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Indictment of Former GSK Lawyer Dismissed

On March 23, 2011, United States District Judge Roger Titus in Greenbelt, Maryland dismissed the indictment of former GlaxoSmithKline in-house counsel Lauren Stevens because prosecutors erroneously instructed the grand jury that the advice of counsel defense did not apply until trial. While the dismissal is without prejudice, Judge Titus ruled that the prosecutors must properly instruct the grand jury before Stevens can be re-indicted.

Stevens was indicted in November on six counts of obstructing justice and making false statements to the Food and Drug Administration. According to prosecutors, Stevens authored several letters to the FDA denying that GSK promoted its anti-depressant Wellbutrin for off-label purposes, when she allegedly knew the company had sponsored events at which Wellbutrin was improperly promoted.

Though the indictment was returned in the District of Maryland (where the FDA is located), it was brought by prosecutors from Main Justice and Massachusetts, without any apparent involvement by the U.S. Attorney for Maryland, Rod J. Rosenstein, or his office. (A grand jury in Massachusetts also heard testimony from some witnesses, including several of GSK's attorneys.)

Stevens pled not guilty, and has said she relied in good faith on the advice of counsel. Filings made on her behalf show Stevens led a team of attorneys tasked with responding to the FDA's request for information about GSK's promotion of Wellbutrin. This team included several former FDA officials from GSK's legal department and a former FDA Associate General Counsel from GSK's outside counsel, King & Spalding.

According to Stevens, the team reached a consensus before submitting any information to the FDA and each of GSK's submissions was drafted and edited by multiple attorneys, none of whom have been indicted or named as unindicted co-conspirators. Further, Stevens says she was never advised that failing to disclose the allegedly improper promotion was unlawful. Instead, Stevens was advised to seek a meeting with the FDA to discuss several topics, including the alleged off-label promotion. Stevens called to request a meeting, but the FDA did not respond and the meeting did not occur.

During the investigation, Stevens learned that several members of GSK's legal team testified before the Massachusetts grand jury. Stevens believed that the legal team's testimony would have been exculpatory and asked the Court to determine if the exculpatory evidence obtained in Massachusetts was presented to grand jurors in Maryland.

In its opposition to Stevens motion, the government disclosed that a grand juror had specifically asked about the advice of counsel defense, but did not disclose the prosecutors' response. Judge Titus ordered the government to disclose the transcripts for an *in camera* review.

After reviewing the record, Judge Titus disclosed that during a November 8, 2010 grand jury proceeding, a juror asked Patrick Jasperse, a trial attorney from the Department of Justice, and Sara Bloom, an Assistant United States Attorney from the District of Massachusetts, whether it mattered if Stevens "was getting direction from somebody else about how to handle [the FDA investigation]."

The prosecutors responded that the advice of counsel defense is an affirmative defense "that a defendant can raise, once the defendant has been charged." The prosecutors then told the jurors that "while it can be relevant at trial . . . if you find probable cause for the elements here that the attorney Lauren Stevens reasonably knew that she was making false statements . . . then that's sufficient to find probable cause."

After receiving briefing from both parties, Judge Titus concluded that the jury instruction was incorrect and misleading. Although a prosecutor is under no obligation to bring exculpatory evidence before a grand jury, *United States v. Williams*, 504 U.S. 36, 55 (1992), because a good-faith reliance on the advice of counsel negates the intent requirement necessary to commit the charged offenses, Stevens should not have been indicted if the jurors believed she relied in good faith on the advice of counsel.

Therefore, while grand jury indictments should only be dismissed when "there is grave doubt that the decision to indict was free from the substantial influence" of the error, Judge Titus nevertheless found that the grand juror's question "went to the heart" of Stevens' case and that dismissal was "appropriate and required in the interests of justice." See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (internal quotations omitted).

Even though the instruction was incorrect, Judge Titus found that the prosecutors did not intend to mislead the grand jury and that dismissing the indictment with prejudice would be "wholly inappropriate." Judge Titus then

ordered that the government could only seek to re-indict Stevens after properly instructing the jury about the advice of counsel defense.

Judge Titus tentatively scheduled Stevens's trial for April 26, so that the matter could move forward without delay if the government obtains a new indictment. Prosecutors indicated that they had not decided whether to seek a new indictment, appeal the dismissal, or drop the case.

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