U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

May 16, 2018

TO BE FILED UNDER SEAL

BY EMAIL

The Honorable Alison J. Nathan
United States District Court
Southern District of New York
40 Foley Square
New York, NY 10007

Re: *United States* v. *Pizarro & Rivera*, S4 17 Cr. 151 (AJN)

Dear Judge Nathan:

The Government respectfully submits this letter in response to the defendants' May 16, 2018 joint motion to dismiss the Indictment in the above-captioned case. The defendants ask that the Indictment be dismissed based on the Government's recent disclosure of information relating to potential alternative perpetrators.

The Government respectfully disagrees with certain assertions in the defendants' submission. That said, there is no question that the Government made several mistakes, both with respect to the disclosures surrounding Guillen's statements to the CI and regarding statements by the DANY CW. These mistakes have received attention at the highest levels of the Office, which has already initiated training and other remedial measures throughout the Office to avoid these and similar mistakes in criminal cases. The Government apologizes to the Court and to the defense for those mistakes, for which we make no excuses. However, the Government respectfully submits that the appropriate remedy for the Government's errors is an adjournment, not dismissal of the indictment.

I. Law

Pursuant to the Due Process clause of the United States Constitution, the Government has a duty to disclose favorable evidence to the accused where such evidence is "material" either to

guilt or to punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963), even if the evidence is only in the possession of the investigating officers and not in the direct possession of the prosecutors, *see Kyles v. Whitley*, 514 U.S. 419 (1995). Favorable evidence includes evidence that tends to exculpate the accused, *see id.*, as well as evidence that is useful to impeach the credibility of a government witness. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). As the Court of Appeals has explained, *Brady* and *Giglio* material must be provided by the Government "in time for its effective use at trial." *In re United States (U.S. v. Coppa)*, 267 F.3d 132, 146 (2d Cir. 2001).

"The rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence only known to the Government." *United States* v. *Le Roy*, 687 F.2d 610, 619 (2d Cir. 1982) (holding that Government was not obligated to disclose allegedly exculpatory grand jury testimony when the defendant was "on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish."). "Thus, *Brady* requires the prosecutor neither to deliver his entire file to defense counsel, nor to make a disclosure if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence." *Tate* v. *Wood*, 963 F.2d 20, 25 (2d Cir. 1992) (internal citations and quotation marks omitted); *see also United States* v. *Corey*, 566 F.2d 429, 431 n.5 (2d Cir. 1977) (prosecutor has no obligation to bring to the defendant's attention matters which he already knows); *United States* v. *Jacques Dessange, Inc.*, 2000 U.S. Dist. LEXIS 2886, 24-25 (S.D.N.Y. Mar. 13, 2000) ("Evidence, even if exculpatory and material, is not required to be disclosed, however, if the defendant knows or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." (internal quotations omitted)).

The Second Circuit has made clear that "the remedy for a *Brady* violation is *vacatur* of the judgment of conviction and a new trial in which the defendant now has the *Brady* material available" to him. *United States v. Halloran*, 821 F.3d 321, 342 n.14 (2d Cir. 2016) (quoting *Poventud v. City of New York*, 750 F.3d 121, 133 (2d Cir. 2014) (en banc)) (emphasis in original); *see also United States v. Espinal*, 96 F. Supp. 3d 53, 70-71 (S.D.N.Y. 2015) (rejecting motion for the "extraordinary remedy of dismissal of the indictment" for *Brady* violations); *United States v. Garcia*, 780 F. Supp. 166, 177 (S.D.N.Y. 1991) (denying motion to dismiss indictment for *Brady* violation). "'It is well established that dismissal of an indictment on grounds of governmental misconduct is an extreme and drastic sanction.'" *United States v. Barcelo*, No. 13 Cr. 38 (RJS), 2014 WL 4058066, at *7 (S.D.N.Y. Aug. 15, 2014) (quoting *United States v. Rubio*, 709 F.2d 146, 152 (2d Cir. 1983); *id.* (noting that dismissal "should 'not even be considered unless it is otherwise 'impossible to restore a criminal defendant to the position that he would have occupied' but for the misconduct'") (quoting *United States v. Stein*, 495 F. Sup. 2d 390, 419 (S.D.N.Y. 2007) (quoting *United States v. Artuso*, 618 F.2d 192, 196-97 (2d Cir. 1980).

II. Discussion

An adjournment is the appropriate remedy for the Government's error, as it will allow the defendants to engage in any necessary investigative steps with respect to the new information recently disclosed by the Government. Defendants have not cited a single case to support their

argument to dismiss the Indictment, nor have they demonstrated how an adjournment could not "restore [them] to the position they would have occupied" had they received the *Brady* information earlier.

The defendants assert that the prejudice caused by the Government's late disclosures cannot be cured by an adjournment because the passage of time has resulted in (1) potential witnesses being arrested, jailed, and obtaining legal counsel, thus depriving the defendants of the ability to conduct surveillance on the potential witnesses, attempt to interview them, or review their social media; and (2) certain social media accounts either no longer exist or have restrictions that limit access to account information. This claimed prejudice is simply rampant speculation, and falls far short of the necessary showing that "it is otherwise 'impossible to restore [the defendants] to the position that [they] occupied' but for the misconduct.'" *Barcelo*, 2014 WL 4058066, at *7.

To the contrary, the defendants have access to a wealth of evidence concerning the charged offenses, including (1) months of security camera footage of the victim's shop, in which the defendants can seek to identify any alternative perpetrators; (2) cell tower data showing all cellphone usage for the towers in the vicinity of the victim's shop and the location where the victim's body was discovered; (3) forensic evidence, including DNA and fingerprint samples, from all crime scenes; (4) photographs of the crime scenes; and (5) the identities of witnesses who claim to have information about alternative perpetrators, and any information those witnesses provided to the Government about such alternative perpetrators, among other evidence.

The Government recognizes that disclosures in this case were untimely, and has worked extensively over the past two weeks to provide the defense with any and all information that they have requested, regardless of whether it falls within the Government's disclosure obligations. However the appropriate remedy for the Government's mistakes is an adjournment of trial should

the defendants ask for one, not the outright dismissal of the case against two individuals that the evidence overwhelmingly proves brutally murdered a federal cooperating witness.[1]

Respectfully submitted,

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cc: All counsel of record (via ECF)

[1] The Government respectfully submits that if the defense seeks an adjournment, time should be excluded under the Speedy Trial Act to permit the defense to conduct any preparation it deems necessary during that time and in advance of trial.