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,

v.

PHILIP ESFORMES, *et al.*,
_____/

DEFENDANT ESFORMES' REPLY TO [ECF 334] GOVERNMENT'S RESPONSE TO [ECF 227] MOTION TO COMPEL DISCOVERY

Mr. Esformes has sought discovery from the Prosecution Team in advance of any evidentiary hearing on his two motions – a motion to disqualify the Prosecution Team and a motion to dismiss or suppress evidence – relating to privilege violations committed in this case. Those motions alleged three distinct forms of privilege violations:

> (1) Obtaining information from the Delgado brothers that they learned during the year-long course of the Joint Defense Agreement ("JDA") between the Delgado and Esformes Defense Teams as reflected in the rough notes of the agents and prosecutors who conducted repeated interviews of the Delgados;
>
> (2) Obtaining information pertaining to the Delgados' recording of Mr. Esformes under the guise that the JDA was valid and protected the confidentiality of those conversations; and
>
> (3) Obtaining information pertaining to the Prosecution Team's violation of DOJ policies governing law office searches.

Contrary to the Prosecution Team, all three categories are directly relevant to the issues set forth in Mr. Esformes' motion.

I. THE STANDARD FOR DISCOVERY AND EVIDENTIARY HEARINGS ON CLAIMS OF GOVERNMENT MISCONDUCT

The Prosecution Team contends that a defendant's rights to discovery are limited solely to "exculpatory" evidence as defined by *Brady* and its progeny, the Jencks Act and Rule 16 of the Federal Rules of Criminal Procedure. That simply is not the case, as shown by the cases which require discovery when other types of misconduct are alleged. For example, when a defendant alleges that he is being selectively prosecuted in violation of the Equal Protection Clause, in order to obtain discovery from the government to support his claim, he need only show "some evidence tending to show the existence of the essential elements of the defense." *United States v. Armstrong*, 517 U.S. 456, 468 (1996). *Accord United States v. Jordan*,635 F.3d 1181, 1188 (11th Cir. 2011).

Similarly, the standard for obtaining a hearing for a motion for new trial based on newly discovered evidence of a possible *Brady* violation is merely that the defendant "has made sufficient allegations so that it cannot be *conclusively* stated that he is entitled to no relief." *United States v. Yizar*, 956 F.2d 230, 234 (11th Cir. 1992) (emphasis in original). Courts are frequently reversed on appeal for failing to grant hearings under this defense-friendly standard. *See, e.g., Fernandez*, 136 F.3d at 1438; *United States v. Gates*, 10 F.3d 765, 768 (11th Cir. 1993); *United States v. Espinosa-Hernandez*, 918 F.2d 911 (11th Cir. 1990); *United States v. Schwarz*, 259 F.3d 59 (2nd Cir. 2001). *Cf. Finn v. Schiller*, 72 F.3d 1182, 1189 (4th Cir. 1996) (ordering evidentiary hearing on motion for new trial, holding that a *prima facie* showing triggers a court's " duty to investigate" potential grand jury abuses). Such hearings would be incomplete without pre-hearing discovery such as Judge Gayles ordered in *United States v. Matthew Pisoni*, Case No. 15-Cr-20339-Gayles (S.D. Fla.) – the rough notes of agents' interviews with an informant who may have violated a JDA by providing the

government with information he learned during the course of the JDA. Based on the evidence presented in Mr. Esformes' initial motions and his replies, he has satisfied these standards.

II. THE PROSECUTION TEAM'S VIEW OF RELEVANCE IGNORES THE FULL SCOPE OF THE JDA PRIVILEGE VIOLATION

After erroneously claiming that there is no legal support for the discovery Mr. Esformes seeks, the Prosecution Team's Response discusses only one of the three categories of privilege violations listed above – the Delgado tape recordings. *See* Gov. Op., p. 3. They entirely ignore Mr. Esformes' claim, similar to the one at issue in *Pisoni*, that the Prosecution Team took woefully inadequate measures to ensure that the Delgados did not reveal the JDA-protected information. In what amounts to willful blindness, all the Prosecution Team did was "advise" the Delgados – who they knew had a long history of committing acts of obstruction of justice[1] – "not to provide information to the government regarding the JDA when debriefing with agents." Apparently, no similar instructions were given to the many agents who actually conducted the interviews and certainly no "taint" agents or prosecutors were used in the debriefings to question the source(s) of the Delgados' information, despite being fully aware of the existence of the JDA.

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[1] *See Government's Appeal and Motion To Extend Stay of Execution of Release Order and For Revocation of Release Order*, *United States v. Guillermo and Gabriel Delgado*, Case No. 14-20359–Cr-Martinez(s) (S.D. Fla.), ECF 15, pp. 4-5, 9 (alleging that the Delgados had concealed and/or misrepresented their assets to Pretrial Services, "attempted to obstruct justice on at least 12 separate occasions" by trying to "coach" witnesses using "code words," and used "someone else's phone to conceal [Guillermo Delgado's] identity); FBI 302 (Sept. 18, 2015) (stating that after Mr. Morales was arrested, Gabriel Delgado "deleted many of his own emails"); Reports of Interviews (Dec. 16 and 21, 2015) (stating that Guillermo Delgado met "with [Jesus] BENETIZ after the indictment to get rid of everything," "destroyed documents," "destroyed the DVR for the cameras in his home with a sledge hammer after DELGADO was arrested, "threw out documents" and "cover[ed] up the fraud scheme in Morales Pharmacy"); FBI 302 (March 21, 2016) (alleging that after Morales was arrested, Guillermo Delgado "destroyed evidence documenting patient referrals from [RODOLFO] DUMENIGO and printouts with other doctor's referrals").

Moreover, Mr. Esformes does not have confidence that the Prosecution Team has been or will be forthcoming about how the Delgados learned whatever they have been saying about Mr. Esformes. As discussed in Mr. Esformes' Reply concerning the motion to disqualify, the Prosecution Team makes a number of factual assertions that are questionable. In particular, the prosecutors contend that:

> (1) They did not know that Norman Ginsparg did any legal work as an attorney for Mr. Esformes, calling him a "non-practicing" attorney who did nothing but business-related tasks. *See* Response, ECF 312, p. 40.
>
> (2) They say it was "bizarre" for counsel to characterize Jacob Bengio as a "legal assistant" to Mr. Ginsparg and that that "[characterization] is news to the government and almost certainly to" Mr. Bengio. *Id*. at p. 13 n. 5.
>
> (3) They "believed at the time of those meeting" with Messrs. Bengio and their counsel in the fall of 2016 "that [Mr. Bengio's] handwritten notes were evidence of a crime..." *Id.* at p. 44.

Proffers from both David O. Markus (Mr. Ginsparg's lawyer) and Robin Kaplan-Eliani (Mr. Bengio's lawyers) indicate that Mr. Markus and Mr. Bengio refuted all three of those claims during their Fall 2016 meetings with the Prosecution Team agents and prosecutors. In particular, both Messrs. Markus and Bengio informed the prosecutors that Mr. Ginsparg was the "Director of Legal Affairs" for Mr. Esformes. In Ms. Eliani's proffer, she further indicates that Mr. Bengio himself confirmed to the Prosecution Team that he was Mr. Ginsparg's "legal assistant" and that prosecutor Young even showed Mr. Bengio copies of demand letters that Mr. Bengio signed "as the assistant to the director of legal affairs."

The proffers also refute the prosecutors' claim that the documents constituting Ms. Descalzo's work product were created to, in effect, cook the books. Rather, the Prosecution Team was told more than once that the documents and notes were, in fact, part of a project assigned to

Messrs. Ginsparg and Bengio *by Ms. Descalzo* and which Mr. Bengio then described to the Prosecution Team in detail – revealing privileged information that the Prosecution Team had no right to have. Ms. Eliani further states that she alerted Ms. Young to a potential attorney-client privilege issue during Mr. Bengio's first interview on September 28, 2016, but that prosecutor Young continued to use the privileged notes and documents and continued to characterized them as evidence of crime-fraud at a second interview on October 14, 2016. Mr. Bengio again explained that the documents were not crime fraud, and reiterated that the documents related to the tasks given to him and that the final reports were sent to Marissel Descalzo.

No one from the Prosecution Team informed Mr. Esformes that they had and were using documents that both Messrs. Markus and Bengio repeatedly stated were Ms. Descalzo's privileged work product. To the contrary. The Prosecution Team continued to use them even after being "alerted" to their privileged status. If the Prosecution Team wished to contest the privileged nature of the documents, they had a duty to notify Mr. Esformes so that the matter could be resolved by this Court, not them.

Under these circumstances, neither Mr. Esformes nor this Court should blindly accept that the Prosecution Team took adequate steps to ensure that the Delgados were not providing JDA-privileged information to the Prosecution Team despite the half-hearted "advise" not to do so. At the very least, counsel should be allowed to review the agents' notes of their interviews with the Delgados in order to assess whether the information being provided by the Delgados did not stem from information provided to the Delgado Defense Team under the protection of the JDA.

III. THE RELEVANCE OF THE EDEN GARDENS' REQUESTS

The Prosecution Team also resists producing any documents relating to DOJ search policies, USAO policies and the "enhanced" policies Judge Gold ordered the USAO to implement in *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). Those documents would show whether, as it seems, the Prosecution Team shunned all such policies when they obtained the search warrant for Eden Gardens.

IV. THE PROSECUTION TEAM'S ASSURANCES THAT NO PRIVILEGED MATERIALS HAVE BEEN USED SHOULD NOT BE CREDITED FOR ADDITIONAL REASONS

The Prosecution Team's Response [ECF 312] to the motion to disqualify claims counsel have "built a veritable cottage industry out of levying meritless allegations of prosecutorial misconduct." ECF 312 at 55, n. 34. It suggests that counsel levy these allegations without a sufficient factual predicate. It cites four cases in support of that accusation, none of which support it:

First, the prosecutors cite to an unpublished ruling by the Eleventh Circuit in the Fabio Ochoa case but fail to cite the published one: *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005). In that case, the Eleventh Circuit ***agreed*** with undersigned counsel that local prosecutors and the Clerk's Office had acted improperly – indeed unconstitutionally under the First Amendment – in creating and using a secret, invisible docket in certain cases. The other misconduct allegations raised in that case, corrupt activities by two DEA agents and a rouge informant, were not rejected as inaccurate but because Ochoa was not sufficiently prejudiced by them. This Court itself found the accusations sufficiently meritorious as to warrant the forfeiture of the informant's cash hoard. *See United States v. $1,449,473.32 In U.S. Currency*, Case No. 01-4645-CV-Lenard (S.D. Fla.). And, OPR later issued a scathing report on the agents' conduct which is still available on the internet. *See*

Final Report, *Corruption (GS Tinsley, SA Castillo);Unauthorized Disclosure of Information (GS Tinsley, SA Castillo), Etc*., March 12, 2002.

Second, the prosecutors cite the second of two opinions in contempt litigation against attorney Sam Burstyn, *United States v. Burstyn*, 878 F.2d 1322, 1323 (11th Cir. 1989), but fail to note that in the first appeal, *United States v. Nunez*, 801 F.2d 1260 (11th Cir. 1986), counsel obtained the reversal of the district court's contempt ruling for procedural irregularities. The only issue *on appeal* in 1989 was whether the evidence was legally sufficient, not prosecutorial misconduct. The opinion merely notes that the district court had denied motions to disqualify the prosecutor and district court but does not state the basis of those motions or the basis upon which they were denied.

Third, the prosecutors *United States v. Cao*, 331 Fed. Appx. 687, 691 (11th Cir. 2009) (per curiam). In that case, the issue was whether the district court committed plain error (since there was no objection lodged by trial counsel) in not finding that the prosecutors engaged in sentencing manipulation through the way a sting operation was orchestrated. The Eleventh Circuit did not dispute the factual support for the allegation but only, on a plain error standard, whether any misconduct rose "to the level of extraordinary misconduct," the elevated standard applicable to claims of sentencing manipulation.

Fourth, and inexplicably, the prosecutors cite *United States v. Schapiro*, No. 14-CR-20175-MGC (S.D. Fla.). In that case, the conduct uncovered by counsel was undisputed – the government *admitted* that the private photocopy service the government required all defense counsel in the district to use had been surreptitiously making duplicate copies of whatever defense counsel ordered copied (ala *Horn*) and was providing the duplicate copies to the government – in *Schapiro,* to the FBI. The only issue was whether the practice was deliberate. But counsel, as the footnote itself

indicates, did not blame the prosecutors for the FBI's conduct and instead repeatedly stated that the prosecutors "acted appropriately and ethically." ECF 312 *at* 55-56, n. 34.[2]

Finally, on page 43 of the Response [ECF 312], the prosecutors claim that the allegations of privilege violations are "reminiscent of a similar conspiracy theory his attorneys unsuccessfully advanced in the First Circuit," citing *In re United States*, 441 F.3d 44 (1st Cir. 2006). In that case, the First Circuit agreed that counsel's motion justified the district court's investigation of grand jury leaks. 441 F.3d at 61. The First Circuit held, nevertheless, that the district court was not sufficiently justified in ***continuing*** the investigation because the return of the indictment "minimiz[ed]" whatever "harm" might have been caused by the leaks, the leaks had been adequately investigated already by DOJ officials, and there was no clear proof that the leaks had to have come from the prosecutors. *Id.* at 60-61. Significantly, the First Circuit found "no error in the district court's initial actions in response to leaks from the media, namely, asking the U.S. Attorney to have the FBI and DOJ investigate the matter." *Id.* at 63; *id.* at 60-61 (finding that the court's initial protective order "may have been justified"). In short, the First Circuit approved the commencement of the district court's investigation based on counsels' motion, and neither the district court nor the First Circuit were critical of counsel for pursuing the motion. To the contrary, as the First Circuit stated, the motion was actually supported by ***allegations first made by two district court judges*** that an FBI agent "was responsible" for the leaks. *Id.* at pp. 65-66. Only the Esformes Prosecution Team would

[2] No claim was made that in the other conceded instances where the discovery was improperly copied and conveyed to the government that the trial prosecutors in those cases had knowledge of the work product intrusions.

have the chutzpah to label us conspiracy theorists and blame us for relying on two federal judges to establish the factual basis for a motion.[3]

CONCLUSION

For all the foregoing reasons, as well as those in Mr. Esformes' initial motion to compel, the Court should order the Prosecution Team to produce the requested discovery.

CERTIFICATE OF SERVICE

This document was served via CM/ECF on the date stamped above.

Respectfully submitted,

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[3] To the extent that the prosecutors meant to imply that footnote 33 of the Government's Response includes cases among the"non-exhaustive list demonstrat[ing] Defendant's pattern of baselessly attacking the government in an effort to obtain strategic advantages," ECF 312, p. 55, n. 33, ***undersigned counsel had nothing to do with either case***: *United States v. Rodriguez*, 556 F.2d 638 (2d Cir. 1977) or *United States v. Caballero*, 277 F.3d 1235 (10th Cir. 2002).

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