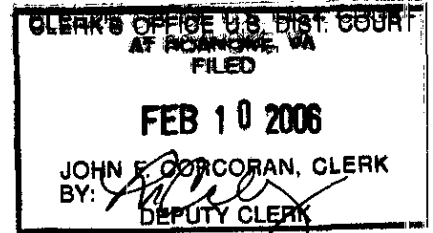


IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION



BEVERLY G. BOONE )  
 )  
 v. ) Civil Action No. 7:06CV00006  
 )  
 UNITED STATES OF AMERICA )

BOONE'S RESPONSE TO GOVERNMENT'S MOTION TO DISMISS

The government has filed a motion to dismiss plaintiff Boone's civil action under the Hyde Amendment (18 U.S.C. code section 3006A, statutory note) alleging that first, Boone was not a prevailing party on the Third Superseding Indictment at trial as she was not totally exonerated on the drug counts since the jury was unable to reach a verdict on the RICO Conspiracy count and that count referenced the substantive drug charges of which Boone was acquitted. Second, the government refers to a Pre-Trial Diversion Agreement signed by Boone on September 14, 2005 waiving rights to attorney's fees and other litigation expenses. Third, the government alleges that this civil action was filed in an untimely manner, exceeding the 30-day mandatory filing requirement under the Hyde Amendment.

In response, Boone states the following:

1. Prevailing Party - Drug Trafficking Acts in RICO Conspiracy

Third Superseding Indictment - **Trial Indictment**

Boone was tried on 78 drug-related counts at trial on a Third Superseding Indictment. Boone was found not guilty as a principal and an aider and abettor for prescriptions that the government alleged were "outside the scope of professional practice and not for legitimate medical purpose."

Specifically, Boone was found not guilty on Count 15 (Drug Conspiracy which included 286 overt acts) and Counts 16 - 68 (Drug Counts). Counts 69 - 71 were dismissed by the court during trial as *no* prescriptions were issued for patient #390 as charged in these counts. Boone was not a defendant in Count 72.

#### Sixth Superseding Indictment - **Pending retrial**

The Sixth Superseding Indictment re-alleges and incorporates the introduction and Paragraphs One through Eight of the RICO Count into the RICO Conspiracy Count, thus both the introduction and the RICO count clearly *exclude* BEVERLY GALE BOONE as a principal or aider and abettor in any drug trafficking or distribution charge.<sup>1</sup> Therefore, in contrast to the RICO charging language in the Third Superseding Indictment,<sup>2</sup> Boone was not named as a defendant in any of the substantive drug counts in the Sixth Superseding Indictment and thus, the government acknowledged that Boone had been completely exonerated of all drug charges. The government was proceeding against Boone on the racketeering acts and the RICO conspiracy exclusively on mail fraud.

To further underscore that Boone was exonerated of all drug charges, Samuel Wilson, the presiding judge, advised Boone's counsel, William H. Cleaveland, that Boone was no longer a defendant in any drug-related charges in RICO predicate acts or RICO Conspiracy due to the unanimous verdicts of not guilty at trial. This occurred during a status conference on January 30, 2004, prior to re-trial, with United States Attorney, John Brownlee, Assistant United States Attorneys Thomas Bondurant and Patrick Hogeboom in attendance.

The government has the burden of proof to establish guilt, beyond a reasonable doubt, for a conviction. The defendant is afforded the presumption of innocence until proven guilty. In

United States v. Knox, the government failed to convince the jury of criminal behavior relating to Boone as to *any* of the drug counts. Therefore, Boone has maintained innocence and is the prevailing party with regard to the RICO Conspiracy count by virtue of the jury's inability to reach a verdict of guilty on that count.

Additionally, the Conspiracy to Commit Racketeering is just that, a conspiracy charge, not a substantive drug charge. Boone was found not guilty on each and every substantive drug charge.

Also important to note, the RICO Count and RICO Conspiracy Count were not initially charged in the first indictment. It was after threats to Boone of a RICO inclusion in a Superseding Indictment for refusal to cooperate with the government in its case against Dr. Knox that Boone was re-indicted and RICO counts were added.

## 2. Pre-Trial Diversion Agreement

Pursuant to the Pre-Trial Agreement signed by Boone, attorney's fees and other litigation expenses were waived "In exchange for the United States' . . . motion to dismiss . . . the *Sixth Superseding Indictment*... I stipulate that the United States had probable cause to bring all counts in *said* Indictment, which are being dismissed under *this* agreement . . . and I am not a 'prevailing party' with regard to *these* charges."

Therefore, as a result of that agreement, on September 19, 2005, the court ordered that the charges be dismissed with prejudice for the following non drug related counts:

18 U.S.C. § 2  
18 U.S.C. § 371  
18 U.S.C. § 1341  
18 U.S.C. § 1347  
18 U.S.C. § 1962 ( c)  
18 U.S.C. § 1962(d)  
42 U.S.C. § 1320a-7b

The agreement also states “I further waive any claim for attorney’s fees and other litigation expenses arising out of the investigation or prosecution of this matter.”

“This matter” is restricted to the counts dismissed in the Sixth Superseding Indictment, as the drug counts were previously resolved by jury verdicts of not guilty at trial and Boone was not charged with drug-related counts in any of the three subsequent Indictments.

In fact, the original Pre-Trial Diversion agreement (Exhibit A), proposed by the government, was limited in language by William H. Cleaveland to specifically identify the charges and Indictment being dismissed (Exhibit B), as Boone had no intention to waive the right to file suit against the government for its vexatious, frivolous and bad faith prosecution and to seek recovery of fees incurred thereof.

Further, court appointment of William H. Cleaveland was ordered on February 26, 2004, for defense of the remaining fraud charges on a retrial, therefore any attorney’s fees and litigation expenses after the first trial are not at issue here and are not being sought in this Hyde petition.

Equal Access to Justice Act (EAJA) opinions have held that a party has prevailed so long as the party has “succeeded on any significant issue” that was litigated. *See Texas State Teachers Ass’n v. Garland Ind. School Dist.*, 489 U.S. 782, 790-92 (1989). This rejects the government’s argument that the case should be decided as an inclusive whole and not on a count by count analysis. The “significant issue” in this petition is that of 78 drug distribution and drug conspiracy charges on which Boone prevailed despite the government’s seeking of those charges without reasonable or probable cause and reckless disregard for the truth.

### 3. Timing of Filing

The government alleges that Boone is not entitled to an award under the Hyde Amendment

as the civil suit was filed 79 days after the final judgment.

The Hyde Amendment requires that the petition be filed within 30 days of the judgment upon which the party seeks recovery and the EAJA defines a final judgment as “a judgment that is final and not appealable, and includes an order of settlement.” 28 U.S.C. §§ 2412(d)(1)(B) and (d)(2)(G).

The clerk’s office, Western District of Virginia, advised that certification of acquittal upon the jury verdict has yet to be entered by the court for Boone, thereby the petition is not time-barred under the Hyde Amendment.

Assuming, *arguendo*, that the 30-day limit has expired under 28 U.S.C. §2412(d), the Fourth Circuit Court of Appeals has held that the procedural limitations, including the filing restrictions in section 2412(d) of the EAJA, are not applicable if the prevailing party seeks attorney’s fees under section (b) of the Hyde Amendment. *See United States v. Holland*, 34 F. Supp.2d 346, 358-59 (E.D. Va. 1999). Section 2412(b) of the EAJA provides for recovery of attorneys’ fees and expenses by a prevailing party in any civil action brought by or against the United States “to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.” Section 2412(b) does not require a statutory filing deadline.

Also, in *Holland*, the court stated there was “no reason to believe the Hyde Amendment intended to confer lesser rights upon criminal defendants than the EAJA conferred upon civil litigants.” *Id.* at 357.

The government cites *United States v. Ranger Electronics Communications* mandating a 30-day limit in which this action could be filed and states that this time limit “is jurisdictional and

cannot be waived” thus arguing that Boone is barred from proceeding and requesting that her petition be dismissed.

A closer look at Ranger reveals that, upon awarding attorney’s fees, the court stated, “Although the Hyde Amendment applies the limitations applicable under the Equal Access to Justice Act (‘EAJA’), 28 U.S.C. 2412, to fee requests, one must keep separate the limitations applicable under Section 2412(b) to cases of ‘bad faith’ conduct and the limitations applicable under Section 2412(d) to cases where the United States’ position was not substantially justified.” See United States v. Ranger Electronic Communications, 210 F.3d (6<sup>th</sup> Cir. 2000). This negates a mandatory filing limit under the Hyde Amendment.

For the reasons stated herein, Boone requests that the Government’s Motion to Dismiss be denied.

Respectfully submitted,

  
BEVERLY G. BOONE

#### Endnotes

1. Count One, Racketeering Act Nine (Drug Trafficking) states, “That as contained in Counts Fifteen through Seventy-Tow of this indictment, which Counts are realleged and incorporated herein...CECIL BYRON KNOX, III, BEVERLY GALE BOONE...and others, both known and unknown to the grand jury, as principals and as aiders and abettors...”

Count Two, Conspiracy to Commit Racketeering, states, “That the Introduction and Paragraphs One through Nine of Count One of this indictment are realleged and incorporated by reference into this Count of the Indictment.”

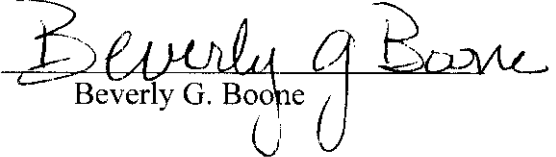
2. Count One, Racketeering Act Six (Drug Trafficking) states, “That as detailed in Counts Nineteen through Ninety-four of this Indictment, which Counts are realleged and incorporated herein, in the five years immediately preceding this Indictment CECIL BYRON KNOX, III, and

others, both known and unknown to the grand jury, as principals and as aider and abettors..."

Count Two, Conspiracy to Commit Racketeering, states, "That the introduction and Paragraphs One through Eight of Count One of this Indictment are realleged and incorporated by reference into this Count of the Indictment."

**CERTIFICATE**

I certify that a true and correct copy of Boone's Response has been mailed to the United States Attorney's Office, Western District of Virginia, P.O. Box 1709, Roanoke, VA 24008-1709, on this 10<sup>th</sup> day of February, 2006.

  
Beverly G. Boone