

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Case No. 1:14-CR-278
)	
AMIR A. BAJOGHLI, M.D.,)	Honorable Gerald Bruce Lee
)	
<i>Defendant.</i>)	
_____)	

**DEFENDANT’S MOTION *IN LIMINE* SEEKING CORRECTIVE
WITNESS INSTRUCTIONS FOR CERTAIN PATIENT WITNESSES**

Defendant Amir A. Bajoghli, M.D., respectfully moves this Court to instruct certain patient witnesses that, contrary to a letter they received from the government here, there has been no conviction of any crime and that they have not been “victimized” by the defendant. The grounds for this Motion are set forth below.

BACKGROUND

On September 3, 2014, six weeks prior to trial, the government sent “victim impact notification” letters to each of the living patient witnesses identified by initials in Counts 1 to 32 of the Indictment. The letters stated, in part, as follows:

[Y]ou were identified by law enforcement as a **victim** during the investigation of the above **criminal case [United States v. Defendant Amir Bajoghli, Case Number 2012R01322 and Court Docket Number 14-CR-00278]**. . . .

[p]lease be aware that most criminal cases are resolved by a **plea agreement** between the United States Attorney’s Office and the defendant. You should know that it is not unusual for a defendant to seek to negotiate a **plea agreement** shortly before a trial is scheduled to begin. . . .

Ex. A (“EDVA Letter”) (emphasis added). Recipients of the EDVA letter included at least twenty-eight patients who are critical defense witnesses, most of whom are elderly. In the EDVA letter, the Department of Justice (“DOJ”) improperly relies upon the Crime Victims’ Rights Act (“CVRA”), 18 U.S.C. § 3771, and Victims’ Rights and Restitution Act (“VRRRA”), 42 U.S.C. § 10607, with the effect of tainting and tampering with elderly witnesses who are key to the defense case. *See* Ex. A.

The EDVA letters have the effect of improperly tampering with witness testimony, and have actively discouraged the development of favorable testimony for the defense. The word “victim” appears in the letter *fourteen times*, and the statements regarding “plea” create the impression that a finding of guilt is imminent and inevitable. Sending this letter to witnesses six weeks prior to trial is extremely troubling, especially since many of the interview reports of these same witnesses contain significant evidence favorable to the defense.

To understand how inappropriate it was to send the EDVA letters to potential trial witnesses,¹ the Court need only consider what would happen if the defendant had sent letters to witnesses stating that they were *not* “victims” under the law of any crime alleged here, and that no plea was going to occur because Dr. Bajoghli is innocent of these charges. While those hypothetical statements would be at least accurate, they could have led to the government adding another obstruction of justice count or witness tampering investigation. If the defense cannot send such letters to trial witnesses, the government cannot either.

¹ While 18 U.S.C. § 1512 makes it a criminal offense to tamper with a witness during the course of judicial proceedings, there does not appear to be a reported case in which this statute was applied against DOJ, notwithstanding the clear fact that it does apply to DOJ. *See* Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. Tex. L. Rev. 801, 834 (2006).

Upon learning of the letters, the defense requested that DOJ cease sending the letters and identify who had received them. *Id.* DOJ responded that they believed the letters were “required by statute,” but they would be “happy to take a harder look at [defense’s] letter and consider [defense’s] concerns.” Ex. B (e-mail exchange between DOJ and defense counsel). On September 15, 2014, the defense requested that DOJ do exactly that and “take a harder look because under the statutes [the defense has not] seen DOJ take such a position.” *Id.* As of the date of this Motion, DOJ has not responded further with information related to why these letters were sent to critical witnesses on the eve of trial.

ARGUMENT²

Dr. Bajoghli was indicted on 53 counts of health care fraud, 18 U.S.C. § 1347. As charged, the alleged “victims” are the payors of the claims, which include Medicare/the Centers for Medicare and Medicaid Services (CMS), Tricare, and Anthem (the “payors”). In total, the indictment charges Dr. Bajoghli with allegedly defrauding the payors of approximately \$31,000.

The DOJ letters sent to critical trial witnesses inappropriately label these individuals, who are mostly elderly, as “victims.” Sending such letters on *DOJ letterhead* containing conclusory statements of fact only weeks before trial can only be considered a calculated attempt to harm the defense’s ability to interview and call these witnesses. While DOJ has a responsibility to comply with CVRA and VRRRA, construing these laws to allow sending victim notice letters to witnesses who were not the legal victims of the alleged criminal acts is tantamount to witness coercion and tampering, and is certainly a perversion of the law that impedes fair access to witnesses.

² There is a dearth of reported decisions in this area is not surprising given that witness coaching by the U.S. Department of Justice “has received relatively modest attention,” with only “[a] handful of judicial and ethics opinions . . . discuss[ing] [the subject matter] superficially.” Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 *Cardozo L. Rev.* 829, 830-31 (2002) (citations omitted).

“[T]he term ‘crime victim’ means a person directly and proximately harmed as a result of the commission of a Federal offense.” 18 U.S.C. § 3771(e); *see also* 42 U.S.C. § 10607(e)(2). Regardless of the quality of Dr. Bajoghli's medical care to his patients, any alleged “victims” of *healthcare fraud* would necessarily be the payors who were allegedly defrauded. *See, e.g., United States v. Weinberger*, No. 2:06-CR-230, 2011 WL 445815, at *1 n.2 (N.D. Ind. Feb. 4, 2011) (considering letter submitted during sentencing of defendant convicted under 18 U.S.C. § 1347: “Although many people may have been harmed by medical malpractice committed by Dr. Weinberger, the victims ‘directly and proximately harmed’ by the health care fraud alleged in this case are the ‘private health benefit programs,’ that is, the insurance companies to which fraudulently inflated insurance claims were made. The writer of the recently filed letter refers to herself as ‘one of Mark Weinberger’s numerous victims’ but the letter does not suggest that she was *defrauded by the health insurance scheme which is the subject of this criminal prosecution.*” (emphasis added)).

Moreover, there has been no conviction of any crime here. Even if Dr. Bajoghli’s patients were “victims” within the meaning of § 3771(e), sending letters to these potential defense witnesses and informing them that they are “victims” of a crime presupposes the “commission” of a crime. *See* 18 U.S.C. § 3771(e). DOJ began its investigation in January of 2010, after the spouse of a Supervisory Special Agent at the FBI complained about a biopsy bill from the doctor’s office. For over four years, DOJ did not seek to inform patients that they were “victims” of any crime. If DOJ actually believed that these patients were “victims,” surely they would have informed the patients at some point during the four years this investigation has been pending, given that the VRRRA provides for “earliest possible notice” about “the status of the investigation of the crime.” *See* 42 U.S.C. § 10607(c)(3). Waiting to do so until right before

trial belies any assertion that these letters were only sent because they are required under that statute.

While the rights accorded by CVRA may attach before an indictment is filed, *see, e.g., Does v. United States*, 817 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011), those rights only run to statutorily-defined victims. As charged in the Indictment, the only possible victims of Dr. Bajoghli's alleged criminal acts, as that term is defined in CVRA and VRRRA, are the payors. The patients named in the Indictment are mere fact witnesses. To allow the government to convert fact witnesses into alleged "victims" of crime would pervert the statutes in a way not foreseen by Congress. *See also United States v. Hunter*, No. 2:07-CR-307-DAK, 2008 WL 53125, at *5-6 (D. Utah Jan. 3, 2008) (determining that neither a murder victim nor her parents were "victims, as that term is defined in the CVRA," because they were not directly and proximately harmed by an individual who had been convicted of illegally selling the murder weapon).

While the defense could seek dismissal of the Indictment,³ defendant simply seeks a fair trial and an opportunity to put witnesses before the jury who have not been informed by an agency of the United States government that they are "victims" of a crime by a defendant likely to plead guilty. As such, the defense requests that witnesses who received the letter be given the following curative instruction from the Court before they testify:

You should disregard the letter you may have received from the U.S. Department of Justice dated September 3, 2014, which characterized you as a victim of the charges alleged here. The letter from the prosecutor is not evidence of any kind, and any assertion included by the prosecutor in that letter is not a fact. Further, you are not a "victim" of any crime charged here, which

³ Courts have dismissed indictments where the government has commented on pre-determined guilt before the grand jury, *United States v. Roberts*, 481 F. Supp. 1385 (C.D. Cal. 1980), *see also United States v. Gold*, 470 F. Supp. 1336, 1352 (N.D. Ill. 1979).

deal with billing and not with patient care. Characterization of you as a victim by the prosecutor in this case was inappropriate and should not influence your testimony here.

Finally, you should know that the indictment referenced in the letter is but a formal method used by the government to accuse an individual of a crime. It is not evidence of any kind. Dr. Bajoghli has pled "Not Guilty" and, he denies that he is guilty of the charges.

The defense requests that the above instruction be read to any witness who wrongfully received the letter from the government prior to their testimony.

CONCLUSION

For the foregoing reasons, Dr. Bajoghli respectfully requests that the Court grant his motion and instruct the patient witnesses accordingly.

Date: October 13, 2014

Respectfully submitted,

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