *see also Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 729-30 (8th Cir. 2002). “[T]he compulsory process right does not entitle the defendant to present evidence that is irrelevant.” *United States v. Simpson*, 226 F. App’x 556, 562 (6th Cir. May 8, 2007) (unpublished).

Requests for testimony from prosecutors trying criminal cases are generally disfavored. *United States v. Presgraves*, 658 F. Supp. 2d 770, 784 (W.D. Va. 2009) (citing *United States v. Ziesman*, 409 F.3d 941, 950 (8th Cir. 2005)). Absent extraordinary circumstances or compelling reasons, an attorney who participates in a case should not be called as a witness. *United States v. Johnston*, 690 F.2d 638, 644 (7th Cir. 1982); *see also United States v. Watson*, 952 F.2d 982, 986 (8th Cir. 1991) (“The party seeking such testimony must demonstrate that the evidence is vital to his case, and that his inability to present the same or similar facts from another source creates a compelling need for the testimony.”). Additionally, for subpoenas against prosecutors, there is a regulatory procedure that must be followed. Particularly, if a defendant seeks the oral testimony of a prosecutor in a case in which the United States is a party, the defendant must present an affidavit or statement setting forth a summary of the testimony sought from the prosecutor. 28 C.F.R. § 16.23(c) (2010).<sup>1</sup>

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<sup>1</sup> It is unclear whether Thomson complied with this procedure.

Thomson asserts that Terrien was intimately involved in the investigation of the defendant and therefore is a material witness. He alleges that Terrien executed a plan to use Salvatierra-Jovel in his investigation of Thomson and that as part of the investigation, Terrien arranged, via emails with Thomson and pleadings in court, for Thomson to believe that he was representing Salvatierra-Jovel when, in fact, Fred Heblich had been appointed. Particularly, Thomson alleges that on November 12, 2010, Terrien wrote Thomson asking him if he was going to represent Salvatierra-Jovel and indicating that Salvatierra-Jovel wanted Thomson, not Heblich, to be his attorney. When Thomson was added as counsel, Terrien wrote Thomson to schedule a proffer, although Heblich was kept as “shadow counsel” to Salvatierra-Jovel.

Thomson argues that the testimony from Terrien would establish facts that are not ascertainable elsewhere, given the exceptional conduct that occurred. Thomson is charged with obstructing justice, among other offenses. He argues that the government will use evidence of a meeting that occurred between him and Salvatierra-Jovel to show that he obstructed justice. Thomson asserts that Terrien’s testimony about the “shadow counsel” arrangement is necessary to explain Thomson’s meeting with Salvatierra-Jovel and to prevent the jury from inferring that Thomson only met with Salvatierra-Jovel to obstruct the investigation.

Thomson maintains that Terrien is the sole witness to offer testimony about the investigation because testimony from others would likely be hearsay and a stipulation would be incapable of fully explaining such a complex situation and would violate his rights to jury trial. He also argues that the opportunity to call Terrien as a witness is necessary to protect his Confrontation Clause rights.

Thomson's arguments about AUSA Terrien are not new; they were previously considered when Thomson moved to dismiss the indictment and for Terrien to be disqualified. The court denied those motions and held that Thomson's due process rights had not been violated by the investigation.

I find that the subpoena here must be quashed because the testimony of AUSA Terrien is irrelevant. Other evidence is available to explain Thomson's relationship with Salvatierra-Jovel and his belief that he was representing Salvatierra-Jovel at the time of the meeting. *See United States v. Dack*, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) (approving of the district court's quashal of a subpoena of the prosecuting attorney because the evidence was easily available from other sources). Additionally, the more probative evidence regarding the obstruction of justice charge is evidence about the conduct that occurred at the meeting between Thomson and Salvatierra-Jovel. Whether Thomson met with Salvatierra-Jovel believing he was his attorney is irrelevant to whether Thomson obstructed justice at the meeting.

To the extent that Thomson wants to present evidence about the investigation to argue that his rights were violated or that the investigation was biased, such evidence is irrelevant to Thomson's guilt or innocence of the crimes alleged. *See Simpson*, 226 F. App'x at 562 (quashing a subpoena of a member of the AUSA's office because a claim of vindictive prosecution was not relevant to the defendant's guilt or innocence). This court has previously determined that Thomson's rights were not violated during the investigation.

Unlike the prosecutor in *United States v. Prantil*, 764 F.2d 548, 552 (9th Cir. 1985), AUSA Terrien is not vital to the defense. In *Prantil*, the prosecutor had negotiated directly with the defendant for the capture of a fugitive whom the defendant was accused of harboring and giving aid. *Id.* at 551. AUSA Terrien is not the person Thomson is accused of speaking with to obstruct justice; that person is Salvatierra-Jovel, who can be called as a witness at trial. AUSA Terrien's role was limited to that of an investigator, and he was not a witness to or participant in any of Thomson's allegedly criminal conduct.

Given these considerations, there are no extraordinary circumstances or compelling reasons for AUSA Terrien to testify. Accordingly, it is **ORDERED** that the Motion to Quash is **GRANTED** and the subpoena for AUSA Terrien is **QUASHED**.

ENTER: June 24, 2011

/s/ James P. Jones  
United States District Judge