UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP ESFORMES, *et al.*,

Defendant.
_____/

DEFENDANT ESFORMES' RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION FOR TIMELY DISCLOSURE OF DEFENSES

The Government seeks an unprecedented order compelling Mr. Esformes to provide pre-trial notice of whether he intends to raise an "advice of counsel" defense, or any other "good faith" defense, by June 1, 2017 – *3½ months before trial* – and discovery of all "communications" between Mr. Esformes and those attorneys by July 1, 2017, when courts have denied similar requests seeking disclosure only *six weeks* before trial. As virtually every other court has done when faced with similar motions in criminal cases – none of which the Government mentions – the Court should deny these requests for two reasons.

First, the Federal Rules of *Criminal* Procedure simply do not authorize the Court to require defendants to provide the Government with advance notice of their intended defenses *other than* those for which pre-trial notice is *explicitly* required under Rules 12-1 (alibi), 12-2 (insanity) and 12-3 (public authority). Indeed, even these notice provisions are constitutional *only* when defendants are afforded reciprocal discovery rights. *See Wardius v. Oregon*, 412 U.S. 470, 471 (1973) ("We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules

unless reciprocal discovery rights are given to criminal defendants. Since the Oregon [alibi] statute did not provide for reciprocal discovery, it was error for the court below to enforce it against petitioner, and his conviction must be reversed."). The Government's motion relies almost entirely on *civil* cases decided under the broader discovery provisions in the Federal Rules of *Civil* Procedure. *See* Gov. Mot., at pp. 5-6. Since the Federal Rules of *Criminal* Procedure are far more restrictive than the civil rules and fail to include any reciprocal right for defendants to compel the Government's theories of prosecution, the Court would violate Mr. Esformes right to due process by granting the Government's motion.

Second, Mr. Esformes is currently unable to determine whether he can or will pursue an "advice of counsel" defense due to the Government's violations of his attorney-client, work product and joint defense privileges, as well as the Government's threats to prosecute one of his attorneys, Norman Ginsparg. Mr. Esformes is also seeking a severance of the obstruction counts as an alternative to the exclusion of evidence obtained by the Government in violation of a joint defense agreement. Until this Court resolves the privilege and severance issues – including whether the current Prosecution Team should even be involved in this case – Mr. Esformes cannot make any informed decisions about what defenses he will pursue. Moreover, the Government's threats to prosecute Mr. Ginsparg have made him unavailable as a witness unless the Court is willing to grant him immunity.

I. THE FEDERAL RULES OF CRIMINAL PROCEDURE DO NOT AUTHORIZE COURTS TO COMPEL DEFENDANTS TO PROVIDE PRETRIAL NOTICE OF THEIR DEFENSES OTHER THAN THOSE IN RULES 12-1, 12-2 AND 12-3

"An advice-of-counsel defense is a somewhat amorphous term that has different meanings in different contexts. As a general matter, the issue arises when a party who is alleged to have

performed an act intentionally or willfully contends that he or she did so on the advice of counsel, and therefore did not have the requisite intent." *United States v. Gorski*, 36 F. Supp. 3d 256, 267 (D. Mass. 2014). *See also United States v. Meredith*, No. 3:12CR-143-S, 2014 WL 897373, at *1 (W.D. Ky. March 6, 2014) (denying government motion for disclosure of advice of counsel defense, noting that it "is not an affirmative defense, but rather negates the element of intent") (citation omitted). Perhaps it is because of the amorphous nature of the defense that the Federal Rules of Criminal Procedure and other authorities, do not require pretrial notice.

In addition to ignoring the multitude of authority adverse to its motion, the Government has failed to cite a single, clear, authoritative and binding source holding that Mr. Esformes, or any defendant, is required to provide (or that a court has the authority to order) early notice of an advice of counsel or any other good faith defense. *See United States v. Faulkner*, No. 09-CR-249, 2011 WL 976769, at *1 (N.D. Tex. March 21, 2011) (denying government's motion for notice of intent to rely on advice of counsel for failure to cite any authority for its request). That is not surprising because a defendant's pre-trial notice obligations under Federal Rules of Criminal Procedure are limited to alibi, insanity and public authority defenses and, under *Wardius*, this Court has no discretion to order any pretrial disclosure of defenses when there is no reciprocal duty imposed on the Government. Any such order would violate due process.

The only criminal case cited by the Government is *United States v. Bachynsky*, No. 04-20250-CR, 2007 WL 152499 (S.D. Fla. 2007), in which the defendant "stated in a court filing that he intends to assert an advice of counsel defense," "acknowledged that the government was correct that he intended to raise an advice of counsel defense at trial," and "no longer actively opposed the production of the documents" relied upon for the advice of counsel defense. 2007 WL 152499, at

*1. *Bachynsky* is therefore not relevant to the analysis in this case, because Mr. Esformes has *not* declared his intent to raise an advice of counsel defense and *opposes* any directive compelling him to waive his privileges in advance of trial.[1/]

The court's decision in *Meredith* is representative of the many cases where courts have denied similar government motions. The Court should adopt the *Meredith* court's reasoning:

> The United States bears the burden of proving the defendant guilty of the crimes charged beyond a reasonable doubt. A defendant need not put on any evidence at all. Meredith need not provide the United States with any information pretrial beyond that which is required to be disclosed under Fed.R.Crim.P. 16(b) or unless otherwise ordered by the court. The United States has cited no authority for any of these requested pretrial disclosures.... Meredith has not revealed his trial strategy, nor is he required to do so.
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> The United States urges the court to order the pretrial production of attorney-client documents relating to the subject matter of the attorney advice purportedly relied upon, on the ground that it will avoid a prolonged delay during the trial for the court to address the extent to which the defendant has waived the attorney client privilege, and to permit the United States an opportunity to review any documents thus produced. The United States has provided no authority to compel pretrial disclosure beyond the bounds of Rule 16 with which Meredith has indicated he has fully complied. The court finds no necessity for compelling such discovery. The motion for pretrial discovery will be denied.

Meredith, 2014 WL 897373, at *1-2.

Similarly in *United States v. Mubayyid*, No. 05-40026-FDS, 2007 WL 1826067 (D. Mass. June 22, 2007), the court denied a government motion for advance notice of the defendant's intent to pursue an advice of counsel defense without prejudice, stating only that it might reconsider the Government's motion if filed "relatively close to the onset of the trial." *Mubayyid*, 2007 WL 1826067, at *3. *Cf. United States v. Coooper*, 238 F. Supp. 2d 1215, 1225 (D. Kan 2003) (granting

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[1/] The court in *United States v. Hatfield*, 2010 WL 183522 *1, *13 (E.D. N.Y. 2010), ordered disclosure but only when the defense did not oppose the Government's request.

a government motion for discovery relating to advice of counsel but not requiring disclosure until 14 days before trial). As in *Meredith*, the *Mubayyid* court reasoned:

> The Federal rules of Criminal Procedure do not specifically require that a defendant provide pretrial notice of an advice-of-counsel defense. The rules do, however, provide for pretrial notice of three types of defenses: alibi (Rule 12.1), insanity (Rule 12.2), and public authority (Rule 12.3).... The fact … that the rules enumerate certain notice requirements, but not others, gives the Court some pause. Ordinarily, the listing of notice requirements in specific instances would strongly suggest that any other notice requirements were intended to be excluded. Nor is the Court empowered as a general matter to fill in the gaps where a statute or rule fails to address a particular circumstance.

Id. at *2.

The *Mubayyid* court also believed that the issue should be tabled until the court resolved whether the communications were privileged anyway due to the crime-fraud exception. *Id.* at *2.[2/] Accordingly, the Court's general interest in ensuring a reasonably efficient trial cannot trump Mr. Esformes' right to due process or permit the Court to re-calibrate the choices made by the drafters of the Federal Rules of Criminal Procedure. *See also United States v. Rubin/Chambers, Dunhill Ins. Services*, 828 F. Supp. 2d 698, 711-12 (S.D.N.Y. 2011) (denying government's motion for notice of advice of counsel defense six weeks before trial); **Exhibit 1**, Order Denying Government's Motion for Disclosure of Reliance on Advice of Counsel, *United States v. Giacobbe, et al.*, No. 3:07CR154-RJC (W.D.N.C. Aug. 5, 2009) (denying government motion, stating that "[d]espite the existence of notice requirements in the Federal Rules of Criminal Procedure regarding these other

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[2/] The court in *Mubayyid* also expressed the belief in dicta that there would be nothing "inherently unconstitutional, or otherwise improper, in a requirement that a defendant make a pretrial disclose of his intention to assert a certain type of defense, even where the disclosure involves privileged information." *Id.* at *2. The court, however, made no mention of *Wardius* and did not explain why the disclosure of privileged information would be irrelevant to the due process and reciprocity issues at the heart of *Wardius* opinion.

defenses [alibi, insanity, public authority], there is no notice requirement regarding the advice of counsel defense" and "there are no statutes or case law found by the Court that require pretrial disclosure of the advice of counsel defense").

A requirement that Mr. Esformes decide ***now*** about what defenses to raise at trial without seeing the Government's proof and understanding its legal theories would place him at a disadvantage not contemplated by the Rules and in direct tension with his constitutional right to a fair trial. Unlike the broad discovery rules governing the civil cases upon which the government relies, the Federal Rules of Criminal Procedure permit only limited discovery rights and those rights are limited for both parties post-indictment. Neither Rule 16, nor any other rule, requires a defendant to commit to his defenses prior to trial – *i.e.,* without first hearing the Government's evidence and legal theories – and *Wardius* places a constitutional barrier on this Court's discretion to compel such disclosures from defendants. Indeed, in direct opposition to the Government's motion, Rule 16(b)(2) specifically exempts from pretrial disclosure statements made by prospective witnesses to a defendant, even when those statements are not privileged.[3/]

The Government attempts to circumvent the limitations on reciprocal discovery contained in the Federal Rules of Criminal Procedure by claiming that it will be "prejudice[d]" if Mr. Esformes

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[3/] Rule 16(b)(2) provides in pertinent part:

> (2) Information Not Subject To Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
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> (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense: or
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> (B) a statement made to the defendant, or the defendant's attorney or agent by .... (iii) a prospective ... defense witness.

is permitted "to surprise the government with these defenses at trial." Gov. Resp., at p. 6. Nothing in the rules, however, authorizes the Court to compel defendants to reveal their defenses and theories in advance of hearing the Government's case-in-chief. Moreover, the Government's sudden concern about "surprise" is selective and self-serving. The criminal rules permit the Government to "surprise" defendants in a multitude of ways. It conducts grand jury proceedings in secret and is not required to produce a witness list or a summary of its legal theories in advance of trial. Indeed, the Government has already objected to filing a bill of particulars, in part, by claiming that the criminal rules do not require it to produce "a comprehensive preview of the Government's trial proof or theories" in advance of trial." *Government's Opposition to Defendant's Motion For a Bill of Particulars*, DE 253, at p. 3. Accordingly, the Government is hardly in a position to complain about being "surprised" by any defenses Mr. Esformes may decide to raise when the Government proposes to surprise him in its case-in-chief.

II. MR. ESFORMES CANNOT DETERMINE WHAT DEFENSES TO RAISE BEFORE THE COURT RULES ON THE GOVERNMENT'S VIOLATIONS OF HIS ATTORNEY-CLIENT, WORK PRODUCT AND JOINT DEFENSE PRIVILEGES

A decision to raise an advice of counsel defense has serious repercussions that do not exist in the alibi, insanity and public authority context. As the Government notes, when an advice of counsel defense is raised, it triggers a limited waiver of the attorney-client privilege.[4/] Mr. Esformes cannot determine whether to waive his attorney-client privilege with any particular attorney until: (1) the Government fully complies with its own discovery obligations; (2) the Court determines the

[4/] The scope of that waiver is not as broad as suggested by the Government. *See SEC v. Wyly*, 10 Civ. 5760 (SAS), 2011 WL 3366491 (S.D.N.Y. July 26, 2011) (in a securities fraud case with certain tax issues, stating that not every communication with counsel about any tax issue was waived, and noting that the court would determine the scope of the attorney-client privilege waiver).

remedies for the Government's violations of Mr. Esformes' privileges; and (3) Mr. Esformes can determine the availability of those attorneys to be witnesses. *See* **Composite Exhibit 2**, Defendant's Memorandum in Opposition to the United States' Motion in Limine to Preclude the Assertions of an Advice of Counsel Defense, Etc. (DE 167) (arguing that the Defendants "at this time cannot say whether they will assert an advice of counsel defense" since the Government has "dumped hundreds of thousands of documents" on the Defendants and "has not produced Jencks or 404(b) material"); and Order Denying Government's Motion (DE 183), *United States v. Lam, et al.*, No. 3:07-CR-374 (E.D. Va. Dec. 24, 2009).

This problem is most apparent with respect to Mr. Ginsparg, since the Government's own actions toward Mr. Ginsparg – the threat of prosecution – have made him unavailable as a witness. With respect to Mr. Esformes' criminal defense counsel – Mr. Pasano and Ms. Descalzo – while it is possible that Mr. Esformes may raise an advice of counsel defense at trial with respect to the obstruction of justice allegations, as Mr. Esformes' pretrial motions underscore, he is seeking to dismiss those charges, exclude all evidence relating to those allegations or, in the alternative, to sever the obstruction counts. At this juncture, Mr. Esformes is in no position to speculate whether he will need to raise an advice of counsel defense, and if he later decides to invoke that defense at trial, the corresponding privilege "waiver" would be limited to the communications concerning the declarations of Guillermo and Gabriel Delgado. Because the scope of the waiver would be narrow, the Government will not be prejudiced by waiting until trial – and until after the Delgados testify, assuming they are even allowed to do so – for Mr. Esformes to determine whether he will need testimony from his own attorneys. Mr. Esformes cannot be forced to make decisions with such

enormous potential ramifications four months before trial and before the Court has made rulings on his pretrial motions.

CERTIFICATE OF SERVICE

On April 14, 2017, this pleading was served on all counsel by CM/ECF.

Respectfully submitted,

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