

The Best Policy: Fifth Circuit Finds Prosecutorial Misconduct And Vindictiveness

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Giving credence to the adage that honesty is the best policy, a panel from the Fifth Circuit Court of Appeals in *United States v. Dvorin* affirmed the district court's finding that the lead prosecutor "exhibited a reckless disregard for her duties and conducted the proceedings in an irresponsible manner" during a bank fraud prosecution by withholding material evidence concerning the credibility of a key government witness, and also by knowingly using false testimony to obtain a conviction. The panel also found that the government failed to overcome the presumption of prosecutorial vindictiveness because it added an additional forfeiture notice once forced to retry the case as a result of prosecutorial misconduct during the first trial. In 2012, a grand jury indicted Jason Dvorin on one count of conspiracy to commit bank fraud. According to the indictment, Dvorin had multiple accounts at Pavillion Bank but experienced cash flow issues. As a remedy, Dvorin brought checks to Chris Derrington, Pavillion's Executive Vice President, which neither man expected to clear. Derrington nonetheless processed the checks, giving Dvorin access to the face value of the checks until they were returned, essentially operating as an unofficial line of credit. Over the course of the two-day trial, the government elicited testimony from Derrington, who by that time had pleaded guilty to conspiracy to commit bank fraud. While on the stand, Derrington explained that he was testifying in hopes of receiving leniency when he would later be sentenced for his guilty plea. When the prosecution asked Derrington if he received any promises from the government in exchange for his testimony, Derrington responded that he had not. The jury returned a guilty verdict against Dvorin. While preparing for appeal, the government's appellate counsel discovered that Derrington's plea agreement also included a sealed supplement in which the government agreed to file a motion urging sentencing leniency for Derrington if his testimony proved helpful at Dvorin's trial. Appellate counsel also learned that Mindy Sauter, the government's trial prosecutor, had neither disclosed nor produced this sealed plea agreement supplement to Dvorin's counsel. Based upon this discovery, the government produced the supplement to Dvorin's counsel and agreed to an order vacating Dvorin's conviction and remanding the case for a second trial. Upon remand, the trial court found that Sauter had engaged in prosecutorial misconduct, but did not act "in bad faith." Still, the trial court ruled that Sauter "exhibited a reckless disregard for her duties and conducted the proceedings in an irresponsible manner." Meanwhile, the government prepared to retry Dvorin, this time with a new prosecution team and under a second superseding indictment that added a forfeiture count for the first time. This second trial resulted in a guilty verdict and an additional forfeiture judgment of more than \$90,000. Upon Sauter's appeal from the lower court's finding that she engaged in prosecutorial misconduct, a panel for the Fifth Circuit affirmed. According to the panel, Sauter suppressed material evidence favorable to Dvorin, including evidence affecting the credibility of key government witnesses. As noted in the panel's [opinion](#), "the plea agreement supplement was sealed and in control of the government," Derrington "was a key witness and the only other alleged conspirator with Dvorin," and the agreement that the government would seek leniency on Derrington's behalf

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obviously affected his credibility as a material witness. The panel also held that Sauter violated her duty not to knowingly use false testimony to obtain a conviction because Derrington's testimony "that he had not received any promise from the government was at best misleading, and at worst false, in light of the government's agreement to file a motion urging sentencing consideration if it determined that Derrington had substantially assisted its prosecution of Dvorin." The panel's admonitions were not limited to Sauter either. It held that the government failed to overcome "the presumption of vindictiveness" arising from its addition of the forfeiture notice to the second superseding indictment after being forced to vacate Dvorin's first guilty verdict and before the second trial. Here, as in most instances, timing is everything. The panel noted that "[o]nly after the district court issued its show cause order did the government file the superseding indictment that included the forfeiture count for the first time." While the panel's opinion takes the government to task for skirting its ethical obligations, the opinion is hardly an unqualified victory for the defense. Dvorin sought dismissal of the indictment with prejudice as a sanction for Sauter's misconduct, or alternatively precluding Derrington from testifying at all in the second trial. The district court denied these sanctions, and the panel upheld the denial, noting that there was no evidence of bad faith or ill-intent in the record to support imposing such severe sanctions. Still, the government's original indiscretion—failing to fully disclose material evidence to opposing counsel—necessitated a second trial and gave rise to judicial rebuke now memorialized in the opinion. And the government's decision to issue a second superseding indictment thereafter, this time adding a forfeiture notice, led the panel to apply the prosecutorial vindictiveness presumption, which the government could not rebut. Thus the panel's opinion serves as a reminder that honesty—full disclosure and candor to the court, the jury, and opposing counsel—is indeed the best policy.