

The Honorable John W. Sedwick

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)	No. 3:07-cr-00056 (JWS)
)	
Plaintiff - Appellee,)	MOTION TO RECONSIDER
)	DECISION DENYING
v.)	DEFENDANT PETE KOTT'S
)	MOTION TO DISMISS, ETC.
PETER KOTT,)	
)	
Defendant - Appellant.)	
_____)	

I. INTRODUCTION

This Court entered its order denying Mr. Kott's motion to dismiss, for discovery, and for an evidentiary hearing, on January 13, 2010. Dkt. #429. The day after this Court issued its decision, the government emailed to undersigned

counsel over 100 pages of additional documents. Those documents had never before been revealed to undersigned counsel. They are now on file with this Court.

Those documents confirm assertions about Bill Allen's prior inconsistent statements made in the motion to dismiss. Those documents also confirm the need for additional discovery and fact-finding about the meaning of documents and snippets of statements or conversations memorialized in those documents and cited in the motion to dismiss.

II. THIS COURT SHOULD RECONSIDER ITS DECISION TO RULE ON MATERIAL FACTUAL ISSUES WITHOUT AN EVIDENTIARY HEARING; TO CREATE A CIRCUIT SPLIT ON THE ADMISSIBILITY OF CRIMINAL ACTS OF MORAL OPPROBRIUM; AND TO REJECT CONTROLLING AUTHORITY ON WHETHER INCONSISTENT STATEMENTS ARE MATERIAL

During the course of the remand to this Court, the government released over 4,600 pages of previously undisclosed documents – from U.S. Attorney files, from Department of Justice files, and from the Anchorage Police Department – to Mr. Kott. This Court accepted briefing and heard oral argument on Mr. Kott's motion to dismiss or, in the alternative, to permit discovery, due to the government's failure to disclose exculpatory information, its failure to correct witness testimony, and its assertions contrary to the suppressed evidence during the course of trial and closing argument.

This Court agreed that the newly disclosed documents contained certain evidence favorable to Mr. Kott – the government even acknowledged as much. However, this Court rejected Mr. Kott’s motions for additional discovery and/or an evidentiary hearing, and denied his motion to dismiss. Dkt. #429.

We urge this Court to reconsider several portions of its decision.

First, this Court’s Order denying the motion to dismiss, etc., shows that certain significant factual matters remain totally unclear. For example, although the government produced voluminous notes of various discussions with witnesses that occurred after Mr. Allen decided to testify, it has still not produced any documents, information, testimony, or FBI 302’s concerning the very first conversation that occurred with Mr. Allen when he decided to cooperate. The 100+ pages of newly released documents contain no record of that first conversation, either. Given the significant additional criminal exposure and public embarrassment that it is now clear that Mr. Allen faced from a variety of sordid and criminal past acts, the omission of those documents memorializing that critical first discussion raises a red flag. See, e.g., Order, p. 13 (“While there is no direct evidence that Allen’s cooperation with the government in the corruption trials was motivated by his desire to avoid charges for his alleged sexual crimes, Kott was deprived of knowledge of the potential additional benefit Allen may have hoped to receive in exchange for his cooperation.”). In addition, the failure to grant additional discovery or an evidentiary

hearing has deprived the defense of any way to meaningfully explore the discussions that occurred at that first meeting, and at other meetings where the fullness of the discussion is not apparent from dry notes.

There are a variety of other meetings that fall into these category. Indeed, even the context for the government's critical directive that the Anchorage Police Department cease investigating Mr. Allen remains unclear. This is especially troubling in light of the significant number of documents that remain sealed in the case of *United States v. Boehm* (3:04-cr-0003), which this Court referenced in its Order. *See* Order, pp. 13, 15-16.

We therefore request reconsideration of the motion to deny discovery and to deny an evidentiary hearing.

Second, this Court's Order shows that significant factual disputes remain. For example, the district court never resolved exactly why an Assistant U.S. Attorney told the Anchorage Police Department to stop inquiry into Bill Allen's criminal conduct in 2004. Similarly, this Court's Order acknowledges that experienced trial counsel submitted declarations showing that they would have advised against calling Mr. Kott to testify if they had known that there was so much material available to impeach Mr. Allen and, hence, to prove the points that they needed to elicit through Mr. Kott, instead, since they lacked the suppressed evidence. Order, p. 9 n. 28. Yet the Court discounted the two sworn declarations of the members of the bar who

authored them despite the absence of contrary evidence and without an evidentiary hearing. Order, p. 9 (dismissing counsel's assertions as "speculative at best").

In any other context, an evidentiary hearing on these and other disputed facts identified in the court below would have been mandatory. There is controlling precedent, for example, holding that an evidentiary hearing is mandatory if there is a dispute over a material question of fact in the post-conviction setting. *E.g.*, *United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998), *amended* Sept. 4, 1998 (28 U.S.C. § 2255 "requires that 'an evidentiary hearing 'shall' be granted 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'"; "The petitioner need not detail his evidence, but must only make specific factual allegations which, if true, would entitle him to relief.") (citations omitted).¹ The Ninth Circuit has come to the same conclusion about the need for an evidentiary hearing in 28 U.S.C. § 2254 cases where the allegations raise

¹ "[W]hen a defendant's allegations [in a § 2255 motion] ... are based on facts outside of the record, an evidentiary hearing is required." *Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994). *See Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990), *cert. denied*, 499 U.S. 940 (1991); *United States v. Burrows*, 872 F.2d 915 (9th Cir. 1989) (evidentiary hearing generally required if § 2255 motion states claim based on matters outside the record; hearing may be denied only if allegations in motion, viewed against the record, either do not state a claim or are so palpably incredible or patently frivolous as to warrant summary denial); *United States v. Espinoza*, 866 F.2d 1067, 1069 (9th Cir. 1988).

a factual dispute.²

This provides yet another reason for this Court to reconsider its decision to deny Mr. Kott's motion to dismiss without further discovery and an evidentiary hearing.

Third, this Court ruled that avoiding embarrassment to a government witness outweighs the importance of cross-examination on some of that witness's motives to curry favor with the government. It therefore ruled that certain material that could have impeached Bill Allen – including “evidence regarding [Allen's] alleged subornation of perjury,” Order, p. 18 – would have been excluded under Fed. R. Evid. 403, regardless of its admissibility under the Confrontation Clause. This decision conflicts with controlling authority holding that the confrontation clause trumps Rule 403, not the other way around.³ It also conflicts with authority holding

² See *Hendricks v. Vasquez*, 974 F.2d 1099 (9th Cir. 1992), amended Oct. 9, 1992 (habeas petitioner entitled to evidentiary hearing on claim if: “(1) the petitioner's allegations, if proved, would entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts.”).

³ See *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1993) (“The jury, not the prosecutor, has the duty to sift through the inconsistencies of testimony, to weigh the credibility of witnesses and to resolve any ambiguities in the evidence”; reversing, because there was reasonable probability that had memorandum been disclosed, “the result of the proceeding would have been different such that our confidence in the outcome is undermined”); *United States v. Endicott*, 869 F.2d 452 (9th Cir. 1989) (“the obligation under *Brady [v. Maryland]*, 373 U.S. 83, 87 (1963) to produce evidence material to a defendant's guilt or punishment includes production of impeachment evidence”); *Hart v. United States*, 565 F.2d 360, 362 (5th Cir. 1978) (remanding for hearing on 28 U.S.C. § 2255 motion alleging that key government

that subornation of perjury is relevant and admissible. *See, e.g., United States v. Cummings*, 969 F.2d 223, 226-27 (6th Cir. 1992); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3d Cir. 1985); *United States v. Culotta*, 413 F.2d 1343, 1346 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970).

In addition, this Court overlooked other clear indications that Mr. Allen had made statements to the government that directly contradicted his trial testimony, and that there should have been no Rule 403 bar to admissibility because they did not involve any acts of moral opprobrium. The initial briefing in this case summarized the bulk of that contradictory material. The newly released documents – BATES 004699 to 004803 – underscore those contradictions. They state, for example, with regard to whether Bill Allen paid Pete Kott for the actual value of the work he put in on his flooring or not: “Kott work on B. Allen home in ’01 did all floors \$21 – 25K.” BATES 004717. “Kott put in wood floors when BA’s house built – paid value – end of 2001 beginning 2002. MBK – 2 checks, \$17K; \$5K – No inflation of invoices.” BATES 004728. As this Court is certainly aware, this contradicts trial testimony that Mr. Allen’s flooring payments to Mr. Kott were vastly inflated as a means to get bribe or extortion money to Mr. Kott or his son.

witness and informant lied about not facing federal charges; “arrests may be admissible to show that an informer might falsely testify favorably to the government in order to put his own cases in the best light possible”).

Those newly disclosed notes further state, with regard to whether the money Bill Allen provided to Pete Kott to buy a truck was extortion, bribery, or a loan: “Bill volunteered – PK didn’t ask first. Pete never repaid.” BATES 004729. As this Court now knows, this contradicts trial testimony and government argument that the money Mr. Allen provided for that truck was an outright gift that amounted to a bribe or extortion, not a loan that was ultimately forgiven.

Further, those newly disclosed documents confirm that in trial preparation sessions immediately prior to Pete Kott’s trial, Bill Allen explicitly denied, in the presence of at least one government attorney (Mr. Goecke), that Pete Kott had ever committed extortion – though it is unclear from the context to whom the no-extortion assertion applies: “Re: extortion. Dave Anderson. Don’t think Pete Kott extorted.” BATES 004790. A handwritten note next to these notes of Mr. Allen’s proposed testimony states, “issue is how hard.” *Id.* This seems to contradict the government’s argument that Pete Kott did extort Bill Allen.

These materials – like the previously released 4,600 pages of sealed documents – thus confirm that Bill Allen made statements to government agents in advance of trial that contradicted his trial testimony and that would not have been shielded by Rule 403. Given the confirmation of the prior contradictory and potentially impeaching Bill Allen statements provided by these newly released

notes, this Court should reconsider its decision to deny not just the motion to dismiss but also the motion for discovery and an evidentiary hearing.

Fourth, this Court agreed with Mr. Kott that the Seventh Circuit decision cited in the motion to dismiss, *Lindh v. Murphy*, 124 F.3d 899 (7th Cir. 1997), *cert. denied*, 522 U.S. 1069 (1998), supports Mr. Kott's argument that the suppressed evidence about Mr. Allen's exposure to conviction, punishment, and moral opprobrium was material, favorable, and admissible. This Court stated that there is no authority that closely on point in this circuit, and declined to follow the Seventh Circuit's decision. The Ninth Circuit, however, holds that the preference is to avoid such splits with other circuits. *United States v. Dupas*, 417 F.3d 1064 (9th Cir.), *amended*, 419 F.3d 916 (9th Cir. 2005), *cert. denied*, 547 U.S. 1011 (2006). This Court should therefore reconsider its decision on the applicability of the Seventh Circuit's analysis to this case, also.

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III. CONCLUSION

For the foregoing reasons, the motion to reconsider should be granted; the motion to dismiss should be granted; or, alternatively, the motion for discovery and an evidentiary hearing should be granted.

DATED THIS 28th day of January, 2010.

Respectfully submitted,

s/Sheryl Gordon McCloud

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CERTIFICATE OF SERVICE

I certify that I caused to be electronically filed the foregoing with the Clerk of the Court of the United States District Court for Alaska by using the CM/ECF system on January 28, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the district court CM/ECF system.

DATED this 28th day of January, 2010.

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