

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

**DEFENDANT'S EMERGENCY MOTION TO PREVENT A GOVERNMENT-INDUCED
MISTRIAL BASED ON SEIZURE OF JEFF VASILAS' PHONE**

Defendant Eric Dean Sheppard submits this Emergency Motion to Prevent Government-Induced Mistrial Based on Seizure of Jeff Vasilas' Phone, and states:

I. REASON FOR EMERGENCY MOTION

After the Government rested its case-in-chief, and while the Defendant is still on the stand during a nearly three-week break, the Government now seeks to review and use **new evidence, never disclosed before and in violation of its Brady obligations.** The Government is trying to ***force a mistrial based on its own misconduct,*** and immediate judicial intervention is necessary to prevent this.

Specifically, on Friday, December 22, 2023, just before 5 pm, the Government emailed defense counsel:

We recently obtained limited consent from Mr. Jeff Vasilas' widow to search and seize certain information from Mr. Vasilas' cell phone. Mrs. Vasilas did not know the cell phone password, and the FBI's computer forensics team has been able to get past the password. We have limited consent to seize communications between Mr. Vasilas and your client and communications with Ms. Gonzalez. The FBI is in the process of trying to generate a Cellebrite report for the items we've been authorized to seize. That should be concluded next week. I will notify you once

that is completed so that you can have someone take an external hard drive to the FBI office to get a copy of the seized materials.

Later that night, at 7:57 pm, defense counsel responded and warned the Government that it was forcing a mistrial from its own misconduct, demanded that the phone remain untouched pending Court Order, and asked that the Government confirm it would await Court Order:

This is wrong, prejudicial, and outrageous, coming after the defendant began his testimony, and only because there was a break (over the defense objection) as the government was incapable of getting its case to the jury on time.

We intend to file an Emergency Motion with the Court prohibiting you from viewing that phone at this time. Therefore, we urge you not to open it, or have any of your agents do so, without Order of the Court.

You advise that you are going to have access to what YOU deem important for your case, without any regard for your obligations pursuant to Brady.

You cannot cherry pick what portions of the phone you will look at or give us access to. We believe we are entitled, at the very least, to have access to the entire phone. If you cannot do this, then you cannot possibly meet your obligations under Brady.

As for the timing, you nonchalantly advise that phone records should be ready for us sometime next week. That will not give the defense time to meaningfully review what you produce, or, at a minimum, to secure an expert to review the production in advance of the trial starting again.

It is our position that you are intentionally forcing a mistrial and we believe the appellate court will see it the same way—especially after the 404B evidence that was admitted given your misrepresentations, and your FBI witness talking for several hours about 12 loans of 1.7 million dollars, many of which are not charged in this case—clearly constituting a variance.

We sincerely believe, if you haven't already, that you will be creating a significant error and forcing a mistrial (that we really do not want) because the government failed to properly investigate this case before trial.

Please confirm that no one from the government will review the contents of the phone, pending Court Order permitting the government to do so. Also, please immediately produce to us the 302 of the Government's discussions with Lindsay Vasilas.

See **Exhibit A** (email chain between defense counsel and Government, quoted above).

Incredibly, to date, the Government has not even responded to the Defendant's Friday night response, thus forcing Defendant to file this Emergency Motion. The Government has no answer to the unfairness and prejudice of opening up discovery in this manner **after it has rested and while the Defendant is on the stand**. Notably, there is absolutely no reason the Government did not attempt to retrieve this evidence prior to the commencement of trial. The Government also has no answer to the irremediable *Brady* disaster it recklessly and disastrously is bringing upon itself, which cannot be fixed because the trial is now almost over, with the Defendant currently on the stand.

II. CONTINUATION OF PATTERN OF GOVERNMENT MISCONDUCT

How did we get to this sorry state of Government misconduct and a trial that has gone off the rails? As the defense has said to the Court on several occasions, we are all suffering because the Government never properly investigated this case. This was made plain, for example and among other ways, by Mr. Cupersmith's testimony on cross that his firm was never even contacted by the Government until after Defendant was indicted and arrested.

The Government's *modus operandi* in this case had been to conduct and provide late discovery, including on the eve of trial. This post-indictment investigation was done after-the-fact to cover up the original sin of not properly investigating the case. For example, the Defendant's motion for an extension of the September trial date, not opposed by the Government, was based principally on a late 404(b) notice, which, as the defense predicted, was effectively adding a new charge that would improperly overwhelm the trial of this case, on the eve of trial. [D.E. 89 at 3-4]. Not only that, but the Rule 404(b) disclosure was built on known and anticipated lies. Trial has proved that defense counsel was correct all along that the Government pulled off a bait and switch. It promised Jeffrey Graff would testify competently that Defendant forged his name on documents

(despite Mr. Graff having zero familiarity with Defendant's signing of Mr. Graff's name) and that if someone working for Defendant's companies signed something, it was at the direction of the Defendant (despite the impossibility of anyone having personal knowledge that no person acted on his/her own). At trial, Mr. Graff provided no such competent testimony, as defense counsel advised the Court would happen in pleadings and immediately after the jury was sworn. Instead, Mr. Graff, a bitter, former best friend and employee of Defendant, offered a lot of innuendo. In permitting this inadmissible melodrama, and in not striking all of it after the truth became clear, the Court, at the Government's urging, violated the core requirement in this Circuit's 404(b) case law that the Government prove the alleged 404(b) by a preponderance of the evidence.

The Government consistently misleads this Court, to its detriment. For example, the Government advised the Court that Mr. Graff was familiar with Defendant's handwriting and had seen it over the years, which would allow him to opine on that subject. Based on that representation, the Court permitted the testimony. In reality, the Government misled the Court because Mr. Graff had **never seen Defendant forge Jeffrey Graff's name and could not even opine on that subject**. The Government also claimed that the 404(b) was relevant because Defendant forged Mr. Graff's name on documents that were directed to a government agency [*See* D.E. 77 pg. 415]. This too was false. Mr. Graff **never** claimed Defendant forged his name on the INS documents, with which the Government tainted this case. Instead, Mr. Graff claimed Defendant signed Mr. Graff's name on an engagement letter with a law firm, which is not a document directed to a government agency. Finally, Mr. Graff's testimony, was, at best, equivocal. Mr. Graff went "back and forth" on whether he believed his name was signed by the Defendant on the engagement letter, thus, not meeting the required threshold for admission. Moreover, the Court

declined the defense request for a sidebar to proffer the 403 prejudice and making this allegation a feature of the case, which it became.¹

The Government already tried to admit brand new evidence upon the closing of its case in the form of emails from PayPal, which were only revealed after cross-examination disproved the PayPal witness' direct testimony that its production was complete. The Court properly barred the Government from using those emails after the PayPal witness had completed her testimony.

As with testimony of the two SBA witnesses and all bank representatives, the PayPal testimony that the PayPal discovery was complete was critical to the testimony as a whole because *these were all improper hearsay witnesses, with no personal knowledge on the key issues, whose only limitation was the written record that they were supposed to have produced completely and sufficiently in advance of trial for the defense to be prepared.* This failure is why the defense had to cross examine these witnesses in excruciatingly careful detail to show how little they knew about all or most of what they testified to, and then to demonstrate the written discovery was incomplete and did not support their testimony. Undeterred, the Government responded with long re-direct examinations trying to get biased hearsay witnesses, who never should have been permitted to get on the stand to begin with, to speculatively agree with the Government positions.

For example, as the Court may recall, the defense properly objected to the re-direct of the PayPal witness because the Government, for the first time on re-direct, induced the witness to say that tax returns were required based on the witness' agreeing with the Government's speculation about a document which patently showed only that some human being, probably in responding to various subpoenas, *viewed tax returns and also other documents that did not relate to the*

¹ At this juncture, Defendant again requests that the testimony regarding the alleged INS forgery be stricken from the record and the Government should not be permitted to argue it in its closing argument to the jury.

Defendant's application. The Government's re-direct was solely and deliberately to elicit a hearsay response from a witness to speculate about this document. And that testimony is the Government's evidence for the AIT charge on this attempted loan. Defendant tried to prevent this by asking for re-cross on this one narrow issue, which was denied by the Court. (11/30/232 Tr. Pg.122:2-4 & 123:1-2).

III. THE NEED FOR COURT INTERVENTION TO PROTECT THE DEFENDANT'S RIGHT TO A FAIR TRIAL

Now, while the Defendant is on the witness stand in the middle of his testimony—which should have been concluded had the Government not intentionally dragged out the testimony of its FBI summary witness², among others, the Government will attempt to introduce additional new evidence from Jeff Vasilas' widow.³ Compounding its misconduct, the Government is only asking for *some of the content* of Mr. Vasilas' phone to be extracted by the FBI—ignoring there may be *Brady* information on the rest of the device.

The Court should completely bar this evidence and forbid the Government from proceeding along this path with evidence that should have been sought, at a minimum, a year ago and would have clearly been discoverable pursuant to Rule 16.

CONCLUSION

It is long past time for the Court to put a halt to the Government's errors and misconduct, which are designed to intentionally cause a mistrial. Defendant has a right to the completion of

² The Government represented the FBI summary witness would only take 15 minutes. Subsequently, the Government was advised that the Defendant would be testifying, so it kept its "summary witness" on the witness stand for a nearly four-hour examination (only approximately 45 minutes of which was the defense's cross-examination), causing the Defendant to be in the middle of his testimony when the Court broke for its recess.

³ The Government has intentionally ceased to maintain and produce 302 reports on recent interviews, particularly regarding their recent contact with the widow of Jeffrey Vasilas and the eventual seizure of his phone. The defense has no idea what inducement was made to Mrs. Vasilas and whether she was advised she had the right to refuse consent to the seizure.

this trial, however flawed it may be. Jeopardy has attached, and though “the train has left the station,” Defendant is entitled to slow this train down to protect the rights guaranteed to him by the U.S. Constitution.

For the foregoing reasons, Defendant respectfully requests that the Court enter an immediate order barring the Government from accessing, reviewing, or using any part of the Jeff Vasilas phone, and, in addition, the Defendant requests the Court prohibit the Government from arguing the alleged 404(b) evidence in its closing argument, and any other relief the Court may grant.

Dated: December 27, 2023

Respectfully submitted,

NELSON MULLINS
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: 305.373.9400

By: /s/ Jayne C. Weintraub

Jayne C. Weintraub
Florida Bar No. 320382
Jonathan Etra
Florida Bar No. 686905

Christopher Cavallo
Florida Bar No. 0092305

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 27, 2023 the foregoing document was filed via the Court’s CM/ECF system to all counsel of record.

/s/ Jayne C. Weintraub
Jayne C. Weintraub

EXHIBIT “A”

phone extraction ...

Jimenez, Aimee (USAFLS) <Aimee.Jimenez@usdoj.gov>

Fri 12/22/2023 4:02 PM

To: Jayne Weintraub <jweintraub@saleweintraub.com>; Jonathan Etra <Jonathan.Etra@nelsonmullins.com>; Chris Cavallo <chris.cavallo@nelsonmullins.com>

Cc: Martinez, Ana Maria (USAFLS) <Ana.Maria.Martinez@usdoj.gov>

Hello Counsel,

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Happy Holidays,
Aimee Jimenez

Aimee C. Jimenez
Assistant U.S. Attorney
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street, 4th Floor
Miami, FL 33132
Tel: (305) 961-9028
Aimee.jimenez@usdoj.gov

From: [Jayne Weintraub](#)
To: [Jimenez, Aimee \(USAFLS\)](#); [Martinez, Ana Maria \(USAFLS\)](#)
Cc: [Jonathan Etra](#); [Chris Cavallo](#); [Jayne Weintraub](#)
Subject: Phone Extraction
Date: Friday, December 22, 2023 7:56:44 PM

Aimee,

This is wrong, prejudicial, and outrageous, coming ***after the defendant began his testimony***, and only because there was a break (over the defense objection) as the government was incapable of getting its case to the jury on time.

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Jayne

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