UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-60173-CR-WILLIAMS

UNITED STATES OF AMERICA

Plaintiff,

v.

CAROLYN DENISE WADE and
TRACY D. WADE,

Defendant,
_____________________________________/

DEFENDANT CAROLYN WADE'S MOTION TO DISMISSS SUPERSEDING INDICTMENT DUE TO BRADY VIOLATION PRIOR TO THE TRIAL ON THE ORIGINAL INDICTMENT AND REQUEST FOR EVIDENTIARY HEARING[1]

Defendant, Carolyn Wade, through counsel, pursuant to the Due Process Clause of the Fifth Amendment of the United States Constitution, *Brady v Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963) and Rule 5(f) of the Federal Rules of Criminal Procedure, moves to dismiss the superseding indictment (DE 88), due to the government's failure to disclose evidence favorable to Ms. Wade prior to the trial on the original indictment. Additionally, Mrs. Wade requests that the Court hold an evidentiary hearing to determine whether dismissal is the appropriate sanction. In support thereof, Mrs. Wade states:

Procedural and Factual Background

[1] On August 12, 2024, during a status conference, the Court ordered that defense motions be filed by August 19, 2024. (DE 126). The undersigned was recently hospitalized and still recovering when the Court entered the order. The undersigned took longer to fully recover than anticipated and is still not 100% healthy. Therefore, the undersigned was unable to finish this motion prior to the August 19, 2024 deadline.

On October 19, 2023, Mrs. Wade was arraigned on an indictment which charged her with one count of wire fraud, in violation of 18 U.S.C. § 1343. (DE 11). In summary fashion, the indictment alleged that from May 2021 to August 2021, Mrs. Wade knowingly devised a scheme to defraud by means of false representations and used wire communications for the purpose of executing the scheme. (DE 3). The indictment further alleged that the purpose of the scheme was for Mrs. Wade to unlawfully unrich herself by making false statements to obtain a Paycheck Protection Program (PPP) loan. (DE 3).

During the arraignment, the Court entered the following order pursuant to the Due Process Protection Act:

> It is ORDERED AND ADJUDGED that pursuant to the Due Process Protections Act, the Court confirms the United States obligation to disclose to the defendant all exculpatory evidence- that is, evidence that favors the defendant or casts doubt on the United States case, as required by Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and ORDERS the United States to do so. The government has a duty to disclose any evidence that goes to negating the defendant's guilt, the credibility of a witness, or that would reduce a potential sentence. The defendant is entitled to this information without a request. Failure to disclose exculpatory evidence in a timely manner may result in consequences, including, but not limited to, exclusion of evidence, adverse jury instructions, dismissal of charges, contempt proceedings, disciplinary action, or sanctions by the Court.

(DE 11). When Mrs. Wade was arraigned, she was represented by Attorney Brian Silber. (DE 10). However, on February 20, Attorney Johnny L. McCray, Jr. filed a notice of substitution of counsel and became Mrs. Wade's counsel of record. (DE 23 and 24).

Prior to filing the notice of substitution of counsel, around February 14, 2024, Mr. McCray had a telephone conference with prosecuting attorney Assistant United States

Attorney (AUSA) David Snider. During this telephone conversation, Mr. McCray advised AUSA that the defense theory was that an individual named Haydee Granados ("Haydee") completed the PPP application on behalf of Mrs. Wade and without Mrs. Wade's knowledge, Haydee included false information regarding income and uploaded a fraudulent IRS Schedule C Form as part of the PPP loan application process.

On March 7, 2024, the government issued a subpoena to testify at hearing or trial to Oto Analytics, Inc. dba Womply. Oto Analytics, Inc. dba Womply. *See* government subpoena to Oto Analytics, Inc. dba Womply attached hereto as defense exhibit 1. Womply was the technology company that helped the Small Business Administration facilitate PPP loan applications. *See* (DE 86), Trial Transcript, pg. 12, lns 2-3.

The attachment to the subpoena directed Womply's legal compliance department to provide all records related to Ms. Wade's PPP loan number. The subpoena specifically requested other PPP applications with the same IP addresses as the IP addresses connected with Ms. Wade's PPP loan number.

On March 14, 2024, Mr. McCray had a telephonic meeting with AUSA Snider. Mr. McCray requested from AUSA Snider any information in the government's possession relating to Haydee Granados involvement in the preparation of Ms. Wade's PPP application. AUSA Snider responded that he was under no obligation to interview Ms. Grandos.

Around March 18, 2024, via email, AUSA Snider advised Mr. McCray that the government had received records from Womply pursuant to a subpoena that the government issued to Womply. AUSA Snider advised Mr. McCray that the records had been received on March 16, 2024.

Among the records received by the government were 21 PPP files associated with IP address 76.110.183.125. During the trial, it was established that the IP address ending in 125 was associated with Haydee Granados. (DE 111, Transcript of Agent Kelly Depietrantonio, pg. 6, lns. 14-17). It was further established that during the trial that Haydee Granados's IP address ending in 125 was involved in the preparation of approximately 20 PPP loan applications that had nothing to do with Carolyn Wade. (DE 111, pgs 27-28).

The defense contends that the government was aware as early as March 16, 2024, that Haydee Granados was involved in the preparation of PPP loan applications. The government knew that that the fraudulent schedule C that was uploaded with Ms. Wade's application was uploaded from the Haydee Granados's IP address (DE 111, pg. 9, lns 3-7).

The defense further contends that the approximately 20 PPP loan applications that Haydee Granados assisted in preparing contained false or fraudulent information and the government knew that the approximately 20 PPP loan applications contained false or fraudulent information, and the government failed to disclose this information to the defense. At the very least the government turned a blind eye to Haydee Granado's involvement in the preparation of approximately 20 PPP loan applications which contained false information.

The trial on the original indictment ended in a mistrial after the jury could not reach a unanimous verdict. (DE 72). Thereafter, the government filed a superseding indictment adding charges against Ms. Wade and adding her husband Tracy Wade as an additional defendant.

Mrs. Wade seeks a dismissal of the superseding indictment because had the government disclosed to the defense that Haydee Granados was involved in the preparation of PPP loan applications which contained false information, the evidence would have been admissible under Fed. R. Evid. 404(b). As such, there was a reasonable possibility that the Mrs. Wade would have been acquitted. Additionally, Mrs. Wade submits that the government's conduct was so egregious that dismissal of the superseding indictment is the appropriate sanction.

Argument and Memorandum of Law

The Due Process Protection Act, Pub. L. No. 116-182, 134 Stat. 894 (Oct. 21, 2020), amended 5(f)(1) of the Federal Rules of Criminal Procedure to require district courts to issue, at the outset of every criminal case, an order confirming the prosecutor's disclosure obligations under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). *See* Fed. R. Crim. P. 5(f). In the Southern District of Florida, the order sets forth the possible sanctions that may be imposed upon violation of the order. Dismissal of charges is one of the possible sanctions listed in the Southern District of Florida's order.

Although dismissal of an indictment for prosecutorial misconduct is an extreme sanction, it is a sanction within a court's discretion if sufficiently egregious prosecutorial misconduct has occurred and has prejudiced the defendant. *United States v. Lyons*, 352

F. Supp. 2d 1231 (M.D. Fla. 2004). Although retrial is normally the most severe sanction available, dismissal with prejudice may be proper for a *Brady* violation where defendant can show both willful misconduct by government and prejudice. *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249 (3d Cir. 2005).

Dismissal for a due-process violation requires the government's conduct to "be so grossly shocking and outrageous as to violate the universal sense of justice. *United States v. Bundy*, 968 F.3d 1019, 1030 (9th Cir. 2020). A district court may dismiss an indictment under its inherent supervisory powers (1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) to deter future illegal conduct. *Bundy*, 968 F.3d at 1030.

In *Bundy,* the 9th Circuit of Appeals affirmed a district court's order to dismiss an indictment mid-trial after the government began disclosing evidence favorable to the defense that should have been produced to the defense well before trial. *Bundy,* 968 F.3d at 1023. The *Bundy* case involved the well-publicized effort by the Bureau of Land Management to impound Cliven Bundy's cattle for a twenty-year failure to pay federal grazing fees. *Id*. at 2022. Bundy and hundreds of armed supporters from around the United States forced federal officials to abandon the impoundment plan. *Id*.

A federal grand jury indicted the Bundy defendants for a slate of federal crimes stemming from the standoff, including impeding federal officers, threatening federal law enforcement, and extortion, along with conspiracy to commit these crimes. *Id.* at 1024.

The favorable evidence withheld by the government included evidence that rebutted the government's assertion that the defendant had lied about the threat his fear of being surrounded by government snipers. *Id*. at 1025. *Id*. at 1025.

In determining whether the district court's decision to dismiss the case mid-trial was justified, the *Bundy* court reasoned the government should not be permitted "a chance to try out its case, identify any problem areas, and then correct those problems in a retrial. *Id*. at 1043. The *Bundy* court further reasoned that there was a need to impose a sanction that will serve to deter future prosecutions from engaging in the same type of misconduct. *Id*. at 1044.

The *Bundy* Court found that the district court had not abused its discretion and that dismissal with prejudice was within the range of appropriate remedies. *Id*. at 1045. The *Bundy* Court concluded that the perquisites for dismissing a case under the district court's supervisory authority were met, (1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) to deter future illegal conduct. *Id.*

In the instant case, the government either knew that Haydee Granados had assisted in the preparation of PPP files that included false information or at the very least, turned a blind eye to the likelihood of that fact. As a matter of law, the prosecution is deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant. *Bundy*, 968 F.3d at1037. The defense contends that evidence of Haydee involvement in the preparation of 20 additional PPP loan application containing false information would have been admissible under Fed. R. Evid. 404(b). It is now well-settled that “Rule 404(b) is one of inclusion which allows such evidence unless it tends to prove only criminal propensity. The list provided by the rule is not exhaustive and ‘the range of relevancy outside the ban is almost infinite ”S*ee United States v. Cohen,* 888 F. 2d 770, 776 (11th Cir. 1989). Generally, the rule is used by the prosecution to introduce evidence of the accused's conduct on another occasion; however, the defense is also permitted to make use of the rule to offer evidence of the behavior of a witness other than a defendant. *Id*. at 976.

Moreover, the standard for admission is relaxed when the evidence is offered by a defendant. *Id.* “When the defendant offers similar acts evidence of a witness to prove a fact pertinent to the defense, the normal risk of prejudice is absent.” *Id.* at 776-77. The defendant must merely demonstrate that it is not offered “to prove the character of a person in order to show action in conformity therewith.” *Id.* at 776.

In *Cohen*, the theory of defense was based upon an assertion that two witnesses concocted and executed the fraudulent scheme without the appellants' knowledge or participation. *Id.* at 775. The defense attempted to introduce evidence that one of the witnesses was involved in similar fraudulent conduct prior to his association with the appellants. *Id.* The Eleventh Circuit noted that the evidence was “critical to support this argument.” *Id.* “By preventing the introduction of relevant evidence of the prior conduct of an essential government witness, the court deprived the [defendants] from presenting an adequate defense and thus deprived them of a fair trial. We have no alternative but to require a new trial." *Id.* at 777.

Here, the government failed to turn over any information relating to Haydee Granados's involvement in the preparation of 20 additional PPP applications until the eleventh hour prior to trial. The defense had insufficient time to investigate whether those files contained false information. As such this Court should dismiss the superseding indictment in this case.

Conclusion

Based on the foregoing fact, arguments and citation to authorities, the defendant Carolyn Wade respectfully requests that the Court dismiss the superseding indictment and/or conduct an evidentiary hearing to determine whether dismissal is the appropriate sanction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was electronically filed with the Clerk of the Court via CM/ECF. I also certify that the foregoing pleading was served electronically on this date on all counsel of record via Notice of Electronic Filing generated by CM/ECF on August 21, 2024.

Respectfully submitted,

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

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