UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

UNITED STATES OF AMERICA,

v.

PHILIP ESFORMES, *et al.,*

ESFORMES' REPLY TO [ECF 310] GOVERNMENT'S OPPOSITION TO [ECF 278] MOTION TO DISMISS, SUPPRESS OR SEVER OBSTRUCTION OF JUSTICE COUNTS

Beginning in late 2014, the Esformes and Delgado Defense Teams were operating under the protective umbrella of a valid Joint Defense Agreement ("JDA"), during which Mr. Esformes' attorneys conveyed a steady stream of information to the Delgado Defense Team. Sometime in May 2015, the prosecutors were apparently told by the Delgados, at a time when they were already seeking leniency through cooperation, that Mr. Esformes was proposing that he and the Delgados obstruct justice. Instead of first investigating further without having to invade the Esformes Defense camp to corroborate the Delgados' claim, and without seeking a warrant from a court giving them advance *permission* to use the Delgados in a sting operation directed against the Esformes Defense camp,[1] the prosecutors gambled that some future court would either *endorse* their conduct if they were right or *forgive* it if they were wrong.

The prosecutors contend that exploiting the JDA privilege as an investigatory tactic without prior court approval was perfectly fine because the June 2015 recordings yielded conversations which it characterizes as incriminating. They contend further that once the Delgados secretly decided to cooperate against Mr. Esformes, the JDA was no longer "valid" because the Delgados and Mr. Esformes no longer shared a "legitimate common interest." See ECF 312 at 30.

[1/] The discussions about Willy Delgado fleeing were initiated by the Delgados as part of a sting, since they had already been "cooperating" when the discussions began. And, as discussed below, the decisions to have them sign the declarations behind the backs of the Delgados' lawyers came from the FBI, not Mr. Esformes.

The prosecutors seek to justify the joinder of the two obstruction counts which explicitly state that the pending proceeding sought to be obstructed was the Delgados' pending case in which Mr. Esformes had not been charged, speculating that the indictment later could have been superseded to add Mr. Esformes as a co-defendant. Contrary to the prosecutors, such a speculative basis for obstruction charges was rejected in *United States v. Aguilar,* 515 U.S. 593 (1995), and *United States v. Vaghela*, 169 F.3d 729 (11th Cir. 1999), neither of which they discuss or even cite.

I. THE EXPLOITATION OF THE JDA

The prosecutors claim in their response to the disqualification motion that their exploitation of the JDA was proper because there never really was one – even though all concerned acted as if there was one, referring in emails to the "joint defense" and exchanging otherwise privileged information in emails and meetings – just because the *written* version was not fully signed. However, JDAs do not have to be in writing, and unsigned contracts are fully enforceable under Hornbook contract principles where, as here, the parties treat them as binding.

The prosecutors do not dispute that their decision to exploit a confidential relationship to gather evidence against Mr. Esformes in June 2015 was made by them, not a court.[2] The absence of judicial approval for this type of "sting" is, we submit, unconstitutional no matter how successful the sting turns out to be. In *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987), the Eleventh Circuit refused to dismiss an indictment when a prosecutor wired a lawyer to gather information from a client without prior court approval. The Eleventh Circuit declined to do so, because Ofshe could show no prejudice of any kind. 817 F.2d at 1515 ("No additional specific facts in the case or

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[2/] No matter how many levels of internal approval were obtained, there was certainly no *judicial* approval for the conduct. Moreover, without a hearing there is no way of knowing what the prosecutors' superiors were told in any event.

strategic decisions were discussed."); *id.* at 1515 (the recordings "produced no tainted evidence" and "no information was provided to the prosecuting attorney"). However, the Eleventh Circuit cautioned that "we do not condone the government's use of criminal defense attorneys as informants against their clients" and cautioned "[h]ad there been demonstrable prejudice, we would be compelled to reverse." *Id.* at 1516. And, the Eleventh Circuit characterized the prosecutor's conduct as "reprehensible" and referred him to the Illinois bar for disciplinary action. *Id.* at 1516, n. 6. As the court in *United States v. Sabri*, 973 F. Supp. 134 (W.D.N.Y. 1996), reasoned in dismissing a count of an indictment where government manipulated the attorney-client relationship, including the taping of conferences with the client, while informants can be used in a variety of legitimate ways, prosecutors may not use them to obtain evidence under the pretense that communications are privileged. "[T]he fact that the informant was the defendant's attorney, and that the attorney-client relationship was the vehicle used to aide in the informant's ability to obtain admissions from the defendant distinguishes this case from those cases in which the government legitimately enlists an informant to tape conversations with the defendant." 973 F. Supp. 134 (W.D.N.Y. 1996).[3] At the very least, it required prior judicial authorization, and the Prosecution Team's failure to do so cannot be justified retroactively depending on the results.[4]

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[3] *See also*; *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991) (dismissing indictment where government collaborated with the defense attorney to build a case against the defendant); *United States v. Omni Int'l. Corp.*, 634 F. Supp. 1414 (D. Md. 1986) (dismissing indictment, in part, where government agents manipulated a former secretary of an attorney into sharing attorney-client privileged information).

[4] The implications of the prosecutors' theory is chilling: they could wire a priest to record a parishioner during a confessional, a husband to record his wife during "pillow talk," or a psychiatrist to record a patient during psychotherapy, all without any prior judicial approval.

It is significant that the alleged crime/fraud – Mr. Esformes allegedly agreeing to fund Guillermo Delgado's flight and asking the Delgados to sign exculpatory declarations – had zero likelihood of reaching fruition, given that the Delgados were cooperating. Deploying the Delgados to record Mr. Esformes in June 2015 was not an effort to stop a crime in progress; it was a sting operation intended to entice Mr. Esformes into uttering words that could be used as evidence against him. Given that there was no risk to the public that any crime was going to occur, there was insufficient justification to exploit the JDA to capture Mr. Esformes' words on tape; intruding on the JDA should have been an investigative technique of last resort. *Cf. United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1115 (9th Cir. 2005) (wiretap affidavit insufficient where it "contained no statements supporting a finding that law enforcement had any reason to fear danger from anyone associated with the office."); *United States v. Blackmom*, 273 F.3d 1204, 1210 (9th Cir. 2001) (wiretap affidavit insufficient where it "contain[ed] only boilerplate conclusions that merely describe inherent limitations of normal investigative procedures").

However the Court rules as to the tape recording in June 2015, the crime-fraud exception does not make available to the prosecutors anything and everything the Delgados' learned about Mr. Esformes' defenses over the course of at least one full year.[5] The crime-fraud exception strips protection *only* from the particular communications that were improper[6] and does not strip all prior

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[5/] *See United States v. Mastroianni*, 749 F.2d 900, 905-06 (1st Cir. 1984) (while assuming without deciding that the government may have an informant "intrude on a defense meeting" in "exceptional circumstances" to record new criminal activity, the government may not keep "intruding further into the attorney-client relationship by debriefing" the witness about other privileged communications).

[6/] *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*

(continued...)

and subsequent conversations of their privileged status. Not even the Delgados' attorneys took that position. *See* DE 329-25 at 2 (Email, June 9, 2015, 6:27 p.m.) (confirming that the Delgados' attorneys "consider[ed] any communications between you and your clients and Philip Esformes and his counsel to be privileged communications as they were made in furtherance of a possible joint defense").

Yet, as with their search of Eden Gardens without a bona fide taint protocol in place, the prosecutors decided to assume the risk to trust that the Delgados would follow their alleged advice to not provide "information to the government regarding" the purportedly non-existent JDA "when debriefing with agents." Response, ECF 312, p. 8, n. 2.

Especially in light of the Delgados' well documented (in FBI 302s) multiple acts of obstruction of justice and destruction of evidence,[7] Mr. Esformes has no meaningful assurance that the Delgados ever abided by any such advice, and neither should this Court without first (1) allowing the Esformes Defense Team to examine the rough notes of every agent and prosecutor who debriefed them and (2) holding an evidentiary hearing on these issues. Nor are Mr. Esformes and this Court required to accept the prosecutors bare assertion that "no privileged information, let alone privileged information regarding trial strategy, was obtained; and there is no prejudice." GO, p. 16, n. 7. Tellingly, neither of the prosecutors' responses deny Mr. Esformes' assertion, as seemingly confirmed by language in the indictment, that the Delgados revealed to the Prosecution Team the

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[6/](...continued)
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 (7th Cir. 1980); Restatement Third, The Laws Governing Lawyers § 82, comment g.

[7/] In *Ofshe*, the prosecutor gave the cooperating *attorney* similar warning, *see Ofshe*, 817 F.2d at1511, but that did not faze the Eleventh Circuit when found the prosecutor's conduct "reprehensible."

Esformes Defense Team's concerns about the charities and transportation services – concerns that the Esformes Defense Team conveyed to the Delgado Defense Team believing those communications would remain privileged under the JDA. In the June 2015 recordings themselves, the Delgados raise the issue of limousines and charities in order to prompt Mr. Esformes to speak about and reveal his thoughts on those subjects – later disseminated to the government – precisely what the JDA was designed to keep confidential.

With respect to the recordings, the prosecutors assert that Mr. Esformes "coerce[d]" and "bullied the Delgado Brothers into signing the affidavits behind their attorneys' backs." GO, p. 3; Response, ECF 312, pp. 8, 53. In fact, it was *the Delgados' own plea bargain attorney* who told prosecutor Hunter that it was "imperative that the guys sign the bogus affidavits." DE 329-21 at 2 (Email, June 8, 2015 (8:50 p.m)); *see also* FBI 302, July 11, 2016, at p. 2 (filed under seal) (indicating that Gaby Delgado did not want to sign the declaration but the FBI made him do so). And, the June 8, 2015, recording shows that it was *the Delgados* – then aligned with the Prosecution Team – and *not Mr. Esformes*, who came up with the idea of going "behind their [the Delgados' attorneys] back[s]" to ultimately get the declarations signed. *See* **Exhibit 1**, Transcript Excerpts (with voice attributions by the defense), June 8, 2015.[8]

The prosecutors also misstate when the Delgado plea negotiations began in order to try to link the commencement of those negotiations to Mr. Esformes' alleged acts of obstruction – the point being to justify the failure to notify the Esformes Defense Team that the JDA was over.

[8/] The prosecutors also claim that Mr. Esformes wanted the Delgados to retain lawyers who would be "*more pliant* to his requests for Gabriel Delgado" than the Moscowitzes. Response, ECF 312, pp. 10, 31 (emphasis added). However, the lawyers Mr. Esformes supposedly thought would be "more pliant" were none other than: (1) Tom Scott (a former federal judge and U.S. Attorney), (2) Eric Holder, former U.S. Attorney General, and (3) Teresa Van Vliet, former Chief of Narcotics and Senior Litigation Counsel for the U.S. Department of Justice.

According to the prosecutors, the negotiations did not begin until *late April*, just before the taping began. However, the Delgados retained their plea bargain attorney a month before that, as reflected by a bank record turned over in discovery (Bates Number: ESF081-00000030) showing that a check from the Delgados to their plea bargain attorney cleared the bank by March 31, 2015. Accordingly, the notice provisions of the JDA were triggered as early as March, long before the prosecutors claim that Mr. Esformes breached it. Moreover, the prosecutors continue to ignore the fact that the decision to seek declarations from the Delgados was approved and executed by Mr. Esformes' defense attorneys for legitimate, indeed constitutionally-protected, reasons as discussed in Mr. Esformes' motions.

And, contrary to the prosecutors, no bona fide taint procedure was used, even with respect to the tape recordings, because Mr. Esformes was never allowed to object to the use of any portion of the recordings before prosecutor Hunter sought permission to do so from Judge Ungaro *ex parte* without affording Mr. Esformes any opportunity to object to or refute prosecutor Hunter's statements about the law and facts.

II. THE FACT THAT THE STRATEGY OF OBTAINING DECLARATIONS FROM THE DELGADOS WAS ENDORSED BY MR. ESFORMES' COUNSEL IS NOT "BESIDE THE POINT" – IT *IS* THE POINT

In a single sentence, the prosecutors dismiss Mr. Esformes' argument (and proffered proof) that the decision to obtain declarations from the Delgados – which did nothing more than confirm the position that their own lawyers were contemporaneously espousing before Judge Martinez – that criminal defense attorneys are free to, if not sometimes constitutionally required to, seek statements from potential witnesses, even if those statements are later contradicted by the witnesses when they join the Prosecution Team. As the Eleventh Circuit found in *United States v. Almeida*, 341 F.3d

1318, 1321 n. 8 (11th Cir. 2003), using inconsistent statements of a witness who was originally a member of a JDA is relevant to show the witnesses' bias. "Potential witnesses are not Government property." *Appeal of Hughes*, 633 F.2d 282, 286-91 (3d Cir. 1980). *See also Harrington v. United States*, 267 F. 97, 101 (8th Cir. 1920) (reversing an attorney's conviction for obstruction of justice for attempting to get a witness to sign a statement *contradicting* grand jury testimony that the witness had already given that conflicted with the statement).

The prosecutors have no answer to *Almeida* or this entire line of authority, so they simply assert that Mr. Esformes' argument "is beside the point." GO, p. 14. Actually it ***is*** the point. Prosecutors are not free to label constitutionally protected conduct that is vital to the criminal justice system as "obstruction of justice," because such conduct "falls short of even being within the outer limits of § 1503." *United States v. Brand*, 775 F.2d 1460, 1470 (11th Cir. 1985). For that reason, the Court should reject the prosecutors' contention that they are at liberty to undermine the criminal defense function by labeling this issue as nothing more than a question for the jury to decide. The issue is "structural" to the proper functioning of the adversary system. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *United States v. Cronic*, 466 U.S. 648, 653-54 (1984).

III. COUNTS 32 AND 33 FAIL TO STATE OFFENSES AND ARE MISJOINED

The prosecutors contend that the obstruction counts state offenses and are not misjoined, but their arguments ignore what the Grand Jury actually charged. The Grand Jury charged Mr. Esformes with endeavoring to obstruct the *already-indicted* case against the *Delgados*. That was the alleged "pending proceeding" – an essential element of 18 U.S.C. § 1503. The prosecutors try to defend the charge by trying to constructively amend the indictment by changing the proceeding to one that was not "pending" – a hypothetical superseding indictment that might charge Mr. Esformes.

In 1995, the Supreme Court in *United States v. Aguilar,* 515 U.S. 593 (1995), resolved a circuit split on how close a "nexus" the defendant's conduct had to have to satisfy the "proceeding" requirement. Prior to *Aguilar*, the Eleventh Circuit had adopted "a broad view of § 1503's Omnibus Clause, requiring simply that the government establish 'that the defendant should have *reasonably foreseen* that the natural and probable consequences of the success of the scheme could [obstruct the due administration of justice].'" *United States v. Vaghela*, 169 F.3d 729, 733, n. 3 (11th Cir. 1999) (citation omitted).

In *Aguilar*, the Supreme Court *rejected* the Eleventh Circuit's "reasonable foreseeability" standard and required the government prove that the defendant "knew" that a judicial proceeding would be obstructed. *Aguilar*, 515 U.S. at 599 (citations omitted). Employing that stricter standard, the Supreme Court reversed Judge Aguilar's conviction for having leaked information about a federal wiretap (through his nephew) to one of the targets of the tap. A grand jury investigation commenced and, while it was underway, two FBI agents interviewed Judge Aguilar.[9] The judge lied to the agents and, based upon these lies, was charged with obstruction of justice on the theory that Aguilar should have known that the agents were *likely* to relate his lies to the grand jury. The Supreme Court, however, found that such an inferential approach was too speculative since the agents "might or might not testify" before the grand jury. *Id.* at 601. The Court then distinguished Aguilar's situation from situations where defendants either testified falsely in grand juries or gave false documents directly to grand juries, as opposed to agents who had "not been subpoenaed or otherwise directed to appear before the grand jury." *Id.* at 601.

[9/] There was some evidence that Aguilar knew that the grand jury was at least in existence from an oblique statement made to him by one of the FBI agents. *Id.*

In *Vaghela*, 169 F.3d at 733, n. 3, the Eleventh Circuit acknowledged that *Aguilar* had rejected its prior "broad view" of § 1503 and reversed Veghela's obstruction conviction. The Eleventh Circuit held that neither "drawing up and asserting the veracity of a false document" to the FBI nor agreeing to do so constituted obstruction of justice absent a clear nexus to "a specific judicial proceeding in a way that is more than merely 'speculative.'" *Id.* at 735, quoting *Aguilar*, 515 U.S. at 601.[10]

The prosecutors' new-found "superseding indictment" theory is equally speculative. GO, p. 8 ("***if*** the indictment is superseded") (emphasis added), citing two cases that preceded *Aguilar*, *United States v. Barfield*, 999 F.2d 1520 (11th Cir. 1993); *United States v. Fields*, 838 F.2d 1571 (11th Cir. 1988). Equally speculative is the prosecutors' theory that the declarations could somehow have been used in the *Delgado* case as "fodder for impeachment" or for "discouraging the Delgado Brothers from testifying in a manner inconsistent with the declarations." GO, p. 11.[11]

CERTIFICATE OF SERVICE

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

Respectfully submitted,

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[10] *See also United States v. Genao*, 343 F.3d 578, 585 (2nd Cir. 2003) (defendant's false statements to agents and prosecutor did not violate Section 1503 since grand jury had not yet convened); *United States v. Schwartz*, 283 F.3d 76, 109 (2nd Cir. 2002) (reversing obstruction of justice conviction where government only proved that defendant only made false statements to federal investigators).

[11] The prosecutors do not identify what rule of evidence would have permitted the Delgados to render lay opinion testimony about Mr. Esformes.

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Limited Appearances for Philip Esformes

EXCERPT JUNE 8, 2015

SIDE-BY-SIDE SPANISH TRANSCRIPTION/TRANSLATION

Participants:

GD =	Gaby Delgado	Voz Masculina 1
MV2 =	Unidentifiable	Voz Masculina 2

English Abbreviations:

Italics	Originally spoken in English
[UI]	Unintelligible
[OV]//	Overlapping Voices
[PH]	Phonetic Sound
[SC]	Secondary Conversation
[ ]	Background, Noise Notations

Spanish Abbreviations:

Cursiva	Hablado en inglés en la versión original
[II]	Ininteligible
[VT]	Voces se Traslapan
[F]	Fonético
[CS]	Conversación Secundaria
[ ]	Al Fondo, Notaciones de Ruidos

	Speaker	Transcription	Translation
1	GD:	*The fee or whatever. Let me know if I can just do this, you know, behind their back or whatever. Or* [II].	*The fee or whatever. Let me know if I can just do this, you know, behind their back or whatever. Or* [UI].
2		[RUIDO]	[NOISE]
3	MV2:	[II]	[UI]
4	GD:	[II]. *Mm. Mm-hm.*	[UI]. *Mm. Mm-hm.*
5		[Fin de la grabación]	[End of recording]

Voice attributions herein were provided by someone other than the translator.