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'S MOTION TO STRIKE GOVERNMENT'S EX PARTE RESPONSE [ECF 322] TO DEFENDANT'S MOTION TO DISQUALIFY [ECF 275] AND TO ORDER PRODUCTION OF *EX PARTE* FILING

The Defendant, PHILLIP ESFORMES, through undersigned counsel, respectfully moves this Court, pursuant to the Due Process Clause of the Fifth Amendment and Canon 3(C)(1)(a) of the Code of Judicial Conduct, for an order (1) striking *The United States of America's Notice of Ex Parte Response to Defendant's Motion to Disqualify the Prosecution Team, Etc.* [ECF 322], filed on May 3, 2017, and (2) producing to Mr. Esformes a copy of whatever was filed *ex parte*. In support of this motion, Mr. Esformes states the following:

1. Mr. Esformes filed a motion seeking the disqualification of the Prosecution Team. ECF 275. On April 28, 2017, the prosecutors filed the Government's Opposition, which indicated in a footnote that the prosecutors have "*sought* leave to file an *ex parte* addendum to this response that contains additional details regarding Manager 1's role. See Fed. R. Crim P. 6(e)," ECF 312, p. 12, n. 4 (emphasis added), suggesting that the *ex parte* nature of this filing is justified under the grand jury secrecy rules. As of April 28, 2017, however, there was no motion filed seeking "leave"

from this Court, in advance, to file anything *ex parte*. Instead, on May 3, 2017, the prosecutors unilaterally filed a "Notice" that they had filed something – *i.e.*, without advance permission from the Court, at least as far as the public docket shows.[1/] If the prosecutors *did* seek "leave" from the Court in advance to file their "Notice," there is no entry for such a motion on the public docket – which the First Amendment requires. *See United States v. Ochoa- Vasquez*, 428 F.3d 1015 (11th Cir. 2005).

2. As a threshold matter, no matter what the filing actually contains, the Government must publicly file a motion *seeking permission* for proceeding *ex parte* and justify, in advance, why it should be permitted to litigate a pending motion *ex parte*. Mr. Esformes had a right to notice and an opportunity to object *before*, not *after*, the Government exposed the Court to *ex parte* information and/or legal arguments.[2/]

3. Litigating *ex parte* is disfavored, as it gives one side an unfair advantage, *In Re Paradyne*, 803 F.2d 604 (11th Cir. 1986), and may threaten the Court's impartiality. *See United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989) (judge's "private conversation in chambers" with the wife of a government witness "even though free of any actual or intended impropriety, is the type of circumstance especially likely to create the appearance of partiality").

4. In addition to striking the *ex parte* filing, a copy of it should be produced to Mr. Esformes, so he can assess the prejudice he has suffered and may suffer in the future from the use of *ex parte* procedures. *See Paradyne Corp.*, 803 F.2d at 612.

[1/] It appears that this "Notice" was originally filed under seal on May 2 and then the Notice alone was filed on the public docket on May 3, 2017, ECF 322.

[2/] If the prosecutors' submission contains any *legal arguments*, rather than just the information, that would compound the constitutional violation. There is certainly no justification for making legal arguments *ex parte*.

MEMORANDUM

"It is settled beyond peradventure that, in our system of justice, ex parte judicial proceedings ... are greatly disfavored." *RZS Holdings AVV v. PDVSA Petroleo, S.A.*, 530 F.3d 350, 356 (4th Cir. 2007). *See generally Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 438–39 (1974) ("our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute"). Absent extraordinary circumstances, "parties should not attempt to have *ex parte* communications with the Court.... [T]his is one of the fundamental principles upon which our judicial system is based." *United States v. Ninety-Nine Thousand, Four Hundred Eight Dollars and No Cents ($99,480.00)*, No. 06-22966-Civ, 2007 WL 1059564, at *1 (S.D. Fla. April 3, 2007), citing *United States v. Carmichael*, 232 F.3d 510, 517 (6th Cir. 2000) ("As a general rule of thumb, in all but the most exceptional circumstances, *ex parte* communications with the court are an extraordinarily bad idea."); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir.1995); *In re Colony Square Co.*, 819 F.2d 272, 276 & nn. 12-13 (11th Cir.1987); *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir.1986) ("*Ex parte* communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires 'a reasonable opportunity to know the claims of the opposing party and to meet them.'") (quoting *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 776 (1938)); *id*. ("'A judge should ... neither initiate nor consider *ex parte* ... communications concerning a pending or impending proceeding.'") (quoting Code of Judicial Conduct for United States Judges, Canon 3(A)(4)) (omissions in original); *Camero v. United States*, 375 F.2d 777, 780-81 (Ct. Claims 1967) ("Of course, one of the fundamental premises inherent in the concept of an adversary hearing, particularly

if it is of the evidentiary type, is that neither adversary be permitted to engage in an *ex parte* communication concerning the merits of the case with those responsible for the decision.... It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers."). *See also United States v. Huff*, 512 F.2d 66 (5th Cir. 1975) (government submitted sentencing memorandum to court without providing copy to defense; court "emphatically disapproves it, as a prejudicial and improper *ex parte* communication between government counsel and the court").

"The value of a judicial proceeding ... is substantially diluted" when a court proceeds *ex parte* because the court "does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties participate." *Carroll v. Princess Anne*, 393 U.S. 175, 183 (1968). *Accord Paradyne Corp.*, 803 F.2d at 612. Indeed, as the Eleventh Circuit noted in *Paradyne*, the potential for disqualification of the Court is an independent reason why the Court must be extremely cautious in agreeing to employ *ex parte* procedures. *Accord RZS Holdings AVV*, 530 F.3d at 356-57 (citing cannon).[3/]

[3/] S*ee also Cortese v. United States*, 782 F.2d 845, 852 (9th Cir. 1986) ("[a] court should not permit the actions of another, whether or not a party, to threaten the fact or appearance of judicial impartiality"); *LaChappell v. Moran*, 699 F.2d 560, 566 (1st Cir. 1983) (*ex parte* communications between judge and partisans "shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding");*Greico v. Meachum*, 533 F.2d 713, 719 (1st Cir.) ("*ex parte* communications shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding"), *cert. denied*, 429 U.S. 858 (1976); *Haller v. Robbins,* 409 F.2d 857, 859 (1st Cir. 1969) ("not only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the Court, it is a dangerous procedure"); *S.C.A. Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) (confidential inquiry made by judge to his brother, a senior partner in the firm representing party, "create[d] an impression of private consultation and appearance of partiality which does not reassure a public already skeptical of lawyers and the legal system").

Proceeding *ex parte* also undermines the adversary system, which was triggered when this case was indicted. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975).[4/] "An *ex parte* proceeding places a substantial burden on the trial judge to perform what is naturally and properly the function of an advocate." *United States v. Napue*, 834 F.2d 1311, 1318 (7th Cir. 1987). *See also United States v. Arroyo-Angulo*, 580 F.2d 1137, 1141 (2d Cir.) ("*in camera* proceedings during a criminal trial are manifestly conceptually incompatible with our system of criminal jurisprudence"), *cert. denied*, 439 U.S. 913 (1978); *In Re Taylor*, 567 F.2d 1183, 1189 (2d Cir. 1977) (noting that "significant pronouncements" should not be made "without the benefit of the enlightenment which accompanies an adversary proceeding").

Rendering a decision on a pending matter by considering materials submitted *ex parte* is contrary to due process. *See RZS Holdings AVV*, 530 F.3d at 356-57 (vacating judgement in part for use of ex parte proceeding in violation of RZS's "due process right to meet and oppose the claims of PDVSA...."); *Briscoe v. Kusper*, 435 F.2d 1046, 1057 (7th Cir. 1971) ("Reliance upon evidence considered *in camera* as the basis for decision is fundamentally inimical to due process.... Only the most exceptional circumstances can justify determinations based upon documents which interested parties may not examine.") (citations omitted). As in *Kusper*, the prosecutors are inviting the Court

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[4/] *See generally Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"); *Gardner v. Florida*, 430 U.S. 349, 360 (1977) (plurality opinion) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases").

to rely "upon documents which interested parties may not examine."[5/] Neither due process nor the appearance of impartiality permit the use of secret "evidence" in an effort to convince the Court that the disqualification motion (and related motion to dismiss) should be denied.

In *Paradyne*, the Eleventh Circuit granted a petition for a writ of mandamus prohibiting the district court from conducting *ex parte* and *in camera* proceedings in a criminal case in order to determine a government motion to disqualify defense counsel. The government contended, among other things, "that the possession of privileged information by defense counsel – particularly in light of their denial that the information is in fact privileged – so taints their representation of defendants that disqualification is required to maintain the integrity of the judicial system." 803 F.3d at 607. The Eleventh Circuit ruled that deciding that issue *ex parte* was unconstitutional: "In our view, this unprecedented program of in camera, *ex parte* inquisitions is so clearly at odds with the principles

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[5/] An analogous situation also occurred in *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1972). In *Dinsio*, a grand jury ordered a witness to provide fingerprint exemplars. In support of its order, the prosecutor submitted to the court an FBI affidavit stating the grounds on which it based the order. The court read the affidavit *in camera* and ruled that the grand jury's request was reasonable. The court refused to disclose the contents of the affidavit to the witness and held her in contempt for refusing to comply with the order. The Ninth Circuit reversed, holding that the witness was entitled as a matter of due process to an opportunity to inspect the affidavit in an effort to demonstrate just cause why she should not be held in contempt.

> Dinsio cannot be expected to demonstrate just cause in a factual vacuum. She cannot be relegated to the status of "a blind man striking at an invisible foe...." Nothing in the record before us provides any basis upon which we could conclude that these disclosures could or would impermissibly compromise the secrecy of the grand jury proceedings. Moreover, modest breaches of grand jury secrecy may well be required when nondisclosure would defeat fundamental constitutional rights, including the right to due process of law.

468 F.2d at 1394. While the Supreme Court has now held that the government does not have to show "reasonableness" prior to issuing subpoenas for handwriting, *see Mara v. United States*, 410 U.S. 19 (1973), the reasoning of *Dinsio* in rejecting the use of *in camera* and *ex parte* proceedings has maintained its vitality.

of open, adversarial system of justice guaranteed by the Constitution that the district court's contemplated actions without question endanger the defendants' rights." *Id.* at 608.

As in *Paradyne*, the violation has already taken place. In *Paradyne*, "to ameliorate any unfair advantage – or the appearance thereof," the Eleventh Circuit ordered that defense counsel were entitled to a transcript of the previously conducted *ex parte* proceeding. *Id.* at 612. "[T]o refuse defendants access to the information presented to the court *ex parte* would subject them to a trial unaware of the accusations leveled...." *Id.* Under the reasoning of *Paradyne*, Mr. Esformes is entitled to a copy of whatever the prosecutors submitted to the Court as well as any *ex parte* motion, if any, that sought permission to act *ex parte* in the first place.

The prosecutors have not articulated – at least publicly – any "particularized" or "compelling" reasons justifying the use of *ex parte* submissions. The defendant should not be relegated to the status of "a blind man striking at an invisible foe." *United States v. Dinsio*, 468 F.2d at 1394.

From the single-sentence footnote in the prosecutors' opposition to the disqualification motion, we assume that the prosecutors are asking this Court to find *ex parte* that all communications between Mr. Esformes and Mr. Ginsparg, and all of Mr. Ginsparg's work product,[6/] that was seized from Eden Gardens is unprivileged under the crime-fraud exception.[7/] While *in*

[6/] The prosecutors' Response to the disqualification motion almost completely ignores the work product privilege.

[7/] The Eden Gardens materials include years of detailed billing records of *other* attorneys who have represented Mr. Esformes both in this case and prior cases – including the billing records of Carlton Fields, one of the firms currently representing him in this case. They also include work product memoranda from these other firms. No finding of "crime-fraud" as to Mr. Ginsparg could possibly strip these materials of their privileged status.

camera proceedings are sometimes permitted for courts to make a preliminary analysis of the crime-fraud exception, "[a] blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception ... would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *United States v. Zolin*, 491 U.S. 554, 571 (1989). Moreover, Mr. Esformes has a due process right to contest any *prima facie* showing concerning the crime fraud exception, especially post-indictment. *See United States v. Trenk*, 385 Fed. Appx. 254 (3d Cir. 2010) ("where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argument"); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (once court makes preliminary finding *in camera* that crime-fraud exception,"the party invoking the privilege has the absolute right to be heard by testimony and argument"); *Glaxo, Inc. v. Novopharm Ltd.*, 148 F.R.D. 535, 554 (E.D.N.C. 1993) (initial prima facie showing of crime-fraud if sufficient then may require the defendant to "'come forward with [an] explanation.... If the court finds the explanation satisfactory, the privilege remains'") (citation omitted). *Cf. In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term*, 1991, 33 F.3d 342 (4th Cir. 1994) (no right pre-indictment).

Moreover, to the extent that the prosecutors claim that the crime-fraud exception voids the privilege as to all communications and documents, they are wrong. The opposite is true. *See In re: Grand Jury Subpoena*, 419 F.3d 329, 343 (5th Cir. 2005) ("We conclude that the proper reach of the crime-fraud exception when applicable does not extend to all communications made in the course of the attorney-client relationship, but rather is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct."). *Accord In re Sealed*

Case, 676 F.2d 793, 814–15 (D.C. Cir. 1982); *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 61 n.19 (7 Cir. 1980); Restatement Third, The Laws Governing Lawyers § 82, comment g.

Contrary to the obscure footnote in the Government's Opposition, Rule 6(e) does not provide the Court with an adequate basis to abandon the adversary system. Even assuming *arguendo* that the prosecutors might have some material information to disclose that is governed by Rule 6(e) – a proposition that should have been litigated in advance – the prosecutors have made no showing that measures short of abandoning the adversary system are inadequate to handle the situation. The prosecutors, for example, had the burden of establishing that a protective order limiting disclosure to Mr. Esformes' counsel only would not be sufficient to protect the secrecy interests asserted. *See Chekkouri v. Obama*, 158 F. Supp. 3d 4 (D. D.C. 2016) (rejecting government's argument that ex parte filing was justified by national security reasons, in part, due to protective order prohibiting counsel from releasing the filing); *King v. Conde*, 121 F.R.D. 180, 190 (E.D.N.Y. 1988) (protective order "can mitigate many if not all of the oft-alleged injuries to the police and to law enforcement"). *Accord Clark v. Township of Falls*, 124 F.R.D. 91, 94 (E.D. Pa. 1988); *Kelly v. City of San Jose*, 114 F.R.D. 653, 666 (N.D. Cal. 1987); *Mercey v. County of Suffolk*, 93 F.R.D. 520, 524 (E.D.N.Y. 1982). *See also Clark v. Township of Falls*, 124 F.R.D. at 94 (ordering disclosure of police reports containing identities of confidential informants on the basis of stipulation of confidentiality entered into by counsel). *Cf. Lundy v. Interfirst Corp.*, 105 F.R.D. 499, 502 (D.D.C. 1985) (rejecting invocation of "intragovernmental opinion" privilege, in part, because protective order deemed "adequate to prevent" public disclosure).[8/]

[8/] However, the Court should not grant such a protective order absent a strong showing by the government that even these restrictions are necessary. *King*, 121 F.R.D. at 190 (citations omitted).

Moreover, Rule 6(e) itself has exceptions. Rule 6(e)(3)(C)(i) permits the disclosure of matters occurring before a grand jury "when so directed by a court preliminarily to or in connection with a judicial proceeding." Courts have granted limited disclosures under this subsection where the moving party demonstrates a particularized need. *See United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *Miller v. Wainwright*, 798 F.2d 426, 429 (11th Cir. 1986). To meet this standard, the moving party must show that (a) the material is needed to avoid a possible injustice in another judicial proceeding; (b) the need for disclosure is greater than the need for continued secrecy, and (c) the request is structured to cover only material so needed. *Sells*, 463 U.S. at 443. For example, grand jury transcripts are routinely produced to defense counsel by the time of trial – either as *Jencks*, *Giglio* or *Brady* material. To the extent that the *ex parte* materials submitted to the Court will eventually be disclosed at the time of trial, there is no justification for delaying the disclosure at this juncture.

The "injustice" here would be if the Court resolved all or some part of Mr. Esformes' disqualification motion based on submissions made *ex parte* by the very prosecutors whose disqualification is being sought. The need for disclosure to avoid this due process violation therefore outweighs the need for secrecy, and the only grand jury material sought is what the prosecutors have already submitted. Therefore, Rule 6(e) stands as no barrier to providing the submission to Mr. Esformes.

WHEREFORE, the Court should strike the *ex parte* filing and order that a copy be provided to Mr. Esformes.

CERTIFICATE OF SERVICE

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

Respectfully submitted,

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