

By-Lined Article

Prosecutorial Misconduct: The Risks Inherent in Criminal Discovery

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On Dec. 1, 2011, a California federal judge overturned a conviction in the first Foreign Corrupt Practices Act (FCPA) case against a corporation to proceed to a jury trial, citing "flagrant" prosecutorial misconduct where the government: (i) failed to turn over Brady evidence, (ii) obtained a search warrant with an application that contained false and misleading information, and (iii) intercepted a defendant's confidential communications with her attorney. The combined weight of these disparate acts of misconduct drove the court's decision and is an object lesson both for government lawyers and the defense bar.

The indictment in *United States v. Noriega, et al.*, Case No.10-cr-1031 (AHM), 2011 U.S. Dist. LEXIS 138439 (C. Dist. Ca. Dec. 1, 2011), charged Lindsey Manufacturing Company, its president and vice president with conspiracy to violate the FCPA and substantive FCPA offenses. The indictment alleged that the Lindsey defendants bribed high-level employees of a government-owned Mexican utility company by funneling the payments through a third company owned and controlled by Enrique Faustino Aguilar Noriega (Enrique Aguilar) and his wife, Angela Maria Gomez Aguilar (Angela Aguilar). The government alleged that Lindsey paid the bribes to obtain contracts from the utility company. The trial began on March 30, 2011, and the jury returned a verdict on May 10. The defendants were convicted of eight counts of conspiracy, aiding and abetting, money laundering and substantive FCPA violations.

But this verdict did not stand. In a 41-page opinion, United States District Judge Howard Matz details six instances of prosecutorial misconduct by federal prosecutors that led the court to set aside the findings of guilt. Among these, the government suborned false or misleading grand jury testimony by an FBI agent whose veracity prosecutors knew to be questionable. Also, the government obtained a search warrant to intercept prison telephone calls between the Aguilars. Instead of adhering to the scope of the warrant,

prosecutors directed the prison warden to intercept Angela Aguilar's e-mail communications, some of which consisted of communications with her attorney. Those communications were then disclosed to the government trial team.

Perhaps the most egregious example of prosecutorial misconduct, however, was the government's failure to timely disclose *Brady* material. In the landmark case of *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that a defendant's right to due process is violated when the government withholds potentially exculpatory evidence. In *Lindsey*, the court ordered the government to turn over the complete grand jury testimony of an FBI agent. In response, the government produced three sessions of agent testimony. But seven weeks after the jury returned a guilty verdict, the government disclosed to the court that it had not produced the transcript. To dismiss the indictment, the government argued that the defendants were not prejudiced by the belated production because the agent did not testify at trial and, in any event, her grand jury testimony was not *Brady* material. The government further argued that it did not intend to call the agent as a witness at trial and therefore was not under a duty to disclose her grand jury testimony because it "didn't want someone who was part of the investigation [to testify], so there wouldn't be questions about the investigation." The court was not persuaded.

Judge Matz found that the agent's grand jury testimony exposed crucial weaknesses in the government's investigation, including the existence of prior contracts between Lindsey and the utility company; a tenuous temporal connection between Lindsey's hiring of Enrique Aguilar and the bribes purportedly paid to him by Lindsey; and the presence of substantial non-Lindsey funds in the bank account of the company owned and controlled by the Aguilars.

The government's failure to disclose the complete transcript despite a court order directing it to do so and the substance of the agent's testimony itself, when viewed in light of the government's refusal to produce the transcript in the first place, led the court to conclude that the government purposely "failed to consider a number of factors pointing to innocence." The court found that the connection among the Lindsey defendants, the Aguilars, and the purported bribe payments was nonexistent. The court rejected four additional allegations by the defendants of prosecutorial misconduct. The government has filed a notice of appeal of the trial court's decision.

Although the government's conduct in *Lindsey* is uncommon, prosecutorial misconduct does take place, and both government lawyers and defense lawyers need to guard against it. Misconduct can take several forms, including improperly influencing the grand jury, making prejudicial comments during summation or withholding exculpatory evidence, as occurred here. The standard for a court to find that a prosecutor has breached an ethical obligation is high; an isolated instance rarely suffices. In the Third Circuit, for example, the defendant must demonstrate that there has been "repeated conduct that 'permeate[s]' the trial." *United States v. Riley*, 621 F.3d 312, 339 (3d Cir. 2010). In New Jersey, the misconduct must be

"so egregious that it deprived the defendant of a fair trial." *State v. Smith*, 167 N.J. 158 (2001). Broad discovery rules can serve as a prophylactic measure against the failure to disclose evidence favorable to the defense, be it inadvertent or otherwise, and avoid the type of misconduct that occurred in *Lindsey*.

A defendant in a federal prosecution does not have an automatic right to obtain a copy of the grand jury testimony that led to the indictment. Specifically, Rule 6 of the Federal Rules of Criminal Procedure provides that, "[u]nless the court orders otherwise, an attorney for the government will retain control of the [grand jury] recording, the reporter's notes, and any transcript prepared from these notes." Fed. R. C. Pr. 6(e)(1).

In contrast, New Jersey's criminal discovery rules are broad and automatic. The New Jersey Rules of Criminal Procedure permit both the prosecution and the defense to obtain a transcript of the grand jury proceedings from the clerk of the court without a court order. R. 3:6-6(b). Further, under Rule 3:13-3 (the analog to Rule 16 of the Federal Rules of Criminal Procedure), the prosecution must make discovery available to the defendant "within 14 days of the return or unsealing of the indictment." R. 3:13-3(b). The rule enumerates nine nonexclusive categories of information that must be included in the State's discovery package. Rule 3:13-3(c).

In New Jersey, whether information is relevant and therefore discoverable "is measured in terms of the opportunity of the defendant to present a complete defense." Pressler & Verniero, *N.J. Court Rules*, Comment 3.1 to Rule 3:13-3 (2011). The Rules also provide for pre-indictment discovery where the prosecution has made a plea offer, R. 3:13-3(a), and reciprocal discovery obligations by the defendant. R. 3:13-3(d). Expedited discovery rules provide the defense with time to review the state's evidence, assess the strength of the prosecution's case, and determine at an early stage whether a plea is the best course. Both sides are also given the opportunity to marshal the evidence and make timely pretrial motions for additional disclosure.

That the withholding of exculpatory evidence threatens a defendant's ability to assert a meritorious defense is illustrated best in *Lindsey*. A classic defense strategy is to attack the government's case by pointing out the vulnerabilities and inconsistencies in its investigation. Selective prosecution, potential suspects not investigated and favorable grand jury testimony are some of the building blocks of a strong defense. Just as the prosecutor's opening statement provides a roadmap of the state's case, the opening statement of defense counsel outlines weaknesses in the prosecution's investigation. The *Lindsey* defendants were deprived of the best evidence available to attack the misleading and false statements presented to the grand jury to secure the indictment — the FBI agent's grand jury testimony. Instead, defense counsel focused on "humanizing" their clients. Moreover, the defendants were unable to "preview . . . for the jurors what they later tried to develop as a major part of their defense."

An intriguing aspect of the *Lindsey* opinion is the court's willingness to rethink the wisdom of its prior rulings on many of the same issues that served as the basis for vacating the conviction. Judge Matz noted that he was "confronted with so many motions challenging the government's conduct that it was difficult to step back and look into whether what was going on reflected not isolated acts but a pattern of invidious conduct ... [the court] did not fully comprehend how the various pieces fit together." The defendants had filed eight motions to dismiss, five of which alleged prosecutorial misconduct. All were denied. When viewed collectively, however, the allegations painted an entirely different picture — one of systemic misconduct by the government during various phases of the case.

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