UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

16-20549-CR-SCOLA/OTAZO-REYES(s)

UNITED STATES OF AMERICA

vs.

PHILIP ESFORMES

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ESFORMES' OBJECTIONS TO REPORT AND RECOMMENDATION [DE 899]

The Report and Recommendation (R&R or Report) reflects the Magistrate Judge's findings of a pattern of prosecutorial misconduct that spanned three years. The misconduct was not limited to the historical investigative efforts from which this case was launched in 2015, but continued through this Court's own adjudicative process where prosecutors and agents testified under oath and presented a coordinated "new narrative" of their own conduct in order to "obfuscate the record" of their prior misconduct. Branded by the Magistrate Judge as "deplorable," this additional prosecutorial misconduct was consistent with the lack of candor that the Prosecution Team exhibited before two additional judges in this case – Judge Ungaro in pre-indictment proceedings involving surreptitious recordings of Esformes and his counsel, and Magistrate Judge McAliley in the application for the warrant to search the offices of Esformes's attorney. By targeting not only Mr. Esformes but this Court and its members, the prosecution's misconduct warrants the full application of remedies equal to the dangers posed.

The Magistrate found that the misconduct was not isolated, but rather repeated, longstanding, and intentional: "The undersigned has found that the government engaged in improper conduct in connection with: the Eden Gardens search; the review of the search materials; the Bengio debriefings; the listing of the Ginsparg/Esformes text messages as trial exhibits; and the recording of Esformes by the Delgado Brothers. Thus, the government's disregard for the

attorney client and work product privileges has not been limited to a single instance or event." [R&R at pgs. 107-114].

The Supreme Court has held that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. U.S.*, 486 U.S. 153, 160 (1988) (Rehnquist, C.J.) (disqualifying defense counsel based upon waived possibility of future ethical issue at trial); *U.S. v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994) (citing *Wheat*). Trial courts are especially dependent upon lawyers' compliance with their duty of candor toward the court, which includes the duty not to present false evidence or testimony. Florida Bar Rule 4-3.3. *See also* Rule 4-3.4(b) (prohibiting a lawyer from fabricating evidence or assisting a witness to testify falsely); Rule 4-8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 4-8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice). The Supreme Court has held that courts have the inherent authority to sanction bad faith litigation conduct, which certainly would include obfuscation of the record with false evidence and testimony. *Chambers v NASCO*, 591 US 32, 43 (1991): *Eagle Hosp. Physicians v. SRG consulting*, 561 F.3d 2298, 1307(11th Cir. 2009) (dismissal); *Maldonado v. New Jersey*, 225 FRD 120, 138 (DNJ 2004) (disqualification).

The systematic and recurring nature of the misconduct by the same "team" of prosecutors and agents, each time claiming the support and approval of named and unnamed supervisors in the senior ranks of the Justice Department, elicits the same apprehensions that underlie the law of conspiracy and its targeting of the unique menace of group misconduct. Here, supervision by DOJ supervisors was not limited to the underlying historical misconduct at issue in real time, but also applied to the subsequent false testimony offered by the Prosecution Team to the Magistrate Judge during the evidentiary hearings. In an effort to avoid having any evidentiary hearings, the

government unsuccessfully sought to quash Mr. Esformes's subpoenas for the Prosecution Team's testimony, arguing to the Court that the subject matter of the testimony of prosecutors must be pre-approved by the Acting Principal Deputy Chief of the DOJ's Fraud Division under the so-called *Touhy* regulations, 28 C.F.R. § 16.21, and then by the Deputy or Associate Attorney General, who would make the final approval for the testimony. [DE 430 at 5, 8-9 n.3 (citing 28 C.F.R. § 16.25(c); DE 413 Tr. 6/19/17 at 9-10]. With clearance by these Department of Justice officials, the Prosecution Team would go on to present a false new narrative about their prior misconduct.

The Magistrate Judge's Report thoroughly accounts for the prosecution's disregard of the privilege responsibilities that are daily borne by all litigants in our justice system. As the consequence for three years of misconduct followed by a coordinated campaign of false denials under oath, suppression is a necessary minimum remedy for the prosecution's unlawful acquisition, exploitation, and subsequent concealment of access to defense privileged material. Suppression alone, however, is insufficient, as the evidence would be inadmissible at a trial anyway purely by operation of privilege law.

In addition to suppression, this Court must also fashion a remedy that addresses (1) the underlying unethical conduct by which the prosecution deliberately and repeatedly violated the attorney-client and attorney work-product privileges, (2) the resulting benefits flowing to the government for the three years of privilege invasions, and (3) the prosecution's lack of candor and obfuscation of the record.

The Report finds that, since mid-2015, the various alleged taint protocols deployed by the government to prevent the prosecution from obtaining access to Esformes privileged material failed do so, substantially increasing the likelihood that such privileged material has permeated the Prosecution Team. This Court cannot rely upon the self-serving assurances of the Prosecution Team to aid the Court in ferreting out the extent of the internal distribution of this privileged

material, because the Magistrate Judge has found that the Prosecution Team has been untruthful in testifying about its prior exposure to Esformes privileged material in order to conceal their misconduct.

The Court must re-level the playing field to ensure that Mr. Esformes obtains a fair trial and that he is tried by a prosecution team that was not exposed to Esformes's confidential defense strategy, nor conflicted by a personal interest to protect their reputations, as mandated by Florida Bar rules and by *Young v. United States,* where the Supreme Court established "a categorical rule" that a defendant has "a fundamental right" to be prosecuted by "a disinterested prosecutor." 481 U.S. 787, 807, 814 (1987).

Mr. Esformes submits that the Court must dismiss the indictment, if not with prejudice, then without prejudice—but also requiring that the tainted members of the Prosecution Team be disqualified; and that the tainted cooperators (the Delgado Brothers) likewise be disqualified / excluded from the case, as Judge Gayles ordered in *U.S. v. Pisoni*, 15-CR-20339-DPG (S.D. Fla. Nov. 1, 2016).

Misleading United States District Judge Ungaro And This Court

After the recordings of Esformes during the joint defense, Prosecutor Christopher Hunter who was assigned as the "taint" prosecutor for the recordings, made an *ex parte* presentation to Judge Ungaro in an effort to obtain judicial approval to share the recordings with the Prosecution Team. Prosecutor Hunter told Judge Ungaro that there was only a "purported" JDA between Esformes and the Delgado Brothers, when Prosecutor Hunter well knew that the JDA was real, not purported, and had been in effect for a year when the recordings started. Indeed, Prosecutor Hunter had a real copy of the real JDA, but withheld it from Judge Ungaro.

Prosecutor Hunter's affidavit filed with this Court states that he "instructed the agents who were working with the Delgado Brothers that no recordings were to be made of attorneys, and the

agents so instructed the Delgado Brothers." Hunter Declaration 6/23/17 at ¶ 8. But Delgado testified that "he was not given any instructions by government agents on how or who he should record and that there were no restrictions imposed by the government on the taping." [R&R ¶ 532]. And Agent Duncan likewise testified that she did not recall Hunter instructing her to refrain from recording attorneys. [R&R ¶ 507]. Indeed, the taint agents prepared a detailed FBI-302 Report on June 9, 2015, memorializing the conversations between Esformes and his lawyers. Not only did Prosecutor Hunter withhold this information from Judge Ungaro, he also did not disclose that this June 9 FBI-302 detailing Delgado's conversations with Esformes and Esformes's counsel had been distributed to members of the Prosecution Team, who were supposed to have been walled off from these interceptions.

In subsequent filings in response to Esformes's motion to dismiss and to disqualify, the Prosecution Team falsely told this Court that Prosecutor Hunter had "meticulously avoided providing *an iota* of information to the prosecution team until after receiving approval to do so from Judge Ungaro," [DE 312 at 37], and that Judge Ungaro had actually *approved* the Prosecution Team's possession and use of the June 9 FBI-302 Report which memorialized the communications between Esformes and his attorneys. [DE 565 at 4-5]. In fact, Judge Ungaro had actually *denied* the Government's request to listen to a conversation involving Esformes's counsel Descalzo, and had *prohibited* the Prosecution Team from getting any communications in which an attorney was a party without first obtaining the Judge's express approval, which Prosecutor Hunter and the FBI did not obtain before turning over the June 9, 2015, FBI-302 Report to the Prosecution Team. DE 312-11 & 12.

According to the Prosecution Team and Hunter, the recordings of Esformes were undertaken with the assistance of two "taint" FBI Agents, Batt and Duncan, who themselves were

supposedly walled off from the Prosecution Team and from the investigation of Esformes. Litigation over the iPhones seizure would fortuitously reveal something different.

As a taint agent, Duncan was exposed to attorney-client, joint defense conversations on June 8 and again on June 12, 2015 (between Esformes and Descalzo)—which Judge Ungaro ordered withheld from the Prosecution Team. [DX H-20G]. When the defense sought to examine Agent Duncan in connection with these events, the Prosecution Team moved to quash the subpoena, contending that "taint agents" Duncan and Batts "were never members of the Prosecution Team." [DE 565 at 3].

Meanwhile, this Court directed the prosecution to produce to the defense the chain of custody documents associated with the July 2016 seizure of Defendants' iPhones. [DE 610]. Even then, the Prosecution Team withheld an FBI chain of custody report. When counsel requested production of the withheld chain-of-custody report, Prosecutor Bradylyons objected – "w*e would oppose on relevance grounds to produce the evidence chain of custody"* – and then made the dubious claim that "we don't have possession of that document." [Tr. 12/8/17 at 30].

After the Magistrate Judge overruled the objection and the withheld report was finally turned over, it revealed that Agent Reilly's report had been approved by Agent Duncan, whose name appeared on the report. [*Id.* at 32-33]. Caught red-handed, the prosecution offered the "small qualification" that Duncan had served as a "relief" *supervisor* and was the acting supervisor of the squad, merely approving the reports of the work of other agents in the Esformes matter. [*Id.* at 124].

The Court and counsel for Esformes would later learn that this was not the only FBI report that "taint" Agent Duncan had approved. On December 15, 2017, as the evidentiary hearings were drawing to a close, the Prosecution Team finally disclosed that Duncan had served as the so-called "relief" supervisor for the prosecution FBI squad in this case on at least *twenty one* occasions

during the prior 18 months. [DX 862, DX 861-1 - 21]. [R&R ¶ 513] (Duncan approved collection of evidence and iPhones during Esformes's arrest; the attempts to interview Bengio; the inventory of items seized from Eden Gardens including all the legal documents; reports by case Agents Reilly and Ostroman; witness subpoena requests; witness interview report, including those of Bengio)]. The government has offered no explanation of how or why Agent Duncan would serve a supervisory role over the FBI case agents in this case on at least 21 occasions after allegedly having been "walled off" as a "taint agent" for the Delgado tapings. Instead, the government has sought to demean the role of a "supervisor," but just for purposes of this litigation, for sure. [R&R ¶ 515].[1]Had the Court not ordered the iPhones hearing re-opened, the Court never would have learned the *whole* truth about Agent Duncan's continued role in the investigation and prosecution of Esformes.

Invading the Joint Defense

Norman Moscowitz testified during the hearings that the JDA "formally was still in place" when the Delgados signed their cooperation plea agreement and started recording Esformes, and that the JDA "stay[ed] in place" through the recordings. [Tr. 12/20/17 at 26, 55; R&R ¶ 495]. With the JDA in place, the prosecution continuously elicited joint defense information from the Delgados, as evidenced by the June 11, 2015, FBI-302 Report of the debriefing of the Delgados about the contents of the JDA (which denominated each page as "privileged"), its many parties (including Norman Ginsparg and Eden Gardens), its terms, and its history. Additionally, by

[1] Magistrate Judge Otazo-Reyes reversed the inquiry when she found that the exercise of Agent Duncan's "administrative duties [had not] 'tainted' Agent Duncan." [R&R at pg. 114, n. 58]. Because Agent Duncan was a member of the taint team that overheard the recording of JDA conversations between the Delgados, Esformes and his counsel, the relevant inquiry is not whether Agent Duncan was "tainted" (she obviously was, by definition), but rather whether the investigation was tainted by Agent Duncan's continued administrative duties as a supervisor.

prompting Esformes to discuss the subject of the affidavit proposed by Pasano, the prosecution, using Delgado, succeeded in getting Esformes to also discuss, in these recorded conversations, Esformes' own views about the government's kickback allegations, as well as the government's kickback allegations that the attorneys had previously discussed in joint defense meetings.[2] The Delgados also volunteered, on the recordings produced to the Prosecution Team, their understanding of the discussions that the Esformes and Delgado lawyers had, during joint defense meetings, about the government's kickback allegations. The Delgados twice recorded Esformes's lawyer and JDA party Norman Ginsparg in the summer of 2015.

The Delgados' plea agreement required "full, complete and truthful information" about Esformes. Meanwhile, Gabriel Delgado did not consider himself bound by any JDA, testifying to this Court that he never agreed to one -- contrary to the testimony of his attorney Norman Moscowitz that a binding JDA was "formally still in place" while Delgado was recording Esformes and his counsel. [Tr. 12/20/17 at 26]. Thus, during the multiple debriefings conducted by DOJ Fraud Section prosecutors, Gabriel Delgado did not endeavor to preserve any JDA confidences. The prosecution's claims that it had been respecting the JDA when debriefing the Delgados is just another bogus narrative.

The disregard for the JDA continued even after the evidentiary hearings. According to an FBI-302 Report recently produced in discovery, while the parties were awaiting a ruling from the court on these motions, Prosecution Team members Bernstein, Young, and Bradylyons debriefed Delgado again in May 2018 about joint defense topics. That the Prosecution Team would continue

[2] Whether the follow-up communications about this joint defense request included counsel or were limited to clients, they were protected under the JDA. *See, e.g., Gucci Am., Inc. v. Gucci*, 2008 WL 5251989, at *1 (S.D.N.Y. Dec. 15, 2008) ("[P]rivilege is not forfeited even though no attorney creates or receives that communication").

to interview the man whose eligibility as a witness was under review by this court because of his exposure to privileged information and denial of the existence of the JDA (that his own lawyer ratified under oath in court), legitimizes the Magistrate Judge's finding that "the government's disregard for the attorney client and work product privileges has not been limited to a single instance or event." [DE 899 at page 114].

At a minimum, this Court should follow the lead of Judge Gayles who, when confronted with a far less egregious example of the prosecution invading a joint defense by obtaining information from a cooperating member, held that the necessary remedy was to bar the cooperator from testifying. In the *Pisoni* case, citing the need "to uphold the integrity of these proceedings," Judge Gayles ruled:

> I don't see any way that I could not bar [the cooperator] 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.

*U.S. v. Pisoni,*15-CR-20339-DPG (DE 227 at 245) (S.D. Fla. Nov. 1, 2016).

The problem created by the prosecution is that it is now virtually impossible for this Court to police whether the Delgados have complied with the JDA and the full scope of its induced breach by the prosecution. Because of the known government misconduct (using JDA material to investigate Mr. Esformes, including by recording him and his counsel), this Court cannot measure the extent of the unknown misconduct by either the Delgados or the prosecution.

What we do know is that the Delgado tapes were used to indict Mr. Esformes. In April 2017, the defense asked this Court to strike the indictment allegations regarding a civil settlement involving the Larkin Hospital. [DE 272]. The Government opposed, declaring that it had developed its evolving "theory of the government's case" in response to the Delgados' recording Esformes in June 2015. The prosecution explained:

> The government intends to provide evidence at trial that Defendant altered his criminal scheme after the Hospital 1 Settlement to avoid detection by law

> enforcement. Specifically, Defendant had less direct involvement in criminal conversations with all but an inner coterie of co-conspirators by making use of a trusted set of intermediaries, such as Gabriel and Guillermo Delgado and Odette Barcha, to strike unlawful, kickback-tainted agreements with other Medicare providers. *This is not merely a theory of the government's case, but is also articulated by Defendant himself in a recording captured by Gabriel Delgado in June, 2015: "[A]fter the [Hospital 1] case if you notice, I don't see so many doctors anymore. I don't go to the hospitals. I don't do any market[ing]. I stay inside the building. I'm on top of my buildings and I sit and I push the girls to do the stuff."* Without the evidence of the Hospital 1 Settlement, this conversation lacks critical context. With evidence of the Hospital 1 Settlement, however, this statement demonstrates Defendant's state of mind and the knowledge of the wrongfulness of his actions. Indeed, Defendant is telling his co-conspirator that he used intermediaries to strike agreements with physicians to grow the patient population in the Esformes Network. *The evidence of the Hospital1 Settlement, therefore, speaks to Defendant's intent, knowledge and that he acted willfully in his dealing with intermediaries*. Moreover, evidence of Hospital 1 Settlement is inextricably intertwined with the government's evidence concerning the evolution of Defendant's conspiracy.

[DE 306 at 5-6] (emphasis added).[3] The taped joint defense communications of June 2015 captured Mr. Esformes expressing his response and potential defenses to the government's allegations. This April 2017 prosecution pleading explains that the prosecution responded to learning of Esformes's defense on tape by crafting a theory of the prosecution case in the subsequent Indictment—that the use of "the girls" was no defense but merely a reaction to the prior civil settlement.[4] This is a classic prosecution tactic of anticipating a known defense and building its case around it.

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[3] The prosecution also used the tapes as evidence in support of the pretrial detention of Defendant. [DE 9 at 14-15 (quoting tape as evidence of using intermediaries to conceal personal involvement)].

[4] The hearing record revealed that, in the summer of 2014, the joint defense conducted an internal investigation of the Esformes operations, designed by Delgado counsel Moscowitz, implemented by Esformes counsel Descalzo, the results of this were shared, which included interviews and assessments of several female managers, which continued thereafter. [Tr. 12/20/17 at 25-26, 30-31& DX NJM-12 (Descalzo June 2, 2014 email); 33 ("another woman who is the administrator"), 35 (describing discussions with Mrs. Robinson), 40 (joint defense memo describing witness interviews of Esformes employees), 42-43 & DX NJM-23 (Moscowitz request to interview two important witnesses, female managers Claudia Pace, the primary administrator for all Esformes facilities, and Mrs. Robinson)].

The Prosecution Team then went back to the well during the post-hearing debrief of Delgado in May 2018 (referenced above) and re-plowed the same territory. Even after supposedly warning Delgado not to discuss Esformes defense strategy, they elicited from Delgado and memorialized in a report that "Esformes wanted to start distancing himself somewhat from the actual kickback payments" by using "the girls' who worked for him." [FBI-302 Report (5/24/18) (ESF-49-00003083-84) (to be filed under seal)].

This establishes that the prosecution used the Delgado taped conversations to indict and prepare for trial. Because the prosecution listened to these tapes, they have a portal on defenses, regardless of whether the tapes or the Delgados are suppressed, leaving disqualification as a minimum means of curing this prejudice. In addition, the Delgados conveyed joint defense information to the prosecution, which information was used to design the "theory of the government's case." Dismissal is therefore justified.

The Surreptitious Recording of Esformes in June 2015 Requires Suppression of the Recordings and Testimony by the Delgados, As Well As *Disqualification of the Prosecution Team.*

Defendant challenged the surreptitious taping of the Defendant and his counsel by the Delgado Brothers on a number of legal grounds, including as constitutional violations of the Fourth, Fifth, and Sixth Amendments, and as statutory violations of Title III, Fla. Bar R. 4-4.2, the McDade Act, and Florida Bar rules, including Florida's No-Contact Rule. [DE 755 at 23-24]. The Magistrate Judge ruled that the Florida no contact rule did apply. [R&R at pg. 113 & n.57]. She is correct, given that the McDade Act, 28 U.S.C. § 530B, mandates application of Florida ethics to this Prosecution Team. Curiously, the Prosecution Team has claimed the continuous supervision and approvals of the DOJ PRAO in the pursuit of this breach of Florida ethics requirements. DE 312 at 6.

The willfulness and deliberate character of the continuing violations of Florida's No-Contact Rule warrant the full measure of sanctions that non-government counsel would face in Florida for non-contact violations, which include disqualification, suppression, and dismissal. *Bedoya v. Aventura Limo. & Transp. Serv., Inc.*, 861 F. Supp. 2d 1346, 1358, 1371 (S.D. Fla. 2012) (disqualification of law firm and individual counsel for contact violations that intrude into privileged relationship); *State v. Kelly*, 640 So. 2d 231 (Fla. 4th DCA 1994) (upholding dismissal for prosecutor violating rule). These are remedies applied in other jurisdictions.[5]

Given its finding of a clear violation of Florida's No-Contact Rule, the Report did not address the other grounds raised by Defendant for challenging the government-induced Delgado contacts during the joint defense agreement, and the Report indicated that other grounds were not being foreclosed. [R&R at pg. 116 n.59]. Esformes renews these arguments here, whether they can be considered additional grounds supporting the Report's suppression ruling, or as objections that these alternative grounds were not also adopted. *See* [DE 755].

A common denominator to all of these statutory and constitutional claims is the total lack of prior judicial approval to initiate recorded contacts of a defendant through his fellow joint-defense members. Only a court could authorize such contacts in advance, upon a proper legal showing, and no effort was undertaken here to secure prior judicial approval.[6] Joint defense

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[5] *See U.S. v. Koerber*, 966 F. Supp. 2d 1207 (D. Utah 2013) (suppression for prosecution's violation); *Coleman v. Brown*, 938 F. Supp. 955, 968 (E.D. Cal. 2013) (striking defense expert reports for defense violation); *Hammond v. Junction City, Kansas*, 167 F. Supp.2d 1271, 1288 (D. Kan. 2001) (disqualification, suppression, and compelling discovery regarding scope of intrusion caused by no contact rule violation), *adopted*, 2002 WL 169370 (D. Kan. 2002), *disqualification appeal dismissed for lack of jurisdiction,* 84 Fed. App'x 57 (10th Cir. 2003); *Camden v. State*, 910 F. Supp. 1115, 1123-24 (D. Md. 1996) (disqualification and suppression).

[6] *U.S. v. Pedersen*, 2014 WL 3871197, *30 (D. Or. Aug. 6, 2014) ("Only a court of competent jurisdiction can determine the applicability of the crime-fraud exception."); *American Tobacco Co. v. State*, 697 So. 2d 1249, 1253 (Fla. 4th DCA 1997) ("When a party opposes the attorney-client privilege through the assertion that the communications fell within the crime-fraud

communications are privileged and protected from government intrusion.[7] The *post hoc* grounds offered by the prosecution for its unilateral intrusion upon a privileged relationship—the crime-fraud exception and the use of taint team—are not legal justifications for deliberately intruding upon a privileged relationship or communications.[8]

The Government cited no legal authority for the Delgado recordings other than the approval of anonymous supervisors, which would satisfy neither the Fourth Amendment nor Title III. *United States v. Giordano*, 416 U.S. 505, 528 (1974). Because the government's intrusion lacked either a warrant or a wiretap authorization, the Government bears the burden of proving an exception to the Fourth Amendment and Title III. *Gennusa v. Canova*, 748 F.3d 1103, 1115 (11th Cir. 2014) (officers claiming exigency for warrantless seizure of attorney-client phone call had burden of proof).

Finally, the Fifth and Sixth Amendments, as further implemented in the McDade Act, render suppression an appropriate remedy. *U.S. v. Koerber*, 966 F. Supp. 2d 1207, 1214 (D. Utah 2013) (5th Amendment); *U.S. v. Bowman*, 277 F. Supp.2 d 1239, 1244 (D. Ala. 2003) (6th Amendment), *vacated on other grounds*, 2003 WL 23272667 (D. Ala. Sept. 12, 2003).

The Search of Esformes's Lawyer's Office

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exception, the court must determine the issue in the first instance. *See* § 90.106(1), Fla. Stat. (1995)").

[7] *United States v. Almeida*, 341 F.3d 1318, 1323 (11th Cir. 2003) ("confidential communications made during joint defense strategy sessions are privileged") (citing *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977)).

[8] *U.S. v. Pedersen*, 2014 WL 3871197, *29-30 (D. Or. Aug. 6, 2014) ("The use of a taint team does not allow the government to intentionally obtain and review attorney-client privileged material and when the government chooses to review such material it is a *per se* intrusion into the attorney-client privilege;" "a filter team is not entitled to review privileged material, even under the auspices of a search for crime-fraud").

In July 2016, the Prosecution Team applied to Magistrate Judge McAliley for a warrant to search the Esformes ALF known as Eden Gardens. The warrant was drafted by Prosecutor Young, approved by her supervisor, and signed by Agent Reilly. [DE 442-20]. Together, they concealed from Magistrate Judge McAliley that the Prosecution Team was targeting for search and seizure the office of Esformes's attorney, Norman Ginsparg. By then, numerous government cooperators, including Gabriel Delgado, had identified Norman Ginsparg as Esformes's attorney. [R&R ¶ 236; DE 442-13 to 20]. Ten days before executing the warrant at Eden Gardens, Prosecutor Young and FBI Agents Reilly, Ostroman, and Myers debriefed Gabriel Delgado, who described for the agents that "when you first walk into the main building of Eden Gardens, you *make a right* immediately to get *to Ginsparg's office. Ginsparg handles lawsuits* and *the legal paperwork in his office* . . . Esformes's office is at his residence." [DE 442-20].

Despite this, Young sought a warrant stating that "*[a]ccording to Gabriel Delgado, the corporate offices* for Philip Esformes' business are directly *to the right* upon entering the front facade of the building" and emphasized that "*[w]e only intend to . . . search the corporate offices to the right* of the entrance, *as described by Delgado.*" [DE 442-20 at 5] (emphasis added). Young and Agent Reilly withheld from Magistrate Judge McAliley that the Prosecution Team knew this location to be the offices of Esformes's counsel Norman Ginsparg, where Ginsparg kept the legal papers, *as described by Delgado*.[9]

With no guidance from the issuing Magistrate Judge, the Prosecution Team deployed a search protocol that gave nothing but lip service to protecting Esformes' attorney client privilege. The prosecution asserted that non-case agents conducted a "filter" process during the search on July 22, 2016, although no corroborative documentary evidence was ever produced of such a

[9] The U.S. Attorney's Manual requires that prosecutors take a series of precautions before searching an attorney's office, none of which were honored here. *See* USAM § 9-13-420E.

protocol—and in all events it did not encompass a "privilege review." According to Prosecutor Young, however, this protocol was discussed in advance with her supervisors (Medina and Surmacz), and with the lead case agent Reilly and his supervisor McCormick. [R&R ¶¶ 247-48]. The FBI lead search agent, Warren, did not even know who Esformes's attorneys were. [R&R ¶¶ 11, 14, 16, 20].

As the hearings progressed, it became clear that the alleged taint protocol was a farce, honored only in its breach. The defense ultimately produced a chart showing how 17 of the 19 searching agents had been involved in the Esformes Prosecution Team either before or after the search, or both, sometimes even alongside Prosecution Team prosecutors. [DX 870A (DE 742-40) & DX 870B (DE 742-41) (collectively "Spiderweb Chart")]. The Report captures only some of these search team members' participation in the prosecution, as revealed in their hearing testimony.

For example, in their work for the Prosecution Team ***after*** searching Eden Gardens, Agents Cavallo and Jurado interviewed Esformes employees, patients, and additional witnesses. Some of these interviews related to the Larkin investigation. The Larkin investigation is at issue in this case and has been charged as part of the conspiracy alleged against Mr. Esformes in the third superseding indictment. Various other search team agents continued working in the prosecution of Esformes after the search of Eden Gardens, including FBI Agent Warren (the team leader of the search), FBI Agent Lynette Alvarez-Karnes, MFCU Agent Fernando Montalvo, HHS-OIG Agent Fernando Porras, HHS-OIG Agent Radu Pisano, and FBI Assistant Special Agent in Charge (ASAC) Julie Rivera. Incredibly, at times some of the search team agents who continued working in the prosecution of Esformes after the Eden Gardens search did so in a joint effort with Prosecutors Young or Bradylyons, sometimes participating together with these prosecutors in post-search witness interviews.

On March 9, 2017, Prosecutor Bradylyons assured undersigned counsel by email that "in compliance with our ethical obligations and Department guidelines, the government has taken steps to prevent the prosecution team from reviewing privileged materials subject to the attorney/client privilege and work product doctrine. In particular, as we have explained to you on numerous occasions, the government utilized *personnel not associated with the investigation or prosecution of this matter to filter any such materials from the prosecution team*." [DE 329-51] (emphasis added).

Three weeks after sending this email, on April 12, 2017, Prosecutor Bradylyons enlisted Eden Gardens search team Agent Lynette Alvarez Karnes and together they interviewed Bertha Blanco. Bertha Blanco is cooperating with the government and is expected to testify about the bribery counts against Esformes.

This is not the first time that that this Court (Judge Scola) has witnessed this same squad of agents and prosecutors blur the lines between filter teams and case agents. During a hearing in an unrelated health care fraud case involving the search of an office that the prosecution team knew was occupied by criminal counsel for an indicted defendant, this Court rhetorically asked prosecutor Hunter why case agent Duncan and other investigating agents participated in the search led by so-called taint team agent Warren:

> [I]if somebody came to you and said, we want you to be in charge as a taint or filter attorney on this case to supervise the execution of this warrant, you're telling me you wouldn't make sure that none of the agents had an active role in the investigation of the case? Isn't that the very definition of a filter team?

U.S. v. Arreaza, 16-CR-20477-RNS, Tr. 12/6/16 (DE 131) at 196. This Court explained the problem created by investigating agents participating in a search alongside taint agents by asking: "Then how do I know what they saw or didn't see, what they are going to do later with that or not do later with that?" *Id.* at 202.

The Prosecution Team's Disregard of Descalzo's Immediate Assertion of Privilege on The Day that Esformes's Lawyer's Office Was Searched, And The False Claim in Court Pleadings that Esformes Never Timely Asserted Privilege

Within days of the search, Prosecutor Young and case Agent Reilly retrieved the work product of Jacob Bengio from the seized boxes, involving an October 2015 project that Bengio had been assigned to assist Esformes counsel Marissel Descalzo in responding to the newly disclosed Delgado Brother guilty pleas. This was done in the teeth of the written and oral privilege assertions of by Descalzo, at the scene the morning of the search and in an email to Young, which Young shared with supervisor Medina that same day. [R&R ¶¶ 243-244; DX 752]. At the scene, Descalzo was assured that a taint protocol was in place so that no one from the Prosecution Team would search through the Eden Gardens materials. [DE 418-1].

Despite being told, orally and in writing, on the day of the search, that Ms. Descalzo was asserting privilege over the seized documents *because* Ginsparg was Esformes's counsel, the Prosecution Team would later try to forestall the hearings on this motion to disqualify by misrepresenting to this Court that: (i) "the government had no reason to believe [Ginsparg] served as a lawyer for the Defendant," DE 227 at n.2;[10] (ii) "Defendant did nothing to assert privilege over the materials he puts at issue in his motion for more than half a year;" and (iii) that Esformes's "utter failure to take any post-search steps to alert the government to the possibility that the Eden

[10] The Prosecution Team also contended that, despite the multiple identifications of Ginsparg as Esformes's counsel by government cooperators including Gabriel Delgado and Delgado's own lawyer, Delgado had also supposedly denied that Ginsparg was Esformes's counsel in an April 2016 prison interview. For reasons never explained, the FBI-302 Report of that Delgado interview was not finalized until eight months later, on December 16, 2016, when it was entered on the FBI database. The report stated: "Ginsparg does not represent Esformes as an attorney." [FBI-302 Report of 04/26/16; GX 68 at 7; R&R ¶ 317]. During the hearings it was revealed that the day before this Delgado FBI-302 report was entered into the FBI system, Prosecutors Young and Bradylyons had met in Washington with supervisors Medina and Surmacz, and their Chief of the DOJ Healthcare Fraud Unit, Joe Beemsterboer, to discuss Young's discovery of an additional potentially privileged document bearing a lawyer's name among the seized Eden Gardens documents.

Gardens materials contained privileged documents" constituted a waiver.[11] [DE 312 at 48-49, & n.29]. Rather than acknowledge to the Court receipt of Descalzo's email the morning of the search on July 22, 2016, where Descalzo asserted that the agents were seizing privilege documents, the Prosecution Team instead made the outlandish claim that "Defendant, who was better informed than the government, did not believe during July 2016 through February 2017, that privileged materials were stored at Eden Gardens -- making his failure to object more understandable -- it undercuts his theory that the government acted 'outrageously' in failing to identify Eden Gardens as a 'law office.'" [DE 312 at 49, n.29]. The Report squarely rejects these bogus claims of waiver by the prosecution. [R&R at pg. 108 (Finding 2)].

In her manual search through the 69 seized boxes beginning in July 2016, Young found the "Descalzo documents," but withheld them from the document scanning process undertaken to produce documents to the defense as part of the government's discovery obligations. [R&R at pg. 109 n.51]. Esformes first observed the Descalzo documents in February 2017, when Esformes's defense lawyers conducted a physical inspection of the 69 boxes at the FBI offices. (Had Esformes's defense lawyers relied solely on the thumb drive produced in discovery—as representing scans of all of the Eden Gardens documents—there is no telling when, if ever, the Prosecution Team would have revealed its possession and use of the Descalzo documents).

The Prosecution's Exploitation and Use of Defense Work Product.

While Descalzo operated under the assumption that a filter process was shielding the Eden Gardens documents from the Prosecution Team, Young was busy sending the Descalzo documents to a forensic consulting expert to obtain advice about how to question the authors of the Descalzo documents and to investigate the finances of the Esformes organization. [Tr. 11/07/17 at 211-12].

[11] Descalzo's email to Prosecutor Young specifically said "we are not waiving any privileges." [DX 752].

Young and Bradylyons and case agent Reilly soon used the Descalzo documents to conduct a reverse proffer meeting with Esformes's counsel, Ginsparg, on September 20, 2016. [R&R ¶¶ 156, 256, 344]. The prosecution was using privileged documents to convince him to cooperate against Esformes. Counsel for Mr. Ginsparg told Prosecutor Young and Bradylyons that the Descalzo documents were arguably work product of Ms. Descalzo. [R&R ¶ 279]. Young then told supervisors Medina and Surmacz about this conversation *Id*. This Prosecution Team decided not to disclose to the Court or Esformes their possession and use of the privileged documents. [R&R ¶¶ 281-282]. They should have immediately notified Esformes and the Court. *Cf*. Position of the U.S. Attorney in the Cohen / Trump search warrant litigation, *Michael D. Cohen v. U.S.*, 18-MJ-3161 (SDNY 2018).[12]

Undeterred and with the approval of supervisors, Young resumed her review of the Eden Gardens documents and came across yet another potentially privileged document on December 7, 2016. The Prosecution Team met, this time with their Chief, and they again decided not to inform the Court or Esformes. [R&R ¶ 285]. Young would later misleadingly assert in a February 2017 email to the defense that the Eden Garden materials were "currently" being reviewed by a Filter Team. [R&R ¶ 285 and n.29]. The belatedly-appointed DOJ Filter Prosecutor, Leo Tsao, filed an affidavit with the Court, stating that the filter team was not reviewing any documents—and never has.

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[12] April 18, 2018 USAO Letter to Judge Wood at p. 3 n.4 ("in the event the Investigative Team believes that a document that has been released to it for review may in fact be subject to the attorney-client privilege, it will stop reviewing and refer the document back to the Filter Team. The circumstances of the Investigative Team's exposure to the document will be recorded in the event it may be relevant to any derivative-use or taint litigation, and counsel and the Court will be notified. (Similar procedures are commonplace in litigation where there may be an inadvertent transmission of privileged information. *See* Fed. R. Civ. P. 26(b)(5) & 45(e)(2); Fed. R. Evid. 502(b); N.Y. Rule of Professional Conduct 4.4(b).)").

The Prosecution Team also used the Descalzo documents to prepare for, and to conduct, two debriefings of legal assistant Jacob Bengio on the work he had performed for Esformes's defense counsel Descalzo in this case. [R&R ¶¶ 163, 215]. In addition to Descalzo's general assertion of privilege on July 22, 2016, attorney Kaplan and Jacob Bengio made a particularized assertion that Bengio's notes represented his work on a defense presentation to Esformes attorney Descalzo, which "put the government on notice of the potential work privilege nature of the Bengio notes." [R&R at pg. 111 (Finding 5)].

The Report carefully chronicles the fact that the participating prosecutors and agents of the Prosecution Team coordinated their positions pre-hearing to present an "internally consistent narrative" about the privilege invocations during the Bengio debriefings, [R&R at pg. 110 (Finding 4)], including by working together on each other's declarations offered to forestall an evidentiary hearing by adopting a consistent narrative. [R&R ¶¶ 268, 347]. Prosecutor Young and FBI Case Agent Mitchell filed affidavits addressing the Descalzo documents. Both of them swore that Bengio's "note**s**," *including* a notation that appeared on the second page, related to a project for Esformes's lawyer, Descalzo:

> Mr. Bengio's counsel advised that Mr. Bengio's note**s**, *including* the notation regarding "removing payments," were taken during a conversation Mr. Bengio had with Ginsparg, after Ginsparg had had a meeting with Descalzo during which Descalzo had asked him to undertake a project. Mr. Bengio's counsel asserted that the note**s** related to a project for Descalzo and were not directing that the company books be altered.

[Agent Mitchell Aff't at ¶ 6] (emphasis added in red). Prosecutor Young filed a similar affidavit:

> Jacob Bengio's counsel advised that his note**s**, *including* the notation regarding "removing payments," were taken during a conversation Jacob Bengio had with Norman Ginsparg, after Ginsparg had a meeting with Ms. Descalzo during which Ms. Descalzo had asked him to undertake a project.

[Prosecutor Young Aff't at ¶ 25] (emphasis added in red).

At a pre-hearing oral argument, Young told the Magistrate Judge point blank: "Your Honor, I think ***we are in agreement that the Government was informed by counsel for Mr. Bengio*** and for Mr. Ginsparg ***that those Descalzo documents were arguably their work product***." [Tr. 07/18/17 at 71].

When this narrative failed to block a hearing, the Prosecution Team presented a "new narrative." In an about-face, at the evidentiary hearings, Young testified that Kaplan had not asserted privilege over the Descalzo documents: "MS. YOUNG: I would disagree that she [Kaplan] was raising a privilege issue about the documents that we had shown Mr. Bengio." [Tr. 11/17/17 at 67]. Instead, she testified that Kaplan only raised privilege over "a certain part of the notes involving putting comments into columns." [Tr. 11/7/17 at 60]. For his part, prosecutor Bradylons lamely tried to reconcile the inconsistency between the pre-hearing affidavits (which he himself drafted for the others) and the new narrative: "it was not our understanding that [Kaplan] was saying all the notes related to this project …that was not our understanding and not what we were trying to say in this affidavit. ." [Tr. 12/18/17 at 72 (D. Bradylyons)."

The Report finds that this coordinated hearing testimony by the Prosecution Team was false, defied common sense, and was contradicted by the agents' own contemporaneous notes, by the pre-hearing affidavits of the Prosecution Team, and by the proposed stipulation that Prosecutor Young offered Magistrate Judge Otazo-Reyes during the July 18, 2017 hearing. [Tr. 7/18/17 at 71]. The obvious motive for such a campaign of concealment was to cover up the Prosecution Team's misconduct.

This goal was furthered by other members of the Prosecution Team, who deliberately elicited the patently false new narrative. AUSA Bernstein cross-examined Young at length after being told by Kaplan that the testimony Young had given on direct examination was perjury. [R&R

¶ 377; DX 851; R&R ¶ 387; R&R at pg. 110 (Finding 4)]. During that examination, Bernstein encouraged Young to repeat the false narrative, as exemplified by this one exchange, among many:

> **Q. Okay. Just so we're 100 percent clear, when those notes were first brought up by Robin Kaplan, isn't it true she never said all of these notes, these entire notes reflect Ms. Descalzo's work product?**
>
> A. No. She never said that.
>
> **Q. Had she said that, what would you have done?**
>
> A. Obviously, it would have stopped immediately.
>
> **Q. Why?**
>
> A. Because if she had described the notes in that fashion, we would have understood her to be making a work-product or privileged claim, and we would have wanted -- we would not have inquired any further. That's something that happens not infrequently in witness interviews. You know, there's been many occasions, in my experience, where a lawyer will raise a privilege objection, where we accidentally start asking a question that intrudes into a privileged conversation or document. And we stop. That's just what we do.

[Tr. 11/30/17 at 8-11].

Prosecutor Medina likewise elicited the false narrative, when he questioned Agent Mitchell:

> **Q: Do you recall at any point in time the attorney for Mr. Bengio saying these additional bullet points pertain to a spreadsheet or a project in any way?**
>
> A: No.
>
> ***
>
> **Q: And the project or spreadsheet did not pertain to the entire set of three pages of notes, fair?**
>
> A: No, not to understanding, it was never—it was never brought to our attention that all of the notes were in regards to that spreadsheet.
>
> . . . .
>
> **Q: Did anyone, Mr. Bengio or his attorney, say that that spreadsheet was for defense counsel?**
>
> A: No.
>
> **Q: Did anyone say that was a project for defense counsel?**
>
> A: No.

Q: Neither Mr. Bengio or the attorney?

A: No, neither.

[Tr. 11/6/17 at 100-04].

Prosecutor Medina covered the same false narrative with Agent Ostroman, another participant in the Bengio debriefings:

Q. She didn't say there was a privilege issue of any reason, right?

A: Correct.

. . . .

Q: The attorney who was there present with Mr. Bengio didn't mention a project in any way, correct?

A: Correct.

Q: These handwritten notes were not for the project for Ms. Descalzo, correct?

A. No.

[Tr. 10/16/17 at 186-93].

Q: Do you recall [attorney Kaplan] saying anything about these documents being privileged in any way?

A: I don't recall that.

Q: Do you recall Mr. Bengio or Mr. Bengio's attorney saying these were privileged documents?

A: I don't recall that.

[Tr. 10/16/17 at 199-200].

This concerted testimony was then marshaled by AUSA Bernstein in the prosecution's post-hearing closing arguments:

> The pleadings are all about Ms. Young said, Ms. Young said, Ms. Young said versus what Ms. Kaplan said. But this is not some kind of swearing contest between two witnesses, Your Honor. What you really have here is four other witnesses -- actually, five other witnesses. Ms. Young is corroborated by Mr. Bradylyons, by four agents who were at the debriefing . . . .

[Tr. 03/06/18 at 69]. Indeed, Mr. Bernstein argued against a finding of outrageous government misconduct by asserting that, if Kaplan had made such a "full-throated" claim of privilege, as she now claims, the government's conduct in response would have been different, and it would not have spent an hour going over the document, *Id.* at 72, which is precisely what the Report found that the Prosecution Team had done.

The questioners knew, as they were eliciting the "new narrative" from their colleagues, that the answers were not the truth. "A prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,' requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts." *Com. of N. Mariana Islands v. Bowie*, 236 F.3d 1083, 1090–91 (9th Cir. 2001), opinion amended on denial of reh'g sub nom. *Com. of N. Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001) (quoting *Napue v. Ill.*, 360 U.S. 264, 269-270 (1959)).

Ironically, during his closing argument, AUSA Bernstein stated that "there's only one case in the United States, Your Honor, where the Court has found that a prosecution should be specifically disqualified and that's *U.S. v Horn*."[13] AUSA Bernstein then attempted to distinguish *Horn* on the ground that *Horn* involved the aggravating factor of a judicial finding of "lack of candor" with the court. [Tr. 3/6/18 at 67].

If a "lack of candor" prompted *Horn* to disqualify, then what of a new narrative under oath?—one that the Magistrate Judge found constituted "a facially inconsistent and not credible explanation for their continued use of the Bengio notes at the Bengio debriefings despite privilege

[13] 811 F. Supp. 739 (D.N.H. 1992), *reversed on other grounds*, 29 F.3d 754 (1st Cir. 1994).

warnings from Attorney Kaplan." [R&R at pg. 110 (Finding 4)]. Given Magistrate Judge Otazo-Reyes's finding of a deplorable attempt to obfuscate the record through false testimony, the remedy of disqualification mandated by the *Horn* court is required here too.

But more is required. Suppression of the documents alone is a hollow remedy because those documents, privileged as they are, would never be admissible as evidence in the first place. The use by the Prosecution Team of the Descalzo documents gave the Prosecution Team a tactical advantage, as they reveal the defense blue print in late 2015 and early 2016 for defending against the kickback charges later brought in this case. Suppression of the Prosecution Team's knowledge of the content of the documents is the necessary remedy here, so disqualification is required.

More Reasons Why Disqualification Is Justified.

Even though an actual ethical violation need not be committed to warrant disqualification under federal common law (*Wheat*), courts nonetheless look to the applicable ethical rules in order to determine whether disqualification is warranted. *See Ross,* 33 F.3d at 1523 (citing Florida Bar rules). The law in Florida is unambiguous—the intentional or inadvertent accessing of privilege material constitutes a sufficient ground for disqualification. See *Walker v. GEICO,* 2017 WL 1174234, *12 (M.D. Fla. Mar. 30, 2017); *Armor Screen Corp. v. Storm Catcher, Inc*., 709 F. Supp. 2d 1309, 1310 (S.D. Fla. 2010); *Rentclub, Inc. v. Transp.Rental Fin. Corp*., 811 F. Supp. 651, 654 (M.D. Fla. 1992) (disqualifying counsel), *aff'd in relevant part*, 43 F.3d 1439 (11th Cir. 1995); *Pharma Supply, Inc. v. Stein*, 2014 WL 4261011, *1 (S.D. Fla. Aug. 28, 2014) (citing S.D. Fla. L.R. 11.1(c), holding "Florida Rules thus provide the substantive standard for attorney conduct by which Pharma Supply's arguments for disqualification will be measured.").

Courts, including Florida courts, have disqualified lawyers and their law firms for far less egregious conduct than that found here, including for:

a. Accessing privileged material in violation of ethical restrictions,[14] even if only inadvertently;

a. Interfering with the attorney client relationship by invading the privilege;[15]

b. Violating the no-contact rule by contacting a represented person;[16]

c. Violating the duty of candor to the tribunal.[17]

As explained in the *Richard*s opinion, federal common law is the same:

> An attorney who receives privileged documents has an ethical duty upon notice of the privileged nature of the documents to cease review of the documents, notify the privilege holder, and return the documents. *A failure by an attorney to abide by these rules is grounds for disqualification.*

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[14] *See, e.g.*, *Walker v. GEICO,* 2017 WL 1174234, *12 (M.D. Fla. Mar. 30, 2017) (no prejudice required to disqualify counsel, imposing disqualification for obtaining access to privileged material, which was supported by violating party's failure to respond appropriately after receiving notice of privilege claim, and rejecting evidence exclusion as a sufficient remedy) (citing *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117, 1118 (Fla. 3d DCA 2008) (no prejudice required for disqualification of entire law firm for counsel's access to privileged material)); *Armor Screen Corp. v. Storm Catcher, Inc.*, 709 F. Supp. 2d 1309, 1310 (S.D. Fla. 2010) (affirming Magistrate Judge's disqualification of counsel who acquired confidential information from adversary, citing Fla. Bar R. 1.9). *See also Lipin v. Bender*, 84 N.Y.2d 562 (NY 1994) (dismissal of case justified for party improperly accessing privileged documents); *Camden v. State*, 910 F. Supp. 1115, 1123-24 (D. Md. 1996) (disqualification needed because suppression insufficient).

[15] *Rentclub, Inc. v. Transp. Rental Fin. Corp.*, 811 F. Supp. 651, 654 (M.D. Fla. 1992) (disqualifying counsel for violation of these ethical duties), *aff'd in relevant part*, 43 F.3d 1439 (11th Cir. 1995).

[16] *Bedoya Aventura Limo. & Transp. Serv.*, 861 F. Supp. 2d 1346 (S.D. Fla. 2012) (disqualifying law firm for violating Florida no contact rule, Rule 4-4.2*); Gifford v. Target Corp.*, 723 F. Supp. 2d 1110, 1119 (D. Minn. 2010) (disqualification for improper contact); *Hammond v. Junction City, Kan.*, 167 F. Supp. 2d 1271, 1290 (D. Kan. 2001) (disqualification, suppression, and compelling discovery regarding scope of intrusion caused by no contact rule violation), *adopted*, 2002 WL 169370 (D. Kan. 2002), *disqualification appeal dismissed for lack of jurisdiction,* 84 Fed. App'x 57 (10th Cir. 2003); *Camden v. State*, 910 F. Supp. 1115, 1123-24 (D. Md. 1996) (disqualification and suppression).

[17] *U.S. v. Associated Convalescent Ctr., Inc.*, 766 F.2d 1342, 1346 (9th Cir. 1985).

Richards v. Jain, 168 F. Supp. 2d 1195, 1200-01 (W.D. Wash. 2001) (emphasis added) (disqualifying entire firm and finding it "shock[ed] the conscience of th[e] Court" that lawyer did not comply with his affirmative duty to refrain from review of documents once he knew they contained privileged information). "Numerous jurisdictions have held that a failure by an attorney to abide by this rule is grounds for disqualification." *Maldonado v. N.J.,* 225 F.R.D. 120, 138 (D.N.J. 2004). *Accord Arnold v. Cargill*, 2004 WL 2203410, *10 (D. Minn. Sept. 24, 2004).

The reasons for invoking this additional remedy include: (i) to deprive the offending party and counsel of the benefits obtained from improper access; (ii) to prevent even the *risk* of future use of privileged information, especially by an adversary with a selective memory;[18] (iii) to prevent the appearance of impropriety;[19] and (iv) to deter such conduct by the violators and those who would follow suit.[20] "The rules governing disqualification are designed to protect against the potential breach of such confidences, even without any predicate showing of actual breach. . . . The threat or potential threat that confidences may be disclosed is enough." *Marvin Lumber & Cedar Co. v. Norton Co*., 113 F.R.D. 588, 591 (D. Minn. 1986).

Here, not only is the Court confronted with the continuing failure of the Prosecution Team to respond appropriately upon obtaining unlawful access to privileged material, it is confronted

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[18] *Martinez v. Cty. of Antelope*, 2016 WL 4094864, *2 (D. Neb. August 1, 2016) ("Courts also take into account a party's interest in a trial free from even the *risk* that confidential information has been unfairly used against it.") (quoting, with original emphasis in, *Gifford, v. Target Corp*., 723 F. Supp.2d 1110, 1117 (D. Minn. 2010) (quoting *Arnold v. Cargill*, 2004 WL 2203410, *5, 13 (D. Minn. Sept. 24, 2004) (holding that "the 'risk' that improperly obtained confidential and privileged information might be used against Cargill justifies disqualification here")).

[19] One of the purposes of the disqualification remedy is to "avoid the appearance of impropriety and to protect against the disclosure of confidences." *Baybrook Homes, Inc. v. Banyan Constr. & Development, Inc*. 991 F. Supp. 1440, 1444 (M.D. Fla. 1997) (citing *McPartland*, 890 F. Supp. at 1030-31).

[20] *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc*., 561 F.3d 1298, 1307 (11th Cir. 2009).

with a concerted cover up for more than a year. Given the Magistrate Judge's finding that the Prosecution Team delivered a false narrative to the court—whether as witnesses on the stand or as examiners at the podium—all complicit members of the Prosecution Team now have a personal interest in defending their "deplorable" conduct.

Meanwhile, Mr. Esformes has a fundamental right to a disinterested prosecutor. In *Young v. United States*, the Supreme Court established "a *categorical* rule" that a defendant in a criminal case has "a *fundamental* right" to be prosecuted by "a disinterested prosecutor." 481 U.S. 787, 807, 814 (1987). Denying a defendant the right to a disinterested prosecutor is a fundamental error, not subject to harmless error analysis. "We have held that some errors 'are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.' We find that the appointment of an interested prosecutor is such an error." *Young*, 481 U.S. at 809-810. Proof of prejudice is not required. *Id*. at 811-812 (requiring proof of "actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. '[J]ustice must satisfy the appearance of justice,' and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite").

Because the Esformes prosecutors are burdened by a personal interest in the Esformes case, they cannot exercise independent judgment in the performance of their prosecution function and must be replaced.

The Pattern and Breadth of Misconduct Warrants Dismissal

The Magistrate Judge diligently pursued this Court's referral and in the process uncovered a cover up of truly unprecedented proportions by the Prosecution Team, under the searching supervision of the most senior circles of the Justice Department. If these were the actions of a rogue prosecutor or agent only, perhaps the harm and its consequences could be isolated and contained. But this Court is confronting three years of prosecutorial misconduct aimed at bedrock

principles of our criminal and adversarial justice systems, all allegedly authorized by the senior reaches of the guardians of the ethics of all federal prosecutors. Even more threatening, to commit its privilege invasion, the Prosecution Team systematically misled Judge Ungaro, Magistrate Judge McAliley (who issued the Eden Gardens search warrant), and ultimately the judge who this Court designated to find the answers, Magistrate Judge Otazo-Reyes.

The Magistrate Judge correctly observed that federal courts generally require a showing of prejudice to justify dismissal under the Sixth Amendment, and outrageous misconduct conduct under the Fifth Amendment.[21] The Report also correctly finds that Defendant had suffered prejudice from the prosecution's misconduct in this case. But the Magistrate Judge declined to recommend dismissal, based on her assessment that the misconduct did not reach the "level of extraordinary misconduct found in" *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) and *U.S. v. Horn*, 811 F. Supp. 739 (D.N.H. 1992))]. [R&R at pg. 114]. But the misconduct in our case is far worse. *Shillinger* involved a deputy sheriff who served as off-duty security for a courtroom used by defense counsel to moot defendant's trial testimony who then shared his observations with the prosecution. That was a single incident, not a three-year campaign of privilege invasion. Likewise, *Horn* involved the prosecution obtaining copies of documents selected by the defense for duplication, which is certainly wrong especially when coupled with a lack of candor to the supervising court as AUSA Bernstein has pointed out, but it again was not a three-year campaign

[21] The Report incorrectly asserts that prejudice is necessary for the Court to exercise its supervisory power to dismiss an indictment. [R&R at pg. 4]. The cited *Nova Scotia* case is addressed to isolated misconduct occurring before a grand jury, not misconduct occurring before the court or under the applicable ethical rules and addressed only whether harmless error applied to grand jury misconduct allegations. *Bank of Nova Scotia v. U. S.*, 487 U.S. 250, 259 (1988) (court "not faced with a history of prosecutorial misconduct"). Because prejudice was found by the Magistrate Judge, this Court should exercise its supervisory power. *U.S. v. Resendiz-Gueverra*, 145 F. Supp. 3d 1128, 1139 (M.D. Fla. 2015) (dismissing under supervisory authority, noting that Eleventh Circuit has not resolved necessity of prejudice, but finding prejudice anyway).

of privilege invasion followed by a cover-up. Critically, neither of these cases involved the presentation of false evidence to block the court's investigation of privilege misconduct. The supervisory authority of this Court, "while it may serve to vindicate a defendant's rights in an individual case, 'is designed and invoked primarily to preserve the integrity of the judicial system' and 'to prevent the federal courts from becoming accomplices' to government misconduct." *U.S. v. Noriega*, 746 F. Supp. 1506, 1535 (S.D. Fla. 1990) (quoting *U.S. v. Omni Int'l Co.*, 634 F. Supp. 1414 (D. Md. 1986) (dismissing case because of prosecutorial misconduct during misconduct hearings)).

This Court is confronted with a rare combination of "recurring prosecution misconduct"[22] with a prosecution cover up violating the duty of candor to this Court. This is the height of bad faith. *See Chambers v NASCO*, 591 US 32, 43 (1991). This Court can have no confidence that it will be able to measure the prejudice the prosecution has wrought. Under such circumstances, courts recognize that a defendant cannot be expected to establish prejudice (although Esformes has). *See, e.g.*, *U.S. v. Bowen*, 799 F.3d 336 (5th Cir. 2015) ("The district court's steady drip of discoveries of misconduct infecting every stage of the prosecution, combined with the government's continued obfuscation and deceit, renders this the rare case in which the imposition of the *Brecht* [due process] remedy is necessary."). Such a due process remedy is justified precisely because the prosecution's obstructive actions make it difficult for courts to assess prejudice. *Id.* at 355.

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[22] *United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981) (quoting and following lower court dissent "'[W]e note that the record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter future lawlessness.'"). *Accord Brecht v. Abrahamson*, 507 U.S. 618, 638 n.9 (1993); *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) ("We note we are not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment.").

While the Eleventh Circuit has not yet addressed a case involving both recurring prosecutorial misconduct invading the privilege followed by a coordinated lack of candor by an entire prosecution team, it has upheld the sanction of dismissal merely for a party's improper conduct of becoming "privy to privileged information which he could not unlearn and because neither [his adversary] or the court could know the extent of [the offending parties'] activities." *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc*., 561 F.3d 1298, 1307 (11th Cir. 2009) (upholding need for dismissal sanction designed to deter other litigants from similarly accessing privileged material).[23] While courts recognize that dismissal is strong medicine for privilege invasions, they tend to endorse it in circumstances, like those present here, where privileged information is obtained not just by an attorney, but by the party themselves.[24]

On the privilege component of the misconduct, the majority view in the federal courts is that, once exposure of the prosecution to privileged or confidential information is demonstrated, either prejudice will be presumed or the burden shifts to the prosecution to disprove any resulting prejudice. *See Shillinger v. Howard*, 70 F.3d 1132, 1142 (10th Cir. 1995)); *Briggs v. Goodwin*, 698 F.2d 486, 493 n.23 (D.C. Cir. 1983), *vacated on other grounds*, 712 F.2d 1444 (D.C. Cir.

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[23] *See also Lighthouse List Co. v. Cross Hatch Ventures Corp*., 2014 WL 11531638 (S.D. Fla. Jul. 15, 2014) (adopting recommendation to grant judgment against party for "egregious violation" of surreptitiously intercepting opposing counsel communications). *Accord Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1327 (D. Utah 2016), *aff'd,* 890 F.3d 868 (10th Cir. 2018); *Jackson v. Microsoft Corp*., 78 Fed. App'x 588 (9th Cir. 2003) (affirming dismissal as sanction for party misconduct during deposition and two evidentiary hearings and who had received privileged information).

[24] *See, e.g., Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc*., 561 F.3d 1298, 1307 (11th Cir. 2009); *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1325 (D. Utah 2016) (mere exclusion insufficient because party and counsel has possessed documents for years and "cannot unlearn the information in the documents"), *aff'd,* 890 F.3d 868 (10th Cir. 2018); *Lipin v. Bender*, 84 N.Y.2d 562 (NY 1994) (dismissal because party obtained access to privileged material).

1983)), *U.S. v. Danielson*, 325 F.3d 1054 (9th Cir. 2003) (where trial strategy disclosed by government informant, government bears burden of disproving prejudice by preponderance of evidence); *U.S. v. Mastroianni*, 749 F.2d 900, 908 (1st Cir. 1984). *See also Neb. v. Bain*, 872 N.W.2d 777, 787 (Neb. 2016); *Conn. v. Lenarz*, 22 A.D.3d 536 (Conn. 2011), *cert. denied*, 565 U.S. 1156 (2012). While there is much to commend in this approach, it becomes absolutely necessary in circumstances like this, where the prosecution team spent the last year engaged in a coordinated campaign to cover up their prior misconduct. As Judge Jones put it for the Fifth Circuit in the *Bowen* case: "the government cannot obstruct the inquiry into [misconduct] and then claim that there is insufficient proof to support the district court's findings." *Bowen,* 79 F.3d at 355.

Even if this case is viewed solely as a question of privilege, the Eleventh Circuit has not unequivocally addressed this issue because it has yet to confront a case in which privileged material was actually accessed by the prosecution. *See, e.g.*, *U.S. v. Ofshe*, 817 F.2d 1508, 1515 (11th Cir. 1987) ("since no information was furnished AUSA Hursey as a result of the intrusion, no Sixth Amendment violation occurred"); *U.S. v. Deluca*, 663 Fed. App'x 875, 879 (11th Cir. 2016) (accepting defense position that Sixth Amendment inapplicable), *cert. denied*, 137 S. Ct. 1216 (2017). Accordingly, Defendant respectfully submits that either by operation of law, or as a result of the government's efforts to obfuscate the record, the duty to establish a lack of prejudice must fall on the prosecution.

Conclusion

During the evidentiary hearings before Magistrate Judge Otazo-Reyes, Prosecutor Bradylyons testified that if he had this situation to do over again, he would not seek court permission or go to the court first before using the Descalzo documents over which privilege had been asserted. [Tr. 12/18/17 at 67-68]. This echoes the cavalier attitude that the Prosecution Team has displayed throughout these proceedings, and the recklessness with which these prosecutors

and their various supervisors have responded to Esformes and to the Court with their filings and during hearings before the Magistrate Judge.

This motion began in April 2017 [DE 275] as an inquiry into the fact and degree of prior prosecutorial misconduct involving successive invasions of the privileged communications and relationships of the Defendant dating back to June 2015. In response to the motions, after nine days of evidentiary hearings, this motion ended with a judicial inquiry into an even more nefarious form of prosecutorial misconduct -- the Prosecution Team's presentation of coordinated false testimony to the Magistrate Judge in order to cover up their prior privilege misconduct.

Any question about how egregious the prior privilege misconduct ranks in the prosecution's own mind is answered by the lengths to which the Prosecution Team went collectively to cover it up by their lack of candor and their deplorable efforts to obfuscate the record.

For the foregoing reasons, the findings of the Magistrate Judge should be accepted by this Court, but the recommendations for relief should be expanded to include disqualification of the Prosecution Team, striking the Delgado Brothers as witnesses, or dismissing the case entirely.

CERTIFICATE OF SERVICE

This motion was served via ECF on the date stamped above.

Respectfully submitted,

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Limited Appearances for Philip Esformes