UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7490
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RUTH A. ANDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:92-CR-112(L)(C))

(January 19, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

At issue is whether the government both violated Ruth Anderson's due process right to a fair trial by interfering with defense witnesses, and likewise constructively denied her effective assistance of counsel. We **AFFIRM**.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Anderson was indicted, *inter alia*, under 18 U.S.C. § 111,[2] on one count of assaulting a government officer, as a result of events occurring on August 11, 1992.[3]

Anderson, an employee of the United States Forest Service (USFS), worked in Raleigh, Mississippi. In March 1992, she drove a Forest Service vehicle to a meeting in Jackson, Mississippi; when she left the meeting, the vehicle was missing. Anderson reported it stolen. USFS Special Agent Wayne Smith, who investigated the incident, discovered that the vehicle actually had been towed, because it was parked illegally.

On April 1, 1992, Smith met with Anderson about the incident, in his office in Jackson. Anderson testified that during the meeting, Smith called her names and told her she could not leave until she signed a witness statement; and that she was afraid of him. She testified that she asked for an attorney and that the meeting be tape-recorded; and that Smith refused both requests. Smith's testimony about the meeting was that it was "unusual", but not "unpleasant"; and that he would not have detained her had she wanted to leave. A third person who was present during the meeting did not testify.

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[2] 18 U.S.C. § 111 states, in pertinent part, that whoever "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [government official] while engaged in or on account of the performance of official duties... shall be fined under this title or imprisoned for not more than three years, or both."

[3] Anderson's first trial, in March 1993, ended in a mistrial when the jury could not reach a verdict. She was retried on April 26, 1993, and found guilty. The events of the April trial form the basis for this appeal.

Based on the results of Smith's investigation, the United States Attorney decided to issue Anderson a mandatory court appearance violation notice, because of Anderson's apparently false statements about the vehicle. On August 11, 1992, Smith went to Anderson's office to get her address and other data required to complete the notice, and to serve it. Smith and Anderson gave very different testimony about what happened during that meeting.

Smith testified that he entered Anderson's office, identified himself, and asked for her driver's license. She became defensive, said she did not have her license, and attempted to leave. Smith touched her arm or shoulder to stop her; she "went berserk," and began to hit him. Smith grabbed Anderson's arms to restrain her, and forced her up against one of the office walls; she continued to assault him. USFS law enforcement officer Mike Hayman came into the office as Anderson was choking Smith with his tie, and helped Smith subdue Anderson, who continued to resist. Finally, Smith and Hayman managed to handcuff Anderson, and escorted her to Smith's car; she continued to struggle. Hayman gave similar testimony about the events he saw.

Anderson testified that after the April 1 meeting, she was afraid of Smith. She had complained about his behavior to co-workers R.D. Nelson and Kevin Swain and her union representative; co-workers, including Herman Hall, had told her that Smith had intimidated and verbally abused another employee. She asked Swain and Nelson to be present if Smith interviewed her. On August 11, Anderson stopped in her office briefly to pick up her messages.

The lights in her office were off; when Smith came in, Anderson at first did not recognize him. He identified himself and asked for her driver's license; she said she did not have it, and turned to leave. Smith grabbed her; she tried to break away, and he began slamming her into the wall. She began screaming for Nelson and her attorney.[4] Even after Hayman came in, she was afraid to go with Smith and Hayman because of what she had heard about Smith's behavior with the other employee.

Prior to trial, Anderson subpoenaed several USFS employees, including Swain, Nelson, and Hall, who had told her about Smith's reputation, to testify on her behalf. The government moved to quash the subpoenas, citing, *inter alia*, 7 C.F.R. § 1.210-18 (1991).[5] The government conceded that the regulations could not prevent an employee from testifying, but maintained that employees who testified without the agency's approval would be subject to discipline.

The court denied the motion to quash the subpoenas, but stated that it did "n[o]t want to get in the position of having one of

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[4] Anderson's screaming for Nelson and her attorney were corroborated by a tape recording made by another employee, who testified that he had heard yelling and screaming from Anderson's office, and recorded the sounds. He did not enter the office.

[5] Sections 1.210-18 regulate the ways in which employees of the USFS (part of the United States Department of Agriculture) can appear as witnesses in proceedings arising from or related to their employment. The regulations require employees to notify the agency of the nature of the proceeding and their testimony. 7 C.F.R. § 1.216(a). If the United States is a party, USFS employees cannot testify on behalf of any other party without being subpoenaed. 7 C.F.R. § 1.216(b)(1). Employees are subject to disciplinary action for violating these procedures. 7 C.F.R. § 1.218.

[the subpoenaed employees] mount the stand and decline to testify because of the fear of sanctions or punishment from the Forest Service." The court indicated that it did not believe the testimony was very important, but that, if it were, the court would consider dismissing the indictment. The government agreed to recommend that the agency take no action against Hall if he testified, but would not make a similar recommendation as to Swain or Nelson. The government did agree to propose a stipulation with regard to the testimony Nelson and Swain would have given, however. Defense counsel agreed to this, and the court read the stipulated testimony to the jury. Following this, the defense rested; the case went to the jury, which returned a verdict of guilty.

Anderson was sentenced to six months imprisonment followed by a one-year term of supervised release, and was assessed a fine of $1000. Anderson states that she began serving her sentence in August 1993; her imprisonment will expire in February 1994.

II.

Anderson contends, first, that the government violated her due process and Fifth Amendment rights to a fair trial, and her Sixth Amendment right to compulsory process, by interfering with the testimony of Swain and Nelson. Anderson maintains that the government coerced Swain and Nelson not to testify by maintaining that they would be subject to discipline if they did so without the permission of the Forest Service. Second, she contends that the government constructively denied her effective assistance of counsel, because the government coerced her attorney into

stipulating to the testimony that Swain and Nelson would have offered.

A.

Allegations that the government has intimidated witnesses are "very serious.... Threats against witnesses are intolerable. Substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant." ***United States v. Goodwin***, 625 F.2d 693, 703 (5th Cir. 1980). ***Goodwin*** established a rule of *per se* prejudice when the government interferes with a defense witness. ***Id.*** That rule has since been modified, however. *See* ***United States v. Viera***, 839 F.2d 1113, 1115 (5th Cir. 1988) (modifying ***Goodwin***'s rule that any interference constitutes *per se* prejudice); ***United States v. Weddell***, 800 F.2d 1404, 1410-12 (5th Cir.) (interpreting intervening Supreme Court decisions as undermining ***Goodwin***'s *per se* rule), *as modified*, 804 F.2d 1343 (5th Cir. 1986). To prevail on such a claim, the defendant now must show how she was prejudiced by the interference, *e.g.*, that the witness was intimidated, or refused to testify, as a result of the government's actions, or that the witness would have offered exculpatory testimony but was prevented from doing so. ***Viera***, 839 F.2d at 1115 (rejecting similar claims both because defendant did not contend either "that the [witness] was influenced [by the government's actions] or that the [witness] did not wish to testify", and because there was no "suggestion ... that the father's testimony would have contained any material exculpatory evidence to aid" the defense).

Anderson has not met her burden. She did not call either Swain or Nelson, even after the district court denied the government's motion to quash the subpoenas for them, and she has not shown that they were intimidated by the government's conduct, or that they would have refused to testify had they been called. Indeed, her counsel assured the court that they were available and ready to testify. Hall, who did express concern about testifying without prior agency approval, testified willingly after the prosecutor's promise to recommend that the agency not discipline him.

Anderson also has not attempted to establish that she was prejudiced as a result of the government's actions. In responding to the motion to quash, Anderson made an offer of proof that Nelson and Swain would have testified that Anderson: (1) told them about the April 1 interview with Smith; (2) was afraid of Smith as a result of this incident; (3) told them she was nervous and having trouble sleeping as a result of the incident; and (4) asked them to be present if Smith came to the office to talk to her.[6] The stipulation about Swain and Nelson's testimony contained essentially the same information:

> [THE COURT] Members of the jury, the government and the defendant have stipulated that .... R. D. Nelson would testify that following the encounter of Ruth Anderson with Wayne Smith on April 1st, 1992, she told him about Wayne Smith's conduct. He would testify that she was very nervous, that she

[6] The offer of proof also included information about a claim of race discrimination Anderson had filed against the agency, and her fear of retaliation as a result; the district court had held earlier that this information was irrelevant, and excluded it.

> was having trouble sleeping at night, that she was afraid of Wayne Smith and asked that if ever he came to see her, R. D. Nelson would be present at the interview.
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> Kevin Swain would testify that following the April 1st, 1992, encounter with Wayne Smith, Ruth Anderson told him about what happened, that she was very nervous about Wayne Smith, that she was afraid that he was coming back down after her and that she told him that she was having trouble sleeping at night because of these fears. He would testify that she asked that if Wayne Smith were to come back down to talk to her or for any other reason, either he or R. D. Nelson please be present at any such meeting.
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> That is a stipulation entered into by the parties as to what each of those persons would testify about.

Anderson has not shown that the government's actions intimidated any witness or prevented any witness from testifying; in any event, she was not prejudiced by the government's actions with regard to the testimony. Accordingly, she has not stated a claim for deprivation of her due process right to a fair trial. *See* ***Viera***, 839 F.2d 1113, 1115.

B.

Anderson's constructive denial of effective assistance of counsel claim is raised for the first time on appeal. Accordingly, we review only for plain error. *See* Fed. R. Crim. P. 52(b) (stating that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court"). "Plain errors" are "those errors that `seriously affect the fairness, integrity, or public reputation of judicial proceedings'" -- errors that, left uncorrected, would result in a miscarriage of justice. ***United States v. Garza***, 807

F.2d 394, 395-96 (1986) (quoting ***United States v. Young***, 470 U.S. 1, 15 (1985) (citations and footnotes omitted)).

When a defendant claims that she was constructively denied effective assistance of counsel, it is not necessary to show prejudice; where counsel is "prevented by surrounding circumstances from providing ... effective assistance", prejudice is presumed. ***May v. Collins***, 948 F.2d 162, 166-67 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 907, *and cert. denied*, ___ U.S. ___, 112 S. Ct. 1925 (1992). Anderson contends, the government's actions with regard to Swain and Nelson prevented her counsel from "mak[ing] independent decisions about how to conduct the defense." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). We disagree.

The record reveals that counsel agreed to the government's proposed stipulation concerning Swain and Nelson's testimony, but it does not indicate why counsel did so. In any event, the record contains no evidence that Anderson's counsel believed that she was unable to present the testimony of Swain and Nelson; as stated, she told the court that they were ready and willing to testify. Nor did the regulations that the government cited in its motion to quash, *see supra*, prevent Anderson from calling Swain and Nelson to the stand. Rather, the record suggests that Anderson's counsel made a tactical decision not to call Swain and Nelson, but to

accept the stipulated testimony instead.[7] There was no plain error.

III.

For the reasons stated above, the judgment is

AFFIRMED.

[7] Had Anderson been required to show that she was prejudiced in order to show that she was denied effective assistance of counsel, she would have been unable to do so. As discussed *supra*, not only were both Swain and Nelson available and willing to testify, but also the stipulated testimony corresponded almost exactly to Anderson's offer of proof regarding their expected testimony.