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STATE OF ILLINOIS

HOUSE OF REPRESENTATIVES

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Opinion and Order
on Respondent's Motion to Extend The Scheduling Order

Respondent, State Representative Derrick Smith ("Respondent"), has filed a motion to continue the Final Hearing date of July 19, 2012 to an indefinite date, at least thirty days in the future. For the reasons set forth below, Respondent's Motion is **DENIED**, and the Final Hearing date shall remain scheduled for **Thursday, July 19, 2012**, at 9:30 A.M. in Room C-600 of the Michael A. Bilandic Building, Chicago, Illinois.

Background

On March 13, 2012, Respondent was arrested by federal agents on the charge of violating 18 U.S.C. § 666(a)(1)(B), namely a charge that Respondent accepted a cash bribe in exchange for recommending an Early Childhood Construction Grant to the Illinois Capital Development Board. Respondent was later indicted by a federal grand jury on the same charge in the United States District Court for the Northern District of Illinois.

On June 14, at the request of the United States Attorney and over the written objection of Respondent, the United States District Court for the Northern District of Illinois entered a Protective Order that, among other things, barred Respondent from using the evidence disclosed by the United States for any purpose other than the defense of the criminal charge in federal court. (A copy of this Protective Order has been entered into the Record in this matter as Select Committee Exhibit 2.) The United States asserted several bases for wanting to preserve the

confidentiality of its evidence, most notably that public disclosure of the evidence would compromise the U.S. Attorney's ongoing investigation of Respondent and other individuals.

On March 21, 2012, pursuant to Rule 91 of the Rules of the Illinois House of Representatives for the 97th General Assembly, five members of the House filed a petition containing suggested charges against Respondent that outlined the allegations contained in the federal prosecution. Pursuant to House Rule 91, this petition triggered the creation of the Special Investigating Committee to investigate the allegations and recommend whether reasonable grounds existed to bring a charge against Respondent.

The Special Investigating Committee adopted a position that it would not seek or hear any evidence that, in the opinion of the U.S. Attorney, would compromise the U.S. Attorney's ongoing federal investigation. This policy was in line with an identical policy undertaken by the House committee that investigated Governor Rod Blagojevich in 2008-09, and an identical policy adopted by the Illinois Senate during the Impeachment Trial of Governor Blagojevich in 2009.

Following the suggestion of charges brought by the Special Investigating Committee against Respondent, this Select Committee on Discipline was created under House Rule 94. At its initial hearing on June 27, 2012, this Committee unanimously adopted the same policy, namely that it would not request or entertain any evidence if the United States Attorney for the Northern District of Illinois indicated that such evidence could compromise the U.S. Attorney's ongoing investigation of Respondent or any related investigation. This policy was also formally adopted in Rule 9 of the Procedural Rules for this Committee, filed by the Chairperson on June 29, 2012 with the House Clerk.

On July 6, 2012, Respondent filed a written motion to continue the Final Hearing date of July 19, 2012, on the grounds that he needed additional time so that he could petition the federal court presiding over his criminal case to modify the Protective Order and allow him to use certain, unidentified evidence in his defense before this Committee.

Analysis

Following the lead of its predecessor committee hearing this matter, as well as the House and Senate tribunals concerning the Blagojevich Impeachment, this Committee has clearly indicated that it would not permit the use of evidence that the U.S. Attorney believed would jeopardize his ongoing investigation into Respondent and others. Although it is theoretically possible that Respondent could convince the U.S. District Court to modify the current Protective Order, the fact remains that the U.S. Attorney has consistently indicated that the Protective Order was necessary to protect his continuing investigation. The U.S. Attorney made his position clear in his correspondence with the Special Investigating Committee (*see* Exhibit 7 in that Committee), in his Motion for Protective Order in the federal criminal case, and again recently in correspondence with Committee Counsel (attached as Exhibit A to this Opinion and Order).

Thus, regardless of any success Respondent may have in federal court in modifying the Protective Order, it would be over the objection of the U.S. Attorney, who is seeking to protect

his ongoing investigation. There is therefore no need for this Committee to await the outcome of litigation over the Protective Order in federal court—the Committee already has its answer. The U.S. Attorney has consistently indicated that he believes a modification of the Protective Order would hinder his investigation, and thus this Committee will not entertain any evidence currently covered by that Protective Order.

It is worth recalling that, while the Select Committee on Discipline is open to any evidence that is available and not violative of its Procedural Rules, the purpose of this Committee is not to conduct long investigations and engage in extensive fact-finding. That was the express purpose of the Special Investigating Committee. In contrast, the purpose of this Committee is to deliberate over the evidence and issue a recommendation to the full House as to whether disciplinary action is warranted. Waiting for Respondent to litigate the Protective Order in federal court would delay these proceedings and would do so without any purpose, given the U.S. Attorney's position on the Protective Order.

For these reasons, Respondent's Motion is **DENIED**, and the Final Hearing date shall remain scheduled for **Thursday, July 19, 2012**, at 9:30 A.M. in Room C-600 of the Michael A. Bilandic Building, Chicago, Illinois.

Submitted this 11th day of July, 2012.

BARBARA FLYNN CURRIE
Chairperson
Select Committee on Discipline

YAHOO! MAIL Classic

U.S. v Derrick Smith Monday, July 9, 2012 4:45 PM

From: "Shapiro, Gary [redacted]

To: "David Ellis [redacted]

1 File (899KB)

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David:

As per our discussion, please find attached the Government's Motion For Entry of Protective Order Governing Discovery, filed *in U.S. v Derrick Smith* in May 2012. The ensuing litigation surrounding our request for the order did not conclude until June with the entry of the protective order by Judge Coleman.

It is our understanding that defendant Smith will seek some modification of the protective order in order to utilize the criminal discovery in his defense of the matter pending before the Illinois House of Representatives, and it is our expectation that we will oppose his request to modify, and will rely on the reasons enumerated in the Government's Motion, particularly those related to witness safety, interference with ongoing investigations, and the possible tainting of the jury pool for the criminal trial, all concerns we believe remain valid today.

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA v. DERRICK SMITH	No. 12 CR 175 Judge Sharon Johnson Coleman

MOTION FOR ENTRY OF
PROTECTIVE ORDER GOVERNING DISCOVERY

Pursuant to Fed. R. Crim. P. 16(d), the United States of America, by Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, moves for the entry of a protective order.

BACKGROUND

On March 12, 2012, defendant was charged by complaint with bribery, in violation of 18 U.S.C. § 666(a)(1)(B). R.1. On April 10, 2012, a grand jury returned a one-count indictment charging the defendant under section 666(a)(1)(B). R.12. As set forth in the complaint, the government's evidence in this case consists primarily of recorded in-person meetings and phone calls between the defendant and a cooperating source ("CS-1"), a campaign worker for defendant. During these recorded meetings and calls, in summary, defendant agreed to write a letter of support for a purported daycare owner seeking a state grant, in exchange for $7,000.

ARGUMENT

The government seeks a protective order in this case for six reasons. First, as noted above, during this investigation, CS-1 assisted the government by, among things, permitting the government to consensually record calls and in-person meetings with defendant. CS-1 has also previously assisted the FBI in other unrelated matters. Following defendant's arrest, the government relocated

CS-1 based on safety concerns.[1] As part of the investigation, other cooperating sources have also assisted the government. The identity of those individuals is not public.

As part of the discovery in this case, the government intends to provide information relating to CS-1, including early discovery of certain materials falling within 18 U.S.C. § 3500. As this Court is aware, the government is not obligated to turn over materials falling within 18 U.S.C. § 3500 until trial. *See, e.g., United States v. Feinberg*, 502 F.2d 1180, 1182 (7th Cir. 1974) ("[S]tatutory provision proscribes pretrial discovery of statements of government witnesses, including those parts which relate conversations of the defendant. Such statements are not producible under 18 U.S.C. § 3500(b) until after a witness called by the United States has testified on a subject matter related to the statements."). In this case, however, the government is seeking to turn over substantial materials beyond the strictures of Rule 16 well in advance of trial. This will allow defendant sufficient time to prepare his defense. Further, this will permit the Court adequate time to address any issues the parties might raise well in advance of trial.

Some of these materials, however, could permit third-parties to identify CS-1. Further, some of the government's discovery would disclose aspects of CS-1's cooperation that – if disseminated to third-parties – could heighten the risk of harm or harassment of CS-1.[2] The government's discovery will also include information relating to the other cooperating sources involved in this investigation.

[1] To be clear, the government's concerns were not directed at defendant.

[2] The government can make a proffer to this Court and defense counsel, although the government would seek leave to make this proffer under seal.

Second, the investigation that resulted in the charges in this case is ongoing. Here again, the government seeks to provide early discovery of certain materials that will reveal aspects of its ongoing investigation. Disclosure of this information could present risks of destruction of evidence, or other obstructive conduct. Further, this discovery will include derogatory information concerning third-parties who have not been charged with criminal wrongdoing.

Third, the government intends to make available discovery that will include information from separate law enforcement investigations, including, for example, investigations of defendant by the City of Chicago, Office of the Inspector General.

Fourth, the government's discovery in this case will also include sensitive financial information of third-parties, including, for example, copies of checks with the third-party payor's account information and home/business address. It is the government's understanding that defense counsel does not object to a protective order with respect to this information.

Fifth, the government's discovery will include defendant's personnel records from his prior employment at the City of Chicago and the Illinois Secretary of State.

Finally, the government seeks a protective order in this case in order to preserve the public's interest in an impartial juror pool.

I. Applicable Law

Under Federal Rule of Criminal Procedure 16(d)(1), this Court may "for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." A "trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect." *Alderman v. United*

States, 394 U.S. 165, 185 (1969) (citing prior version of Fed. R. Crim. Proc. 16(d)). Well-established legal principles support the entry of a protective order in this case.

First, the public has an interest in protecting cooperating witnesses from intimidation or harassment. Fed. R. Crim. Pro. 16, 1974 Amendments notes ("Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed.") (citing *Will v. United States*, 389 U.S. 90 (1967)); *see also United States v. Moore*, 322 Fed.Appx. 78, 78, 2009 WL 1033608, at *4 (2d Cir. April 17, 2009) (unpublished) ("The district court was within its discretion in preventing defendant's unsupervised possession of § 3500 material, which included statements by cooperating witnesses, to protect such witnesses from intimidation and retribution.") (attached as Ex. A); *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (recognizing it was appropriate for court to "protect the identities of cooperating witnesses and others involved in . . . investigation, as well as to protect other confidential law enforcement information").[3] As the district court in *United States v. Garcia*, 406 F.Supp.2d 304, 306-07 (S.D.N.Y. 2005), recognized, a protective order is an effective means to balance the public's interest in protecting cooperating witnesses against the defendant's interest in early access to materials that go beyond Rule 16's requirements:

[3] In fashioning appropriate relief, courts have looked to the principles underlying the confidential informant privilege recognized in *Roviaro v. United States*, 353 U.S. 53 (1957). *See United States v. Celis*, 608 F.3d 818, 833 (D.C.Cir. 2010) (citing *Roviaro* in upholding protective order allowing government witnesses to testify under pseudonyms, and limiting disclosure of their true identities). As the Supreme Court stated in *Roviaro*, "[t]he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

> The Government, under § 3500, is entitled not to produce the statements in question at all until after each witness testifies. Such a solution would effectively preclude the kind of independent review of the materials by defendants that they seek. It would also hamper defense counsel's preparation and interfere with the efficient administration of justice. Where there is a legitimate concern for witness safety, a protective order of the sort requested by the Government will facilitate the valuable practice of early and expansive disclosure of 3500 material while reducing the danger of obstruction of justice. It is therefore appropriate, and in the interests of justice, to grant the [protective order] the Government seeks.

Accord Celis, 608 F.3d at 833 (upholding protective order allowing government witnesses to testify under pseudonyms, and limiting disclosure of their true identities); *United States v. Pelton*, 578 F.2d 701, 707 (8th Cir. 1978) (affirming district court's protective order denying defendant access to certain recordings of defendant's own voice where "[t]he purpose of the order sought . . . was to protect the identity of persons cooperating on the case"); *United States v. Bolden*, 514 F.2d 1301, 1312 (D.C.Cir. 1975) ("refusal of [defense] counsel to accept any material under a protective order not to disclose it to his client, coupled with evidence of threats against witnesses, supports the trial court's refusal to require a witness list"); *United States v. Smith*, No. 09 CR 82S, 2009 WL 1346867, at *2 (W.D.N.Y. May 13, 2009) (unpublished) (holding that government could postpone producing audio recordings to defendant based on conclusion that "disclosure of the identity of the confidential informant by producing the audio recordings at this time would pose a threat to that individual") (attached as Ex. B).

Second, the public has an interest in guarding against jeopardizing the government's ongoing investigation of criminal wrongdoing. *See, e.g.*, *United States v. Nava-Salazar*, 30 F.3d 788, 800-01 (7th Cir. 1994) ("[T]he government's delay in disclosing the additional incriminating evidence it had concerning Nava was a justifiable, necessary and proper step to protect its investigation until it was completed and the other conspirators apprehended. Premature disclosure of that evidence not only

would have jeopardized the investigation of a major drug operation, but also could have threatened the life and safety of a number of the persons involved, including the undercover DEA agents and their informants."); *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) (affirming district court's refusal to unseal transcripts of *in camera* proceedings on the ground that it would damage continuing law enforcement investigations). Further, individuals who have not been charged with criminal wrongdoing have a privacy interest in avoiding dissemination of materials that might suggest they engaged in misconduct. *See, e.g.*, *United States v. Smith*, 602 F.Supp. 388 (M.D. Pa. 1985) ("Persons who have not been charged as defendants in a criminal case have a recognized right of privacy in not being named as unindicted co-conspirators in an indictment or being identified and accused by the Government of criminal activity where such accusations are not directly relevant to the proceedings.").

Third, a protective order will also protect the public's interest in an impartial juror pool, by limiting dissemination of the government's discovery materials outside the context of these judicial proceedings. "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. California*, 314 U.S. 252, 271 (1941). "'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'" *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 597 (9th Cir. 1985) (quoting *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) (Holmes, J.)).

II. The Proposed Protective Order is Supported by Good Cause and Does Not Inhibit Defendant's Ability to Prepare for Trial.

A. The Proposed Protective Order

The proposed protective order in this case[4] is limited solely to "materials provided by the United States." It does not apply to information or documents available to defendant independent of the government's discovery in this case.[5] In addition, the protective order specifically provides that:

> The restrictions set forth in this Order do not apply to documents that are or become part of the public court record, including documents that have been received in evidence at other trials, nor do the restrictions in this Order limit defense counsel in the use of discovery materials in judicial proceedings in this case, except that any document filed by any party which attaches or otherwise discloses specially identified sensitive information as described in Paragraph 3 [of the draft protective order] . . . shall be filed under seal to the extent necessary to protect such information, absent prior permission from this Court.

Further, the proposed protective order explicitly provides that defendant may "apply[] to this Court for further relief or for modification of any provision hereof."

The government intends to request discovery under Rule 16 from defendant. The government will agree to restrictions consistent with those set forth in the proposed protective order with respect to discovery produced by defendant.

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[4] In accordance with this Court's standing orders, the government will submit a copy of the proposed order electronically to this Court for consideration, with a copy served on defense counsel.

[5] *Accord Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) ("[A] protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes.").

B. Argument

The government seeks a protective order in this case to avoid dissemination of materials relating to:

> (a) cooperating sources, including CS-1, who the government has previously relocated based on safety concerns;
>
> (b) the government's ongoing investigation of criminal wrongdoing that resulted in the charges in this case;
>
> (c) separate law enforcement investigations of wrongdoing that have involved or otherwise related to defendant; and
>
> (d) financial information of third parties.

A protective order will also protect the public's interest in an impartial juror pool, by limiting disclosure of discovery for purposes unrelated to these judicial proceedings. Plainly, based on the case law discussed above, the government has established good cause as required under Rule 16.

At the same time, the proposed protective furthers defendant's interest in early disclosure of information. Again, Rule 16 does not permit "pretrial discovery of statements of government witnesses, including those parts which relate conversations of the defendant. Such statements are not producible under 18 U.S.C. § 3500(b) until after a witness called by the United States has testified on a subject matter related to the statements." *Feinberg*, 502 F.2d at 1182. However, such a procedure – though permitted by statute – can "hamper defense counsel's preparation and interfere with the efficient administration of justice." *Garcia*, 406 F.Supp.2d at 306. Thus, as in *Garcia*, in this case, the government seeks to "provide early, generous and convenient disclosure of such material." *Id.* But to protect the important interests discussed above – including a "legitimate concern for witness safety" – the government seeks a protective order. *Id.* As the *Garcia* court reasoned in approving a similar protective order:

> Early disclosure of 3500 material . . . facilitates trial efficiency by avoiding lengthy recesses during trial. Such efficiency is vital for the sake of conscripted jurors, as well as for the expeditious conclusion of trials in busy courts where the time allotted to any one trial must perforce be limited.
>
> While the strict rule of *Jencks* and § 3500 has come to be modified by practical necessity, the letter of the holding and of the statute remind us that 3500 material is ultimately provided for a limited purpose. Defendants are not given such material to facilitate general trial preparation or as a form of pre-trial discovery; indeed, Fed.R.Civ.P. 16(a)(2) and § 3500(a) specifically exclude 3500 material from pre-trial discovery.

Id. at 305-06. Further, the proposed protective order in no way limits defendant's ability to make use of the government's discovery in these judicial proceedings. Finally, the proposed order is not an absolute bar against defendant's use of discovery materials outside the context of this judicial proceeding. Instead, it simply requires that defendant seek this Court's permission. *See* Proposed Protective Order ¶ 10 (either party may "apply[] to this Court for further relief or for modification of any provision hereof"). In this way, the protective order ensures that this Court controls any public dissemination of the government's discovery outside the context of these judicial proceedings.

Defense counsel's public statements to date underscore the need for a protective order. On April 4, 2012, defendant's lawyer was interviewed on the Don & Roma Show, WLS 890 AM.[6] During that interview, in discussing the government's investigation of defendant, defense counsel stated "this goes back to McCarthyism," and repeatedly compared the government's investigation of defendant to the prosecution of Senator Ted Stevens, which defense counsel stated involved "the same government lawyers, the ones who get a paycheck just like Patrick Fitzgerald, the same

[6] The broadcast is available at http://www.wlsam.com/article.asp?id=2428586. The government can provide the Court a DVD copy upon request.

American government lawyers, had lied, had cheated." Further, defense counsel suggested that the government targeted defendant because the "federal government was leaning on Derrick Smith to give up names and Jesse White was one of those names," which is simply untrue, insofar as the government filed its complaint against defendant on March 12, 2012 and did not approach him until the time of his arrest on March 13, 2012.

On April 30, 2012, the parties appeared before this Court for arraignment. During that proceeding, this Court addressed government and defense counsel and cautioned the parties regarding public statements. Within minutes, defense counsel and defendant proceeded to the lobby of this courthouse and addressed the press. During that press conference, defendant stated: "I have been troubled to experience the shenanigans being played by the FBI to lean on people around me and to get them to say bad things about me."[7] Defense counsel again discussed the government's investigation, this time, referencing the Holocaust.[8] Defense counsel also stated, "This is the same FBI that wiretapped Martin Luther King." Defense counsel then disclosed details of CS-1's criminal history and later stated, "They know who he [CS-1] is on the west side, I'm telling you that now."[9]

This publicity campaign to date demonstrates the real risk of public dissemination of the government's discovery in this case in the event a protective order is not in place, which could: (a)

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[7] This statement and the penultimate and final sentences in this paragraph were aired on NBC Chicago on April 30, 2012. That broadcast is available at http://www.nbcchicago.com/video/#!/news/local/video-override/State-Rep--Pleads-Not-Guilty-to-Bribery-Charges/149575925. The government can provide the Court a DVD copy upon request.

[8] *Unfortunately, We've Seen this Legal Circus Before*, SouthtownStar (May 7, 2012) (available on Westlaw at 2012 WLNR 9574002) (attached as Exhibit C).

[9] While the government does not ascribe such motives to defense counsel, this statement could be construed as a veiled threat. At a minimum, this statement – in which defense counsel appropriately refrained from publicly identifying CS-1 – demonstrates defense counsel's understanding of the potential for harm to CS-1 based on his cooperation in this case.

lead to harm or harassment of cooperating sources who have assisted law enforcement, including CS-1; (b) compromise the government's ongoing investigation of criminal wrongdoing in this case, or reveal derogatory information regarding uncharged individuals; or (c) disclose details regarding separate investigations of wrongdoing by law enforcement.

Further, these types of statements risk presenting evidence to the public that, in all likelihood, will not be part of this case. For example, at trial, the government's evidence will consist primarily of defendant's statements, which were recorded. While no final determination has been made at this point, the government may ask this Court to admit these recordings without CS-1's testimony under well-established law.[10] Thus, it is possible the government will not call CS-1 as a witness at trial, which would make CS-1's criminal history and background irrelevant.[11]

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[10] *See, e.g., United States v. Emerson*, 501 F.3d 804, 814 (7th Cir. 2007) (upholding district court's admission of recordings based on non-participant officer testimony noting general rule that proponent can authenticate recordings "by offering evidence establishing the tape's chain of custody *or* the testimony of an eyewitness that the recording accurately reflects the conversation that he or she witnessed or evidence establishing the chain of custody") (emphasis added).

[11] While the defense might try and call CS-1 as a trial witness, here too, there would relevancy and Rule 403 limits on evidence regarding CS-1's background. For example, it is well established that "'a party may not call a witness for the sole purpose of impeaching him.'" *United States v. Vasquez*, 635 F.3d 889, 897 (7th Cir. 2011) (quoting *United States v. Giles*, 246 F.3d 966, 974 (7th Cir. 2001)). Further, the Seventh Circuit has repeatedly warned that a party may not call a witness it knows will not give helpful testimony in order to introduce otherwise inadmissible impeachment evidence. *See Giles*, 246 F.3d at 974 (upholding district court's refusal to allow defendant to call confidential informant simply to "expose his warts to the jury and float the inference that the FBI should not play footsie with a sleazeball"); *accord United States v. Medley*, 913 F.2d 1248, 1257 (7th Cir. 1990) ("[W]e do not allow impeachment where it is merely a government subterfuge to get before the jury evidence otherwise not admissible."). Similarly, the defense may not call a confidential informant for the purpose of sullying the prosecution by association. *See United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995) ("[N]otwithstanding [defendant's] assertion . . . that 'a confidential informant with a sordid history . . . is always beneficial to the defense in front of a jury,' the unsavory nature of an informant is not admissible into evidence merely to make the prosecution appear dissolute by

Accordingly, permitting public dissemination of details regarding CS-1's background not only risks harm to CS-1, but also runs contrary to the well-established principles that "[t]he outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070 (1991). "Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet." *Id.*

The fact that defendant is aware of CS-1's identity – insofar as CS-1 previously worked on defendant's campaign – does not obviate the need for a protective order for at least four reasons. First, as noted above, the government's concerns for CS-1's safety are not directed at defendant, but are instead rooted in concerns that others might seek to harass or physically harm CS-1 and/or CS-1's family if certain aspects of CS-1's assistance to the government were made public. *Cf. United States v. Herrero*, 893 F.2d 1512, 1526 (7th Cir. 1990) (with respect to *Roviaro* privilege, holding "that limited, circumscribed disclosure of an informant's identity and/or the substance of the informant's statements to a criminal defendant's counsel during trial" did not result in waiver of the privilege, as it was the defendant "who would have cause to resent [the informant's] conduct") (quoting *Roviaro*, 353 U.S. at 60 n.8). Second, even if CS-1's identity is known to defendant – and perhaps others – dissemination of certain non-public information regarding CS-1's prior assistance to law enforcement could heighten the risk of harassment and/or physical harm to CS-1 and/or CS-1's family. *See Garcia*, 406 F.Supp.2d at 306 ("It is not enough to say, as the defendants argue in this case, that the damage is done by the mere disclosure that a witness has cooperated with the

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association.").

authorities. Hard evidence of the witness's betrayal can facilitate retaliation or intimidation of the witness."). Third, as noted above, information concerning CS-1's background may not be admissible in a criminal trial and a protective order ensures that this Court – not defendant – controls what information is made known to the potential juror pool, thereby safeguarding the public's interest in an untainted juror pool. Finally, guarding against unrestricted public dissemination of information regarding CS-1 – and the other cooperating sources who assisted the government in its investigation of defendant – serves the public interest in effective law enforcement by encouraging such individuals to assist or come forward with information. *Accord Roviaro*, 353 U.S. at 59 ("The purpose of the privilege [recognized in *Roviaro*] is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.").

For all of the reasons set forth above, there is good cause for a protective order in this case.

CONCLUSION

WHEREFORE, the government respectfully moves this Court to enter a protective order to govern discovery in this case.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/ J. Gregory Deis
J. GREGORY DEIS
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Dated: May 16, 2012

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

MOTION FOR ENTRY OF PROTECTIVE ORDER GOVERNING DISCOVERY

was served on May 16, 2012, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

BY: /s/ J. Gregory Deis
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322 Fed.Appx. 78, 2009 WL 1033608 (C.A.2 (N.Y.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 322 Fed.Appx. 78, 2009 WL 1033608 (C.A.2 (N.Y.)))

H

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Appellee,
v.
Gregory MOORE, Jason Mitchell, Jeffrey Martinez, Alvin Martinez, Nathaniel Slater, Anthony Bowens also known as Tony Felder, Nelson Martinez, Defendants-Appellants.[FN1]

FN1. We resolved the appeals of Defendants Gregory Moore and Jason Mitchell in separately issued orders.

Nos. 07-1589-cr(lead), 07-2247-cr(Con), 07-2787-cr(Con), 07-2930-cr(Con), 07-2931-cr(Con), 07-3584-cr(Con).
April 17, 2009.

Background: Defendants were convicted in the United States District Court for the Southern District of New York, Rakoff, J., of conspiracy to distribute crack cocaine. Defendants appealed.

Holdings: The Court of Appeals held that:
(1) evidence was sufficient to support convictions;
(2) District Court did not violate defendant's Fifth and Sixth Amendment rights by denying his motion to lift a protective order so that he could possess a copy of statements by government witnesses in his jail cell without the presence of defense counsel;
(3) government did not improperly vouch for credibility of its witnesses; and
(4) District Court was entitled to take account of defendant's leadership role in conspiracy when sentencing him.

Judgments of conviction affirmed; remanded for resentencing.

West Headnotes

[1] Conspiracy 91 ⇐47(12)

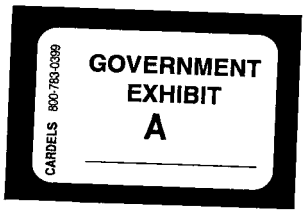
91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k44 Evidence
91k47 Weight and Sufficiency
91k47(3) Particular Conspiracies
91k47(12) k. Narcotics and Dangerous Drugs. Most Cited Cases

Evidence was sufficient to prove that defendant knowingly participated in conspiracy to distribute crack cocaine; witnesses testified at trial that defendant was the boss of a certain avenue, shared a supplier with co-conspirator, joined forces with co-conspirator to reopen the avenue for crack cocaine sales, jointly purchased large quantities of crack cocaine with another co-conspirator, and acted to keep out competition. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

[2] Conspiracy 91 ⇐47(12)

91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k44 Evidence
91k47 Weight and Sufficiency
91k47(3) Particular Conspiracies
91k47(12) k. Narcotics and Dangerous Drugs. Most Cited Cases

Evidence was sufficient to prove that defendant knowingly participated in conspiracy to distribute crack cocaine; surveillance tape showed drug transaction involving defendant and a confidential informant, witness testified that defendant worked for him as a pitcher and distributed packs of crack cocaine to other pitchers, and another witness testified to serving as a look-out for defendant while he was engaged in crack cocaine sales. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.



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[3] Conspiracy 91 ⚖47(12)

91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k44 Evidence
91k47 Weight and Sufficiency
91k47(3) Particular Conspiracies
91k47(12) k. Narcotics and Dangerous Drugs. Most Cited Cases

Evidence was sufficient to prove that defendant knowingly participated in overarching conspiracy to distribute crack cocaine, even if crack cocaine dealers in the alleged conspiracy competed against each other for individual customers, where members of conspiracy shared resources and acted in concert to warn each other if police were present. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

[4] Criminal Law 110 ⚖627.7(3)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.7 Statements, Disclosure of
110k627.7(3) k. Statements of Witnesses or Prospective Witnesses. Most Cited Cases

District court did not violate defendant's Fifth and Sixth Amendment rights by denying his motion to lift a protective order so that he could possess a copy of statements by government witnesses in his jail cell without the presence of defense counsel; protecting witnesses from intimidation and retribution was of particular concern, as two co-defendants awaiting trial were alleged to have intimidated a prosecution witness in a prior state case. U.S.C.A. Const.Amends. 5, 6; 18 U.S.C.A. § 3500.

[5] Sentencing and Punishment 350H ⚖635

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(C) Accommodation to Prior or Subsequent Sentence
350Hk632 Sentence in Other Jurisdiction
350Hk635 k. State and Federal Sentences. Most Cited Cases

Section of Sentencing Guidelines governing imposition of a sentence on a defendant subject to an undischarged term of imprisonment was not applicable when sentencing defendant, who was previously convicted in state court of selling crack cocaine, to statutory mandatory minimum sentence for federal conviction of conspiring to distribute crack cocaine, since state court conviction was not the basis for an increase in the offense level for the federal offense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846; U.S.S.G. § 5G1.3(b), 18 U.S.C.A.

[6] Criminal Law 110 ⚖1119(1)

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)15 Questions Presented for Review
110k1113 Questions Presented for Review
110k1119 Conduct of Trial in General
110k1119(1) k. In General. Most Cited Cases

Criminal Law 110 ⚖1440(2)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1435 Consideration Despite Waiver or Other Bar
110k1440 Counsel
110k1440(2) k. Preferability of Raising Effectiveness Issue on Post-Conviction

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Motion. Most Cited Cases

Court of Appeals would not review ineffective assistance of counsel claim on direct appeal, but would instead deny claim without prejudice so that it could be raised in a motion to vacate, set aside, or correct sentence, where record was not sufficiently developed for resolution of claim. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2255.

[7] Criminal Law 110 ⟹2098(5)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(5) k. Credibility of Other Witnesses. Most Cited Cases

Government did not improperly vouch for the credibility of its witnesses during summation in trial for conspiracy to distribute crack cocaine by asking the jury to consider the motives of cooperating witnesses in testifying and what those witnesses would lose if they lied, where government's remarks were made in response to defense counsel's attacks on the credibility of cooperating witnesses.

[8] Jury 230 ⟹34(7)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(7) k. Particular Cases in General. Most Cited Cases

District court was entitled to take account of defendant's leadership role in conspiracy to increase his base offense level when sentencing defendant for conspiracy to distribute crack cocaine, even though jury did not specifically find that defendant was a boss in the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

***80** UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgments of conviction of the United States District Court for the Southern District of New York (Rakoff, *J.*) are AFFIRMED and the sentences of Appellants Jeffrey Martinez, Nelson Martinez, Nathaniel Slater, and Anthony Bowens are remanded for resentencing in accordance with *Kimbrough v. United States,* 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007).Anthony L. Ricco, (Steven Z. Legon, on the brief), New York, NY, for Appellant Jeffrey Martinez.

Maurice H. Sercarz, (Julia L. Gatto, on the brief), Sercarz & Riopelle, LLP, New York, NY, for Appellant Alvin Martinez.

William H. Devaney, (Liam C. Ewing, Jr., Meredith Boylan, on the brief), Venable LLP, New York, NY, for Appellant Nathaniel Slater.

Melinda M. Sarafa, Sarafa Law, LLC, New York, NY, for Appellant Anthony Bowens.

Steven A. Feldman, New York, NY, for Appellant Nelson Martinez.

David V. Harbach, II, Assistant United States Attorney for Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY, for Appellee.

PRESENT: Hon. CHESTER J. STRAUB, Hon. PETER W. HALL, Circuit Judges and Hon. STEFAN R. UNDERHILL,[FN*] District Judge.

FN* The Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

SUMMARY ORDER

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(Not Selected for publication in the Federal Reporter)
(Cite as: 322 Fed.Appx. 78, 2009 WL 1033608 (C.A.2 (N.Y.)))

****1** Defendants-appellants Jeffrey Martinez, Nelson Martinez, Slater, Bowens, and Alvin Martinez appeal from judgments of conviction entered on June 26, 2007, June 28, 2007, June 29, 2007, and July 27, 2007, resulting from their involvement in a conspiracy to distribute crack cocaine in and around the Mitchel Housing Projects in the County of the Bronx between 1994 and 2005. Following a jury trial in the Southern District of New York, Defendants Jeffrey Martinez, Nelson Martinez, Slater, and Bowens were convicted of conspiracy to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841 ***81** and 846. Defendant Alvin Martinez pleaded guilty prior to trial pursuant to a plea agreement. The district court sentenced Jeffrey Martinez, Nelson Martinez, and Slater to 360 months' imprisonment. Bowens received a sentence of 180 months, and Alvin Martinez was sentenced to 120 months' imprisonment.

On appeal, the defendants challenge their convictions and sentences on numerous grounds. We assume the parties' familiarity with the underlying facts and procedural history.

Sufficiency of Evidence

Jeffrey Martinez, Slater, and Bowens assert that there was insufficient evidence to prove their knowing participation in the overarching conspiracy to distribute crack cocaine for which they were convicted. This Court reviews sufficiency of the evidence claims *de novo. United States v. Leslie,* 103 F.3d 1093, 1100 (2d Cir.1997). A defendant challenging a district court's denial of a motion for acquittal on the basis of insufficient evidence "bears a heavy burden." *United States v. Jones,* 482 F.3d 60, 68 (2d Cir.2006) (internal quotations omitted). We "view the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor, and reverse only if no rational factfinder could have found guilt beyond a reasonable doubt." *United States. v. Carlo,* 507 F.3d 799, 801 (2d Cir.2007) (per curiam); *United States v. MacPherson,* 424 F.3d 183, 187 (2d Cir.2005) (upholding a conviction if " *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original))).

To sustain a conspiracy conviction, there must be "some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States v. Sanchez Solis,* 882 F.2d 693, 696 (2d Cir.1989) (internal quotation marks omitted). "[A] single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance." *United States v. Maldonado-Rivera,* 922 F.2d 934, 963 (2d Cir.1990). Although the Government has the burden of proving the conspiracy alleged in the indictment, "[w]hether it has proved the existence of this conspiracy and each appellant's membership in it or has instead proved multiple other independent conspiracies is a question of act for a properly instructed jury." *United States v. Alessi,* 638 F.2d 466, 472 (2d Cir.1980). The issue before us, therefore, is whether the evidence presented supports a finding that the conspiracy was proved and that each appellant was a member of it.

****2** [1] As to Jeffrey Martinez, witnesses at trial testified that he: (1) was a boss of 205 Alexander Avenue; (2) shared a supplier with Slater (the boss of 350 East 137th Street); (3) jointly purchased large quantities of crack cocaine with Nelson Martinez and Anthony Glover (the boss of 215 Alexander Avenue); (4) acted to keep out competition; (5) "join[ed] forces" with Slater and Trey Boglin (the boss of 175 Alexander Avenue) to reopen 205 Alexander Avenue for crack cocaine sales; and (6) fronted Glover crack cocaine and arranged, along with his brothers, to be the source of Glover's resupply.

Witnesses at trial identified Slater as the boss of both 350 and 360 East 137th Street. When the

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operation was at its peak, Slater's workers sold $4,000-$5,000 worth of crack cocaine per day. A witness testified that when business "slowed up," ***82** Slater would "merge" his operations with Trey Boglin (the boss of 175 Alexander Avenue). This included sharing a "stash house." Slater's cooperation with another boss was corroborated by a second witness who testified that he had heard that Slater "joined forces" with Boglin. Also, following the arrest of one of his employees, Slater discussed with bosses Glover and Nelson Martinez his plan to reopen 350 East 137th Street for crack cocaine sales.

[2] The evidence against Bowens included: (1) testimony by Detective Jose Ramirez that he saw Bowens in front of 215 Alexander Avenue "all of the time," and in the company of "a bunch of people"; (2) a surveillance tape showing a drug transaction involving Bowens and a confidential informant; (3) testimony from boss Eric Glover that Bowens worked for him as a pitcher; (4) testimony from Glover that Bowens, for a period of time, distributed packs of crack cocaine to pitchers; (5) testimony that a competitor referred to Glover's people, including Bowens, as "you all" and "guys around here"; (6) testimony from Norbell Lynch that he served as a look-out for Bowens while Bowens was engaged in crack cocaine sales; and (7) testimony by George Verdejo that Glover had told Bowens to attend to customers who had been waiting, which Bowens then did.

We agree with the district court's assessment that the Government presented enough evidence for the jury to reasonably infer that Jeffrey Martinez, Slater, and Bowens participated in a conspiracy to distribute crack cocaine in and around the Mitchel Houses as charged in the superseding indictment. *See United States v. Sisca,* 503 F.2d 1337, 1345 (2d Cir.1974) ("It is sufficient for the government to have proven ... that each [coconspirator] knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business." (internal quotation marks omitted)).

On appeal, Bowens argues the evidence showed, at most, only that he joined a smaller conspiracy located within 215 Alexander Avenue, not the forty-three person Mitchel Houses conspiracy charged in the indictment. We are not persuaded. "A single conspiracy may be found where there is mutual dependence among the participants, a common aim or purpose or a permissible inference from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture." *United States v. Williams,* 205 F.3d 23, 33 (2d Cir.2000) (internal quotations marks omitted); *see also United States v. Barnes,* 604 F.2d 121, 155 (2d Cir.1979) ("retailers whose existence is actually unknown to each other can be held to have agreed in a single conspiracy if each knew or had reason to know that ... [the] middleman handles a larger quantity of narcotics than one retailer can sell." (citation omitted)). Based on the evidence presented against him, including, *inter alia,* Glover's testimony that Bowens distributed crack cocaine to other pitchers, and Lynch's testimony of serving as a look-out for Bowens, a reasonable jury could infer that Bowens "was aware of his part in a larger organization." *See Williams,* 205 F.3d at 33.

****3** [3] In his appeal, Slater argues that although he may have participated in the sale of crack cocaine, there was no overarching conspiracy because the crack cocaine dealers in the Mitchel Houses competed against each other for individual customers. This competition, however, does not mean that the conspiracy was not present, as long as the conspirators were working together toward the shared goal of distributing crack cocaine around the ***83** Mitchel Houses. Despite evidence of their sometime competing interests, members of the conspiracy shared resources, and workers from the various buildings acted in concert to warn each other if the police were present.

Right to Review Witness Statements

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[4] Nathaniel Slater alleges that the district court violated his Fifth and Sixth Amendment rights when it denied his motion to lift a protective order so that he could possess a copy of 18 U.S.C. § 3500/*Giglio* material in his jail cell without the presence of defense counsel. We find no such violations. The Government timely disclosed the § 3500 material, and Slater was permitted to view it with counsel present. The district court was within its discretion in preventing defendant's unsupervised possession of § 3500 material, which included statements by cooperating witnesses, to protect such witnesses from intimidation and retribution. This was of particular concern in this case given that two of Slater's codefendants awaiting trial were alleged to have intimidated a prosecution witness in a prior state case.

Sixth Amendment Right to Present Evidence

Jeffrey Martinez argues that this Court should reverse his conviction because the district court violated his Sixth Amendment rights by limiting the extent of his cross-examination of Government witnesses. Specifically, Jeffrey Martinez contends that "[o]n several occasions," the district court improperly prevented him from presenting "evidence of the co-conspirators['] backgrounds and the circumstances under which they grew up in the Mitchel[ ] Housing Projects." "The decision of the trial court to restrict cross-examination will not be reversed on appeal unless its broad discretion has been abused." *United States v. Maldonado-Rivera,* 922 F.2d 934, 956 (2d Cir.1990). Here, there has been no abuse of discretion. Jeffrey Martinez does not point to any specific instances in the record in which the court improperly limited Jeffrey Martinez's counsel's attempts to introduce background evidence.

Request for Adjournment and Application of U.S.S.G. § 5G1.3(b)

[5] Alvin Martinez asserts that the district court abused its discretion in refusing to postpone his sentencing so that he could first be sentenced in a New York State criminal case. According to Alvin Martinez, if the state court had sentenced him first, § 5G1.3(b) of the Sentencing Guidelines would have required the district court to take into account the state sentence and sentence him below the mandatory 120 month minimum. This argument fails. As the district court properly found, § 5G1.3(b) is inapplicable to Alvin Martinez because the state court conviction was not "the basis for an increase in the offense level for the instant offense." *See* U.S.S.G. § 5G1.3(b). Alvin was found guilty of conspiring to distribute 50 to 150 grams of crack cocaine and received a statutory mandatory minimum sentence of 120 months. Alvin's prior state court conviction for sale of crack cocaine on June 11, 2002, did not increase his base offense level.

Ineffective Assistance of Counsel

****4** [6] Appellant Bowens asserts that his trial counsel was ineffective for failing to explain the Government's plea offer adequately and for refusing to notify the district court of Bowens's desire for new counsel. This Court has a "baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Khedr,* 343 F.3d 96, 99 (2d Cir.2003) (citations and internal quotation marks omitted); *see also* ***84***Massaro v. United States,* 538 U.S. 500, 504-05, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003) (expressing preference that an ineffective counsel claim be evaluated pursuant to a § 2255 motion, rather than on direct appeal). But this Court will review ineffective assistance claims on direct appeal when the record is fully developed and resolution is beyond doubt. *See United States v. Garcia,* 413 F.3d 201, 219 n. 13 (2d Cir.2005); *see also Khedr,* 343 F.3d at 100 (holding that this Court should resolve an ineffective assistance claim on direct appeal where "their resolution is beyond any doubt or to do so would be in the interest of justice." (internal quotations omitted)). Here, the record is not sufficiently developed for us to resolve Bowens's ineffective assistance claim. We believe that Bowens's claim should be heard as part of a § 2255 motion if he opts to file one. We therefore deny his claim of ineffective assistance of counsel without prejudice to his raising it on an appropriate motion for collateral review.

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Nelson Martinez's Pro Se Arguments

[7] In his supplemental *pro se* brief, Nelson Martinez alleges that the Government improperly vouched for the credibility of its witnesses during summation. It did not. In the challenged remarks the Government asked the jury to consider the motives of cooperating witnesses in testifying and what those witnesses would lose if they lied. These remarks were made after defense counsel's attacks on the credibility of cooperating witnesses. The Government's response was not improper. *See United States v. Rivera,* 22 F.3d 430, 438 (2d Cir.1994) ("[W]hen the defense has attacked ... the credibility of the government agents, the prosecutor is entitled to reply with rebutting language suitable to the occasion." (internal quotations omitted)).

[8] Nelson Martinez also contends that he can be held responsible only for the 50 grams of crack cocaine charged in the indictment, and not the 1.5 kilograms of crack cocaine for which he was found responsible by the district court at sentencing. Similarly, he argues that the district court erred by increasing his base offense level in taking account of his leadership role in the conspiracy because the jury did not specifically find that he was a boss of one of the buildings in the Mitchel Housing Projects. These arguments are without merit. *See United States v. Martinez,* 525 F.3d 211, 215 (2d Cir.2008) ("This Court has determined that, judicial authority to find facts relevant to sentencing by a preponderance of the evidence survives *Booker* ... and that, with the mandatory use of the Guidelines excised, the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection." (internal quotations and alterations omitted)).

Resentencing in light of Kimbrough

****5** Defendants Nelson Martinez, Jeffrey Martinez, Bowens, and Slater argue on appeal that they are entitled to resentencing in light of *Kimbrough,* 128 S.Ct. 558, and the retroactive amendments to the Guidelines pertaining to crack cocaine. The Government has consented to a remand, and we agree that one is appropriate here. *See United States v. Regalado,* 518 F.3d 143 (2d Cir.2008).

We have considered appellants' remaining arguments regarding their convictions and find them to be without merit.

For the foregoing reasons, appellants' appeals are DENIED, and their judgments of conviction are affirmed in all respects, except that the case is remanded for resentencing of Nelson Martinez, Jeffrey Martinez, Bowens, and Slater and we note, as to Bowens's ineffective assistance argument that it has been denied without prejudice. We do not address defendants' arguments about the reasonableness of ***85** their sentences as such arguments may become moot following resentencing, and may be raised in a subsequent appeal following entry of final judgments.[FN2]

FN2. This includes Nelson Martinez's argument that his sentence was unreasonable because the district court did not fairly and accurately consider the factors under 18 U.S.C. § 3553(a).

C.A.2 (N.Y.),2009.
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Slip Copy, 2009 WL 1346867 (W.D.N.Y.)
(Cite as: 2009 WL 1346867 (W.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
W.D. New York.
UNITED STATES of America,
v.
Mark SMITH, Defendant.

No. 09CR82S.
May 13, 2009.

West KeySummary**Criminal Law 110 627.10(3)**

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.10 Informers or Agents, Disclosure
110k627.10(2) Particular Cases
110k627.10(3) k. Drug and Narcotic Offenses. Most Cited Cases

Disclosure of the identity of a confidential informant by producing an audio recording between a drug defendant and the informant prior to trial would pose a threat to the informant and thus, the government's request for a protective order against producing the recording to the defendant was granted. The government's production of transcripts of the recording containing the statements of the defendant, and the context of those statements by including a transcript of others recorded in the conversation, allowed the defendant to adequately prepare for trial while also protecting the identity and safety of the informant. The defendant did not establish that pre-trial disclosure of the actual recording or the identity of the informant was essential to his defense.

Anthony M. Bruce, U.S. Attorney's Office, Buffalo, NY, for Plaintiff.

Order

HUGH B. SCOTT, United States Magistrate Judge.

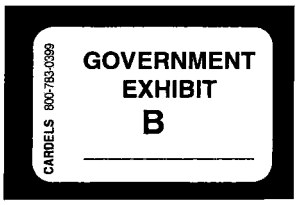
***1** Before the Court is defendant's oral motion for production of audio recordings. At a status conference on March 30, 2009, defendant stated that the Government had not produced these records but the Government offered to produce transcripts of these tapes. Defendant, however, insisted upon production of the tapes themselves. The Court ordered the parties to submit authority on this issue by April 14, 2009. (Text minute entry of Mar. 30, 2009.) Defendant (Docket No. 3) and the Government (Docket No. 2) submitted this authority and the matter was deemed submitted as of April 14, 2009. Time was excluded from the Speedy Trial Act calculation due to this pending motion (*see* text minute entry of Mar. 30, 2009).

BACKGROUND

This is a single count drug possession with intent to distribute prosecution, part of a number of prosecutions (*see also* Docket No. 2, Gov't Memo. at 2-3; Docket No. 3, Def. Memo. at 3 n. 1, listing other cases where defense counsel raised similar issue) arising from raids in Niagara Falls, New York. Defendant was charged with possessing five grams or more of a substance containing cocaine base on or about May 19, 2008, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (Docket No. 1, Indict.).

The Government states that it made at least one recording between defendant and a confidential informant (Docket No. 2, Gov't Memo. at 2). Since this case arose with other drug and firearm trafficking cases, the Government generally concludes that "there is a clear danger to witnesses, especially including those witnesses who recorded their conversations with defendants (including, in this case, defendant Mark Smith)" (*id.* at 3). The Government offers to defer production of the actual recordings until thirty days prior to trial and would immediately produce transcripts of the recordings, in order to protect the confidential informant (*id.* at 3, 6-7).

Defendant argues that these recordings should



be produced pursuant to Rule 16 (Docket No. 3, Def. Memo. at 3-6). Defendant disputes whether the Government articulated a threat to the confidential cooperating witnesses to justify a protective Order (*id.* at 5).

DISCUSSION

As an initial matter, it is undisputed that the tapes are generally discoverable under Rule 16. Rule 16(a)(1)(B) states that on the request of the defendant, "the government must disclose to the defendant, and make available for inspection and copying ... any relevant ... recorded statement by the defendant" if the statement is in the government's possession. However, Rule 16(d)(1) provides a court with the authority to defer inspection or discovery. Rule 16(d)(1) provides:

> At any time the court may, for good cause shown, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte.* If relief is granted, the court must preserve the entire text of the party's statement under seal.

***2** In the instant matter, the Government seeks a protective Order on the grounds that the production of the actual recordings would endanger witnesses including confidential informants. Further, the Government contends that this case is "associated" with other prosecutions arising out of Niagara Falls, New York, involving narcotics trafficking and firearm offenses. (Docket No. 2, Gov't Memo. at 2-3.)

The Supreme Court has held that, in construing the Government's obligations under Rules 16 and 17 of the Federal Rules of Criminal Procedure, the Court should "be solicitous to protect against disclosures of the identity of informants," *Bowman Dairy Co. v. United States,* 341 U.S. 214, 221, 71 S.Ct. 675, 95 L.Ed. 879 (1951). This is consistent with the protection provided to Government witnesses under the Jencks Act, 18 U.S.C. § 3500. The purpose of this protection is to safeguard witnesses from possible reprisals, and thus, is consistent with the "strong public interest in encouraging the free flow of information to law enforcement officers" used to justify secreting informants' identities, *see United States v. Ciambrone,* 601 F.2d 616, 626 (2d Cir.1979); *United States v. Tucker,* 380 F.2d 206, 213 (2d Cir.1967); *see also United States v. Nava-Salazar,* 30 F.3d 788 (7th Cir.1994) (delay in providing discoverable information to the defendant was justified to protect investigation and safety of informants based upon *ex parte* submissions to the Court pursuant to Rule 16(d)(1)).

The issue here is the manner in which defendant's statements are to be produced well in advance of trial. In the instant case, the Government has articulated a sufficient basis for the Court to conclude that disclosure of the identity of the confidential informant by producing the audio recordings at this time would pose a threat to that individual. Under the circumstances, the production of the transcripts of the audio recordings containing the statements of the defendant, and the context of those statements by including the transcript of others recorded in the conversation, allows the defendant to adequately prepare for trial in this matter while protecting the identity and safety of the Government's confidential informants. The defendant has not established that the pre-trial disclosure of the actual recordings when transcripts will be furnished or the identities of any informants is essential to his defense. *Roviaro v. United States,* 353 U.S. 52, 60-61 (1957); *United States v. Saa,* 859 F.2d 1067, 1073 (2d Cir.), *cert. denied,* 489 U.S. 1089, 109 S.Ct. 1555, 103 L.Ed.2d 858 (1988). Rule 16 does not require the Government to disclose the names of witnesses prior to trial. *United States v. Bejasa,* 904 F.2d 137, 139 (2d. Cir.), *cert. denied,* 498 U.S. 921, 111 S.Ct. 299, 112 L.Ed.2d 252 (1990). It is sufficient that the audio recordings be produced prior to trial, along with the Jencks Act material as directed in the trial order issued by the District Court Judge in this case.

CONCLUSION

Based on the above, the Government's request for a Protective Order (*see* Docket No. 2) against producing audio recordings to defendant is **granted;** the Government shall produce a copy of the transcript of the audio recordings including the statements of the defendant with the confidential informants as soon as practicable. The Government then shall produce copies of the audio recordings at least thirty (30) days prior to trial in this case or as directed by the presiding District Judge.

***3** So Ordered.

W.D.N.Y.,2009.
U.S. v. Smith
Slip Copy, 2009 WL 1346867 (W.D.N.Y.)

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SouthtownStar (Chicago, IL)

May 7, 2012

Section: Op-Ed

Unfortunately, we've seen this legal circus before

Rich Miller

Call it "Blagojevich Lite" or whatever you want, but it became pretty clear last week that state Rep. Derrick Smith's attorneys are planning the same sort of mockery of the system that Rod Blagojevich's legal team did during those dark days after the former governor's arrest.

"While I have been troubled to experience the shenanigans being played by the FBI, to lean on people around me and to get them to say bad things about me, I will not cower," Smith (D-Chicago) told reporters after he pleaded not guilty to federal bribery charges.

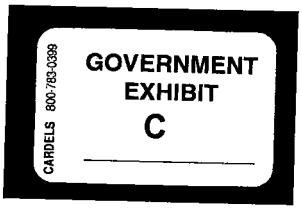
Never mind the fact that nowhere in the arrest report or federal indictment is there any reference to anybody saying "bad things" about him. Smith is accused of taking a $7,000 bribe to help get a state grant for a day care operator, a business that was a creation of federal agents.

Smith also claimed that the people of his district "elected" him on March 20 because "they believed in me." Yeah. Right. OK.

The voters gave him the Democratic nomination on March 20 despite the fact that he had been charged because party leaders warned them that Smith was up against a white, conservative Republican activist who was posing as a black Democrat. Many of those same Democratic leaders are now calling for Smith's resignation.

Smith's pledge to never "cower" in the face of the federal prosecution was right out of Blagojevich's defiant playbook. Blagojevich loudly declared his complete innocence, vowed to fight to the end, said he had been persecuted by the feds and once even challenged the U.S. attorney to a manliness contest.

Right up until he checked himself into federal prison to serve a 14-year term, Blagojevich said the feds had the wrong guy. Smith, by the way, is now looking at 10 years in a federal penitentiary.



But it was one of Smith's attorneys, Victor Henderson, who really brought the former governor to mind with his remarks.

Henderson told reporters that Smith had been entrapped, but the lawyer's evidence of this entrapment was an allegedly phony government website and a fictitious day care center operator. That's hardly proof of entrapment. Actually, it's standard stuff for a federal sting operation.

And doesn't claiming that Smith was entrapped into accepting a $7,000 bribe mean Smith and his lawyers are all but admitting that he took the money? And if he did take the cash, isn't that enough right there to expel him from office?

The House doesn't have to consider whether or not Smith is guilty under state or federal criminal statutes. This is not about criminality. It's about politics.

Under its rules, the House merely has to establish "disorderly behavior" by the offending member. That isn't a very high bar. Theoretically, the House could expel a member for spitting on the sidewalk if two-thirds of the members so voted.

Henderson did make a good point about the FBI failing to inform a judge of its informant's extensive criminal record. And he gave the strongest indication yet that he planned to disrupt and distract the process from beginning to end when he quoted anti-Nazi Lutheran Pastor Martin Niemoller's immortal poem about moral cowardice during the Holocaust.

"First they came for the socialists, and I did not speak out because I was not a socialist. Then they came for the trade unionists, and I did not speak out because I was not a trade unionist. Then they came for the Jews, and I did not speak out because I am not a Jew. Then they came for me, and there was no one left to speak to, for me."

"Today it's Derrick Smith," Henderson told reporters, according to Chicago Public Radio. "Who is it tomor- row?"

Needless to say, invoking the Holocaust to defend a client accused of taking a cash bribe is more than a bit much.

But now that the House Special Investigating Committee has allowed Smith and his legal team more than enough time to get their feet underneath them by continually postponing the inevitable, we can probably expect a lot more crud such as this.

Henderson told Illinois Issues magazine that his client plans to testify at future House hearings. The next one is scheduled for May 10.

If Henderson was telling the truth about Smith testifying, we can all expect an embarrassing circus.

Rich Miller also publishes Capitol Fax, a daily political newsletter, and CapitolFax.com

---- INDEX REFERENCES ---

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