UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 09-335 (RJL)
	:	
v.	:	
	:	
AMARO GONCALVES, *et al.*,	:	
	:	
Defendants.	:	
	:	

GOVERNMENT'S REPLY TO DEFENDANT PATEL'S
OPPOSITION TO GOVERNMENT'S MOTIONS IN LIMINE

The United States of America, by and through its undersigned attorneys, submits this reply to Defendant Patel's Opposition to Government's Motions to Preclude Certain Evidence, Impeachment and Arguments (Docket Entry No. 365). Patel incorrectly argues that attacks on the "propriety" of Bistrong's "statements and conduct" as well as the integrity of the government's investigation overall are "fair game." (Patel Opp. at 6.) Although the government does not contest that the defendants may cross-examine law enforcement witnesses regarding specific investigative techniques, and did not move to preclude them from doing so, Patel's broader claim that he is entitled to argue issues involving governmental misconduct and the overall propriety of the government's investigation before the jury is not supported by the case law he cites or the Federal Rules of Evidence. The Court should reject any attempt by him or the other defendants to improperly invite the jury to nullify based on the government's manner of conducting the investigation.

I. Evidence and Argument Regarding the Propriety of the Investigation Is Unrelated to Factual Guilt or Innocence

Relying principally on *United States v. Quinn*, 537 F. Supp. 2d 99 (D.D.C. 2008), Patel claims that case law supports the appropriateness of "his defense based on discrediting the

government's investigation and proving its lack of good faith." (Patel Opp. at 7.) He is incorrect. *Quinn*, and the cases it cites, involved facts and circumstances markedly different from those present here and do not support Patel's thinly veiled attempt to present a defense aimed at jury nullification, as the Court recognized when Patel described his intended defense.

In *Quinn*, the defendant sought a new trial based on the government's suppression of material evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The court granted the motion, finding that the government had suppressed *Brady* evidence by failing to disclose that it had developed serious doubts about the veracity of a key piece of inculpatory evidence against the defendant—statements by the defendant's supervisor, in which he asserted that he had told the defendant that indirect shipments to Iran were illegal, in a case where the "primary contested issue at trial was going to be whether [the defendant] knew that indirect shipments to Iran were illegal." *Quinn*, 527 F. Supp. 2d at 105. The district court found that the suppression of this evidence was prejudicial because the defendant was prevented from impeaching the testimony of the law enforcement agent who had relied on the supervisor's misstatements to initiate the investigation of the defendant, who was the only witness to the defendant's alleged false statements regarding his conduct. *Id.* at 114.

The court found that had the defendant been provided with the suppressed information, he might have been able to cross-examine the law enforcement agent to elicit that the defendant's supervisor had not, in fact, told the defendant that it was illegal to ship goods indirectly to Iran and instead, had instructed the defendant to do so. *Id.* This testimony would have been directly relevant to an element of the offense with which the defendant was charged—the defendant's knowledge of the illegality of his conduct. The defendant would also have been

able to use the agent's admissions on cross-examination to call into doubt the credibility of the agent's testimony regarding the defendant's alleged false statements regarding his conduct. Indeed, unlike in this case where the defendants' statements are captured on audio and video recordings, in *Quinn*, the defendant's "alleged [inculpatory] statements were not recorded, and the jury had nothing to rely on other than [the case agent's] testimony." *Id.* The suppressed evidence, which cast doubt on the credibility of the agent's testimony, would thus have had a direct bearing on the jury's determination of whether the defendant actually made those statements. *Id.*

The facts of this case bear little resemblance to those in *Quinn.* Nor are the facts similar to the cases cited by *Quinn* and noted in Patel's motion. *See Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986) (suppression of evidence that cast doubt on the defendant's guilt necessitated the invalidation of his convictions); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (suppression of evidence calling into question key witness's identification of defendant in case involving misidentification defense required vacating defendant's conviction).[1] Indeed, the Court here is not faced with a situation where the defendants seek to call into question the integrity of the government's investigation because the government ignored, failed to fully investigate, or

[1] *Holmes v. South Carolina*, 547 U.S. 319 (2006), also does not support the defendant's argument. (Patel Opp. at 8.) In *Holmes*, as Patel notes, the court explained that a criminal defendant's constitutional right to have "a meaningful opportunity to present a complete defense" is "abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 324 (internal quotation marks and citations omitted). The *Holmes* court then cited four cases involving state evidence rules that resulted in the exclusion of critical defense evidence, including, in one instance, another individual's confession to the crime with which defendant was charged, as examples of such "arbitrary" rules. *Id.* at 325. Far from supporting Patel's claims that he should have license to argue general government misconduct before the jury, *Holmes* and the cases it cites demonstrate that this case is not one of the rare instances in which a defendant's constitutional rights will be violated if the case is tried in a manner consistent with the requirements of the Federal Rules of Evidence.

suppressed evidence that suggested that the defendant did not commit the charged crimes. Instead, here, the defendants seek to argue that, by allegedly violating its own internal rules, utilizing a cooperating witness, and failing to record all conversations between Richard Bistrong and the defendants or among the FBI agents and Bistrong, the government's actions were so outrageous that the jury should not reward the government by convicting them. The defendants' proposed argument does not relate to any of the elements of the charged crimes—instead, it is aimed solely at jury nullification.

This case is thus far more analogous to *United States v. McLain*, a tape case in which the district court properly precluded defendants from improperly arguing or introducing evidence regarding government misconduct, including evidence of the government's "intent." *See United States v. Finley et al.*, 708 F. Supp. 906, 913-14 (N.D. Ill. Feb. 28, 1989) [hereinafter *Finley I*]; *United States v. Finley et al.*, Nos. 87 CR 364-1, 87 CR 364-2, and 87 CR 364-3, 1989 WL 51131, at *8 (N.D. Ill. May 3, 1989) [hereinafter *Finley II*]. That case, like this one, involved a government cooperator who participated in numerous consensual recordings as part of an FBI corruption investigation. The cooperator, Michael Burnett, participated in "thousands of hours" of recorded conversations, which formed the basis for the prosecution of nine defendants, including Clarence McClain and Morgan Finley. *See McClain*, 934 F.2d 822, 823-34 (7th Cir. 1991) (affirming in part and reversing in part, on other grounds, defendant McLain's conviction). Given these similarities, it is notable that prior to trial, the district court ruled that defendants should not be permitted to present argument or evidence "impugning the nature of the government's investigation and its use of Michael Burnett," and "from arguing or presenting evidence which is not relevant to defendants' guilt but is designed only to persuade the jury that

defendants should be acquitted because the government engaged in misconduct during its investigation." *Finley I*, 708 F. Supp. at 913-14. The court also rejected the defendants' arguments that evidence of or questioning regarding "government intent" was relevant to their defense, and specifically to the credibility of the government agents who would testify:

> The intent of the government agents or the government informant who gathered evidence in this case simply does not bear on the issues of whether the defendants are guilty of the crimes charged in the indictment. Furthermore, to the extent defendants wish to allege governmental misconduct, this is a question of law to be determined by the Court rather than presented to the jury. The court has already rejected defendants' motions to dismiss the indictment in this case for reasons of governmental misconduct.

Finley II, 1989 WL 51131, at *8-9.[2]

Other courts have similarly held that claims relating to alleged governmental misconduct in an investigation or the institution of a prosecution are matters of law to be resolved by the Court, rather than the jury, because they are "unrelated to factual innocence of the crime charged." *United States v. Regan*, 103 F.3d 1072, 1082 (2d Cir. 1997); *see also United States v. Demosthene*, 334 F. Supp. 2d 378, 380 (S.D.N.Y. 2004). In *Regan*, the court of appeals affirmed the district court's exclusion of defendant's evidence of alleged improprieties in the government investigation, because the claim was "ultimately separate from the issue of his factual guilt." *Regan*, 103 F.3d at 1082 (citing *United States v. Cuervelo*, 949 F.2d 559 (2d Cir. 1991)). In *Demosthene*, the district court explained that although the defendant could properly impeach the veracity of any government witness, the defendant "*may not argue before the jury issues relating*

[2] The district court also noted that even if the defendants had sought to present an entrapment defense—which the Court in this case has advised would first require defendants to proffer sufficient evidence of inducement—any evidence of government intent remained irrelevant and would not be permitted at trial. *Finley II*, 1989 WL 51131, at *9. *See also United States v. Makhlouta*, 790 F.2d 1400, 1402 (9th Cir. 1986) ("[U]nder the law of entrapment, it is not the state of mind of the government agent that is important; it is the predisposition of the defendant to commit the offense that counts.") (internal citations and quotations omitted).

to the overall propriety of the Government's investigation in this case." *Demosthene*, 334 F. Supp. 2d at 380 (emphasis added). Moreover, the court rejected "any attempt by [the defendant] to dissect an individual law enforcement agent's state of mind during the course of the investigation, or to belabor the details of the investigation's chronological development," as irrelevant to the central question of [the defendant]'s guilt or innocence" and held such evidence inadmissible. *Id.* (citing *United States v. Reyes*, 18 F.3d 65, 71 (2d Cir. 1994)). As *Demosthene* and these cases demonstrate, restricting the defendant from offering improper argument regarding the "overall propriety of the Government's investigation" is entirely appropriate and will avoid introducing issues that have no bearing on the "central question" of the defendants' guilt or innocence.[3]

II. The Credibility of a Non-Testifying Cooperating Witness Is Not at Issue

As set forth in the Government's Motion In Limine To Preclude Improper Impeachment of Non-Testifying Cooperating Witnesses (Docket Entry No. 356), the credibility of a non-testifying witness, who is not otherwise a declarant for purposes of Rule 806 of the Federal Rules of Evidence, is simply not at issue. *See, e.g., United States v. Williams*, 954 F.2d 668, 672 (11th Cir. 1992) ("The law is clearly established that one may not introduce evidence to impeach a witness who does not testify.").

Notwithstanding defendant's claims to the contrary, *see* Patel Opp. at 7, this conclusion is not altered or affected by the role that Bistrong played in the undercover operation. In *United*

[3] By taking the Court's comments from the February 4, 2011 hearing out of context, Patel also claims that the Court has already ruled that the defendants may introduce evidence and make arguments concerning government misconduct. (Patel Opp. at 12.) But the Court's statements suggesting that defendants would be able to argue government misconduct to the jury, were preceded by the following phrase—"should the evidence unfold in such a way that demonstrates bad faith . . . calculated to prejudice the Defendants." Feb. 4, 2011 Tr. at 63. As the Court has previously indicated, defendants have yet to make any showing of bad faith.

States v. McClain, discussed *supra*, after the government decided not to call the main cooperating witness, the defendants sought to introduce impeachment evidence against him under numerous theories, including that his statements on the tapes were being offered for their truth and that impeachment was thus appropriate under Rule 806. The district court ruled that the admission of the tapes was no basis for impeaching the non-testifying informant. *See Finley II*, 708 F. Supp. at 908-911.

Moreover, if the defendants seek to call Bistrong in their case, the Court may and should properly restrict the scope of the questioning. *See United States v. Hall*, 613 F.3d 249, 256-57 (D.C. Cir. 2010) (quoting *United States v. Hemphill*, 514 F.3d 1350, 1360 (D.C. Cir. 2008) ("[T]he trial court 'may prevent questioning that does not meet the basic requirement of relevancy, as well as other factors affecting admissibility.'")). In *McClain*, while the district court permitted the defendant to call the cooperating witness "for questioning regarding the taped conversations and even . . . to impeach the informant with specific prior inconsistent statements should such contradictions in the testimony appear,"[4] the court denied a request strikingly similar to that which Patel makes here, rejecting "the defendant's request to impeach [him] on collateral matters, given that his comments on the taped conversations were not admissible for their truth." *McClain*, 934 F.2d at 832-33. The Seventh Circuit upheld all of these evidentiary rulings,

[4] In his pleading, Patel incorrectly states that the government "seeks to preclude defendants from impeaching trial witnesses with out-of-court statements." (Patel Opp. at 2). That assertion is false. The government's motion seeking to preclude defendants from improperly offering out-of-court statements (Docket Entry No. No. 354) explained that defendants could appropriately seek to *introduce* certain recordings *in evidence* under Rule 801(d)(1)(B) of the Federal Rules of Evidence as prior consistent statements, provided that the threshold requirements of that rule were met. The government has never asserted, and did not do so in its motion, that defendants would not be entitled to *impeach* the government's witnesses with their own statements on the recordings. Notably, however, "[i]mpeachment evidence is to be used solely for the purpose of impeachment, and it may not be 'employed as a mere subterfuge to get before the jury evidence not otherwise admissible.'" *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986) (citations omitted).

including the district court's restrictions on the defense's questioning of the cooperator during its case, "given that [the cooperator's] comments on the tape conversations were not admissible for their truth." *Id.* at 833. *See also United States v. Regan*, 103 F.3d 1072, 1082 (2d Cir. 1997) (finding that the district court properly prevented defendant from introducing evidence to impeach the credibility of non-testifying government informants whose statements were offered simply as "background evidence"). *Id.* at 1082-83; *see also id.* at 1083 ("We have previously made clear that a district court need not allow impeachment of even a 'central figure' whose out-of-court statements were not admitting for their truth.") (citation omitted).

Notably, the Seventh Circuit in *McLain* squarely rejected an additional argument also raised by defendant here: that Bistrong's statements on the recordings implicate the Sixth Amendment. (Patel Opp. at 9-10). The Seventh Circuit emphasized that an appropriate limiting instruction, in which the court explained to the jury that the informant's statements on the tapes should only by considered for the context they provided "as to what the listener says, does, or believes in response to them," erased any Confrontation Clause concerns:

> McClain complains that denying him the opportunity to impeach Burnett violated his sixth amendment right to confront the witnesses against him and conflicted with Federal Rules of Evidence 607 and 806. A claim on all fours with McClain's sixth amendment claim has previously been rejected by this court in *United States v. Davis*, 890 F.2d 1373, 1379-80, a case not only analogous to this one but arising from the same corruption scandal. Davis, a Chicago alderman who allegedly accepted SRS bribes for helping secure the same parking contract, likewise protested that his sixth amendment rights were abridged when the judge refused him the right to impeach Burnett on cross. As in this case, Burnett was never called by the government, but his statements saturated the taped conversations with Davis. We held in *Davis* that the same limiting instruction as given here eliminated Burnett as a "witness" against the defendant. Hence no sixth amendment right to cross-examine applied.

McClain, 934 F.3d at 832. *See also United States v. Jordan*, 810 F.2d 262, 264 (D.C. Cir. 1987) (informant's statements "were not hearsay; they were admitted not for their truth, but 'to make [appellant's] responses intelligible to the jury and recognizable as admissions.' . . . There having been no reason to test [the informant's] credibility, the introduction of his side of the conversations violated neither the hearsay rule nor appellant's sixth amendment right of confrontation."); *United States v. White*, No. 88-3073, 88-3083, 1990 WL 42213, at *2 n.2 (D.C. Cir. Apr. 4, 1990) ("Confrontation clause cases stressing the importance of cross-examination of government informants paid on contingency are inapposite when, as in this case, the informant does not testify. . . . If an informant does not testify, impeachment evidence has no value.").

Finally, defendant's argument that Bistrong's statements constitute admissions of a party-opponent is not only incorrect but conveys a seriously misleading and selective impression of the law on this issue. Defendants cite only one case in support of the assertion that Bistrong's statements are party admissions, *United States v. Branham*, 97 F.3d 835 (6th Cir. 1996), even failing to identify the circuit from which the case originates. Notably, the *Branham* case—cited by the government in its motion, *see* Docket Entry No. 354, at 7, stands against the overwhelming weight of authority on this issue, which establishes that "the out-of-court statements of a government informant are not admissible in a criminal trial pursuant to Rule 801(d)(2)(D) as admissions by the agent of a party opponent." *United States v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004). *See also United States v. Garza*, 448 F.3d 294, 198-99 & n.14-15 (5th Cir. 2006); *United States v. Arroyo*, 406 F.3d 811, 888 (7th Cir. 2005); *United States v. Prevatte*, 16 F.3d 767, 779 n.9 (7th Cir. 1994); *Lippay v. Christos*, 996 F.2d 1490, 1497-98 (3d Cir. 1993).

III. Conclusion

For the foregoing reasons, the government respectfully requests that the Court grant its motions in limine (Docket Entry Nos. 354, 356, and 361).

Respectfully submitted,

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