UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.23-cr-60173-KMW (Graham)

UNITED STATES OF AMERICA,

Plaintiff,

v.

CAROLYN D. WADE,

Defendant.
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DEFENDANT'S MOTION TO DISMISS INDICTMENT DUE TO PROSECUTORIAL MISCONDUCT AND MEMORANDUM OF LAW

I. INTRODUCTION

COMES NOW the Defendant, **CAROLYN D. WADE ("Ms. Wade"),** by and through undersigned counsel, and respectfully moves this Court, pursuant to the Fifth Amendment of the United States Constitution, the Sixth Amendment of the United States Constitution, and Federal Rules of Criminal Procedure 12(b) to dismiss the Indictment. Further, Ms. Wade requests an evidentiary hearing due to the factual complexity of the issue presented below.

II. FACTUAL BACKGROUND

Ms. Wade is charged by Indictment with one count of wire bank fraud in connection with a United States Small Business Administration's Paycheck Protection Program ("PPP") application, in violation of 18U.S.C. Section 1343. To obtain a conviction of Ms. Wade on the allegations set forth in the indictment, the

Government must prove the following elements: (1) the Defendant's intentional participation in a scheme to defraud; and (2) the use of the interstate wires in furtherance of that scheme. *United States v. Maxwell*, 573 F.3d 1282, 1299 (11th Cir. 2009).

At the suggestion of her husband, Tracey Wade, ("Tracy") Ms. Wade made an application for a PPP Loan for her beauty salon business, One Step A-Head ("One Step"). Tracy was in the funeral home business, operating Wade Funeral home in Hallandale Beach, Florida and had become a friend of Edward Rivero ("Eduardo"), who owned and operated Edward Rivero Funeral Home in Hollywood, Florida. Eduardo's funeral home had successfully applied for and received a PPP loan.

Eduardo's other businesses and businesses operated by his wife, Haydee Granados ("Haydee"), had also received PPP loans. All of these loan applications were prepared by Eduardo and Haydee. Additionally, Eduardo and Haydee prepared PPP loan applications for their friends who owned or operated businesses for a fee.

In order to prepare Mr. Wade's PPP loan application, Eduardo instructed Mr. Wade to provide his bank account information, driver's license, social security (front and back), and a cancelled check. Eduardo also instructed Mr. Wade to obtain a DocuSign account, and to provide the log in information and passwords for his DocuSign account.

Mr. Wade obtained a PPP loan after Haydee filed an PPP loan application on Mr. Wade's behalf. After he received the loan Mr. Wade paid $4000 for preparing the loan. Neither Haydee nor Eduardo informed Mr. Wade of the specific SBA criteria to procure the loan or its forgiveness. After successfully securing a PPP loan, Mr. Wade told his advised his wife, to allow Eduardo and Haydee to also apply for a PPP loan for her hair salon business. To fWade providedfort, Mr. Wade provided Ms. Wade's business information and documents Eduardo and Haydee.

Mr. Wade acted as a point person for Ms. Wade. No SBA loan criteria was ever mentioned or explained to Ms. Wade. Ms. Wade also received a PPP loan and paid Haydee a total $5000 for preparing Ms. Wade's application. Additionally, Mr. Wade paid Haydee $2000 for applying for a second PPP loan.

The defense proffers that neither Ms. Wade nor Mr. Wade knew that Haydee had submitted any documents which included false information as to Ms. Wade's business income when applying for Ms. Wade's PPP loan.

The pivotal question in this trial is whether Ms. Wade filed or caused the loan application to be filed, which included false information submitted to SBA. The Schedule C Internal Revenue Service form which Haydee submitted in support of Ms. Wade's application falsely represented that her 2019 business income was in excess of $113,000. Ms. Wade had no knowledge of this submission and maintains that Haydee used her log in information to upload false information in support of her application, all motivated by Eduardo and Haydee's desire to earn a fee for preparing the loan applications.

On Monday, April 15, 2024, pursuant to subpoena dues tecum issued by defense counsel, Eduardo and Haydee, accompanied by legal counsel, Lindsay Chase, Esq., met at defense counsel's office.

During the meeting, Eduardo and Haydee indicated that they only served in an advisory capacity in preparing Ms. Wade's PPP loan application. Nevertheless, they agreed to assist in anyway that they could and to inform them whether or not they would be needed to testify at trial.

The defense served Eduardo and Haydee with a trial subpoena on April 15, 2024. Subsequently, the defense team has spoken with Ms. Chase at least twice advising that the trial date remained as scheduled and that the defense would keep her abreast of the date and time Eduardo and Haydee would be needed to testify. Up until to Wednesday, May 15, 2024, the only discussions Eduardo and Haydee's counsel was about scheduling.

On May 16, at roughly 4:00 p.m., after the trial commenced, the undersigned counsel received a phone call from Ms. Chase, who advised that her clients would be invoking their Fifth Amendment Privilege under the United States Constitution, if called to the witness stand. The undersigned inquired of Ms. Chase- - "What happened, did the Government contact you"? She responded- - "Yes". The undersigned further inquired "Whether the Government put a little fear in [her] clients, and Ms. Chase responded "pretty much". At that time, the undersigned advised Ms. Chase that since her clients had for the first time informed us of their intention to invoke their fifth amendment rights, they no longer needed to be present. The undersigned requested an email be sent by Ms. Chase memorializing her representation of her clients' intention.

Within five minutes, the undersigned phoned Ms. Chase again to ascertain the specifics of the conversation between her and the Government. Ms. Chase advised the following: (a) the Government shared what evidence had been introduced in its case-in-chief; (b) Ms. Wade's PPP application had connections with Haydee; (c) that the Womply documents in evidence link Haydee's IP address (ending in 125) to Ms. Wade's PPP application activity; and (d) the government apprised Ms. Chase of a stipulation entered into earlier in the day with the defense which indicates: "Protocol IP address ending in 125 was an IP address with usage attributable to Haydee Granados".

At the inception of the trial in this case, pursuant to Federal Rule of Evidence 615[1], the Government invoked the rule of sequestration.

III. MEMORANDUM OF LAW

Courts draw their power to dismiss an indictment from three discrete sources. The first source of authority for the federal courts to dismiss an indictment is within their power and duty to dismiss an indictment obtained in violation of the Constitution or the laws of the United States. *United States v. Holloway*, 74 F. 3d 249, 253 (11th Cir. 1996).

The second source of authority from which the federal courts draw their power to dismiss an indictment, generally on nonconstitutional bases and usually for governmental misconduct, lies in the courts' supervisory powers. These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of

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[1] Rule 615. Excluding Witnesses

(a) Excluding Witnesses**. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony.**

cases." *Link v. Wabash R. Co.,* 370 U.S. 626, 630-631 (1962). There are three purposes underlying the federal courts' use of their supervisory powers: the first is to implement a remedy for the violation of recognized rights; the second is to preserve the integrity of the judicial system by ensuring that a conviction rests on appropriate considerations validly before a jury; and the final purpose is to provide a remedy designed to deter illegal conduct. *United State v. Hasting,* 461 U.S. 499, 505 (1983).

The third source of authority from which the federal courts draw their power to dismiss an indictment emanates from Federal Rule of Criminal Procedure 12(b), which allows for the consideration by the court, at the pretrial stage, of "any defense, objection, or request that the court can determine without a trial of the general issue … that [a] party may raise by pretrial motion." Fed. R. Crim. P. 12(b)(2). Fed. R. Crim. P. 12(b)(2). Federal Rule of Criminal Procedure 12(b) allows for a pretrial motion to dismiss an indictment to be well taken where the Government, as a matter of law, is incapable of proving beyond a reasonable doubt the charges against the defendant, where the Government has violated the defendant's constitutional rights, or where the Government has committed constitutional error in the prosecution of the indictment.

The Supreme Court has recognized that a criminal defendant has a constitutional right to "present his own witnesses to establish a defense. "*United States v. Terzado-Madruga,* 897 F. 2d 1099, 1108 (11th Cir. 1990) (*citing Washington v. Texas,* 388 U.S. 14, 19 (1967)). Although this right is specifically found in the Sixth Amendment right to compulsory process, the Court held that the right was so fundamental to a fair trial that it was also guaranteed by the Due Process Clause. *Id.* The right to offer testimony of a witness and compel his or her attendance is commensurate with the right to present evidence and a defense to a jury. *Id.* "Just as the accused has the right to confront the prosecution's witness for the purposes of challenging their testimony, he has the right *to present his own witnesses to establish a defense." Id.; see also United States v. White,* 454 F. 2d 435, 438-439 (7th Cir. 1971)(emphasis supplied).

The importance to a litigant of interviewing potential witnesses is clearly recognized by the courts. *United States v. Fischel,* 686 F. 2d 1082, 1092 (5th Cir. 1982). "In particular, in criminal cases, where a defendant's very liberty is at stake, such interviews are especially crucial. Thus, one of the first things responsible counsel does in preparing a case is to seek to interview those witnesses involved in the litigation." *Id.* Therefore, it is well established that a defendant is entitled, without governmental interference, to access to any prospective witnesses. *See United States v. Brown,* 555 F. 2d 407, 425 (5th Cir. 1977). The Government is not permitted to instruct a witness not to speak to defense counsel or otherwise restrict a defendant's access to a witness. *United States v. Agostino,* 132 F. 3d 1183, 1191 (7th Cir. 1997). If the members of the prosecution team impermissibly interfere with the defense's access to a witness during a criminal trial, that conduct violates due process insofar as it undermines the fundamental fairness of the proceeding. *United States,*655 F. 3d 232, 238 (3d Cir. 2011). Substantial government interference with a defense witness' free and unhampered choice to testify has been repeatedly held as unconstitutional. *Demps v. Wainwright*, 805 F. 2d 1426 (11th Cir. 1986) (*citing United States v. Goodwin,* 625 F. 2d 693, 703 (5th Cir. 1980)). Such government interference with potential defense witnesses requires dismissal of an indictment. *United States v. Wilson,* 715 F. 2d 1164, 1169 (7th Cir. 1983).

With regard to a motion to dismiss on these grounds, the defendant bears the burden of proving that the Government's conduct "interfered substantially with a witness's free and unhampered choice to testify." *United States v. Skilling,* 554 F. 3d 529, 567 (5th Cir. 2009). Even if the defendant can satisfy his burden of proving that the Government substantially interfered with a witness's decision to cooperate with the defendant, there can be no dismissal unless the defendant can also make some plausible showing that the witness's testimony would have been both material and favorable to the defendant—in other words, that the defendant suffered prejudice as a result of the witness's choice not to cooperate with the defendant. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

Government interferences generally occur when agents of the Government instruct a witness not to speak with the defense or otherwise artificially restrict the defense's access to a witness. *See United States v. Agostion,* 132 F. 3d 1183, 1192 (7th Cir. 1997) (citing *White,* 44 F. 2d at 439; *United States v. DeRobertis,* 766 F. 2d 270, 274 (7th Cir. 1985). Threats or intimidation made by the Government, including agents, that dissuade a potential defense witness from testifying constitute such a violation of the defendant's Fifth Amendment right to due process of law and his Sixth Amendment right to compulsory process for obtaining witnesses in his favor.Webb, 409 U.S. at 98. The constitutional right of a criminal defendant to call witnesses in his or her defense requires that they are free to testify without fear of reprisal or retaliation from the Government. *Skilling, 554 F. 3d at 567; United States v. Blackwell,* 694 F. 2d 1325, 1334 (D.C. Cir. 1982). As the Supreme Court has observed, "the desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial [is] a matter for the accused rather than the government to decide." *Rovario v. United States,* 353 U.S. 53, 64 (1957).

In *United States v. Thomas,* when the first witness was called to testify by defense counsel, defense counsel advised the prospective witness that his testimony could lead to a prosecution for misprision of a felony and inquired whether he wished to confer with his attorney.488 F. 2d 334, 335 (6th Cir. 1973). The witness acknowledged the advice but declined the opportunity to seek Counsel *Id.* Thereupon, the court made an additional explanation of the matter and upon further inquiry from counsel, the prospective defense witness agreed to consult counsel. *Id.* A short recess was called to allow the witness to locate his counsel. *Id.*

During the recess the witness was unable to locate his attorney, but during this time he was approached by a secret service agent involved in the case who told him that he *would* be prosecuted for misprision of a felony if he testified in the case. *Id.* The witness testified for the limited purpose of describing the conversation between the agent and himself and the agent was permitted to testify in rebuttal that he only advised the witness that he *could* be prosecuted if he took the stand. *Id.* The court reprimanded the secret service agent and the Assistant United States Attorney on whose behest the agent had approached the prospective witness. *Id.* The court also denied defense counsel's motions for a mistrial and motion to withdraw. *Id.* Following this, the witness failed to testify. *Id.* The Government advised the court that the witness would not be prosecuted if he testified, although immunity was not provided. *Id.* The witness indicated that he would testify only under subpoena, which was not requested. *Id.* The defendants were ultimately convicted. *Id.*

The Sixth Circuit Court of Appeals found that there was no question that it was completely unnecessary for the Government to approach the prospective witness. *Id.* at 366. The court found that such action by the agent cannot be viewed as serving any valid purpose, even accepting the agent's assertions of good faith. *Id.* The Government argued that its later statement to the court that the witness would not be prosecuted based on his testimony was sufficient to overcome any prejudice inuring to the appellant, and believed that the defense's failure to issue the witness a subpoena was pivotal. *Id.* The court disagreed because there is an obvious and considerable difference between the free and open testimony anticipated of a voluntary witness and the perhaps guarded testimony of a reluctant witness who is willing to appear only at the command of the court. *Id.* Further, the court found that the Government's action substantially interfered with any free and unhampered determination the witness might have made as to whether to testify, and if so, as to the content of such testimony. *Id.* Therefore, the Sixth Circuit Court of Appeals remanded the case for a new trial. *Id.*

In *United States v. Hammond*, a defense witnesses had already testified and was being cross-examined when the court called a recess.598 F. 2d 1008, 1012 (5th Cir.

1979) *on reh'g*,605 F. 2d 862 (5th Cir. 1979). During this recess, an FBI agent approached the witness. *Id.* The agent told the witness that he knew about the "situation in Colorado." *Id.* The witness had been indicted in a state matter in Colorado and had agreed to go there to work with the FBI in an assistance capacity. *Id.* The agent told the witness that if he "continued on," he would have "nothing but trouble" in Colorado. *Id.* The next morning both the defense witness in question and another defense witness, who had not yet given any testimony, were subpoenaed to appear before a grand jury. *Id.* After these events, the defense witness refused to give further testimony and the other defense witness refused to testify at all. *Id.* The parties informed the court about what had transpired. *Id.* The witness told the judge that he feared that if he testified, the Government would hurt him in his Colorado trial. *Id.* According to the defense attorney, the other witness refused to testify because of the subpoena and because he had learned of the conversation between the witness and the agent. *Id.* Instead of asking for a dismissal, the defense attorney and the Government stipulated to what the two witnesses would have said if they took the stand and the judge read the stipulation to the jury. *Id.* The defendant was convicted and appealed. *Id.*

The Fifth Circuit Court of Appeals found that it was certainly reasonable for the defense witness to interpret the agent's comments as threats to retaliate if he continued to testify. *Id.* Because of these comments, the witness did refuse to testify. *Id.* Accordingly, the court held that the agent's comments constituted a "substantial governmental interference" with the defense witness' "free and unhampered choice to testify," which violated his due process right to present his witnesses, requiring a reversal.

In this case, it is known that Government placed at least one phone call to Eduardo and Haydee's attorney and cause some fear of prosecution if they were to Testify pursuant to Ms. Wade's issued subpoenas. Notwithstanding the invocation of the rule of sequestration, the Government proceeded to inform the defense witnesses of the evidence that had been introduced in the Government's case-in-chief. The inescapable inference from the Government's revelation is that evidence potentially implicates Haydee. Given the Government's prosecutor(s) having made direct contact with witnesses' attorney, it is certainly reasonable for the witnesses to fear prosecution. Ms. Chase confirms this when she advised defense counsel that the Government "pretty much" put a little fear in her clients. It is reasonable to conclude that both prospective witnesses were intimidated based on fear of prosecution in light of the Government informing them of the evidence adduced during their case-in-chief. Why was it necessary for to discuss the evidence that had been introduced, especially relating to the two witnesses? The Government is concerned that the two witnesses testimony would support Ms. Wade's theory of defense.

The above-listed facts reveal the successful effort on the Government's part to discourage Eduardo and Haydee, through intimidation and subtle threats, from testifying. This intimidation created by the Government has substantially interfered with any free and unhampered determination the witness might have made as to whether to testify per the defense subpoenas. Due to the Government's actions, the witnesses are in fear of reprisal or retaliation from the Government if they reveal anything beneficial to defense counsel. The effect on the content of the potential witnesses' testimony is evidenced in the fact that the witnesses have material and exculpatory information in this case

The Government's conduct was reasonably calculated to serve as a threat and intimidation designed to dissuade the witnesses from testifying. Such conduct as described above constitute a violation of Ms. Wade's Fifth Amendment right to due process of law because the Government has undermined the fundamental fairness of the proceeding. Further, the Government's impermissible actions have violated Ms. Wade's Sixth Amendment right to compulsory process for obtaining witnesses in their defense.

Therefore, the defense believes that this government interference with potential defense witnesses may require this Court to exercise its power and duty to dismiss the indictment under the Court's supervisory power, or grant a mistrial. Prior to any dismissal, the defense requests the opportunity for evidentiary hearing so that witnesses can be called and the facts developed, under oath, which will permit a fair and just determination of this issue.

As the defense has set forth, several of the witnesses who were made unavailable to the defense are material to the preparation of the Defendants' theory of the case. It is submitted that a proper remedy, short of outright dismissal, would be to grant the defense an opportunity to depose those unavailable witnesses.

V. CONCLUSION

Ms. Wade has been prejudiced due to the Government's impermissible interference with the Defendants' access to witnesses Haydee Granado and Eduardo Rivero, her husband, who hold information both material to the case at hand and beneficial to the defense. This impermissible government interference due to threats and intimidation of witnesses has violated the Defendants' fifth amendment right to due process of law and their sixth amendment right to compulsory process for obtaining witnesses in their favor.

WHEREFORE, based on the foregoing, the defense respectfully requests an evidentiary hearing on this matter and for this Court to dismiss the indictment, or, as an alternative form of relief, grant a mistrial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2024, I electronically filed the foregoing motion/document with the Clerk of the Court using CM/ECF. I also certify that the foregoing motion/document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing, on this 26th day of April, 2024.

/s/
____
Johnny L. McCray, Jr., Esq.

Respectfully submitted,

/s/ ***Johnny l. McCray, Jr.***
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