

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">PLAINTIFF,</p> <p>v.</p> <p>SUZANNE L. SCHMITZ,</p> <p style="text-align: center;">DEFENDANT.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>CASE NO.: CR-08-P-14-RDP-PWG</p>
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**DEFENDANT’S MOTION TO DISMISS INDICTMENT DUE TO
 PROSECUTORIAL MISCONDUCT DURING GRAND JURY PROCEEDINGS**

Comes now the defendant, Sue Schmitz, by and through counsel and requests that this court dismiss the indictment against the defendant due to prosecutorial misconduct by Assistant United States Attorneys William C. Athanas, Matt Hart, and William Lisenby (hereinafter “A.U.S.A.”) during the interrogation of witnesses during the grand jury investigation into the present action. In support of this motion, Ms. Schmitz provides the following:

The grand jury is one of the most powerful instruments in the arsenal of the prosecutor. While the prosecutor may appropriately explain the law and express an opinion on the legal significance of the evidence, he or she should give due deference to its status as an independent legal body. ABA Standard 3-3.5(a) (1993). The decision to issue an indictment belongs solely to the grand jury. As noted by the Supreme Court in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), the essential mission of the grand jury is to act independently of the prosecution. A prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which

would be impermissible at trial before a petit jury. ABA Standard 3-3.5(b) (1993). A prosecutor is under a duty not to inflame or otherwise improperly influence the grand jury's ability to evaluate the evidence independently and impartially. Wood v. Georgia, 370 U.S. 375 (1962).

Prosecutorial Misconduct during interrogation of witnesses

The prosecutor has an obligation not to engage in techniques, either knowingly or inadvertently, to curry favor with the grand jurors and lead them to abrogate their role as unbiased factfinders. U.S. v. Breslin, 916 F.Supp 438, 443 (E.D. Pa. 1996). A prosecutor may not deprive the grand jury of the opportunity to evaluate the evidence independently. U.S. v. Mechanik, 475 U.S. 66, 74 (1986). "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away" Stirone v. United States, 361 U.S. 212, 218-19 (1960).

During multiple grand jury examinations, AUSA.'s Athanas, Hart, and Lisenby repeatedly badgered and harassed witnesses and expressed their opinions regarding the evidence presented against Ms. Schmitz and sarcastically demonstrated disdain for Ms. Schmitz and the witnesses in such a manner as to unjustly influence and create a biased grand jury. The following are examples of such actions during the grand jury proceedings which ultimately led to Ms. Schmitz's indictment:

From the transcript of Rex Cheatham:

9:15 **Cheatham:** "She was like any of us would be who had lost their job or possibly was losing their job. She was pretty upset."

9:18 **Prosecutor Athanas:** "Oh, yeah, I'd be upset if I lost that job as well."

From the transcript of James Cornell:

31:12 **Cornell:** "That she had gone over her work responsibilities with her, and told her that she had to go to work."

31:15 **Prosecutor Athanas:** "We're at least a year into her job right now. She doesn't know she has to go to work?"

31:17 **Cornell:** “Well, that was a poor choice of words.”

31:18 **Prosecutor Athanas:** “I’m not sure it is. I think it’s a perfect choice of words, quite frankly...”

From the transcript of Barbara Creel: - regarding Ms. Schmitz’s keeping of time logs in lieu of timesheets

52:4 **Prosecutor Athanas:** “So, at some point she is not even going through the charade of backdating her timesheets because she not even submitting time sheets any more?”

From the transcript of Lester Crowder:

11:2 **Prosecutor Athanas:** Are you aware of any other C.I.T.Y. employees with a flexible work schedule?”

11:4 **Crowder:** “Yes, sir.”

11:5 **Prosecutor Athanas:** “Who?”

11:6 **Crowder:** “Sue Smith.”

11:7 **Prosecutor Athanas:** “Sue Smith or Sue Schmitz?”

11:8 **Crowder:** “Sue Schmitz, whatever.”

11:9 **Prosecutor Athanas:** “Well, we’ll get to why you don’t appear to know her name all to well...”

From the transcript of Carol Dotson:

25:1 **Prosecutor Athanas:** You indicated that you thought it was a short period of time hat she spoke. I think you said six or seven minutes.”

25:4 **Dotson:** “I think that’s probably what it was.”

25:5 **Prosecutor Athanas:** ‘I don’t know, but that [Schmitz] doesn’t sound to me like somebody that’s on the agenda?’”

From the transcript of Charles Foley:

16:12 **Foley:** [response to whether ever enlisted Schmitz for public relations work] “...So, I was very assertive in making those things happen in our community. So, in soliciting---- well, I didn’t actually solicit her funds. She would actually give me a business card of a local business representative, and I would touch base with that person and things happened.”

16:18 **Prosecutor Athanas:** “Sounds like you were the one doing the work.”

18:11 **Prosecutor Athanas:** “Do you evaluate the performance of your insubordinates?”

18:13 **Foley:** “I do, yes.”

18:14 **Prosecutor Athanas:** “They must love you.”

18:15 **Foley:** “They do.”

18:16 **Prosecutor Athanas:** “If that’s what you believe is doing a great job.”

34:4 **Prosecutor Athanas:** “Forming alliances. Give us some detail on what that entails because it sounds like high-level stuff.”

- 34:7 **Foley:** "High level stuff."
34:8 **Prosecutor Athanas:** "Sounds like she's out negotiating treaties. Forming alliances. That's pretty much just pick up the phone and talk to somebody once in awhile, right?"
34:12 **Foley:** "That was some of things that we were required to do as program coordinators."
34:14 **Prosecutor Athanas:** "No terribly objective criteria, right?"
34:15 **Foley:** "Right."
34:16 **Prosecutor Athanas:** "It's very difficult to determine whether or not someone has been successful in forming alliances unless you're attacked by some sovereign nation, right?"
34:20 **Foley:** "Okay."
34:21 **Prosecutor Athanas:** "You agree with me that's sort of a joke job description, isn't it?"

From the transcript of Seth Hammett:

- 10:14 **Prosecutor Hart:** Well, let me just ask you this. Do you remember speaking to Dr. Hubbert or any representative of Dr. Hubbert about Sue's problems and how she might be helped?
10:18 **Hammett:** I probably did, but I don't honestly remember.
10:20 **Prosecutor Hart:** I'm going to tell you something. You're under oath.
10:22 **Hammett:** Yes, sir.
10:23 **Prosecutor Hart:** I'm going to be polite to you. I'm not going to be rude to you today, and you don't have to stay here either. You can leave anytime you want to, okay?
11:2 **Hammett:** Yes, sir.
11:3 **Prosecutor Hart:** This is non-custodial at this point. It is not credible that you don't recall, if it occurred, it's not credible that you don't recall speaking to somebody about these specific types of things. Let me just tell you, we have evidence that this conversation occurred, okay?
11:10 **Hammett:** All right.
11:11 **Prosecutor Hart:** I'm doing the best I can do to refresh your memory, but I'm finished tap dancing at this point. Is that clear?
11:14 **Hammett:** Yes, sir.
11:15 **Prosecutor Hart:** Is it clear?
11:16 **Hammett:** Yes, sir.

From the transcript of Simon Jacob:

- 40:3 **Prosecutor Athanas:** "Well, Mr. Foley wanted to be the director of the program, right?"
40:5 **Jacob:** "Yeah."
40:6 **Prosecutor Athanas:** "And Sue Schmitz was backing him for that position, right?"
40:8 **Jacob:** "Yes."
40:9 **Prosecutor Athanas:** "Do you think that had something to do with why he thought she was doing a great job?"

40:11 **Jacob:** "I would think that would be part of it."

40:12 **Prosecutor Athanas:** "Yeah, me too."

From the transcript of Tracy Jordan:

12:19 **Prosecutor Athanas:** "Right. You see the same people everyday, right?"

12:21 **Jordan:** "I do"

12:22 **Prosecutor Athanas:** "And occasionally over a multi-year period between five and ten times you see Sue Schmitz sort of wandering around the office, right?"

From the transcript of Mary Bruce Ogles:

9:4 **Prosecutor Athanas:** "The number three person in a very powerful entity. Do you agree with me that AEA might be the most powerful entity in the state?"

9:7 **Ogles:** "Powerful how?"

9:8 **Prosecutor Athanas:** "In terms of influencing legislation?"

9:9 **Ogles:** "That's a possibility."

9:10 **Prosecutor Athanas:** "More than a possibility. Call it a probability."

41:12 **Prosecutor Athanas:** "Do you ever read The Birmingham News?"

41:13 **Ogles:** "Yes, sir."

41:14 **Prosecutor Athanas:** "Did you ever read that in The Birmingham News?"

41:16 **Ogles:** "Yes, sir."

41:17 **Prosecutor Athanas:** "Before or after this conversation took place?"

41:18 **Ogles:** "I was thinking it was after."

41:19 **Prosecutor Athanas:** "Let's see if that's true..."

42:20 **Ogles:** "If I remember correctly, The Birmingham News was bringing into issue all legislators. Not just specifically---"

42:23 **Prosecutor Athanas:** "One of which was Ms. Schmitz?"

42:24 **Ogles:** "Not specifically Ms. Schmitz, but all the legislators."

43:1 **Prosecutor Athanas:** "You didn't understand her to be one of the legislators?"

43:3 **Ogles:** "That's not what I said."

43:4 **Prosecutor Athanas:** "Did you understand her to be one of the legislators?"

43:6 **Ogles:** "Yes."

43:7 **Prosecutor Athanas:** "We just spent five minutes trying to answer that question. Let's not do that again..."

78:2 **Prosecutor Athanas:** "Do you know if anything on here is true?"

78:3 **Ogles:** "No, I don't."

78:4 **Prosecutor Athanas:** "Saturday, the twenty-first, 10 hours of newsletter development. Twenty-third, 10 1/2 hours research website development. Twenty-seventh, 11 hours research and development. It must have been some website."

From the transcript of Larry Palmer:

12:21 **Prosecutor Hart:** “Was that a change you knew was going to take place at the C.I.T.Y. Program?”

12:23 **Palmer:** “No. I was actually quite taken aback by the whole thing.”

12:25 **Prosecutor Hart:** “Well, for good reason.”

35:8 **Prosecutor Hart:** “And when you looked at her time sheets, did you think it was odd that she was working eight hours every day?”

35:11 **Palmer:** “Well, you might say I thought it was odd. Actually, O thought this is not accurate is what I thought.”

35:14 **Prosecutor Hart:** “That’s probably what I’d say too.”

55:14 **Prosecutor Hart:** “How many meetings do you need to have on this topic?”

55:16 **Palmer:** “I don’t know. I don’t know how to answer that question, sir.”

55:18 **Prosecutor Hart:** “Apparently, one more than we had, right?”

Dismissal of the indictment is appropriate “if it is established that the violation substantially influenced the grand jury's decision to indict,” or if there is “*grave doubt*” that the decision to indict was free from the substantial influence of such violations. United States v. Mechanik, 475 U.S. 66, 78 (1986) (concurring opinion) (emphasis added). Courts possess the power and duty to dismiss indictments obtained in violation of the Constitution or laws of the United States. In addition, courts have a “supervisory power over the administration of justice to regulate the manner in which grand jury investigations are conducted. United States v. Pabian, 704 F.2d 1533, 1535 (11th Cir. 1983) quoting United States v. Serubo, 604 F.2d 807, 816 (3d Cir. 1979). The AUSA’s tactics during the grand jury investigation raise “grave doubt” that the grand jury’s decision to indict was free from substantial influence.

This indictment is based upon presumptions and innuendo promoted by the conduct and behavior of the U.S. Attorneys during the grand jury investigation. It is the product of high handed, sarcastic, demeaning and superiority actions on behalf of A.U.S.A.’s Athanas, Hart, and Lisenby. Their actions have no place in the administration

and pursuit of justice. The A.U.S.A.'s have presented no evidence of substance to the grand jury that supports the reasonable expectation of a conviction based on the statutes cited but to the contrary presented inflaming incitement to indictment. *See Perez v. Ledesma*, 401 U.S. 82, 118 n.11 (1971).

Taken in its totality, the A.U.S.A.'s behavior is not only grounds for dismissal of this indictment under the supervisory capacity of this court but to the thinking of this author gives rise to reprimand. *Pabin*, 704 F.2d at 1535. This is not a game. The U.S. Attorneys' actions have gravely affected Ms. Schmitz's life and well-being and have unnecessarily cost the government untold resources. Quite simply, their actions fly in the face of the well established rule that is the prosecutor's role to seek the truth and not a conviction. Ms. Schmitz requests that this Court review the grand jury transcripts in their entirety and set an evidentiary hearing to further examine the A.U.S.A.'s treatment of witnesses and evidence during the grand jury investigation.

For the reasons stated above, the pending charges against Ms. Schmitz are due to be dismissed. Or, in the alternative set an evidentiary hearing to allow Ms. Schmitz to present evidence of prosecutorial misconduct in regard to the grand jury.

Respectfully submitted this the 18th day of April, 2008.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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