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Judge drops indictments against two pharmacists at rare request of federal prosecutors

Prosecutors requested dismissal after judge told the jury that they failed to fully disclose plea deal

By Kylie Reynolds

LOS ANGELES - After being lambasted in front of a jury by a federal judge, prosecutors in Los Angeles admitted to withholding evidence and asked for dismissal of some of their indictments.

The "cumulative seriousness" of the prosecutors' violations required the defendants' dismissal in the interest of justice, according to a government motion filed Oct. 13. U.S. District Judge Dean Pregerson of the Central District granted the dismissal with prejudice.

The health care fraud and conspiracy case stems from the alleged sale of nearly 1 million Oxycontin pills. A clinic wrote bogus prescriptions for recruited Medicare and Medi-Cal patients, who filled them at local pharmacies, some of which submitted claims to the public insurance programs, according to a 2012 grand jury indictment. The ring's members allegedly resold more than 900,000 Oxycontin pills on the streets.

The dismissed defendants, Theodore Yoon and Phic Lim, were Southern California pharmacists who assistant U.S. attorneys Lana Morton-Owens and Grant B. Gelberg alleged filled a significant percentage of these prescriptions.

Among the prosecutors' *Brady* violations - failures to timely disclose exculpatory evidence to the defense - was not telling defense attorneys about a years-old deal with one of the prosecution's key witnesses until during trial this month.

As part of a plea deal with a medical assistant at the clinic in her own criminal case, prosecutors agreed not to try to prevent her from working in health care. The assistant, Julie Shishalovsky, later testified about defendants' participation in the scheme, according to court transcripts.

Defense attorneys found out late in the game about a "side agreement" the prosecution had with one of its key witnesses, court transcripts said, but the deal was never disclosed to the judge or the jury during testimony.

Pregerson, upon learning about it from defense attorneys, lambasted Shishalovsky and prosecutors in front of the jury for failing to disclose the agreement. Shishalovsky "did not tell me the truth," he said in court. He told the jury they could consider the omissions in assessing Shishalovsky's credibility, according to transcripts.

"During that examination of the witness, the government failed to tell you that there was this side agreement where the government would agree not to seek to bar the witness from working in the health care field in the future," Pregerson said.

Prosecutors' failure to timely disclose the deal was a "serious oversight," according to the dismissal motion.

SPECIAL REPORT

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Litigation

Judge drops indictments against two pharmacists at rare request of federal prosecutors

In a case about a so-called prescription mill in Los Angeles, prosecutors admitted to withholding evidence from defense lawyers in a motion to dismiss last week.

Criminal

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Irvine attorney Kent Easter, convicted in September of conspiring to frame a school volunteer by planting drugs in her car, was sentenced to 180 days in Orange County jail plus three years probation and 100 hours of community service.

Environmental

Justices can end the saga of the delta smelt

Two petitions for certiorari to the U.S. Supreme Court filed in the last month raise important points about the administration of the federal Endangered Species Act and our environmental laws. By **David Aladjem**

Criminal

Ex-mill superintendent pleads guilty to illegal n

A former superintendent of a gold mine pleaded guilty to charges that he allowed arsenic and lead-laced waste materials from a gold mine to flow into a nearby creek, road and other areas belonging to the Bureau of Land Management.

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Three public interest law firms won money from the federal Legal Services Corp. for use on technology initiatives.

Law Practice

On the Move

A weekly roundup of lateral attorney moves, law

Michael D. Nasatir and Vicki I. Podberesky of Nasatir, Hirsch, Podberesky & Khoro PLC represented Yoon. Victor Sherman, of Sherman & Sherman Law PLC, and Thomas A Mesereau Jr. of Mesereau & Yu LLP represented Lim.

The attorneys declined to comment Friday, citing pending litigation. Three defendants are still in trial.

The *Brady* violations were compounded by a letter prosecutors received during trial from the counsel for a former co-defendant, Matthew Cho. That letter disclosed information potentially covered by a pre-existing joint defense agreement between Yoon, Lim and Cho, the dismissal motion stated, and could "adversely impact the ability of defendants Yoon and Lim to testify in their own defense in this case."

The motion did not reveal the details of that information.

Prosecutors Morton-Owens and Gelberg declined through a spokesman to comment Friday, as the case is still in trial.

It's not often that prosecutors move for dismissal, but courts have been warning against *Brady* violations in recent years, said Laurie Levenson, a Loyola Law School criminal law professor and former federal prosecutor.

While it's extremely rare to see *Brady* violations in federal court, Levenson said, it was a "smart move" for prosecutors to step up and seek dismissal when such issues came to light.

"It's better to cut their losses, dismiss the case against these defendants ... and maintain their credibility," she said. "In the long run, that will be much better than trying to rehabilitate that case."

Closing arguments for the case's remaining defendants are expected Tuesday.

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Solo and Small Firms Employment attorneys advocate co-counseling

For the last several years, the California Employment Lawyers Association or CELA has been encouraging its newer and younger members to team with co-counsel.

**Government
California lawyer to lead patent office**
Ten months after being tapped as the acting leader of the U.S. Patent and Trademark Office, Michelle Lee is in line to become the agency's permanent director after being nominated late last week by President Barack Obama.

California Courts of Appeal Firm must face malpractice claim, appeals court rules

A malpractice lawsuit can proceed against a California law firm for its representation of a conservator who misappropriated more than \$1 million from his mother's estate, a state appellate court ruled Friday.

Ethics/Professional Responsibility McDermott asks for dismissal in malpractice case

Lawyers for the firm asked San Mateo County Superior Court Judge Marie S. Weiner for dismissal Wednesday in a malpractice suit filed by a former client. But the judge appeared skeptical.

**Government
Debate heats up over health care premium regulation initiative**
A fierce campaign is being waged over whether California should allow third parties to intervene in the regulation of health care premiums.

**Labor/Employment
Women, karma, and the wage gap**
To achieve real equality, it is necessary, but not sufficient, for more women to be hired and promoted into positions of thought-leaders and decision-makers. By **Barbara S. Bryant**

**Tax
Tax system should be fair — and perceived as fair**
There is no way to entirely prevent getting audited. While the Franchise Tax Board often piggybacks on whatever the IRS has done, the FTB sometimes audits even where the IRS does not. By **Robert W. Wood**

**Criminal
Elimination of 'panic defense' sends clear message**
The so-called "gay panic" and "trans panic" defenses, used by defendants who claim their

violent acts were triggered by the victim's sexual orientation or gender identity have been eliminated. It's about time. By **Rick Zbur**

Letter to the Editor

LETTER: Garnishment helps to collect on valid debts

While I agree that everyone should be entitled to due process before a judgment is entered against them, the garnishment provisions of our state laws must remain. By **Paul Wallin**

Judicial Profile

Ethan P. Schulman

Superior Court Judge San Francisco County

Litigation

Data breach cases find more sympathetic ear in California judges

Companies facing lawsuits have used a Supreme Court decision as a powerful tool to fight data breach cases, arguing the injury is far too speculative for plaintiffs to have standing. But some California cases are turning out differently.

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