

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.*,

Defendant.

**ESFORMES' MOTION TO COMPEL DISCOVERY RE PROSECUTION TEAM'S
EXPOSURE TO ATTORNEY-CLIENT PRIVILEGED MATERIALS**

The Defendant, PHILLIP ESFORMES, through undersigned counsel, respectfully moves this Court, pursuant to Rules 16 and 33 of the Federal Rules of Criminal Procedure and the Due Process Clause of the Fifth Amendment, *Brady v. Maryland*, 373 U.S. 83 (1963), and Judge Gayles' endorsed order in *United States v. Pisoni*, Case No. 15-20339-Cr-Gayles (S.D. Fla. Aug. 3, 2016) (DE 191), compelling the government to produce the rough notes of all agents who interviewed Guillermo and Gabriel Delgado, as well as an order compelling the government to produce the following three categories of documents and/or information:

(I) requests relating to how the Prosecution Team exploited the Joint Defense Agreement ("JDA") between Mr. Esformes and his attorneys ("the Esformes Defense Team") and the Delgados and their attorneys ("the Delgado Defense Team");

(II) request relating to the search of the Eden Gardens ALF and, in particular, the law offices located therein of Mr. Esformes' long-time civil attorney, Norman Ginsparg, and his assistant, Jacob Bengio;

(III) requests relating to how the Prosecution Team has been monitoring the document review and selection process by the Esformes Defense Team at government warehouses; and

I. EXPLOITATION OF THE JDA

- A.** Whether the Prosecution Team sought approval from their superiors in the U.S. Department of Justice, the U.S. Attorney for the Southern District of Florida, the First Assistant U.S. Attorney and the Criminal Division Chief before they secretly used informants Guillermo and Gabriel Delgado to tape record conversations with Mr. Esformes and two of his lawyers, Michael Pasano and Marissel Descalzo, despite the Joint Defense Agreement (“JDA”) entered into between the Delgado Defense Team and the Esformes Defense Team.¹
- B.** All written policies of any kind issued by the USAO concerning the tape recording of attorneys.
- C.** What, if anything, the USAO promulgated to comply with Judge Gold’s directive for a report “on any enhancements to the USAO’s ‘taint’ wall policy and its enforcement,” *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).

¹ *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 (conceding that the trial prosecutors allowed two informants “to tape their discussions with members of the defense team in violation of United States Attorney’s Office policy requiring prior notification and approval of the United States Attorney (Office Circular on Attorney Investigations, Court’s Exhibit 5”).

- D. The rough notes of all interviews, by either agents or prosecutors, of the Delgado brothers before or after they entered into cooperation agreements with the Prosecution Team.²
- E. All communications, including emails, telephone messages, text messages and letters, from May 2014 to date, between anyone from the Prosecution Team and anyone from the Delgado Defense Team, including: (i) Jane Moscovitz, (ii) Norman Moscovitz, (iii) Joaquin Mendez, (iv) Gabriel Delgado and/or (v) Guillermo Delgado.
- F. All documents and communications concerning or reflecting plea negotiations, including the dates of those communications, between the Delgados (directly or through counsel) and the Prosecution Team, *see Doe No. 1 v. United States*, 749 F.3d 999, 1008 (11th Cir. 2014) (affirming disclosure order and rejecting government's privilege

² See **Composite Exhibit 2**, *United States v. Pisoni, et al.*, No. 15-20339-Cr-Gayles (S.D. Fla.), containing *Defendants' Joint Motion For Production of All Rough Notes of Interviews, Etc.*, July 20, 2016 (DE 176) and *Government's Notice of Compliance*, Aug. 8, 2016 (DE 195). On August 3, 2016, Judge Gayles entered an "Endorsed Order" granting the defendants' motion. The docket sheet reads:

08/03/2016 191 ENDORSED ORDER granting 176 Defendants' Joint Motion for Production of All Rough Notes of Interviews as to Matthew Pisoni (1), Marcus Pradel (2), Victor Ramirez (4). Within 10 days of this Order, the government shall provide to defense counsel and the Court all rough notes of Defendant Leon's interview statements. The government may redact non-relevant information, including information related to other investigations and the agents' mental impressions. If so, the government shall also provide an unredacted copy of the notes to the Court. Signed by Judge Darrin P. Gayles (DPG) (Entered: 08/03/2016)

objections, holding that “[n]o privilege prevents the disclosure of the plea negotiations”).

- G.** What discussions the Prosecution Team had with the Delgado Defense Team concerning their obligations under the JDA with the Esformes Defense Team, including but not limited to any discussions about not complying with the requirements in the JDA that they notify the Esformes Defense Team as soon as the Delgados’ interests became adverse to Mr. Esformes’ interests.
- H.** What protocols, if any, have been used to shield the Prosecution Team from learning privileged information: (1) that the Esformes Defense Team had conveyed to the Delgado Defense team during the course of the JDA (approximately May 2014 through the end of September 2015); (2) that was seized from Eden Gardens on July 22, 2016; (3) that was contained in Mr. Esformes’ iPhones after they were seized during his arrest.³

³ This request of course also relates to Section (II).

II. THE LAW OFFICE SEARCH AT EDEN GARDENS

- A.** A copy of Circular 08-CRM-45, issued by the United States Attorney's Office ("USAO") setting forth the mechanism for obtaining approval to search an attorney's law office and any update or revisions to that Circular.⁴
- B.** What, if anything, the Prosecution Team did to comply with Section 9-13.420 of the United States Attorney's Manual, which sets forth DOJ requirements for conducting law office searches.
- C.** A copy of the completed form USAM 0-23.420, entitled "Attorney Search Warrant," which the USAM requires federal prosecutors to submit to their superiors before seeking a search warrant for an attorney's law office.
- D.** The identities of all prosecutors and agents who participated in the July 21-22, 2016, search of the Eden Gardens ALF and, more specifically, the law offices of Mr. Ginsparg and his assistant Jacob Bengio, which the Prosecution Team knew was located on the premises at least 10 days before the search.

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On July 22, 2016, the Prosecution Team executed a search on the Eden Gardens ALF which, as the Prosecution Team knew before it sought the warrant, contained the law office of Mr. Esformes' long-time civil attorney Norman Ginsparg and his assistant Jacob Bengio. The warrant application did not reveal to the Magistrate Judge that the premises contained a law office, and there is no indication that the Prosecution Team followed any of the requirements for law office searches established by both the Department of Justice and the United States Attorney's Office.

- E.** Which of the prosecutors and/or agents who participated in the Eden Gardens search, if any, were independent of the Prosecution Team – *i.e.*, assigned to a “taint” or “filter” team – and, if there were any, provide their identities.
- F.** What oral and/or written instructions, if any, were given to the agents who conducted the search of the law offices of Mr. Ginsparg and his assistant Jacob Bengio concerning privileged material.
- G.** The identities of the agent(s) who reviewed and placed into a box labeled “Box # 70 TAINT” on the search inventory from the seizures made during the search of the law offices of Mr. Ginsparg and Jacob Bengio.
- H.** Identify all agents and prosecutors who (1) have had *access* to and/or (2) reviewed the materials seized from Eden Gardens from the date of the search (July 22, 2016) to the present.
- I.** Identify *the date* upon which Box # 70 (or its contents) was first conveyed to the so-called DOJ “taint” or “filter” team prosecutor Christopher J. Hunter and the circumstances under which he received it, including but not limited to who he obtained it from.
- J.** Identify by box number and/or bate stamp number the documents that are currently under the control of the new “taint team” headed by DOJ Fraud Section Trial Attorneys Leo Tsao and Leslie Garthwaite and disclose when and from whom they received those materials.

- K.** Identify all cases (by docket number) in which DOJ Fraud Section Trial Attorneys Elizabeth Young, Allan J. Medina and Drew Bradylyons have worked with Trial Attorneys Hunter, Tsao and Garthwaite.
- L.** Identify and produce all documents seized from the law offices of Mr. Ginsparg and Jacob Bengio which the Prosecution Team has (1) included in its Trial Exhibit List; (2) shown to any potential witness, subject, target or alleged co-conspirator in this case; (3) shown or made accessible to any third party including but not limited to the co-defendants and their attorneys.
- M.** Produce any logs or other record-keeping reflecting when agents or prosecutors viewed or accessed the materials seized from Eden Gardens, both electronically and the actual (70) boxes of hard copy documents.
- N.** Produce all drafts and metadata re: the Search Warrant Application and Sworn Declaration of Agent Reilly, and identify everyone who participated in drafting/typing those documents, including the language representing to the Magistrate Judge that "[a]ccording to Gabriel Delgado, the corporate offices of Philip Esformes' businesses are directly to the right upon entering the front facade of the building."

- O.** All documents and communications (including emails, text messages, phone calls) by and between prosecutors and agents concerning their exposure to potentially privileged materials seized from Eden Gardens, to include, by way of example, communications about the documents used by the Prosecution Team during proffers/meetings with Norman Ginsparg and/or his counsel and Jacob Bengio and /or his counsel; the law review article identified as a Government Exhibit; and the not-yet-identified document that a member of the Prosecution Team observed on December 7, 2016 referenced in the *Motion for Approval of Filter Process* [DE 227].
- P.** Produce all documents extracted from the computers, hard drives, thumb drives, discs, and other electronic media seized from Eden Gardens.⁵

⁵ In an email from Ms. Young to Michael Pasano on January 19, 2017, she stated: “Hi Mike. I know your team is requesting access to the Eden Gardens search warrant materials and we are fed ex'ing you a copy of the scanned paper documents on Monday. If you want [sic] to the documents seized from the computers at Eden Gardens, please send us a hard drive that can accommodate 600 GB of data.” On January 25, 2017, before the start of a status conference before Judge Lenard, defense counsel handed Ms. Young a new hard drive that could accommodate 600 GB of data, but to date it has not been returned with the requested materials.

III. MONITORING THE ESFORMES DEFENSE TEAM DURING DOCUMENT REVIEW

- A. The surveillance videos, if any, of members of the Esformes Defense Team reviewing discovery in this case or any notes made by agents recording what the Esformes Defense Team was either reviewing or requesting copies of.
- B. Notes, memoranda or communications of any agents reflecting or discussing the discovery materials that the Esformes Defense Team has been reviewing at government warehouses and storage facilities in this case.
- C. The identities of all agents who have been supervising and/or have been present while the Esformes Defense Team was reviewing discovery materials.

In support of these requests, the Defendants submit the following:

1. Mr. Esformes is filing, simultaneously herewith, a motion to disqualify the Prosecution Team and related motions, which we hereby adopt and incorporate by reference herein, concerning the numerous efforts by the Prosecution Team to learn, seize and/or use a host of privileged material.

2. As the Esformes Defense Team began reviewing the mountains of discovery, it became apparent that there were no signs that the Prosecution Team had taken *any* precautions to shield itself from privileged material. Since at least early January 2017, the Esformes Defense Team has requested most of the information sought above and have been stonewalled. Indeed, both the

Prosecution Team and *ad hoc* Taint Teams – all headed by prosecutors from the DOJ Fraud Section with assistance from the FBI’s Miami Field Office – have refused to answer the most basic questions about procedures, protocols, instructions to agents, even the identity of some agents, and their receipt and use of the privileged documents, such as how they obtained them, to whom and when the materials were stored, accessed, and used. The newest “taint team” in fact was only summoned by the Prosecution Team in late January 2017 – *after* the Esformes Defense Team began making pointed inquiries about the seizures from Mr. Ginsparg’s law office.

3. Counsel are also filing not only the disqualification motion but a motion to dismiss the obstruction counts and to suppress all privileged information obtained by the Prosecution Team.

4. Mr. Esformes has a compelling interest in ensuring that privileged materials are not used against him – although much has already been used by the Prosecution Team. The requested discovery simply seeks clear answers from the Prosecution and Taint Teams about how they came to possess privileged material and whether written policies of the DOJ and the USAO were followed or, as it appears, violated. Since the Prosecution and Taint Teams have steadfastly refused to provide answers voluntarily, Mr. Esformes respectfully requests that the Court compel them to do so.

5. “The attorney-client privilege is one of the oldest recognized privileges for confidential communications.” *Abdallah v. Coca-Cola Co.*, No. Civ. A. 1:98-CV-3679-RWS, 2000 WL 33249254, at *2 (N.D. Ga. Jan. 25, 2000). As the Eleventh Circuit observed in *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003):

The attorney-client privilege is intended to encourage “full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). More broadly, the privilege is grounded “in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which

assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.” *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888). The privilege is intended to encourage frank communication with an attorney. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). It is an essential aspect of this country’s adversarial and representational system. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”).

6. In federal criminal cases, federal privilege law governs the application of the attorney-client, work product and joint defense privileges. *See* Fed. R. Evid. 501 advisory committee’s note (“In nondiversity jurisdiction civil cases, federal privilege law will generally apply.”). Federal law deems material protected by the attorney-client privilege where (1) the communication was made between a lawyer and the client (2) in confidence (3) for the purpose of securing or providing legal advice or assistance. *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991); *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (“To determine if a particular communication is confidential and protected by the attorney-client privilege, the privilege holder must prove the communication was ‘(1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential.’”) (emphasis and citation omitted.)

7. The work product privilege is, of course, related to the attorney-client privilege. The Eleventh Circuit prohibits the surreptitious receipt, use, and disclosure of an adversary’s privileged documents. *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1306-07 (11th Cir. 2009); *see also Lazar v. Mauney*, 192 F.R.D. 324, 331 (N.D. Ga. 2000) (requiring counsel to return all copies of inadvertently produced privileged materials and provide a list of every distribution of the privileged documents within twenty-four hours).

8. One core function of a criminal defense attorney that is shielded by the work product privilege is to interview and obtain statements from potential witnesses, both good and bad. *See, e.g., United States v. Brand*, 775 F.2d 1460, 1470 (11th Cir. 1985) (rejecting government’s argument that defendant obstructed justice by trying to convince a government witness to sign an affidavit pursuant to defense counsel’s strategic decision-making, holding that “the mere attempt to secure a statement from a potential witness falls short of even being within the outer limits of § 1503”); *Appeal of Hughes*, 633 F.2d 282, 286-91 (3d Cir. 1980) (upholding work product claim by attorney who, during his representation of a target of a grand jury investigation, hired a private investigator to interview government witnesses, rejecting government’s argument that no privilege existed because the interviews obstructed justice, observing that “[p]otential witnesses are not Government property” and recognizing that “[r]esentment of energetic trial preparation by defense counsel may lead to unfounded suspicion and baseless charges”).

9. The joint defense privilege is an off-shoot of the attorney-client privilege. “[C]onfidential communications made during joint defense strategy sessions are privileged.” *Almeida*, 341 F.3d at 1323, citing *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir.1977); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989). The joint defense privilege “serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.” *Schwimmer*, 892 F.2d at 243. As the Second Circuit observed, “[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.” *Id.* at 243-44 (citation and quotation marks omitted).

10. The Eleventh Circuit has recognized that when an attorney in a JDA suspects that a co-defendant member of the JDA may be waffling, it may be not only proper but advisable to seek an exculpatory statement from him before it is too late:

Suppose, for example, that Fainberg [here the Delgados] made proclamations of Almeida's [here Mr. Esformes'] innocence during the joint defense strategy sessions. Such hypothetical statements would have been inconsistent with the position Fainberg [the Delgados] maintained while on the witness stand [at a trial of Mr. Esformes] and might have revealed the existence of bias stemming from the Government's offer to advocate a reduction in Fainberg's [the Delgados'] sentence[s]. To be sure, evidence of a plea agreement might, standing alone, tend to show bias. But the existence of a plea agreement *in conjunction with an inconsistent story would be much more effective in establishing bias*. The defense might also have been able to point out inconsistencies between Fainberg's analyses of the tape recordings made during joint defense strategy sessions (e.g., identification of certain speakers) and those made during trial.

Almeida, 341 F.3d at 1321, n. 8 (emphasis added).

11. Members of the Prosecution Team in this case – apparently unsupervised from anyone from either DOJ or the USAO – took it upon themselves to view Mr. Pasano's effort to obtain exculpatory declarations from the Delgados during the course of his representation of Mr. Esformes as “obstruction of justice” rather than as effective assistance of counsel. Nor did the Prosecution Team make any effort to shield itself from information that the Esformes Defense Team conveyed to the Delgados from May 2014 through the end of September, 2015. Worse still, the Prosecution Team caused the Delgados to keep pretending that the JDA still existed in order to enable the Prosecution Team to secure privileged information from the Esformes Defense Team and to even tape record not only Mr. Esformes but also his attorneys. There have been no indications that the Prosecution Team notified or sought permission from either a federal judge, their superiors at DOJ, or the United States Attorney for the Southern District of Florida (whose name appears on all three indictments in this case). It also appears that the Prosecution Team took no steps to protect its

members (both prosecutors and agents) in the event that they were mistaken. They simply chose to assume the risk, ignoring all established guidelines in the process – or, at least, Mr. Esformes can only assume so given the Prosecution Teams’ stonewalling.

12. After learning from the Delgados that Mr. Esformes’ long time civil attorney, Norman Ginsparg, maintained his law office at Eden Gardens, members of the Prosecution Team engaged in additional privilege violations by obtaining a search warrant for Eden Gardens without informing Magistrate Judge Chris M. McAliley that they knew a law office was on the premises and that they intended to search it, and apparently without complying with DOJ and USAM protocols.

13. Mr. Esformes has a right to get to the bottom of this. As Judge Gayles did in *Pisonia*, the Court should convene an evidentiary hearing on these matters after granting the discovery requested herein. *See also Eagle Hosp.*, 561 F.3d at 1302 (“Eagle deposed Gerst in an attempt to find out how and when he had obtained [Eagle’s] privileged and internal emails.”); *Arnold v. Cargill*, No. 01-2086 (DWF/AJB), 2004 WL 2203410, at *13 (D. Minn. Sept. 24, 2004) (“ ‘risk’ that improperly obtained confidential and privileged information might be used against Cargill” justifies relief).

CERTIFICATION PURSUANT TO LOCAL RULE 88.9

In a good faith effort to resolve the issues raised in the instant motion, yesterday undersigned emailed a draft of this motion to opposing counsel asking for their position. As of 4pm today, no response was received.

CERTIFICATE OF SERVICE

On the date stamped above, this pleading was served on all counsel of record by CM/ECF.

Respectfully submitted,

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