IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| vs. | ) | No. 08 CR 888 (01) |
| | ) | |
| ROD BLAGOJEVICH, *et al.*, | ) | Honorable James B. Zagel |
| | ) | Presiding Judge |
| Defendants. | ) | |

PARTIAL PRETRIAL MOTIONS FOR ROD BLAGOJEVICH

Rod Blagojevich (hereafter Rod to avoid confusion with his similarly named co-indictee), through undersigned counsel, submits partial pretrial motions regarding issues of concern to Rod.

1. Because the April 2, 2009, superseding indictment "incorporates [by-reference]," segments of counts one, two and thirteen into counts two-eighteen, a complex succession of putative schemes are charged. Moreover, it is difficult for the motivated reader to discern whether Rod is charged in counts thirteen-fifteen, but given the background of counts one and two, Rod is certainly implicated in the "Cellini" counts.[1] That said, Rod proceeds apace.

2. OTHERS KNOWN AND UNKNOWN TO THE GRAND JURY—[BUT] PRESUMPTIVELY KNOWN TO THE GOVERNMENT. By way of discovery, Rod maintains that—in order for his lawyers to be constitutionally effective—they must necessarily (well-in advance of trial), investigate and prepare for the presentation of government witnesses/testimony/documentary evidence concerning "others known and unknown to the grand jury." At p. 10 of count one (RICO conspiracy), the grand jury charge includes: "others known and unknown to the grand jury." Similarly, in count two (incorporating segments of count one) at p. 17, it names other individuals and "others." Again, Rod must necessarily have the benefit of being apprised of the names of "others," in order that plenary investigation and preparation ensue in advance of trial.

[1] At pp. 52, 55-56, count thirteen specifically names Rod "and others."

There are a wealth of authorities holding that a defendant can be convicted of conspiracy with individuals neither named nor described in the indictment other than "others known and unknown to the grand jury." See *United States v. Viezca*, 265 F.3d 593, 598 (7th Cir.2001) (conspiring with others known and unknown to the grand jury can support conspiracy conviction; citing *United States v. Duff*, 76 F.3d 122, 127 (7th Cir. 1996); *United States v. Kincannon*, 567 F.3d 893, 898 (7th Cir. 2009) (affirming dope conviction noting that defendant's complicity is not limited to those named within the contours of the indictment where the indictment includes "others known and unknown," moreover the fact that the indictment does not name another individual is irrelevant, cf., *United States v. Avila*, 557 F.3d 809, 816 (7th Cir. 2009) (same); *United States v. Lechuga*, 994 F.2d 346, 350, 352 (7th Cir. 1993) (*en banc*) (plurality) (same).

In light of Seventh Circuit precedents, *ante*, it is pristine that Rod must have the benefit of government disclosures concerning "others known and unknown to the grand jury" well-in advance of trial.[2]

3. HONEST SERVICES *VEL NON*. Counts one, two and thirteen incorporate "intangible right to the honest services" [of Rod, *et al.*] (pp. 10-11 of count one, p. 17 of count two and pp. 48, 50 of count thirteen). Rod is devoting substantial time and effort in preparing his defense based on challenges to "intangible rights-honest services." While a subsequent filing will challenge the integration of "intangible rights-honest services," this Court will judicially note that the United States Supreme Court has a trio of "intangible right-honest services" cases on its docket . Cf., *Black et al. v. United States*, No. 08-876, *Weyhrauch v. United States*, No. 08-1196 and *Skilling v. United States*, No. 08-1394.

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[2] In *United States v. Thomas*, 348 F.2d 78, 82-85 (2nd Cir. 2003), the court, while affirming dope conspiracy convictions, furnishes a discussion regarding the impact of "others known and unknown to the grand jury" (coll. cases); *United States v. Martinez*, 96 F.3d 473, 477 (11th Cir. 1996) (on rehearing) (same); *United States v. Nason*, 9 F.3d 155, 159 (1st Cir. 1993) (defendant can be indicted and convicted even if the names of his coconspirators are unknown * * *.).

In all events, Rod maintains that pursuant to Fed.R.Crim.P. 7(f), he is entitled to a complete government response regarding "others known and unknown to the grand jury."

Suppose the Supreme Court issues its (presumptively consolidated Black, Weyhrauch and Skilling) opinion(s) during June 2010—a week or so in advance of Rod's scheduled joint trial. Suppose further that the Court holds that "intangible rights-honest services" are constitutionally vague (facially invalid)—and Rod has already spent several months preparing his challenges to "honest services," *et seq.* Under those circumstances, this Court would be confronted with [a] motion to continue Rod's trial because the foundational underpinnings for the majority of Rod's charges have been held invalid. Given that realistic potential, Rod reasonably assumes that his June 2010 trial setting will be aborted.[3] With those dubieties foreshadowing [a] June 2010 trial date, Rod suggests that the court consider resetting Rod's trial to a day certain commencing September 2010.

4. ACCELERATED SANTIAGO PROFFER AND 3500 MATERIALS.

Count one of Rod's indictment charges a RICO conspiracy from "in or about 2002 to on or about December 9, 2008" (Pg. 9, ¶ 4). Thus, the government "may" be permitted to offer (subject to multiple FRE exceptions) evidence concerning activity—prior to—2002 or post-December 9, 2008. Given the six or more years of charged (or depending on government pretrial disclosures) uncharged sporadic [mis]conduct, Rod is compelled to fully investigate and prepare for trial (sans surprises).[4]

The pivotal importance of [the] government's Santiago proffer cannot be understated. As example, in *United States v. Gee*, 226 F.3d 885, 895 n. 8 (7th Cir. 2000), the district court declined to permit the government to introduce its FRE 801(d)(2)(E) coconspirator statements. Also, in *United States v. Centracchio*, 265 F.3d 518, 525 (7th Cir. 2001), the court reversed the district court's sustaining of defense objections to the admission of coconspirator evidence as articulated in its Santiago proffer. And, recently, in *United States v. Alvair*, 573 F.3d 526, 539-40 (7th Cir. 2009), the

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[3] Compare *United States v. Williams*, 576 F.3d 385, 388-91 (7th Cir. 2009) (reversing bank robbery convictions where trial court rejected defense motion for continuance where government trial theory was significantly altered on the eve of trial).

[4] Presumptively, the government will provide its theory of proffering "uncharged" conduct, if any, within the fabric of its Santiago proffer.

court, citing FRE 104(a), explained that the district court must make a preliminary determination concerning the admissibility of coconspirator's declarations. In part, the court explained [that]: Conditions for admission are that the government must convince the court, by a preponderance of evidence, that (1) a conspiracy existed, (2) the defendant and declarant were members of the conspiracy, and (3) the statement(s) sought to be admitted were made during and in furtherance of the conspiracy. * * *. The government may submit evidence of these elements in a pre-trial proffer, and the district court may admit the statement(s) subject to its later determination during trial—that the government has established by a preponderance of the evidence the trio of foundational elements. * * * . *Id.* at 540.

Simply stated, Rod advances the simple and straightforward notion that since he is entitled to effective assistance of counsel—which translates into adequate time for investigation and preparation—and given the [over] six-year span of the charged conspiracies and substantive counts, blended with millions of pages of disc-generating data, it makes perfect sense for Rod's defense to be able to allocate its pretrial resources to that which the government intends to [attempt] to introduce at trial—rather than "guessing" which of the millions of pages of disc-generated data have—even marginal importance within the universe of ... constitutionally compelled pretrial and trial investigation and preparation. And, of course, while Fed.R.Crim.P. 26.2 compels production of materials relating to prior statements of the witness (as described in the Rule) after the witness testifies on direct ... if there is no adequate pretrial disclosures ... then most assuredly the defense would be requesting trial adjournment so that the government witness or witnesses can be effectively confronted and cross-examined (including FRE 806 impeachment).[5]

By all accounts, the case at hand, with its multiple counts and defendants, remains confusing

[5] Simply by way of example, several witnesses that testified in *United States v. Rezko*, 05 CR 691, are identified by name, or are potential witnesses in Rod's trial. Presumptively, the government has secured complete Rezko trial transcripts of those witnesses. Rod, as a quasi-CJA defendant, requests that this Court direct the government to furnish Rod's counsel with copies of the Rezko transcripts in order to avoid "continuance" motions, in advance of, or during Rod's trial.

and complex. Given that reality, Rod moves that the court direct the government to furnish to Rod's defense counsel its Santiago proffer and Rule 3500 materials— 120-days before trial.[6]

5. BRADY DISCLOSURES.

Pursuant to, *inter alia*, the Fifth Amendment and principles embodied in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, including *United States v. Banks*, 546 F.3d 507, 509-511 (7th Cir. 2008) and *Wisehart v. Davis*, 408 F.3d 321, 323-326 (7th Cir. 2008), Rod moves that the Court enter an order requiring the government to immediately disclose any evidence or information in its possession, control, or custody, which is known, or by the exercise of reasonable diligence may be known to the government, that is (1) favorable to Rod, or is material to his innocence, or sentencing, or (2) bears upon the credibility of any intended or potential government witness. In support, defendant requests prompt disclosure of all Brady evidence, including potentially impeaching evidence including, but not limited to:

a. Any and all written or recorded statements of interviews, with any individual, including Government agents, persons who may have cooperated with the Government, and persons not charged in the indictment, which tend to exculpate or reflect favorably on the Defendant, or which is consistent with the Defendant's innocence.

b. The name, last known address and written or recorded statement, or memorandum or notes of interview of any individual whose testimony would be favorable to the Defendant in (or are otherwise consistent with the Defendant's innocence), including but not limited to statements of the Defendant instructed or expected others to conduct themselves in conformance with applicable laws.

c. The name, last known address and written or recorded statement, or memorandum or notes of interview of any individual whose testimony would contradict or be inconsistent with the expected testimony of any witness for the Government, whether or not the

[6] In similar "intangible right(s)-honest services" prosecutions in this district the government provided discovery, pursuant to protective orders, well-in advance of trial, see *United States v. Vrdolyak*, 07 CR 298 at R. 67, 71, 73, and 76.

Government intends to call such a person as a witness.

d. Any evidence or information that contradicts or is inconsistent with the expected testimony of any witness for the Government, or that relates to the credibility of any. witness the Government intends to call at trial, including? but not limited to evidence or information relating to the commission of crimes (whether or not resulting in prosecution or conviction), bad acts, or the giving of false or misleading statements of any kind.

e. Any prior statement or testimony of a Government witness that contains or reflects any contradiction or inconsistency with the expected trial testimony of the witness or with other statements or testimony given or made by the witness.

f. Any documents reflecting any consideration or promise of consideration offered or given to any potential Government witness, or requested by any potential Government witness, including any favors provided to such Government witnesses. This includes, but is not limited to, any correspondence with these potential witnesses and/or their attorneys, and any memoranda of conversations with these witnesses and/or their attorneys regarding the request, offer or provision of any consideration. "Consideration" means anything of value, whether bargained for or not, that arguably could benefit the witness or persons connected with the witness, or be perceived by the witness as a benefit or perceived by the Government as a benefit.

g. Any criminal activity in which a Government witness has engaged, whether that activity has or has not resulted in a prosecution or conviction, including any pending criminal charges.

h. Any statements made by a witness the Government intends to call at trial that arguably reveals an interest, motive or bias of that or any other witness against any of the Defendants and/or in favor of the Government.

Based on the above, Rod moves that this Court orders the Government to immediately disclose Rod's foregoing Brady, *et seq.* importunings.

6. CONCLUSION.

Rod Blagojevich (not to be confused with Rob Blagojevich) submits these partial pretrial motions. Since they are self-explanatory, further comment borders on indecorous.

Respectfully submitted,

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