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Judge Tosses Rare Fugitive-Harboring Charges

By John Hanusz
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A federal judge in Los Angeles on Thursday upheld a decision to dismiss a complaint against a woman charged with conspiring to harbor her fugitive husband.

Earlier this week, U.S. Magistrate Judge Victor B. Kenton said prosecutors had no probable cause to charge Hanny Fouad Bahna with conspiring to harbor a fugitive after her husband fled the country rather than stand trial on health care fraud charges.

U.S. District Judge Dale S. Fischer rejected prosecutors' request to reverse Kenton's order.

"If Congress wanted district judges to

have the power [to hear the appeal], they would have given it," Fischer said at a hearing Thursday afternoon. "If there's no authority for me to hear something, I cannot hear it."

Hanny Bahna was freed shortly after Fischer announced her decision. She had been detained for a week on charges she conspired to harbor and conceal her husband, Mamdouh S. Bahna, a doctor who fled to Egypt after his indictment in October.

"It's just a great outcome. It was the right result," said Michael J. Proctor, Hanny Bahna's attorney. Proctor, of Caldwell, Leslie, Newcombe & Pettit, argued Fischer had no jurisdiction to hear the claim.

Prosecutors are free to file a new complaint or seek an indictment against his client, Proctor said.

Assistant U.S. Attorney Pegeen Rhyne declined to comment on the judge's ruling, except to say she was surprised. Rhyne would not say whether she would seek an indictment or new complaint against Hanny Bahna.

Spokesman Thom Mrozek said the U.S. attorney's office will not appeal Fischer's ruling to the 9th U.S. Circuit Court of Appeals. But he added that Hanny Bahna remains under investigation.

An indictment may well be in the works: A grand jury called the couple's children to

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testify Thursday morning.

In the criminal complaint filed last week, federal prosecutors charged Hanny Bahna, 50, with a single count of conspiracy to harbor a fugitive. The government alleged she performed acts, such as having her husband's heart medication prescriptions filled, with the intent of helping him evade apprehension.

Before Hanny Bahna's arrest, U.S. Magistrate Judge Paul L. Abrams signed off on the complaint and found probable cause to arrest her on the conspiracy charge.

In an unusual decision five days later, Kenton, after hearing Proctor's motion to dismiss the complaint, found the FBI agent's affidavit supporting the complaint was "not supported by probable cause" and ordered the case dismissed.

In the alternative, Kenton ordered Hanny Bahna released on a \$100,000 third-party surety bond and to surrender her passport.

Kenton stayed both orders while the appeal was pending. His ruling caused both sides to file a flurry of paperwork, with the last filing made just a few hours before Thursday's hearing.

Experts called Kenton's ruling extraordinary.

"It's a very, very rare occurrence," said criminal defense lawyer Richard Novak. He attributed the rarity of such dismissals to the caution typically exhibited by local federal prosecutors in filing criminal complaints.

"Complaints are usually pretty solid," said Marilyn E. Bednarski, of Pasadena's Kaye, McLane & Bednarski. Motions to dismiss on probable-cause grounds are uncommon as well, because weaker cases are generally prosecuted at the state level or not at all, she said.

In light of Fischer's ruling, Bednarski said she expects defense attorneys to file more dismissal motions in the future.

"It certainly gives everyone the incentive to do it," she said.

The decision to charge Bahna and subpoena her children to testify in front of the

grand jury is an aggressive move by prosecutors, experts said.

"They're using all the tools that are available to them," said Novak, noting prosecutors' use of grand-jury subpoenas to compel family members to testify against one another and make an end run around a potentially defective complaint is entirely legal.

"If the grand jury issues an indictment [against Hanny Bahna], then the whole issue is moot," Novak said.

Bednarski called prosecutors' actions in the case manipulative and coercive.

"It sounds like they're trying to put pressure on [Mamdouh Bahna]," she said.

Brian O'Neill, a white-collar defense lawyer with Jones Day and former federal prosecutor, agreed, calling it a case of sour grapes.

"They already know where [Mamdouh Bahna] is," he said. "What does this do for them?"

Rhyme denied the charge against Hanny Bahna had anything to do with an effort to pressure her husband to return to the United States to face charges.

"We're pursuing the case because it is a righteous one. She harbored her husband," she said.

Pamela Johnston, an attorney with Foley & Lardner who represents the Bahna children, would not comment on the case.

In October, prosecutors charged Mamdouh Bahna with conspiracy and 14 counts of health care fraud for allegedly performing unnecessary surgeries and fraudulently billing private insurance companies for the procedures. He masterminded a scheme where "marketers" recruited individuals who were willing to undergo surgeries that they did not need in exchange for cash or other discounted medical procedures, prosecutors allege.

Although Mamdouh Bahna agreed to voluntarily surrender to federal authorities the day after the grand jury issued his indictment, he failed to turn himself in and remains a fugitive.

Mamdouh Bahna's attorney, Terry Bird, of Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, could not be

reached for comment.

The affidavit filed in support of the complaint against Hanny Bahna alleges that she conspired with Doina Florescu, one of husband's employees, to have prescriptions for his heart and medications filled in December, after he went on the lam.

After learning that Mamdouh Bahna's prescriptions had been filled on two occasions after he fled, federal agents executed a search warrant on Dec. 14 and discovered empty prescription bottles dated that same day with Mamdouh Bahna's name on them in a trash can; a document evidencing a \$25,000 wire transfer from a bank in the Cayman Islands to Mamdouh Bahna in Cairo; a letter asking the reader to perform certain acts, such as deleting e-mail and having a marriage certificate notarized and birth certificates translated into Arabic; and three plastic bags containing pills, two of them labeled "Plavix" and "Lipitor," two types of heart medication.

One of the bags containing the medication also contained a credit card issued in the name of "M S Bahna."

Abrams found that the facts as alleged in the affidavit constituted probable cause to charge Hanny Bahna with conspiring with Florescu to help Mamdouh Bahna evade detection.

But Kenton rejected the government's contentions, finding "there is simply no evidence" to support the allegation that Hanny Bahna intended to provide the medications so as to help hinder Mamdouh Bahna's apprehension.

"While the court can foresee hypothetical situations in which providing medical or drug assistance to a fugitive might meet [the harboring statute] ... such a showing has not been made by the Affidavit in this case," Kenton wrote.

Citing a 9th Circuit case, *U.S. v. Yarbrough*, 852 F.2d 1522 (9th Cir. 1988), Kenton also dismissed the argument that providing financial assistance to a fugitive does not constitute harboring or concealing, even assuming Hanny Bahna was responsible for the wire transfer.