

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	
)	
v.)	
)	No. 08-cr-231 (EGS)
THEODORE F. STEVENS,)	
)	
Defendant.)	

**SENATOR STEVENS’S MOTION FOR DISCOVERY AND AN EVIDENTIARY
HEARING REGARDING ALLEGATIONS IN LETTER FROM DAVID ANDERSON**

Defense counsel are in receipt of a letter, dated November 15, 2008, from government witness David Allen Anderson. *See* Exhibit 1.¹ The letter makes startling allegations of government misconduct. Among other things, Mr. Anderson accuses government counsel of suborning perjury and making intentionally false statements in disclosures to defense counsel. Senator Stevens requests that the Court (a) permit the defense to take discovery into Mr. Anderson’s allegations and (b) schedule an evidentiary hearing to consider those allegations and to determine what remedies may be appropriate.

1. The Court is intimately familiar with the history of the government’s conduct in this case. As to Mr. Anderson in particular, the government submitted false VECO accounting records showing him as working virtually full time on the Girdwood renovations in late 2000, when the prosecution team knew all along that Mr. Anderson was in Portland, Oregon during a substantial part of that time period. The Court sharply criticized the government for this conduct during the trial:

¹ Mr. Anderson’s letter is addressed to the Court, with copies to government counsel and defense counsel. Defense counsel received the letter by fax on November 16.

THE COURT: The government knew that Anderson had taken an oath before the grand jury and said, I'm in Portland. I was in Portland during those two or three months. The government reread the records, though, because you did circle the records. Someone circled them. So you know, these are the records. VECO spent a hundred-and-eighty-thousand, plus these are the records. Anderson was there. Williams was there. And all along the government knew that was a lie.

Tr. (Oct. 8, 2008 p.m.) at 54 (emphasis added) (attached hereto as Exhibit 2). The government withheld this exculpatory information about Mr. Anderson's whereabouts—obviously *Brady* material—until it was ordered to produce all of the grand jury transcripts as a sanction for other *Brady* violations.

At the same time, the prosecution team refused to disclose Mr. Anderson's whereabouts or to accept a defense trial subpoena on his behalf until after the Court criticized the government's similar machinations with respect to another witness (Rocky Williams). At that point, the government suddenly made Mr. Anderson available to accept service of a subpoena in the District of Columbia, where he evidently had been for some time meeting with the government in preparation for his trial testimony. Notwithstanding this lengthy preparation, the government decided not to call Mr. Anderson as a witness and informed the Court and the defense that it was resting its case. Only after its misconduct had been revealed, and after the Court struck that portion of the false VECO accounting records relating to Mr. Anderson, did the government belatedly reopen its case and call him as its final witness over the defense's objection.

2. Mr. Anderson testified on October 9, 2008. He displayed an unusually detailed recollection of the Girdwood renovations and VECO's alleged role in them. As a consequence, Mr. Anderson essentially functioned as a summary witness for the government,

reinforcing the testimony of other government witnesses who had testified about various components of the Girdwood renovations over the course of several weeks.

At the conclusion of his direct testimony, the government elicited the following testimony about an affidavit Mr. Anderson signed on March 25, 2008²:

Q. Okay. Mr. Anderson, let me ask you about something that occurred earlier this year. Did you sign an affidavit that wasn't completely accurate?

A. Yes, I did.

Q. Tell the jury about that.

A. Okay. We drafted, basically I tried to keep like my loved ones protected in the best way that I can through all this. It's been a long road. I mean, it's been a long, hard road, so, you know, I tried to keep them protected as much as I can, you know, through all this, because it has been a long road.

Q. All right. Did you sign an affidavit that said that a number of people had been given immunity by the United States government from criminal prosecution?

A. Yes, I did.

Q. Do you know that that was not true?

A. Yes. That was never said. It was kind of a gentlemen's agreement, you know. You know, that's what I work off of.

Q. All right.

A. A handshake, you know, so, you know, I take it as an immunity, but it was never — that was never said.

Q. Did you draft that affidavit?

A. I didn't draft it, but I signed it.

Q. Did you know that it wasn't true when you signed it?

A. Yes.

Trial Tr. (Oct. 9, 2008 a.m.) at 80–81 (attached hereto as Exhibit 4).

3. Mr. Anderson's trial testimony about his affidavit thus echoed the government's prior *Brady* disclosures. On September 9, 2008, government counsel had

² A copy of Mr. Anderson's March 25 affidavit is attached as Exhibit 3.

represented in a letter to defense counsel that Mr. Anderson's March 25, 2008 affidavit was false.

16. On August 13, 2008, David Anderson stated he signed an affidavit on March 25, 2008; the affidavit was drafted by Jerry Ward; Ward chose the individual names that would be included in the affidavit; Anderson felt pressured to sign the affidavit because of his relationship with Ward's daughter; the affidavit contains numerous false statements; and that he and the other individuals mentioned in the affidavit were not promised, offered, or actually given immunity.

Letter from Ms. Morris to Mr. Romain (Sept. 9, 2008), filed at Dkt. No. 126-3 (Oct. 2, 2008) (attached hereto as Exhibit 5).

At the time Mr. Anderson testified, defense counsel had no contrary information with which to cross-examine Mr. Anderson about his affidavit. The defense accordingly had no choice but to accept the witness's representation that the government had not promised to protect him or persons associated with him from prosecution in exchange for his favorable testimony against Senator Stevens. Had defense counsel known that Mr. Anderson in fact believed he had such an agreement with the government, counsel would have cross-examined him on this point and would have requested an appropriate jury instruction. *See, e.g.,* Parties' Joint Submission Regarding Proposed Final Jury Instructions (Dkt. No. 52) at 1 (Sept. 8, 2008) (proposing Red Book Instruction 2.23, "Testimony of Immunized Witness").

4. Mr. Anderson's letter of November 15 casts his trial testimony and the government's *Brady* letter in a far different light.

- He states that even though he testified at trial "that there was never immunity for me or my family and friends," that testimony "is simply not true." Ex. 1 at 1.
- He explains that he did believe there was an agreement but he testified falsely because: "I understood that if I testified that [the March 25 affidavit] was not an accurate

document we would all be able to continue with life and we even covered it during the closed door sessions I had with the government.” Ex. 1 at 1.

- He alleges that “[t]he Department of Justice has never ever denied that they shook my hand on this agreement but instructed me on how to sugar coat it and get it swept under the rug during the trial as they have told the court just the opposite.” Ex. 1 at 2.

- He notes that the government’s covert assurances of an existing agreement were essential to his decision to testify at all: “Before I took the witness stand that day I had the understanding that the agreement would be honored or I would never have testified, I would have pleaded the fifth.” Ex. 1 at 1.

- He states that the above-quoted paragraph 16 of the government’s September 9 *Brady* letter “is not true and is completely false.” Ex. 1 at 1.

- With regard to his detailed trial testimony about the Girdwood renovations, Mr. Anderson’s letter describes how the government “found ways to create the timeline” of events that Mr. Anderson could not remember on his own. Ex. 1 at 2. He describes an occasion where the government told Mr. Anderson not to read certain documents but then left him alone in the room with the documents. “Of course I read it all.” *Id.*

- With regard to the government’s presentation of false VECO accounting records, Mr. Anderson’s letter confirms that he “testified at the Grand Jury that I had been in Oregon while VECO billed my time elsewhere. . . . I was told by the Department of Justice they did not have to provide the defense with my testimony from the Grand Jury until 24 hours before I took the stand. The prosecution had always known where I spent my time and how.” Ex. 1 at 3. This further establishes that the government knowingly introduced false evidence when it proffered these purported business records at trial.

- Mr. Anderson's letter concludes:

Without the preparation from the prosecution and the reminders from them about my activities and the agreement I had with them about my family and myself I would not have given the same testimony. Without a shadow of a doubt I believe this trial would have gone much differently.

Ex. 1 at 3.³

5. Under these circumstances, the Court should (a) grant Senator Stevens's request to take discovery relating to Mr. Anderson's allegations, and (b) order an evidentiary hearing to consider those allegations and to decide what remedies may be appropriate. A district court has discretion to order discovery and an evidentiary hearing post-trial in appropriate circumstances, including when newly discovered evidence comes to light. *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007). "According to the Supreme Court, 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is' entitled to a new trial, 'it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'" *Id.* (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)). "In fulfilling this duty, a district court has broad discretion to fashion discovery mechanisms suitable to the case before it" and "is required to conduct [an] evidentiary hearing . . . if the evidence presented by the petitioner, if accepted as true, would warrant relief as a matter of law." *Id.*⁴ See also, e.g. *United States v. Boney*, 97 F. Supp. 2d 1,

³ Upon receiving Mr. Anderson's unsolicited letter, defense counsel telephoned Mr. Anderson to confirm its authenticity. Mr. Anderson confirmed that he sent the letter and that he stands by its contents.

⁴ In *Velarde*, the court found that the petitioner did not satisfy the Tenth Circuit's standard for an evidentiary hearing "because, by his own admission, he was unable to procure the necessary evidence . . . without judicial compulsion." *Id.* As a result, the court granted petitioner's request for judicially compelled discovery. *Id.*; see 3 Federal Practice and Procedure § 557 at n.41 (citing *Velarde*) ("Where the defendant made showing that further investigation would more

2–3 (D.D.C. 2000) (Sullivan, J.) (discussing two evidentiary hearings ordered by Court of Appeals to ascertain possible prejudice to defendant from juror bias that was undisclosed during *voir dire*; Court of Appeals ordered that defense counsel be permitted to cross-examine the juror); *United States v. Koubriti*, 297 F. Supp. 2d 955, 959, 972 (E.D. Mich. 2004) (court conducted post-trial evidentiary hearing to ascertain the impact of government’s failure to disclose a letter containing arguably exculpatory information; Court ordered non-party to produce relevant documents). Evidentiary hearings are also appropriate pre-trial when government misconduct is alleged. *United States v. Omni Int’l Corp.*, 634 F. Supp. 1414, 1434, 1438–39 (D. Md. 1986) (“The AUSA’s failure to be fully candid could have had tragic consequences. The Court was faced with the issue of whether or not to permit an evidentiary hearing. If the Court had blindly relied on the AUSA’s representations, no hearing would have been held. . . . In light of all the testimony adduced at the [28-day-long] evidentiary hearing, it is clear that this case rises to the high threshold imposed for invocation of the supervisory power [to dismiss]. The Court condemns the manner in which the Government proceeded, and cannot now stand idly by, implicitly joining the federal judiciary into such unbecoming conduct.”).

Here, Mr. Anderson’s letter presents brand new allegations that could not have been known to the defense until after the trial and that unmistakably justify discovery and an evidentiary hearing. For example, the allegations in Mr. Anderson’s letter suggest that the government intentionally suborned perjury, by knowingly soliciting statements that were not true while “instructing” him how to “get it swept under the rug during the trial.” Such conduct would violate the clear constitutional proscription against knowing presentation of false evidence. *See*

likely than not lead to facts the defendant could use to effectively cross-examine government witness, it was error to deny defendant’s motion for a new trial without granting an opportunity for discovery under the court’s subpoena power.”).

United States v. Iverson, 637 F.2d 799, 801 (D.C. Cir. 1980); *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). Mr. Anderson's letter also indicates that the government withheld critical exculpatory evidence from the defense—his continued belief that the government had promised him and his family and friends immunity in exchange for his testimony—that could have been used to impeach his testimony, and indeed that the government lied about this evidence in its September 9 letter to defense counsel. This too would be a flagrant constitutional violation warranting a severe remedy, including dismissal of the indictment. *See Giglio, supra; United States v. Chapman*, 523 F.3d 1073 (9th Cir. 2008). Notably, Mr. Anderson's allegation that the government secured his cooperation by promising not to prosecute his family and friends closely resembles the government's inducements to Bill Allen. Mr. Allen testified that the government promised him that, if he cooperated and if his testimony provided "substantial assistance" to the investigation, then the government would not indict and prosecute Mr. Allen's three children for various crimes. *See* Trial Tr. (Oct. 7, 2008 a.m.) at 48 (attached hereto as Exhibit 6).

In evaluating whether the misconduct alleged in Mr. Anderson's letter occurred and what remedy may be appropriate, it is essential that the Court give the defense the ability to compel the production of documents (including notes, memoranda and emails), and to examine prosecutors and agents under oath, so that the record will reflect exactly what happened—i.e., what the government did with respect to Mr. Anderson, what the government knew, and when the government knew it. An evidentiary hearing is necessary to determine these essential facts. In advance of the hearing, the Court should permit the defense to take discovery so that the relevant facts can be presented to the Court at the hearing in an expeditious and orderly fashion. At the hearing, the Court should hear directly from Mr. Anderson, and the government and

defense each should be permitted to call any other witnesses who may have relevant information about his allegations.

We respectfully suggest that the Court order a schedule along the lines of the following for these proceedings: December 10, 2008—defendants submit discovery requests to the government; January 9, 2009—government responds to defendant’s requests; January 16, 2009—hearing on discovery requests; January 30, 2009—all discovery completed; February 18-20, 2009—evidentiary hearing.

CONCLUSION

For the foregoing reasons, the Court should permit the defense to take discovery and should order an evidentiary hearing.

Dated: November 21, 2008

Respectfully submitted,

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