UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-20549-CR-LENARD/OTAZO-REYES(s)(s)
CASE NO. 16-23148-CV-WILLIAMS

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP ESFORMES, *et al.,*

Defendants.

ESFORMES' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISQUALIFY THE PROSECUTION TEAM, ETC.

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TABLE OF CONTENTS

INTRODUCTION

This case is the *fourth* "white collar" criminal case in this District *in the last 12 months* in which the court must confront government intrusions into a defendants' attorney-client, work product and/or joint defense privileges.[1]

1. In *United States v. Salo Schapiro*, No. 14-Cr-20715-Cooke (S.D. Fla.), an FBI agent working on the prosecution team was obtaining from a government-contracted copy service duplicates of defense counsels' discovery selections. Defense investigation revealed that the practice was not an isolated incident – the copy service had been surreptitiously providing the government duplicate copies of defense work product for ten years.[2]

2. In *United States v. Gabriela Raurell-Gomez, et al.*, Case No. 16-20477-Cr-Scola (S.D. Fla.), the government obtained a search warrant to seize documents from a location that the prosecutor knew was functioning as a satellite law office, without telling the issuing Magistrate Judge. With no taint protocol in place, the search agents – consisting of members of the prosecution team including the case agent – were exposed to the attorney work-product of defense counsel in preparation for trial on the then-pending indictment.

3. In *United States v. Matthew Pisoni*, Case No. 15-Cr-20339-Gayles (S.D. Fla.), the

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[1] In *United States v. Josephine Tinimbang*, No. 14-cr-00732 (N.D. Ill.), another health care fraud case being handled, in part, by the DOJ Fraud Section, the case recently fell apart due to prosecutorial misconduct. Some counts were dismissed outright and the lead defendants were allowed to plead to minor charges. See ECF 491, 498, 500, 502, & 503. According to news reports, DOJ Fraud Section Trial Attorney (now Assistant Chief of the Health Care Fraud Task Force) apologized to the court and opposing counsel on behalf of the Government. *See* Chicago Tribune, *Case fizzles against couple accused of $45M health care fraud, keeping indentured servant* (March 29, 2017).

[2] Coincidentally, in the District of Kansas, the Federal Public Defender discovered that the attorney-client meetings at CCA-Leavenworth were being recorded and then used by United States Attorney's Office in its cases. The court appointed a Special Master to assess the damage. *See United States v. Black*, No. 16-cr-20032-JAR, 2016 WL 6967120 (D. Kan. Nov. 29, 2016). Mr. Esformes is making a similar request.

government enlisted a co-defendant who was bound by the terms of a Joint Defense Agreement ("JDA") to continue participating in joint defense, trial strategy meetings while cooperating with the government.

4. In the instant case, the *Esformes* Prosecution Team has utilized this entire tool box to pry into the work-product and attorney-client privileges. In the process, the Prosecution Team has made representations to defense counsel and judges that, at a minimum, have been misleading.

These violations all occurred in this district, where Judge Gold had already criticized the unsupervised tape recording of defense counsel. *See United States v. Shaygan*, 661 F. Supp. 2d 1289, 1325 (S.D. Fla. 2009), *rev'd on other grounds*, 652 F.3d 1297 (11th Cir. 2011). Later on, in *Pisoni,* Judge Gayles was obviously perplexed that the office was still not properly supervising its AUSAs, despite Judge Gold's opinion. Now this case. As Judge Gayles' suppression order underscores, the time for judicial hand-wringing is over. Disqualification of the Prosecution Team, suppression of the testimony of Gabriel and Guillermo Delgado, and other meaningful relief must be given.[3]

I. THE COURT'S SUPERVISORY POWER OVER GRAND JURIES AND ATTORNEYS PRACTICING BEFORE THEM

The Court's authority to disqualify the Prosecution Team stems from its supervisory power over grand juries,[4] court proceedings and attorneys practicing in federal court.[5] Courts have frequently used their supervisory authority to disqualify prosecutors for obtaining materials protected

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[3] Mr. Esformes is separately moving to dismiss the indictment, in whole or in part, and to suppress evidence including witness testimony.

[4] *See United States v. Williams*, 504 U.S. 36, 68 (1992); *United States v. Pabian*, 704 F.2d 1533, 1536 (11th Cir. 1983).

[5] *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). This Court has taken an expansive view of its supervisory power over attorneys practicing before it. *See* Order, *United States v. Humberto Hernandez, Jr.*, No. 97-582-Cr-Lenard (S.D. Fla. Oct. 21, 1998) (DE 409).

by the attorney-client privilege.[6] The Court's obligations in this area are also well-established. Upon a sufficient *prima facie* showing, "[i]t is the district court's duty to investigate" potential grand jury abuses and impose appropriate "sanctions when it finds a violation has occurred." *Finn v. Schiller*, 72 F.3d 1182, 1189 (4th Cir. 1996). Mr. Esformes has satisfied that standard.

II. RELEVANT FACTORS

In determining whether disqualification of the Prosecution Team is required for privilege violations, courts consider the following factors: (1) whether the attorney knew or should have known that the material was privileged; (2) the adequacy and timeliness of any screening safeguards employed to shield against intrusions into the privilege; (3) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information; (4) the extent to which the attorney reviews the privileged information; (5) the potential prejudice from the violation; (6) the extent to which the privilege holder may be at fault for the unauthorized disclosure; and (7) the extent to which the violator will suffer prejudice from the disqualification. *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001), adopting *In re Meador*, 968 S.W.2d 346 (Tex. 1998). *Accord Maldonado v. New Jersey*, 225 F.R.D. 120, 138 (D. N.J. 2004).

Although the *appearance* of impropriety, standing alone, is usually not enough to require disqualification, many courts still consider it to be a relevant factor.[7] This is especially so when the

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[6] *See, e.g., In re Grand Jury Proceedings John Doe #462 (Under Seal)*, 757 F.2d 600 (4th Cir. 1985). *Cf. In re Investigation Before the February, 1977 Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977) (disqualifying defense counsel with conflicts of interest); *Granger v. Peyton*, 379 F.2d 709 (4th Cir. 1967) (vacating state conviction where prosecutor had a disabling conflict of interest); *Arnold v. Cargill Inc.*, No. 01-2086 (DWF/AJB), 2004 U.S. Dist. LEXIS 19381, at **16-18 (D. Minn. Sept. 24, 2004) (invoking court's inherent power "to ensure the administration of justice and the integrity of the litigation process" in disqualifying law firm).

[7] *See, e.g., Optyl Eyewear Fashion Int'l Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1049 (9th Cir. 1985); *Arnold*, 2004 U.S. Dist. LEXIS 19381, at *16); *Lewis v. Capital One Servs.*, No. 3:04CV186, 2004 U.S. Dist. LEXIS 26978, at *13-14 (E.D. Va. June 10, 2004); *MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F . Supp. 712, 718 (D. Conn. 1991). Some states, including Florida, have

conduct of government attorneys is under scrutiny.[8] Indeed, pursuant to 5 C.F.R. § 2635.501, government employees, including prosecutors, are directed to "take [ ] appropriate steps to avoid an appearance of loss of impartiality in the performance of his [/her] official duties." *See also* 5 C.F.R. § 2635.502; 28 C.F.R. § 45.2(b)(2).

III. APPLICATION OF THE FACTORS TO THE PROSECUTION TEAM'S CONDUCT

A. Tape Recording Attorneys and Manipulating JDAs

On April 14, 2009, following revelations that local prosecutors sent informants to record a criminal defense attorney without authorization, Judge Gold gave the USAO 30 days to provide him with a report "on any enhancements to the USAO's 'taint' wall policy and its enforcement." *See Shaygan*, 661 F. Supp. 2d at 1325. We do not know whether the USAO ever complied with that order and, if so, what the "enhanced" policy is.[9] In any event, the USAO assured Judge Gold that office policy already required prosecutors to seek "prior notification and approval of the United States Attorney (Office Circular on Attorney Investigations, Court's Exhibit 5)" before recording attorneys. *See* **Exhibit 1**, *Government's Response To Motion For Sanctions*, *United States v. Shaygan*, No. 08-20112-Cr-Gold (S.D. Fla. March 25, 2009), at p. 2. The USAO characterized the *Shaygan* prosecutors' failure to follow that policy as a "serious mistake." *Id*. at 3.

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amended their conflict rules to eliminate references to the "appearance of impropriety." However, Florida courts have continued to rely on it as a basis for disqualification. *See State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633-34 (Fla. 1991); *Baybrook Homes, Inc. v. Banyan Const. & Dev., Inc.*, 991 F. Supp. 1440, 1444 (M.D. Fla. 1997).

[8] *See, e.g., Gomez v. Superior Court*, 717 P.2d 902, 904 (Ariz. 1986); *Villalpando v. Reagan*, 121 P.3d 172, 177 (Ariz. App. 2005); *Speckels v. Baldwin*, 512 N.W.2d 171, 176 (S.D. 1994); *People v. Davenport*, 760 N.W.2d 743, 748-50 (Mich. App. 2008); *People v. Doyle*, 406 N.W.2d 893, 899 (Mich. App. 1987); *Pisa v. Commonwealth*, 393 N.E. 2d 386, 389 (Mass. 1979).

[9] The Prosecution Team has refused to produce the "enhanced" order, if one even exists, and Mr. Esformes is moving to compel production of it, along with other materials that the Prosecution Team has refused to produce voluntarily.

That "mistake" was repeated here, where the Prosecution Team wired indicted cooperating defendants, brothers Gabriel and Guillermo Delgados, and sent them to record Mr. Esformes and his lawyers ("the Esformes Defense Team") in violation of even the un-enhanced USAO policy. But the situation here is even worse. The Delgados and their attorneys (the "Delgado Defense Team") had, months earlier, agreed with the Esformes Defense Team to collaborate pursuant to a Joint Defense Agreement ("JDA") that required that all communications remain confidential. The Prosecution Team was told of the JDA by the Delgado Defense Team. The Prosecution Team thus knew that by authorizing the Delgados to record Mr. Esformes and his counsel, the Prosecution Team would be infiltrating the JDA between the Esformes and Delgado Defense Teams and obtaining a stream of privileged information, both from the Delgados themselves and by recording of privileged discussions.

The Prosecution Team's tactic violated the principles set forth in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977). In *Tweel*, an IRS agent falsely informed a suspect that his investigatory purpose was *civil* not *criminal* when, in fact, the agent was investigating the suspect for possible criminal charges. By affirmatively misleading the suspect about his status in the eyes of the government, the suspect waived his Fifth Amendment rights and produced documents. The Fifth Circuit held that the agent's "sneaky deliberate deception" was "shocking conduct" and suppressed the evidence obtained from the suspect. *Id*. at 300.[10] The "sneaky deliberate deception" at issue here went on for months.

Judge Gayles recently suppressed the testimony of a government witness in *United States v. Matthew Pisoni*, No. 15-Cr-20339-Gayles (S.D. Fla.), in response to the government's manipulation

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[10] *Tweel* is binding on this Court under *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), which adopted as binding precedent all decisions of the Fifth Circuit decided prior to October 1, 1981.

of a JDA to gather evidence against the defendants. In November 2014, the targets of a grand jury investigation – John Leon, Matthew Pisoni and others – entered into an oral JDA, which was later memorialized in a writing. *See* **Exhibit 2**, *Motion Hearing Transcript*, *United States v. Matthew Pisoni*, Case No. 15-Cr-20339-Gayles (S.D. Fla.) (Nov. 1, 2016), at pp. 241-42. Several months after the targets were indicted, Leon entered into secret plea negotiations but, as here, failed to disclose his changed status to the other members of the JDA – in order to help the USAO gather evidence. *See* **Exhibit 3**, *Motion To Dismiss Based on Government Invasions of the Defense Camp, Etc.*, *United States v. Matthew Pisoni*, Case No. 15-Cr-20339-Gayles (S.D. Fla.) (June 29, 2016), at pp. 2-4. Thereafter, Leon continued to participate in joint defense discussions, including discussions where the attorneys were present. *Id.* at 4-5. Leon also obtained written materials from the other attorneys and shared the information with the government. *Id*. at 6-7. When Leon's cooperation finally became known, the defendants moved to dismiss the indictment and/or to suppress Leon's testimony. During the two-day evidentiary hearing on the motion, the prosecutors conceded that they had not obtained permission from any supervising officials in the USAO to use this ploy. *See* **Exhibit 4**, *Motion Hearing Transcript*, Oct. 17, 2016, *United States v. Matthew Pisoni*, Case No. 15-Cr-20339-Gayles (S.D. Fla.), at p. 18. Judge Gayles then inquired whether the prosecutors were aware of Judge Gold's order in *Shaygan*. When they conceded that they were, Judge Gayles was baffled: "I understand the Eleventh Circuit had a difference of opinion as expressed in its opinion as to some aspects of Judge Gold's decision, but for the life of me, I don't understand why, with all the layers of approval at the U.S. Attorney's Office that you wouldn't have discussed this and flushed this out and made a decision of whether or not this actually [was] the best way to proceed because this goes to the integrity of this whole proceeding." *Id.* at 20-23.

At the conclusion of the hearings, Judge Gayles declined to dismiss the indictment because

Pisoni was unable to show any prejudice. However, Judge Gayles did exclude Leon from testifying at trial, finding that "the Government knowingly and willfully allowed him to invade the defense camp, which I do believe to be improper under the circumstances." *See* **Exhibit 2**, at 242-43. Accordingly, Judge Gayles ruled as follows:

> ...[To] uphold the integrity of these proceedings, I don't see any way that I could not bar Mr. Leon from testifying. If the Government isn't willing to do it on its own, I will certainly do it. So, he will be stricken as a witness and prohibited from testifying as to any matter in this case.
>
> Finally, I just want to add that ***the need to conduct further investigation as to another target can't ever justify invading the defense camp under these circumstances. The proper thing to do is what I discussed from the outset, that an Assistant United States Attorney first bring this issue up through its – the chain of command at the U.S. Attorney's Office, and then get the explicit blessing of the Court through a very specific motion informing the Court of all the necessary details***.
>
> And I will add, you know, I don't know what's happening at the U.S. Attorney's Office. This is the latest in a series of instances that is affecting the credibility of that office and ... I can only make a decision based on the merits of this case and the merits of this issue and not everything else. Someone has got to look at this. You know, I have looked at what happened in Judge Gold's case and, of course, the Eleventh Circuit decision and, of course, this Court is limited in what it can do, but there is a problem here that needs to be rectified in some way.

Id. at 245-46 (emphasis added).

Judge Gayles did not address the potential remedy of disqualification, because the defendants did not seek it (and the remedy was not discussed in *Shaygan*).[11] However, disqualification has been deemed appropriate even for much milder violations of the attorney-client privilege. *See generally United States v. Horn*, 811 F. Supp. 739 (D. N.H. 1992) (where prosecutor and agent secretly kept track of discovery documents copied by defense counsel, work product privilege violated, ordering disqualification of both the prosecutor and agent), *aff'd in part and rev'd in part* 29 F.3d 754, 758 (1st Cir. 1994) (affirming disqualification order). And, Mr. Esformes has been prejudiced, as the

[11] Dr. Shaygan was acquitted at trial, so the disqualification issue was moot.

existence of the obstruction of justice charges themselves establish.[12]

B. The Prosecution Team Knew or Should Have Known That the Search Warrant Did Not Authorize the Seizure of Privileged Materials

In situations where the government knows in advance that privileged materials are likely to be found during the execution of a search warrant, courts have virtually unanimously recommended or required the inclusion of a meaningful screening procedure in the search warrant application and in the warrant itself – *i.e.*, to include the protections before, not after, the search takes place.[13] As discussed in the accompanying motion, DOJ policies require similar procedures. Judges in this district have recognized that self-appointing a conflict-ridden, Government "filter team" to unilaterally decide privilege issues, without input from the defense or the judiciary, is not an acceptable procedure. *Black v. United States*, 172 F.R.D. 511 (S.D. Fla. 1997) ("the best way to achieve a fair balance of the respective rights of the parties is for a United States district judge or his designee to review the material and make a prompt decision on the issues."); *United States v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995).[14]

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[12] As discussed in the accompanying Motion to Compel, Judge Gayles ordered the production of the agents' rough notes so that defense counsel could determine the extent of the privilege violation. We seek a similar order.

[13] *See, e.g., United States v. Derman*, 211 F.3d 175, 181 (1st Cir. 2000); *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 961 (3d Cir. 1984); *United States v. Crim. Triumph Capital Group*, 211 F.R.D. 31, 42-43 (D. Conn. 2002); *United States v. Hunter*, 13 F. Supp. 2d 574, 585 (D. Vt. 1998); *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 57 (S.D.N.Y. 1994). *See generally Preventive Med. Assocs. v. Commonwealth*, 465 Mass. 810, 992 N.E.2d 257 (2013) (listing four "essential component[s] – a *sine qua non* – of a valid taint team procedure"); *Kala v. Aluminum Smelting & Ref. Co.*, 688 N.E.2d 258, 266 (Ohio 1998) (listing elements of an effective screen); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 124 cmt. d (2000) (discussing screening).

[14] Even the cases cited by the Government in its belatedly filed *Motion for Approval of Filter Process,* DE 227 at 6, require judicial review. E.g., *In re Ingram*, 915 F. Supp. 2d 761, 763 (E.D. La. 2012) ("[A]n FBI Special Agent, unaffiliated with the squad assigned to the investigation, will first retrieve . . . then refer the attorney e-mails to the filter AUSA—an AUSA who has no connection

Consequently, the Prosecution Team in this case had a duty to inform Magistrate Judge McAliley that the search of the Eden Gardens included the law office of Mr. Esformes' attorney, Norman Ginsparg, so that she could implement a proper protocol to deal with privileged documents – a safeguard for Mr. Esformes' rights that the Prosecution Team was able to circumvent.[15] At least in the context of foreseeable conflicts, courts have cited the failure to take meaningful preemptive actions as a factor supporting disqualification. *See Mitchell v. Metro. Life Ins. Co.*, No. 01 Civ. 2112 (WHP), 2002 U.S. Dist. LEXIS 4675, at **27-29, 2002 WL 441194, at *10. The Prosecution Team failed to take any preemptive action. It knowingly conducted a law office search without any pre-designated taint/filter team in place. In its recently-filed *Motion for Approval of a Filter Process*, DE 227 at 3-4, the Prosecution Team admits that attorney Ginsparg notified the search team of the presence of privileged materials. Nevertheless, unidentified members of the search team collected 70 boxes of materials. The search team labeled Box #70 as "TAINT," then handed the remaining 69 boxes over the Prosecution Team – all without any guidance from a filter prosecutor, the defense or a judge. The Prosecution Team admits that, beginning in August 2016, members of the Prosecution Team began reviewing the 69 boxes of documents seized from Eden Gardens. DE 227, at 4. ***Four months later,*** on December 7, 2016, someone from the Prosecution Team "observed a document that may have implicated the attorney-client privilege." Until then, the Prosecution Team had no valid

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with Ingram's criminal investigation. After the filter AUSA determines which e-mails are subject to the attorney-client or work product privileges ("privileged e-mails") and those which are not ("non-privileged e-mails"), Ingram's attorneys will review the non-privileged e-mails and they will be given the opportunity to challenge the filter AUSA's determination. If the filter AUSA and Ingram's attorneys cannot agree as to whether an e-mail is or is not privileged, the Court shall resolve the dispute.").

[15] *See United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1039 (D. Nev. 2006) ("Because the Government did not provide or implement any procedure for notifying SDI of the taint attorney's privilege decisions or afford SDI an opportunity to challenge those determinations in court before the documents were provided to the Prosecution Team, it is doubtful that the court would have approved the Government's taint procedures if SDI had challenged them.") (citations omitted).

filter review protocol in place.

Even after admittedly observing "a document that may have implicated the attorney-client privilege," the Prosecution Team did not take any steps to address the issue with defense counsel or the Court until three months later, and only after the Esformes Defense Team uncovered the truth of what the Prosecution Team had done. According to the Prosecution Team, two "filter" prosecutors were first assigned to the case on January 25, 2017, ***more than six months after the seizure and more than six weeks after the Prosecution Team admits it was exposed to privileged materials***. Even then, the Prosecution Team was not entirely candid with the Esformes Defense Team, for it waited until February 12, 2017 to identify the filter prosecutors to the Esformes Defense Team and then represented that "the Eden Gardens materials are currently being reviewed by a filter team ***and not by the prosecution team***." (Email of February 12, 2017 from Elizabeth Young to Jackie Perczek). In fact, the Prosecution Team had already reviewed a substantial amount of the Eden Gardens materials (which it prefers to characterize as a "handful of boxes"), as it finally conceded in its *Motion for Approval of a Filter Process*, DE 227, at 4, filed March 10, 2017. The Third Circuit has squarely rejected the use of a non-attorney agent as the first level reviewer for privilege, even when that agent's decisions were subsequently reviewed by "independent federal agents." *See In re Search of Electronic Communications in the Account of Chakafattah@Gmail.com,* 802 F.3d 516 (3d Cir 2015). Courts have also roundly condemned the practice of entrusting a taint review to members of the prosecution team. *See, e.g., United States v. Pedersen*, No. 3:12-cr-00431-HA, 2014 WL 3871197, at *29 (D. Ore. Aug. 6, 2014). To counsel's knowledge, no court has ever knowingly approved such a procedure,[16] and the Prosecution Team's use of its own non-lawyer agents to

[16] In *United States v. Derman*, 211 F.3d 175 (1st Cir. 2000), criminal investigators were allowed to conduct a law office search, where the lawyer himself was the target of the investigation, guided by specific instructions in the warrant for segregating targeted files from unrelated clients of the firm. However, the investigators were supervised on the scene by "a 'privilege team' composed of

conduct a privilege review also violated DOJ policies. *See* USAM, Department of Justice, § 9-13.000.

In any event, once the unsupervised agents found privileged materials during the search at Eden Gardens (*e.g.*, the contents of Box #70 which the search team labeled "TAINT"), they should have immediately stopped to contact a prosecutor who, in turn, should have either contacted Magistrate Judge McAliley or, at the very least, superiors at DOJ and/or the USAO for advice (who, hopefully, would have either contacted the judge or belatedly summoned a *completely* independent Taint Team). *Cf. United States v. Neill*, 952 F. Supp. 834, 841 (D.D.C.1997) (denying motion to dismiss, in part, because agent "acted responsibly by sealing the materials without reading them" and then delivered them to a taint team for review). Instead, they kept searching the premises at Eden Gardens without alerting anyone – reading documents and placing a very small fraction of the privileged documents into a box they labeled "TAINT" (after, of course, reading them first). Or worse, they knew they did not have to contact anyone because they were simply following instructions from the Prosecution Team. Whether grossly negligent or deliberate, the Prosecution Team's failure to implement *any* meaningful screening procedures "weighs heavily in favor of disqualification." *Richards*,168 F. Supp. 2d at 1206; *Maldonado*, 225 F.R.D. at 139. Moreover, in light of the Prosecution Team's behavior, the burden should now be on the Prosecution Team "to rebut the presumption that tainted material was provided to the Prosecution Team." *Neill*, 952 F. Supp. at 841. *See also SDI Future*, 464 F. Supp. 2d at 1040 (placing burden on the government when it "'chooses to take matters into it own hands'") (quoting *Neill*).

C. The Absence of Any Instructions To the Search Team

The Prosecution Team has refused our requests to disclose what privilege-related

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attorneys separate from the team of searching agents" who were "on hand 'to answer any questions'" and to conduct a thorough review of all items seized for privileged information. 211 F.3d at 181.

instructions, if any, were given to the agents. We, therefore, can only assume that none were given. The prosecutors thus knowingly allowed agents with no legal training and an obvious conflict of interest to be the first-line filters for any privilege review. *See Arnold*, 2004 U.S. Dist. LEXIS 19381, at *25 (disqualifying law firm, in part, for leaving it up to a witness "not trained in the law" and therefore "not in a position to determine what ... information [about his former employer] was disclosable and what was not disclosable without the assistance of counsel"). Not surprisingly, counsel have found privileged materials throughout the Eden Gardens boxes, with the so-called "TAINT" box containing only a small fraction of them, and even that box was apparently in the possession of the Prosecution Team until early 2017.

Attorneys are not only responsible for their own conduct but also for the conduct of non-lawyers they are supervising. *See* Rule 4-5.3 of *The Rules Governing the Florida Bar*; *Zimmerman v. Mahaska Bottling Co.*, 19 P.3d 784, 791 (Kan. 2001) (granting the motion to disqualify after legal secretary moved from plaintiff's firm to defendant's firm, concluding that "nonlawyers [should] be treated in the same manner as lawyers when considering confidentiality issues"). The Prosecution Team's failure to supervise its agents' review strongly supports disqualification. *See, e.g.,Richards*, 168 F. Supp. 2d 1195 at 1202-03 (although "[a] failure to properly supervise paralegals and other staff members would certainly not create a per se rule of disqualification ... under the circumstances presented here ... failure to take any reasonable measures to protect the attorney-client privilege through proper supervision of a paralegal creates an appearance of impropriety").

D. The Absence of Any Check on the Privilege Review

Finally, the procedures used by the Prosecution Team were inherently defective, because they did not give Mr. Esformes any opportunity to lodge any meaningful objections to the Prosecution Team's decision-making, even when seeking permission to review privileged material from Judge Ungaro. *See In re: Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (where holders of

privilege would have had no opportunity to dispute taint team's privilege determination, court "[did] not see any check in the proposed taint team review procedure against the possibility that the government's team might make some false negative conclusions, finding validly privileged documents to be otherwise").

E. The Prosecution Team's Failure to Promptly Notify Mr. Esformes That Privileged Information Was Reviewed and Used

"An attorney who receives privileged documents has an ethical duty to cease review of the documents, notify the privilege holder, and return the documents." *Arnold*, 2004 U.S. Dist. LEXIS 19381, at *30. *Accord Maldonado*, 225 F.R.D. at 139-40; *Richards*, 168 F. Supp. 2d at 1200-01. *Cf. United States v. Taylor*, 764 F. Supp. 2d 230, 235 (D. Me. 2011) ("I conclude that the government behaved reasonably here by immediately seeking judicial instructions once its agent noticed that e-mail headers reflected communications between lawyer and client"). The Prosecution Team never notified Mr. Esformes, Magistrate Judge McAliley or this Court when it encountered privileged materials.[17] To the contrary, the Prosecution Team provided all the discovery electronically, such as thumb drives, discs, and hard drives, *except for* the Eden Gardens materials. Those materials were not produced until we asked for permission to access the boxes. It was only then that the Prosecution Team sent us USB #8, a thumb drive purporting to contain all the Eden Gardens materials. When

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[17] *See Pedersen*, 2014 WL 3871197, at *29 ("it is obvious that no government entity should intentionally review privileged materials without the express approval of the court"); *Taylor*, 2010 U.S. Dist. LEXIS 112393, at *3 (approving use of government taint team but with "a proviso that [the defendant] be afforded the opportunity to seek court review prior to the turnover of any arguably privileged documents to the prosecution"); *In re Search of 5444 Westheimer Rd. Suite 1570*, Misc. Action No. H-060238, 2006 WL 1881370, at *3 (S.D. Tex. July 6, 2006) (nothing that courts have upheld "taint team" review in circumstances in which "the defendants would have the opportunity to object to any privilege determinations made by the taint team" with such objections resolved by the court before materials were turned over to the Prosecution Team). *Accord* United States Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, 111 (3d ed. 2009) (recommending that defense counsel have the opportunity to review taint team's results before turning over documents to the prosecution in order to enhance legitimacy).

we later reviewed the actual boxes, we discovered that Box 6, which contained Descalzo/Bengio/Ginsparg privileged defense work product *in this case* as well as other privileged documents, had not been scanned and was missing from USB #8. By concealing for months that the Prosecution Team was reviewing the Eden Gardens materials, the Prosecution Team did not heed the caution of Rule 4.4(b) of *The Rules Regulating the Florida Bar*, which provides:

> (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent must promptly notify the sender.[18]

Thus, whether from ethical standards or substantive law, Mr. Esformes should have been afforded the opportunity to seek judicial review *prior* to examination and use by the Prosecution Team. Indeed, notification before use – so that the privilege holder can seek redress before a court – is a central feature of virtually every recognized taint review process, whether performed by a government taint team or a special master.[19] The Prosecution Team never notified Mr. Esformes that it viewed and planned to use privileged materials and made no attempt to either return them or seek court permission to keep and use them (except for the limited *ex parte* disclosure to Judge Ungaro). The Prosecution Team thus usurped the Court's authority to make any determinations *with input*

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[18] While Rule 4.4(b) refers only to "inadvertent" conduct, the deliberate nature of the seizure here should have placed a greater, not a lesser, responsibility on the Prosecution Team. *Cf. Pedersen*, 2014 WL 3871197, at **28-29; *Burt Hill, Inc. v. Hassan*, No. 09-1285, 2010 U.S. Dist. LEXIS 7492, at **11-14, 2010 WL 419433 (W.D. Penn. Jan. 29, 2010).

[19] *See, e.g., United States v. Deluca*, No. 6:11-cr-221-Orl-28KRS, 2014 U.S. Dist. LEXIS 92730, at *5, 2014 WL 3341345 (M.D. Fla. July 8, 2014); *Hicks v. Bush*, 452 F. Supp. 2d 88, 103 (D.D.C. 2006); *United States v. Grant*, No. 04 CR 207BSJ, 2004 U.S. Dist. LEXIS 9462, [WL] (S.D.N.Y. May 25, 2004); *Triumph Capital Grp., Inc*., 211 F.R.D. at 43; *Hunter*, 13 F. Supp. 2d at 583; *Black*, 172 F.R.D. at 516-17; *Abbell*, 914 F. Supp. at 521; *Preventive Med. Assocs.*, 465 Mass. at 828, 992 N.E.2d at 271.

from the Esformes Defense Team.[20] These facts strongly support disqualification.[21]

The Prosecution Team compounded the violation by possessing and accessing the privileged material for months. The lengthy time period in which the Prosecution Team has had improper possession and use of privileged materials adds further weight to the disqualification remedy.[22]

F. The Use of Privileged Material By the Prosecution Team and Its Significance

The use of even one privileged document can result in disqualification. *E.g., Lewis v. Capital One Services, Inc.*, 2004 U.S. Dist. LEXIS 26978 (E.D. Va. 2004) (plaintiff's counsel disqualified

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[20] *See In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1214 (3d Cir. 1989) ("disclosure can be obtained only in a context where the district court will first evaluate, *in camera*, the right of the government to gain access to the documents") (citing *United States v. Zolin*, 491 U.S. 554 (1989); *Pedersen*, 2014 U.S. Dist. LEXIS 106227, at **92, 96 (criticizing taint procedure that authorized a government taint team to make that determination, finding that "[o]nly a court of competent jurisdiction can determine the applicability of the crime-fraud exception" and "[t]he only entity that is entitled to make a determination that a private communication between an attorney and her client is not privileged is the court"); *SDI Future*, 464 F. Supp. 2d at1054 (establishing procedure for court to resolve disputes about the applicability of the crime-fraud exception).

[21] *See Horn*, 811 F. Supp. at 748 (disqualifying prosecutor, pointing out that "[h]aving been placed on notice of the existing problem, the lead prosecutor had the opportunity, the authority, and the duty to maintain the status quo by sealing the documents pending judicial review, thereby avoiding any prejudice to the defendants, until the court had ruled on the matter"); *Maldonado*, 225 F.R.D. at 139-140 (Plaintiffs failure to notify defense counsel and did not admit to having the materials until "it was discovered by Defendants ... weights heavily in favor of disqualification"); *Richards*, 168 F. Supp. 2d at 1206 ("Plaintiff's failure to explicitly notify Defendants of the disclosure of privileged information weighs in favor of disqualification" and even if they had been notified, "simply informing Defendants that they were in possession of privileged material would not excuse or lessen the impact of the review of large numbers of privileged documents").

[22] *Compare Arnold*, 2004 U.S. Dist. LEXIS 19381, at *31-33 (law firm "blatantly risked creating the appearance of impropriety" by conducting "its own privilege review" and keeping documents for 18 months – conduct which "[a]t a minimum ... recklessly disregarded the risks associated with playing fast and loose with the rules protecting against disclosure of privileged and confidential material"); *Richards*, 168 F. Supp. 2d at 1200, 1209 ("[I]t is apparent that eleven months of access to privileged materials creates an appearance of impropriety and so taints the proceedings that the harsh remedy of disqualification is justified."), *with Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 262 P.3d 720, 725-26 (Nev. 2011) (denying disqualification because attorney promptly notified opposing counsel after receiving its documents on disk from an anonymous source).

for viewing privileged document). The full extent of the Prosecution Team's use of privileged information cannot be fully determined without additional discovery, a review of the agents' notes of their interviews with the Delgados and others, and a full evidentiary hearing. However, the Prosecution Team has already used privileged material in at least five ways: (1) to indict Mr. Esformes for obstruction of justice; (2) in framing the kickback charges to include allegations about payments for limousine services and to charities; (3) in arguing for Mr. Esformes' detention before this Court and the Eleventh Circuit; (4) in selecting its trial exhibits; and (5) to confront attorney Ginsparg and his assistant Jacob Bengio to obtain information from them, and solicit their cooperation against Mr. Esformes. *See Maldonado*, 225 F.R.D. at 140 (finding extent of review factor "points towards disqualification" because counsel considered the privileged materials important and relied upon them in pleadings); *In Re Mktg. Inv. Corp.*, 80 S.W.3d 44, 50-52 (Tex. App. 1998) (because the former employee's lawyer had "reviewed the documents" and "referenced them in new pleadings," the trial court "abused its discretion in not disqualifying [him]."); *Richards*, 168 F. Supp. 2d at 1207-08 ("the sheer extent of the privileged material accessed," approximately 1,000 privileged documents that "were read, at least briefly," weighed in favor of disqualification).

Other evidence of the Prosecution Team's use of privileged material will be presented at the requested evidentiary hearing and/or after the requested discovery is obtained and reviewed. For example, the agents' notes of interviews with the Delgados must be reviewed to more accurately determine what information the Esformes Defense Team conveyed to the Delgado Defense Team that the Prosecution Team has improperly learned from the debriefings of the Delgados, and what investigatory leads the Prosecution Team may have obtained from reviewing all the detailed law firm billing records seized from Eden Gardens such as the confidential memorandum exploring defenses to the earlier False Claims Act litigation that was seized at that time. *See Maldonado*, 225 F.R.D. at 140 (the "significance cannot be overstated" of Plaintiff's possession of a letter which discussed

defense strategy and served as "a blue print to merits of Plaintiff's case, as well as Defendants' defense" and "weighs heavily in favor of disqualification").

G. The Extent To Which Mr. Esformes Could Be Faulted

Mr. Esformes cannot be faulted for anything the Prosecution Team unlawfully learned from its manipulation of the JDA. As to the search of Mr. Ginsparg's law office, Ms. Descalzo was barred from entering the building but notified the search team of the presence of privileged material and reminded them of the need for a taint team. The Prosecution Team at that point acted at its own peril.

It was not until January 2017 that the Esformes Defense Team discovered that the Eden Gardens materials, which had originally been omitted from the Prosecution Team's electronic discovery, were being maintained *by the Prosecution Team* at one of its warehouses. Once the Esformes Defense Team began reviewing the contents of the boxes themselves, finding a host of obviously privileged documents, the Esformes Defense Team promptly informed the Prosecution Team – which, of course, the Prosecution Team already knew because it had already been using documents from the boxes in various ways. Instead of coming clean and trying to resolve the problem, the Prosecution Team refused to answer the most basic questions about who has had access to the Eden Gardens boxes since they were seized in July 2016, and who, if anyone, in authority has been supervising the Prosecution Team's conduct. To place any blame on the Esformes Defense Team would be, in effect, to blame the Esformes Defense Team for presuming that the Prosecution Team was acting in good faith and following DOJ and USAO policies.

H. Prejudice To the Prosecution Team From Disqualification

The Prosecution Team has only itself to blame for any prejudice its conduct and concealment of that conduct has caused. If the case is far advanced, it is because the Prosecution Team disregarded policies of the USAO and DOJ, established precedent, the Rules Regulating the Florida Bar and Judge Gold's order in *Shaygan*. It also concealed material information from Magistrate

Judge McAliley. The Prosecution Team unilaterally made all the privilege determinations without involvement by either Mr. Esformes or the Court, in contravention of well-established case law. And, the Prosecution Team waited for more than ***seven months*** (July 22, 2016 until March 10, 2017) when it filed the filed its *Motion For Approval of Filter Process* to bring this matter to the attention of the Court, and only because the Esformes Defense Team had uncovered the truth and demanded answers. Any prejudice to the Prosecution Team is thus of its own making. *Cf. Richards*, 168 F. Supp. 2d at 1208 ("Plaintiffs are directly responsible for the breach of privilege, and thus, the deprivation of counsel of choice does not weigh heavily against disqualification").

I. Disqualification Is Justified

As in *Horn*, *Richards*, *Maldonado* and *Cargill*, the foregoing factors strongly support disqualification. The privileged materials have permeated virtually the entire Prosecution Team and even its trial exhibit list. Mr. Esformes has been prejudiced by the sheer volume of material, the length of time the Prosecution Team has had access to it, and the specific examples of prejudice previously discussed. While Mr. Esformes is also seeking other remedies, including dismissal of the obstruction counts and suppression of evidence to include the testimony of the Delgados, there is no ruling short of disqualification that can undo the damage to date. Disqualification is required because there is no way to remove from the minds of the Prosecution Team the information that they have learned from the Delgados and from the contents of privileged documents. *See Richards*, 168 F. Supp. 2d at 1209 (even if the Plaintiff's counsel returned the privileged materials, it would not remove the taint on the proceedings because "disclosure of privileged information cannot be undone."); *Cnty. of Los Angeles v. Superior Ct.*, 222 Cal. App. 3d 647, 657-58, 271 Cal. Rptr. 698, 705 (Ct. App. 1990) ("Having become privy to an opposing attorney's work product, there is no way the offending attorney could separate that knowledge from his or her preparation of the case."). In both *Richards* and *Maldonado*, cases with similar but less egregious factual scenarios, counsel were

disqualified. The fact that this case involves prosecutors and federal agents does not call for a different result. *See In re Grand Jury Proceedings John Doe #462 (Under Seal)*, 757 F.2d 600, 602 (4th Cir. 1985) (ordering the disqualification of the prosecutor and two agents but later finding issue moot); *Horn*, 811 F. Supp. at 748 (previously discussed).

CONCLUSION

Whether the Prosecution Team deliberately or "recklessly disregarded the risks associated with playing fast and loose with the rules protecting against disclosure of privileged and confidential material," or whether they are "guilty of a serious deception," disqualification is required. *Arnold*, 2004 U.S. Dist. LEXIS 19381, at **35-36.

CERTIFICATE OF SERVICE

This document is being served on all counsel by CM/ECF on April 14, 2017 .

Respectfully submitted,

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