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US prosecutors accused of misconduct in case

By CURT ANDERSON

U.S. prosecutors in Miami are facing the ire of a federal judge over their decision to order the secret recording of a defense attorney and his investigator in a criminal case and failure to disclose key information to the defense.

U.S. District Judge Alan S. Gold, who held two days of hearings this week on the matter, said there were "flagrant violations" of basic rules by prosecutors and indicated he would likely order the U.S. government to pay the defense lawyers thousands of dollars in fees and costs.

"It's more than just mistakes. Important safeguards were not met," Gold said. "It doesn't seem like any facts were verified."

U.S. Attorney R. Alexander Acosta on Wednesday called the situation "regrettable" and said the allegations have been referred to the U.S. Justice Department for possible disciplinary action.

The misconduct claims arose earlier this month during the trial of Dr. Ali Shaygan, 36, who was accused in a 141-count indictment of writing illegal prescriptions including one that led to a patient's death from a methadone overdose. Shaygan, acquitted last week of all charges, had faced a minimum of 20 years in prison because of that person's death.

During the trial, Shaygan attorney David O. Markus found out by chance during questioning of a witness that his prior telephone conversation with that witness had been recorded. It later turned out that prosecutors authorized two witnesses - Carlos Vento and Trinity Clendening - to secretly record their phone calls with Markus and his investigator, Michael Graff.

At least one witness seemed to ask Markus to pay a bribe for testimony, according to the recordings. But Markus wouldn't go along.

"I am not paying any money for anything," the attorney said in one recording, according to a transcript.

In addition, Vento and Clendening had agreed to become confidential informants for the Drug Enforcement Administration - a critical fact never disclosed to the defense. Such information is important in criminal trials because a jury could otherwise never learn that the witnesses might have a bias in favor of prosecutors.

During this week's hearings, prosecutor Sean Cronin admitted making mistakes but denied attempting to hide evidence or use the recordings to learn Shaygan's defense strategy. Cronin said the recordings were authorized because a third witness, Courtney Tucker, had indicated to a DEA agent that the defense might be trying to tamper with her testimony - which would be a separate crime.

But Tucker said this week she never raised defense tampering allegations. In fact, she said a DEA agent appeared to be pressuring her to tailor her testimony to fit the prosecution's case against

Shaygan, telling her she could be in "big trouble" otherwise.

"I was intimidated because I had every intention of telling the truth and I couldn't understand why he was saying those things to me," Tucker said.

Cronin and his immediate superior at the U.S. attorney's office, Narcotics Section Chief Karen Gilbert, admitted they never got authorization for the recordings from Acosta or other senior-level officials as required by the Justice Department. In fact, Acosta was never told about the recording until after the fact.

"We should have done a better job, there is no doubt about that," Cronin said. "At no time was I acting in bad faith."

Markus and his two co-counsels - Marc Seitles and Robin Kaplan - initially sought to have the indictment against Shaygan dismissed, but now that he has been found not guilty, they want the federal government to pay his legal fees and expenses for a yearlong case. They would not reveal the exact amount.

"We're just happy the truth came out, not just about this issue, but everything in this case," Markus said.

Judge Gold is expected to issue an order in several weeks.