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September 5, 2012

BY ECF

Hon. Dennis M. Cavanaugh, U.S.D.J.
U.S. District Court, District of New Jersey
Post Office Building & Federal Courthouse, Room 451
Newark, New Jersey 07101-0999

Re: United States v. Bergrin, Crim. No. 09-369 (DMC)

Dear Judge Cavanaugh:

The Government's initial brief asked this Court to preclude Defendant Paul Bergrin from mentioning or eliciting evidence of his prior military service or his legal representation of police officers and/or soldiers, arguing that Bergrin would misuse that evidence to seek jury nullification. Dkt. 381 at 44 (quoting A648-49); id. at 49-51.[1] In his opposition brief, Bergrin responded as follows:

> evidence of Mr. Bergrin's prior acts that angered the Government, such as his testimony in the defense of police officers in contravention of the United States Attorney's instructions while he was employed as an Assistant United States Attorney, his subsequent successes as a defense attorney after he left the United States Attorney's Office, and the position he took in the Abu Ghraib prisoner-abuse scandal as a defense attorney, are crucial to Mr. Bergrin's defense theory of prosecutorial vindictiveness.

Dkt. 386 at 16-17. Bergrin then argues that, since he must "prove prosecutorial vindictiveness before this Court," excluding the evidence the Government cited "would deprive [him] of a complete defense." Id. at 17. The Government now moves *in limine* to preclude Bergrin from suggesting or arguing prosecutorial vindictiveness before the jury, as it is not a proper trial defense as a matter of Third Circuit law.

[1] The Government cites to the page numbers in the ECF legend at the top of the e-filed pleading.

Federal Rule of Criminal Procedure 12(b)(3) lists motions that "must" be made prior to trial. Among them are motions "alleging a defect in instituting the prosecution" or "alleging a defect in the indictment or information[.]" Fed. R. Crim. P. 12(b)(3)(A), (B). Under Third Circuit law, claims of vindictive or selective prosecution are *legal* defenses that must be addressed to and decided by the court. See United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973); United States v. Kemp, Crim. No. 04-370, 2005 WL 730686, at *2 (E.D. Pa. Mar. 29, 2005) ("Whatever the characterization, the law does not allow a trial jury to consider such pre-indictment governmental conduct. Any such contention must be made by pretrial motion, which was not filed, and the Court infers it was not filed because defense counsel in this case are well aware of the huge burden that a Defendant carries to prove such an allegation.") (citations omitted); see also United States v. Abboud, 438 F.3d 554, 579-80 (6th Cir. 2006) ("A defense of selective prosecution is a matter for the court, not the jury."); United States v. Safavian, Crim. No. 05-370, 2008 WL 5255534, at *1 (D.D.C. Dec. 12, 2008) ("Where issues of vindictive or selective prosecution are properly raised they are legal matters for the Court, not theories of defense for the jury.").

Because selective or vindictive prosecution raises a pure question of law, district courts can and should prohibit defendants from introducing evidence supporting that defense and from arguing it to the jury. United States v. Cleveland, Crim. No. 96-207, 1997 WL 253124, *3 (E.D. La. May 14, 2009) ("Evidence introduced for the purpose of showing that the prosecution has brought these criminal charges for improper reasons shall therefore be excluded."); United States v. Stewart, Crim. No. 03-717, 2004 WL 113506, at *1 (S.D.N.Y Jan. 26, 2004) (finding that "arguments or evidence that would invite the jury to question the Government's motives in investigating and indicting Ms. Stewart as opposed to other individuals who may also have committed the crimes charged or similar crimes … are essentially claims of selective prosecution.").

Here, Bergrin has not moved to dismiss the indictment on the ground of vindictive or selective prosecution, presumably because of the "huge burden that a Defendant carries to prove such an allegation." Kemp, 2005 WL 730686, at *2. Rather, Bergrin wishes to argue at trial that the U.S. Government is out to get him because of actions he took as an AUSA (more than 20 years ago) or as a defense attorney. That is patently improper, and it underscores the concern raised in the Government's motion that Bergrin seeks to have the jury decide this case on irrelevant issues, instead of the evidence. See A649-52 (precluding Bergrin from arguing prosecutorial vindictiveness to the jury).

Beyond the risk of jury nullification, permitting Bergrin to pursue a claim of vindictive prosecution at trial would open the door to testimony by prosecutors and agents assigned to this case that Bergrin was charged because the evidence gathered by the Government amply established probable cause. For example, Government witnesses could rely on the tape of Bergrin instructing a putative hit man to make it look "like a home-invasion robbery" and not "a hit" on a witness to rebut any suggestion of vindictiveness. Dkt. 304-5 at 3-4. Such a trial defense also would allow the Government

to put on evidence showing that it did not prosecute other defense attorneys who vigorously defended clients or took controversial positions. The trial would quickly devolve into a series of time-consuming mini-trials over collateral issues, distracting the jury from the only proper issue in the case: whether the evidence establishes Bergrin's guilt beyond a reasonable doubt. Because the limited probative value of Bergrin's "vindictiveness" claim would be dwarfed by the danger for confusing the issues and wasting the jury's time, this Court has discretion to exclude evidence supporting that defense. See Holmes v. South Carolina, 547 U.S. 319, 326 (2006) ("well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury") (citing Fed. R. Evid. 403).

For the foregoing reasons, this Court should preclude Bergrin from eliciting evidence to support (and from making arguments asserting) prosecutorial vindictiveness.

Respectfully submitted,

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By: /s STEVEN G. SANDERS
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cc: Lawrence S. Lustberg, Esq.
Amanda B. Protess, Esq.
(by ECF and e-mail)