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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. AARON J. SCHOCK, Defendant.	)	Case No. 16-cr-30061

[PROPOSED] DEFENDANT SCHOCK'S RESPONSE TO GOVERNMENT'S COMPLIANCE WITH THE COURT'S OCTOBER 3, 2017 ORDER AND MOTION TO RECONSIDER

INTRODUCTION

In response to the Court's order directing that the government "review all claims and statements made in all filings currently pending before the court" and "submit a memorandum detailing any further misrepresentations or misleading statements," Order at 3, Docket No. 143, the government now tells the Court not that the government made a mistake by misleading the Court (and the defendant), but that it is the Court that is mistaken in concluding that it was misled. In addition, instead of responding forthrightly to that directive as to whether it made other misleading representations to the Court, the government thinks it sufficient to now state that it made no *intentional* and *material* misrepresentations, clearly implying that any unintentional or non-material misrepresentations, which remain unacknowledged, should be excused. That it does so while paying lip service to its duty of candor to the tribunal renders this position by the government a breathtaking abdication of a commitment to credibility in the courtroom.

The defense in this case discovered indications that the government, in possible violation of Mr. Schock's constitutional rights, had improperly commented to the grand jury on his non-

appearance before that body and sought discovery to determine if that in fact had occurred. The Court, relying in part on the government's "unequivocal" representations denying such commentary before the grand jury occurred, denied that request for discovery. When the defendant persisted and asked for an evidentiary hearing to make further inquiry as to whether such commentary had occurred, the government came forward and contradicted its previous denial, now telling the Court that it had occurred on eleven occasions.

The Court is not the party mistaken. Instead, the government's pathetic claim now that it merely unequivocally denied the literal statement by a third-party is a further error compounding its prior false and misleading representations to the Court. In essence, the government has doubled down on its initial misleading representation, claiming now that when discovery was sought to determine if comments about Mr. Schock's non-appearance were in fact made it had no duty to inform either the Court or the defense that such had in fact occurred and that it was the Court's mistake to conclude that the government's denials were misleading. That is an outrageous statement to make to a court – yet another indication that when it comes to respecting a defendant's constitutional rights the government believes it, not a court, determines what needs to be disclosed.[1] That position is also consistent with the government's continuing practice to simply deny misconduct when faced with facts that show its occurrence.

We are constrained to note further that this controversy arises in the context of whether the defendant's fundamental constitutional rights were violated in the grand jury process. The government continues to take the position that its commentary on Mr. Schock's failure to come

[1] Just as the Court wondered if full disclosure had been made to the then-Deputy Attorney General who purportedly authorized the indictment in this case, the undersigned former-Deputy Attorney General has to wonder if the Justice Department has authorized the audacious position now being taken on this issue by the prosecution in this case.

into the grand jury and answer the prosecutors' "difficult questions" was proper. For the reasons stated in our motion to dismiss, that position is no more credible than is the government's meager, self-serving claim that it was not misleading to deny the commentary occurred when it knew there were eleven instances of it.

In short, there is no reason for the Court to, as the government requests, reconsider its findings and now all the more reason to dismiss this case.

DISCUSSION

I. Reconsideration is not warranted: the Court's finding was accurate

Instead of apologizing to the Court for a representation that the Court has already deemed, based on its review of the government's own filings, to have been "misleading, if not simply false," Order at 1, Docket No. 143, the government now apologizes for causing a "misunderstanding" by the Court and advances a new and cramped interpretation of the record that strains credulity and denies that it ever made any misleading representation at all.

Despite the government's disingenuous attempts to parse its prior statement, to any objective reader the meaning of its original unequivocal representation was plain. The government acknowledged in the filing in which it made its unequivocal representation that the "substantial question" raised in Mr. Schock's motion for discovery of grand jury materials was "whether the government improperly commented on [Mr. Schock's] failure to testify before the grand jury." Gov't's Resp. to Def. Schock's Mot. for Discovery Regarding Use of Confidential Informant and Mot. for Disclosure of Grand Jury Materials at 60-61, Docket No. 69 ("Discovery Response"). The government then quoted the witness's statement, which Mr. Schock never offered as a verbatim recitation of what occurred before the grand jury and which on its face made no such

assertion, as the basis for that substantial question. Then the government made its unequivocal representation that it "did not happen." *Id.* at 61.

We now know, because of the government's own filing, that this unequivocal representation was misleading and not the truth about what occurred before the grand jury – and that was the issue, obviously not the literal accuracy of what third-person hearsay reported. Surely the government would gladly prosecute a false statement case where, in a similar circumstance, such a statement was made that concealed the full facts.

The Court recognized the representation was neither accurate nor complete. The government now insists that the Court was "mistaken" when it made this plain observation, Gov't Compliance and Mot. to Reconsider at 14, Docket No. 144 ("Gov't Mot."), that it was a misunderstanding if the Court concluded that the government had acknowledged it made a misrepresentation. Despite the fact that the government cited to the Illinois Rule of Professional Conduct that mandates candor to the tribunal, the government insists that its intention in detailing the eleven instances where "government counsel commented on or addressed Mr. Schock's testifying or decision not to testify before the grand jury," Gov't's Resp. to Def.'s Mot. to Dismiss Indictment for Alleged Fifth Amendment Violation and for Leave to Subpoena a Grand Juror at 4, Docket No. 119 ("MTD Response"), was merely to "confirm to the Court that the government did not make the statement alleged" in the witness's statement, Gov't Mot. at 6.

This representation does not appear in the government's response to the motion to dismiss. The government never suggested that its review had "confirm[ed]" the accuracy of its prior statement. Instead, the government stated, consistent with Illinois Rule of Professional Conduct 3.3, that it was "supplement[ing] and clarif[ying] its response." MTD Response at 4.

If the government had intended its filing to support its unequivocal representation, it conspicuously did not say so. Indeed, this is the first time the government has stated its unequivocal representation was limited solely to the exact words that appeared in the witness's statement. If it were actually the case that Mr. Schock's motion to dismiss made a broader claim than his motion for discovery, it would not have been necessary for the government to "supplement[]" or "clarif[y] the prior response. Accurate statements do not need supplementing or clarifying in order for the speaker to comply with their ethical obligations as attorneys.

The examples the government listed in its response to the motion to dismiss further belie its self-serving and belated claim to be merely correcting a misunderstanding. The witness's statement related a conversation in which the witness was told that "Aaron Schock and his attorney were requested to appear and that no one had shown up." Ex. A, Docket No. 102. There are two elements to this statement: that the government requested or invited Mr. Schock to appear, and that he did not appear. On March 24, 2016, AUSA Bass, who made the unequivocal representation, told the grand jury "I did extend an invitation to him, and he declined." MTD Response at 11. On August 3, 2016, AUSA Bass told the grand jury "We did – in accordance with department policy, we did extend – we can extend an invitation" to Mr. Schock "to voluntarily appear and make a statement . . . And that was declined." *Id.* at 11-12. On September 8, 2016, AUSA Bass told the grand jury "[w]e invited him to produce any evidence, invited him to testify. He declined . . . ." *Id.* at 14. On October 4, 2016, the government told the grand jury "We have invited Aaron Schock to come in on more than one occasion and we'll continue to extend that invitation. He has respectfully declined." *Id.* at 15. To illustrate this even more starkly:

THE GOVERNMENT "UNEQUIVOCALLY SUBMITS TO THIS COURT THAT THIS ALLEGATION IS FALSE. IT DID NOT HAPPEN."[2]		
Declarant Statement	***Date***	***Government Statement to Grand Jury***
"Aaron Schock and his attorney were requested to appear and that no one had shown up."[3]	March 24, 2016	"I did extend an invitation to him, and he declined."[4]
	August 3, 2016	"We did – in accordance with department policy, we did extend – we can extend an invitation" to Mr. Schock "to voluntarily appear and make a statement . . . And that was declined."[5]
	September 8, 2016	"[w]e invited him to produce any evidence, invited him to testify. He declined . . . ."[6]
	October 4, 2016	"We have invited Aaron Schock to come in on more than one occasion and we'll continue to extend that invitation. He has respectfully declined."[7]

These examples speak for themselves. The unequivocal representation was false and misleading even if the Court accepts the government's wholly implausible interpretation. No truthful and responsible advocate, much less a federal prosecutor charged with the responsibility of representing the United States, would ever make the unequivocal representation here, even if

[2] Discovery Response at 61.
[3] Ex. A, Docket No. 102.
[4] MTD Response at 11.
[5] *Id.* at 11-12.
[6] *Id.* at 14.
[7] *Id.* at 15.

he secretly meant by that representation "it did happen, just not in those exact words." This misrepresentation was all the more egregious because it concerned information solely within the prosecutor's knowledge.

The government's response to the Court's order reveals a troubling standard for truthfulness. The government caveats its representations in its response to the Court's order, and asserts that its statements and claims "were made in good faith, using due care under the ordinary practice in the United States District Court." Gov't Mot. at 8. In essence, the government understands the Court in its order to have imposed a higher standard of clarity, a standard the government apparently cannot meet. However, any advocate knows, and particularly a prosecutor knows, that the Court expects truth in their representations. Indeed, ABA standards recognize that "[i]n light of the prosecutor's public responsibilities, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations." *Criminal Justice Standards for the Prosecution Function* at 3-1.4(a), The Prosecutor's Heightened Duty of Candor (4th ed.). The government's initial misrepresentation, now compounded by this transparent effort to revise the record and walk back the implications of its misconduct, demonstrates that the Court should be wary of the government's caveated statement of compliance.

II. The government failed to comply with the Court's order

In its October 3, 2017 order, the Court concluded that "it was misled by the Government" regarding the government's "unequivocal" representation denying our claim that the government commented on Mr. Schock's failure to testify before the grand jury. Order at 2, Docket No. 143. The Court further concluded that the government's representation was "inaccurate" and that the Court "now knows to be false." *Id*. Because the Court relied on the government's false and inaccurate representation, the Court stated that it must "ensure that it does not rely on any

inaccurate information in any future orders," and instructed the government to review all claims and statements made in its current filings to ensure that there are no further misrepresentations or misleading statements.[8] Notwithstanding the Court's clear instruction and statement of purpose, the government in its latest filing has failed to comply with the Court's order because it has provided the Court with virtually no assurance that the government's previous filings may not contain false or misleading representations by the government.

At page 8 of its response, the government states that it "is confident that there are no *intentionally* false or misleading *material* claims made by the government." Gov't Mot. at 8 (emphasis added). We assume, of course, that the government reviewed its previous filings and carefully considered what it could and could not say about the representations in those filings. What is clear is that the government has unequivocally not stated that its previous filings do not contain any misrepresentations or misleading statements, as the Court instructed. Rather, the government heavily qualifies its current representation and thus leaves open the possibility that the government's previous filings may contain (a) false or misleading statements *that are unintentional*, and/or (b) false or misleading statements *that are (in the opinion of the government) not material*. Moreover, rather than provide the Court, as ordered, with a listing of any inaccurate or misleading representation to "ensure that it does not rely on any inaccurate information in any future orders," the government instead informs the Court that there may be false or misleading statements by the government in its previous filings – but such false or misleading statements were not made intentionally or, in the government's view, they are not material.

[8] Order at 2: "the Government must file a memorandum with this court detailing any further misrepresentations or misleading statements made by the Government. If there are none, the memorandum should state that fact."

The Court's October 3 Order is clear in demanding that the government detail any further misrepresentations or misleading statements by the government or, if there were no such further misrepresentations or misleading statements by the government, then state that there were no other misrepresentations or misleading statements by the government. In its equivocal and heavily qualified response, the government fails to follow the Court's instruction and give the Court the assurance it seeks as to whether the record created by the government in previous filings is accurate and can be relied upon by the Court for future orders. As the Court observed, what is at stake here is the integrity of the Court's process. Order at 2, Docket No. 143. The government in essence asserts that its indefensible parsing of its prior statement to avoid the consequences of its blatant misrepresentation and its apparently conscious failure to comply with the Court's order are sanctioned by "the ordinary practice in the United States District Court." Gov't Mot. at 8.

III. The government's response contains additional misleading statements

Although the government asserts that it "is confident that there are no intentionally false or misleading material claims made by the government," Gov't Mot. at 8, its response contains additional misrepresentations. Hedging with repeated assertions of the government's "good faith" in making representations, the government specifically raises a few examples of "statements or arguments made regarding disputed matters" before doubling down on their veracity. But it does so regarding both the inappropriate questions regarding Mr. Schock's sexual orientation and allegations that witnesses felt harassed by offering to call an attorney (Mr. Beckett) to testify against his own former clients, instead of calling them directly. The government's statements here are misleading, and an evidentiary hearing—with the affected witnesses—would demonstrate that.

Particularly troubling is the ease with which the government offers new representations in this filing that are in fact false or misleading themselves. For example, the government represents:

"Statements regarding the reasonableness and legality of the CI's actions, for example are supported by reports authored by law enforcement agents." Gov't Mot. at 12. Based on all material made available to the defense after specific demands for it, that representation is false. The government, in response to our claims that the CI was not instructed regarding the Speech or Debate privilege, has twice represented that it instructed the CI "not to initiate any discussion concerning legislative matters," *see* Discovery Response at 11, Docket No. 69; Gov't Resp. to Def. Schock's Mot. to Suppress Evidence Obtained Through the Confidential Informant and in Violation of Speech or Debate Clause at 4, Docket No. 116, but it has repeatedly failed to cite any evidence of record to support this representation. The government's cited evidence in those contexts has nothing to do with the Speech or Debate Clause.[9] The defense is aware of no government report confirming that it ever admonished the CI about Speech or Debate. Instead of recognizing that patent discrepancy (which is not difficult, since it is an issue we have raised before), the government here compounds the falsehoods.

Further troubling is the government's response to the footnote in the Court's order highlighting the government's repeated assertions that "the Department of Justice authorized the charges in this case," and questioning whether "such authorization was made with full knowledge of the occurrences before the Grand Jury as set forth by the Government in its recent filing." Order at 2 n.3, Docket No. 143. In response, the government states "the transcripts of the grand jury minutes were not provided to the officials at the Department of Justice, and were, therefore, not

[9] The government has made two citations that were apparently intended to support its statement. The first is to an FBI report in Exhibit 6 of the Discovery Response and the second is to a portion of the CI's grand jury testimony. The FBI reports cited in Exhibit 6 are standard admonishment forms that do not include instructions regarding the Speech or Debate privilege. The cited transcript page refers only to instructions pertaining to the individuals the CI was supposed to record. Indeed, those individuals included other staffers to whose communications the privilege could easily attach. It does not disclose any instructions regarding the Speech or Debate privilege.

within the knowledge of those officials in approving the indictment." Gov't Mot. at 8-9. However, the Court's order did not direct the government to state whether the *transcripts* were provided to the Department of Justice, but whether the Department was aware of the *occurrences* before the grand jury. The government cannot quite bring itself to admit that the Department of Justice was not aware of the prejudicial comments it made to the grand jury on Mr. Schock's right not to testify (though that fact is clearly implied), instead characterizing the issue as a matter of when it is appropriate to order and review the transcripts of the grand jury minutes.[10] In other words, the government again hides behind clearly inadequate "standards" to avoid addressing the Court's order. But the lead prosecutor made these comments himself. They were within his personal knowledge. No review of the transcripts should have been necessary to ascertain the fact that such comments were made. And yet, the government made its unequivocal representation and is now seeking to avoid the clear implications of its misconduct.

CONCLUSION

This latest filing by the government not only further compounds its prior misrepresentations and misconduct, it distracts from the fundamental purpose of Mr. Schock's underlying motion: this indictment must be dismissed because the prosecution violated Mr. Schock's Fifth Amendment rights by repeatedly commenting to the grand jury about Mr. Schock's decision not to testify. The jury's interest in the topic, noted by the government, demonstrates that the government's comments were prejudicial: they went to the most critical element in the case,

[10] The discrepancy on this point also highlights the issue anew as to whether the grand jury was properly instructed on law relevant to official congressional reimbursements and standards for reporting campaign expenditures to the FEC. All we and the Court have on that issue is the government's representation that the grand jury was correctly instructed.

intent. If the government had instead made the comments it has acknowledged it made before the grand jury to a petit jury at trial, there is no doubt that a court would not hesitate to find a violation.

There is no dispute about the fact of the government's comments now. But remarkably, the government's position in its latest filing is that it would have been entirely entitled to withhold that information from the defense and the Court because the prosecutors had not uttered the *exact* words relayed by the witness. Such an unconscionable position cannot be squared with the interests of justice.

Therefore, the government has failed to demonstrate any basis for the Court to reconsider its accurate finding that the government's unequivocal statement was a misrepresentation. That fact is confirmed by the government's own filings, which amount to an admission. Accordingly, Mr. Schock respectfully requests that this Court deny the government's motion to reconsider, and dismiss this case due to improper influence on the decision to indict.

Dated: October 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record at their respective email addresses disclosed on the pleadings on this 18th day of October, 2017.

/s/ George J. Terwilliger III

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