IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**4:20-CR-00081-RSB-BWC**
	)	
JAMES CLAYTON PEDRICK	)	

MOTION TO SUPPRESS STATEMENTS OR IN THE ALTERNATIVE TO DISMISS COUNT TWO OF THE INDICTMENT

Now comes the Defendant, James Clayton Pedrick (hereafter "Pedrick"), through undersigned counsel, who files herewith this Motion to Suppress or in the Alternative to Dismiss Count Two of the Indictment, showing to this Honorable Court the following:

I. INTRODUCTION

On September 20, 2020, Pedrick was indicted in the instant case along with four co-defendants. Count One of the Indictment charges all of the defendants with Sherman Act conspiracy under 15 U.S.C. §1.

Pedrick is the sole defendant named in Count Two of the Indictment which charges him with false statements under 18 U.S.C. §1001. Count Two charges Pedrick as follows:

> "20. The Grand Jury incorporates and re-alleges Paragraphs 8 and 10 of Count One as if fully set forth herein.
> 21. On or about February 5, 2018, in Savannah, Georgia, in the Southern District of Georgia, Defendant Pedrick knowingly and willfully made false statements to federal law enforcement agents which statements were material to a matter within the jurisdiction of the executive branch of the United States Government. Specifically, in connection with an investigation by the United States Postal Service Office of Inspector General and the Federal Bureau of Investigation, Defendant Pedrick was interviewed by special agents of the United States Postal Service Office of Inspector General and the Federal Bureau of Investigation. During that interview, Defendant Pedrick falsely stated:
> A. He had never heard of collusion or price-fixing in the Savannah market; and
> B. He had never personally discussed concrete price increases with David Melton.
> The statements were false because, as Defendant Pedrick then and there knew:

A. He had heard of and knew of collusion and price-fixing in the Savannah market; and
B. He had personally discussed concrete price increases with David Melton.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1001."

It is with respect to the manner and means by which the Government obtained the allegedly incriminating statements from Pedrick at the February 5, 2018 interview referred to in Paragraph 21 of the Indictment that this Motion to Suppress is concerned. We contend the lead lawyer for the Government at the time of the interview, Eyitayo "Tee" St. Matthew-Daniel, Trial Attorney, Antitrust Division, United States Department of Justice ("Attorney St. Matthew-Daniel"), as well as the interviewing Agents, FBI Special Agent Jason Spurlock ("Agent Spurlock") and Special Agent Marcus Mills of the United States Postal Service, Office of Inspector General ("Agent Mills"), knew or should have known that Pedrick was represented by counsel in connection with the matters to be discussed at the interview but made no effort to contact Pedrick's lawyer before the interview.

In authorizing Agents Spurlock and Mills to approach Pedrick directly for an interview without first contacting counsel for Pedrick and asking for permission to interview his client, or giving Pedrick's counsel the opportunity to intervene on behalf of Pedrick, Attorney St. Matthew-Daniel violated federal statutory law, the Code of Federal Regulations, and United States Department of Justice policies governing the ethical conduct of its attorneys, as well as Rule 4.2 of the Georgia Rules of Professional Conduct.

The statutory, policy and ethical violations of the well-established no-contact rule by Attorney St. Matthew-Daniel enabled Agents Spurlock and Mills, acting under her supervision and control and at her direction, to elicit the statements from Pedrick which form the basis for Count Two of the Indictment. This conduct violated Pedrick's right to due process of law under the Fifth

Amendment as well as his right to counsel under the Sixth Amendment. Therefore, the statements made by Pedrick that form the basis of Count Two of the Indictment should be suppressed or, in the alternative, Count Two of the Indictment should be dismissed.

Furthermore, as will be argued below, oral statements and a written statement made by Pedrick at a second uncounseled interview with Agents Spurlock and Mills on February 6, 2018 and at an interview with counsel present on September 25, 2018 should also be suppressed.

II. FACTUAL BACKGROUND OF CASE

The interview in question took place on February 5, 2018 in Mr. Pedrick's residence located at 219 E. 46th St., Savannah, Georgia 31405. According to an FBI 302 prepared by Agent Spurlock,

> "Upon first meeting the interviewing agents and being informed of the nature of the interview, Pedrick stated that several years ago that he had spoken with an attorney. Pedrick was subsequently informed that he always had the right to have an attorney present and could discontinue conversation with interviewing Agents at any time and for any reason. Pedrick subsequently invited the interviewing agents into his home and agreed to be interviewed."

As will be shown, this colloquy between Pedrick and the agents, during which the agents were reminded by Pedrick of something they already knew, namely, that Pedrick was represented by counsel, was not sufficient to cure the egregious violations of Pedrick's rights nor justify the uncounseled interview which followed. The history of the investigation which lead to the instant Indictment and this Motion is long and has had many twists and turns.

A. The First Antitrust Division Investigation.

According to an FBI memorandum titled "To request case be opened and assigned to SA William" drafted by FBI Special Agent William J. H. Filson ("Agent Filson"), a federal criminal investigation into possible antitrust violations in the concrete industry in Georgia was initiated on

February 16, 2012. The case was predicated on information provided to the Department of Justice, Antitrust Division, Atlanta Field Office by Christopher F. Young ("Young"), an Argos Concrete, LLC ("Argos") area sales manager in Savannah, Georgia.

On April 2, 2012, Young was provided with an Amnesty Letter by the Antitrust Division pursuant to the Antitrust Division's Leniency Policy for Individuals. This letter enabled Young to avoid criminal prosecution if he cooperated with the Government in its investigation of Young's allegations.

According to numerous interviews of Young by law enforcement agents and attorneys for the Government, Young became concerned about possible antitrust violations by Argos and other concrete companies and, in 2010, began secretly recording conversations with colleagues using his own recording device or devices. Young later approached the Atlanta Field Office of the Antitrust Division and provided documents and two recordings. In March, 2012, Young was provided with a government recording device by Agent Filson. Thereafter, between March, 2012 and January, 2013, Young made numerous secret recordings of conversations with colleagues at Argos as well as other people involved in the concrete industry using the FBI provided equipment.

According to another memorandum written by Agent Filson, titled Closing Communication, dated December 24, 2013, despite Young's numerous secret recordings, on January 3, 2013, the Antitrust Division's Atlanta Field Office decided to close the investigation "due to lack of evidence." As a result of this decision, the FBI recording device was recovered from Young by Agent Filson on February 1, 2013.

According to Agent Filson's December 24, 2013 Closing Communication, a Closing Memorandum written by the Atlanta Office of the Antitrust Division explaining why the investigation was being closed was provided to Agent Filson by the Antitrust Division's Atlanta

Field Office by email on April 19, 2013.[1] Agent Filson's Closing Communication states that the Antitrust Division's Closing Memorandum was to be maintained in "the 1-A section of this investigative file."

B. The *Qui Tam* Action and the Government Investigation Resulting Therefrom.

It appears that during the time he was making secret recordings for the FBI and the Antitrust Division, or shortly thereafter, Young engaged the services of an attorney, Raymond L. Moss, Esq. ("Moss"). On or about April 17, 2013, the same week Agent Filson received the Closing Memorandum from the Antitrust Division by email, Mr. Moss filed a *qui tam* action under seal in the Southern District of Georgia, Civil Action File No. CV 413-095. Young was the relator in that *qui tam* action. The *qui tam* lawsuit alleged a massive antitrust conspiracy in the concrete industry in coastal Georgia and coastal South Carolina. The *qui tam* action relied in large part on the numerous secret recordings Young made on his own device or devices as well as recordings made using the government recording equipment.

On April 30, 2013, the U.S. Army Criminal Investigation Command ("USACIDC") was notified by the Defense Criminal Investigative Service ("DCIS") of the *qui tam* action filed by Young. An investigation was initiated. USACIDC Special Agent Jennifer Coleman ("Agent Coleman") and DCIS Special Agent Randy Temples ("Agent Temples") were assigned to the investigation. AUSA Edgar Bueno ("AUSA Bueno"), Chief of the Civil Division, and AUSA Scott Grubman ("AUSA Grubman") of the Civil Division of the U.S. Attorney's Office in Savannah, were also assigned to work on the case. Those lawyers supervised the investigative work of Agents Coleman and Temples.

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[1] The government declined to produce in discovery the Antitrust Division's Closing Memorandum.

On May 23, 2013, Young was interviewed at the U.S. Attorney's Office, Southern District of Georgia ("USAO SDGA) in Savannah by Agents Coleman and Temples, together with AUSA Bueno, AUSA Grubman, AUSA Brian Rafferty, Chief of the Criminal Division, and AUSA Jennifer Solari, also of the Criminal Division, together with a forensic auditor and a paralegal. On June 28, 2013, Young was again interviewed at the USAO SDGA by AUSA Grubman and Agent Temples.

On November 19, 2013, Agents Coleman and Temples interviewed Pedrick at his residence. The purpose of the interview was to question Pedrick about the allegations in the *qui tam* action of antitrust violations in the concrete industry. According to a memorandum of the interview written by Agent Coleman, at one point during the interview the agents "advised Pedrick that he was making false statements and that we were aware that he had been in antitrust meetings and should know of such things." Later in the interview, Agent Coleman wrote, "Mr. Pedrick was advised several more times of his false statements regarding his knowledge bid rigging [*sic*] and price fixing. However, Mr. Pedrick continued to deny any knowledge."

Shaken by this interview, six days later, on November 25, 2013, Pedrick hired criminal defense attorney Donnie Dixon ("Attorney Dixon") to represent him in the antitrust investigation of the concrete industry.[2] Attorney Dixon has continued to represent Pedrick to this day. After being retained, Attorney Dixon made contact with the U.S. Attorney's Office to inquire about Mr. Pedrick's status. Thereafter, on December 10, 2013, AUSA Scott Grubman and, possibly, AUSA Edgar Bueno presented Attorney Dixon with what is commonly referred to as a reverse proffer. We have reason to believe that Agent Temples and/or Agent Coleman were also present for the reverse

[2] Attorney Dixon is a well-known Savannah criminal defense attorney, former United States Attorney for the Southern District of Georgia, and a current member of Pedrick's defense team.

proffer.

A reverse proffer is a presentation to a defense lawyer of the Government's case against the client. The purpose of a reverse proffer is to try to elicit a "shock and awe" response leading to a possible guilty plea and cooperation with the government by the client. In this case, the reverse proffer was made to Attorney Dixon alone without Pedrick being present.

At the reverse proffer, a recording was played for Attorney Dixon, likely by one of the agents. If the agents followed protocol, a memorandum of the reverse proffer was prepared for their files. We also believe there is documentation of this event in the possession of the Justice Department in the form of memoranda to file prepared by AUSA Grubman or AUSA Buena, emails between the parties relating to the reverse proffer, notes regarding telephone conversations, or calendar entries.

Following the reverse proffer on December 10, 2013, Attorney Dixon consulted with Pedrick and thereafter contacted the U.S. Attorney's Office to decline the invitation for his client to cooperate with its investigation. Thereafter, and at all times prior to the surprise interview of Pedrick on February 5, 2018, Attorney Dixon made no further effort to contact the Government regarding Pedrick, nor was he contacted by the Government regarding Pedrick. Moreover, following the reverse proffer, and before the February 5, 2018 interview, Attorney Dixon never informed the Government that he no longer represented Pedrick in connection with antitrust investigations of the concrete industry. These events establish that it was known to the Department of Justice that Pedrick was represented by Attorney Dixon in the concrete antitrust investigation as early as December, 2013.

After an exhaustive and thorough three year investigation, the United States Attorney's Office for the Southern District of Georgia declined to intervene in Young's *qui tam* action. On

July 8, 2016, AUSA Charles W. Mulaney, Deputy Chief, Civil Division ("AUSA Mulaney"), on behalf of United States Attorney Edward J. Tarver, Southern District of Georgia, filed the Government's Notice of Election to Decline Intervention in the *qui tam* case. In that Notice, the Government gave no reason for its decision. However, in a Memorandum, dated June 22, 2016 to then United States Attorney Edward J. Tarver and First Assistant United States Attorney James D. Durham from AUSA Mulaney, titled "Recommendation to File Notice of Declination in *United States ex rel. Young v. LaFarge, S.A., et. al.* (Case No. CV 413-095)" (hereafter "Declination Memorandum"), the reasons for the declination are laid out in detail. [3]

The Declination Memorandum revealed that the Antitrust Division was updated on the *qui tam* investigation, including being apprised of the existence of two cooperating witnesses. (Declination Memorandum, page 5). The Declination Memorandum also notes that the "Antitrust Division again declined to open a criminal investigation, stating that evidence of the exchange of information and attempts to get competitors to collude are generally insufficient to pursue a criminal antitrust case." *Id.*

Significantly, for purposes of this Motion, the Declination Memorandum also notes that in the course of the *qui tam* investigation, Pedrick was confronted by [Special Agent] Temples with certain recordings of conversations but "Pedrick refused to talk and retained Donnie Dixon, who informed us that Pedrick had no cooperation to offer." *Id.* at 5.

This revelation demonstrates in writing that as late as June 22, 2016, the Department of

[3] Some of those reasons cited in the Declination Memorandum are that there was no clear "inflated price" to distinguish from a competitive price; the fact that concrete prices in the Savannah area were "fairly competitive with concrete prices in other parts of the State; and the fact that various concrete companies gave lower prices to preferred customers and the price of concrete often varied by supplier, customer, and volume of work.

Justice knew Pedrick was represented by Attorney Dixon and that Attorney Dixon had specifically informed the government his client "had no cooperation to offer." Further, the Antitrust Division was "updated on the investigation to date" by the U.S. Attorney's Office before the Declination Memorandum was finalized and, presumably, was provided a copy of the Declination Memorandum, or at least a draft thereof, although such information has not been provided to us in discovery.

C. The Second Antitrust Division Investigation.

Sometime between about July 8, 2016 and October 19, 2017, the exact date being unknown to Pedrick, the Antitrust Division of the U.S. Department of Justice working with the FBI and the United States Postal Service, Office of Inspector General, reopened its criminal antitrust investigation of the concrete industry.

On October 19, 2017, at the United States Attorney's Office in San Diego, California, Young was interviewed again by the Government. This interview was conducted by a new lead prosecutor on the matter, Attorney St. Matthew-Daniel, as well as new agents assigned to the matter, FBI Special Agent Jason Spurlock ("Agent Spurlock") and Special Agent Marcus Mills, United States Postal Service, Office of Inspector General. ("Agent Mills").

According to Agent Spurlock's FBI 302 of this interview, Young told the three interviewers (Attorney St. Matthew-Daniel, Agent Spurlock and Agent Mills) that "[a]fter ARGOS became aware of a *qui tam* complaint against the firm, JIM PEDRICK stated that the complaint would blow over, because PEDRICK had a politically connected attorney." Agent Spurlock's FBI 302 thus establishes that Attorney St. Matthew-Daniel, Agent Spurlock and Agent Mills all heard from Young during the October 19, 2017 interview that Pedrick was represented by a "politically connected attorney" in connection with the concrete investigation. This interview took place less

than four months before the February 5, 2018 interview of Pedrick by Agents Spurlock and Mills.

On October 20, 2017 (the day following the above-referenced interview of Young), Attorney St. Matthew-Daniel, Agent Spurlock and Agent Mills interviewed Jason Wells ("Wells") and Mark Turner ("Turner"), co-owners of Southeast Ready Mix. During his interview, Wells stated that he and Turner met Pedrick in a parking lot in Savannah in 2016 and that during that meeting "Pedrick told Wells that agents served him with a civil investigative demand, but his attorney got him out of it in two weeks".[4]

During his interview, Turner also related that he and Wells met in a Savannah parking lot with Pedrick in 2016 and that during that meeting "Pedrick told Wells that agents had served him with a civil investigative demand, but his attorney got him out of it in two weeks." [5] Thus, Attorney St. Matthew-Daniel, Agent Mills and Agent Spurlock all heard for the second and third time in two days that Pedrick was represented by counsel in the concrete investigation.

On December 17, 2017, a Tactical Intelligence Report on Pedrick was prepared for Agent Spurlock by the FBI's Washington Field Office, Field Intelligence Group. The report includes a chart labeled the "Ready Mix Collusion Chart, Pedrick's Alleged Involvement in Ready Mix Collusion." The chart puts Pedrick at the center of the alleged conspiracy. The body of the Tactical Intelligence Report contains a detailed discussion of Pedrick's alleged centrality to collusion in the concrete industry and demonstrates that Pedrick was squarely in the cross-hairs of the team conducting this criminal investigation. It is thus clear that when Agents Spurlock and Mills showed

[4] Memorandum of Interview of Jason Wells written by Agent Mills on October 31, 2017, at pages 6-7.

[5] Memorandum of Interview of Mark Turner, written by Agent Mills on October 31, 2017, at page 7.

up at Pedrick's residence less than two months later, on February 5, 2018, he was a target of their criminal investigation.

Attorney St. Matthew-Daniel was present with Agents Spurlock and Mills for another interview of Pedrick on September 25, 2018. Thus, Attorney St. Matthew-Daniel was still assigned to the concrete industry antitrust investigation on that date.

Following his October 19, 2017 interview, Young was later interviewed by Agent Spurlock on April 3, 2018 and April 23, 2018, and by Agent Mills on May 3, 2018, July 11, 2018 and July 16, 2018. The next reported interview of Young was on December 2, 2019. At that time, Young was interviewed at Antitrust Division offices in Washington, D.C. by Antitrust Division Trial Attorneys Matthew Stegman and Patrick Brown, as well as Agent Mills and a new player, FBI Special Agent Matthew Hamel.

In light of the foregoing, at some point in time after Attorney St. Matthew-Daniel's presence at the interview of Pedrick on September 25, 2018 and the interview of Young on December 2, 2019, a new Trial Attorney team at the Antitrust Division was assigned to the matter. This is the team that brought the Indictment in this case, including Count Two against Pedrick.

As noted earlier, Count Two of the Indictment charges Pedrick with making false statements to law enforcement officers in the interview at his residence on February 5, 2018. Those law enforcement officers were the aforementioned Agents Spurlock and Mills. Agents Spurlock and Mills had both participated with Attorney St. Matthew-Daniel in the interview of Young on October 19, 2017 in San Diego, California where Young told them that Pedrick had a politically connected lawyer. They were also present with Attorney St. Matthew-Daniel for the interviews of Jason Wells and Mark Turner on October 20, 2017, when they were told twice that Pedrick had a lawyer. And, all three were present at the interview of Pedrick on September 25, 2018. Thus, from

at least October 19, 2017 through September 25, 2018, it appears that Attorney St. Matthew-Daniel was in charge of the Antitrust Division's investigation of Pedrick and Agents Spurlock and Mills were working under her supervision on the case.

On February 6, 2018, the day after the February 5, 2018 interview at his residence, Pedrick met again with Agents Spurlock and Mills at their request. Pedrick again was not represented by counsel at this interview.

According to Agent Spurlock's 302 of the February 6, 2018 meeting, Pedrick stated, among other things, that he was aware of price increase communications in the concrete industry in the Savannah market, that he had discussed price increases with David Melton, and that he was aware of job swapping and the exchange of price increase letters in the Statesboro market. At this meeting, Pedrick was also asked by the agents to hand write and sign a statement, which he did.

As noted earlier, on September 25, 2018, Pedrick and his counsel, Attorney Dixon, met with Attorney St. Matthew-Daniel, Antitrust Division Trial Attorney Justin Wechsler, and Agents Spurlock and Mills at the FBI office in Savannah.[6] According to Agent Spurlock's 302 memorandum of this meeting, Pedrick stated he was aware of price increase communications in the Savannah market, although he did not think there was a price increase agreement in Savannah among competitors in the concrete industry. Pedrick also stated that he had discussed a concrete price increase with David Melton one time. He also said that he recalled telling Tommy Strickland of Evans Concrete that Argos was going up in price and Strickland telling him that Evans would also go up in price. Pedrick also told the Government at this interview that Young sent him out to

[6] Aware of potential problems created by Pedrick's two uncounseled interviews in February, 2018, Attorney Dixon agreed to this interview in hopes of cleaning up the mess created by the uncounseled interviews.

get the price of concrete moving upward.

Despite Pedrick's attempts to cooperate with the Government in both the February 6, 2018 interview and later with counsel present on September 25, 2018, the Government still indicted him in this case, including Count Two charging him with making false statements based on the uncounseled statements he allegedly made on February 5, 2018.

D. Factual Assertions of Defendant Pedrick.

In light of the foregoing, Pedrick asserts the following contentions; (1) Attorney St. Matthew-Daniel was in charge of the Department of Justice Antitrust Division's concrete antitrust criminal investigation on February 5, 2018. (2) Agents Spurlock and Mills were operating under Attorney St. Matthew-Daniel's direct supervision; (3) Prior to February 5, 2018, Attorney St. Matthew-Daniel (as well as Agents Spurlock and Mills) knew, or should have known, that Pedrick was represented by former United States Attorney Donnie Dixon in the concrete industry antitrust investigation and that no information to the contrary had ever been received by the government; Specifically, (4) Attorney St. Matthew-Daniel knew, or should have known, that on or about December 10, 2013, the United States Attorney's Office for the Southern District of Georgia presented a reverse proffer in the concrete industry antitrust investigation to Pedrick's attorney, Donnie Dixon; (5) Attorney St. Matthew-Daniel knew, or should have known, that on or about June 22, 2016, the United States Attorney's Office for the Southern District of Georgia wrote the Declination Memorandum in the *qui tam* investigation, in which Pedrick's representation by Mr. Dixon was discussed, including Mr. Dixon's communication to the Justice Department that his client had no cooperation to offer in the concrete investigation; (6) Attorney St. Matthew-Daniel knew, or should have known, that on October 19, 2017, Young told her that Pedrick was represented by a politically connected lawyer; (7) Attorney St. Matthew-Daniel knew, or should

have known, that on or about October 20, 2017, both Jason Wells and Mark Turner told her that Pedrick had a lawyer in connection with a civil investigative demand related to the *qui tam* investigation; (8) Attorney St. Matthew-Daniel knew before February, 2018, that Pedrick was a target of her investigation; (9) Attorney St. Matthew-Daniel knew that Agents Spurlock and Mills, acting under her supervision, were going to attempt to interview Pedrick at his residence on February 5, 2018; and (9) Attorney St. Matthew-Daniel made no attempt to contact Pedrick's lawyer, Donnie Dixon, prior to the interviews of his client on February 5 and 6, 2018, in an effort to either obtain his permission for such interviews or to give Attorney Dixon the chance to intervene on behalf of his client.

As will be shown in the next section, if the foregoing contentions are true, then the interviews of Pedrick on February 5 and 6, 2018 violated federal statutory law, the Code of Federal Regulations, established Justice Department policy governing the ethical conduct of its attorneys which was designed to protect people like Pedrick, and the Georgia Rules of Professional Conduct with which Attorney St. Matthew-Daniel was required by law to comply. The result of Attorney St. Matthew-Daniel's egregious ethical and legal violations was that Pedrick made uncounseled statements to Agents Spurlock and Mills on February 5, 2018 that, despite his later efforts to cooperate, form the basis for Count Two of the Indictment charging Pedrick with making false statements under 18 U.S.C. §1001.

III. CITATION OF LEGAL AUTHORITY

The McDade Amendment to the Citizen's Protection Act, codified at 28 U.S.C. §530B, and subtitled "Ethical standards for attorneys for the Government," provides as follows:

> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.
>
> (c) As used in this section, the term "attorney for the Government" includes any attorney de scribed in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40 [28 USCS §§ 591 et seq.]

28 CFR § 77.1, Purpose and authority, states as follows:

> (a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to implement 28 U.S.C. 530B and to provide guidance to attorneys concerning the requirements imposed on Department attorneys by 28 U.S.C. 530B.
>
> (b) Section 530B requires Department attorneys to comply with state and local federal court rules of professional responsibility, but should not be construed in any way to alter federal substantive, procedural, or evidentiary law or to interfere with the Attorney General's authority to send Department attorneys into any court in the United States.
>
> (c) Section 530B imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but should not be construed to impose greater burdens on Department attorneys than those on non-Department attorneys or to alter rules of professional responsibility that expressly exempt government attorneys from their application.
>
> (d) The regulations set forth in this part seek to provide guidance to Department attorneys in determining the rules with which such attorneys should comply.[7]

28 C.F.R. §77.2, Definitions, provides in subsection (a) that the above-cited law and regulations apply to attorneys employed in the Antitrust Division. Subsection (b) states that the term "case" includes grand jury investigations and related proceedings. Subsection (j) provides that

[7] The Antitrust Division is well aware of the obligation of its attorneys to follow ethical rules. In a recent brief filed in the United States District Court for the District of Colorado, in response to a motion alleging that Assistant Attorney General Jonathan Kanter committed an ethical violation, the Antitrust Division stated; "As an officer of the court and a representative of the United States, AAG Kantor abides by and will continue to abide by the Codes of Professional Conduct, other ethical obligations, and the mission of the Department of Justice." *United States v. Penn, et al. (D. Colo.)*, Criminal Action No. 20-cr-00152-PAB, United States' Response to Defendants' Motion for Expanded Voir Dire and Peremptory Challenges, page 2, Document 1287, filed April 29, 2022.

if there is a case pending, the applicable rules of ethical conduct a Department attorney should comply with are the rules of ethical conduct adopted by the local federal court or state court before which the case is pending.

28 C.F.R. §77.3, Application of 28 U.S.C. 530B, provides, in pertinent part:

> In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in § 77.2 of this part.

28 C.F.R. §77.4, Guidance, provides in subpart (a) that

> "[a] government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending." [8]

28 C.F.R. § 77.4, subpart (j) states, in pertinent part,

> "[a] Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under Section 530B."

The Justice Manual, previously known as the United States Attorney's Manual, contains publicly available Department of Justice policies and procedures. It is prepared under the supervision of the Attorney General and under the direction of the Deputy Attorney General. The following are excerpts of selected sections of the Justice Manual found in Title 1, § 1-4.000, Standards of Conduct.

1-4.010. Introduction. Department employees must comply with the rules on Government

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[8] LR 83.5 (d) of the Local Rules of the United States District Court, Southern District of Georgia, provides that "[t]he standards of professional conduct of attorneys appearing in a case or proceeding, or representing a party in interest in such a case or proceeding, are governed by the Georgia Bar Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. When a conflict arises, the Georgia Bar Rules of Professional Conduct shall control. A violation of any of these rules in connection with any matter pending before this court may subject the attorney to appropriate disciplinary action."

ethics, and Department attorneys also must comply with applicable rules of professional conduct. Compliance with Government ethics rules and rules of professional conduct supports the credibility of and faith in government decisions and promotes the common good.

1-4.020. Obtaining Advice and Approval on Ethics-Related Matters. Department attorneys have the . . . responsibility of complying with applicable rules of professional conduct. When in doubt about a professional responsibility obligation, Department attorneys should consult with a professional responsibility officer (PRO) in the applicable Department component or U.S. Attorney's Office, and/or the Department's Professional Responsibility Advisory Office. (PRAO).

1-4.100. Selected Ethics Guidance. Department attorneys ". . . must follow the applicable professional responsibility rules. *See* 28 C.F.R. Part 77."

In light of the McDade Amendment to the Citizen's Protection Act, corresponding C.F.R. regulations, and related Justice Department policies, coupled with LR 83.5 (d) of the Local Rules of this Court, Attorney St. Matthew-Daniel was required to comply with the Georgia Rules of Professional Conduct in the discharge of her duties as the lead Department Attorney in the concrete antitrust federal grand jury investigation in this district. This duty extended to her supervision of Agents Spurlock and Mills because, as stated in 28 C.F.R. §77.4 (j), "[a] Department Attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under Section 530B."

The Georgia Rules of Professional Conduct can be found on the web site of the State Bar of Georgia.[9] Rule 4.2, Communication with Person Represented by Counsel, states:

[9] https://www.gabar.org/_files/ugd/7b5a59_51b11f4ab1c94b45bbdd578d8d1b9039.pdf. Rule 4.2 is found at pages 92-93.

> (a) A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.
> (b) Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State.
>
> The maximum penalty for a violation of this Rule is disbarment.

Comment [2] to Rule 4.2 states:

> "Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing government entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, where there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions."

While Rule 4.2 may not prohibit undercover or covert activity of investigative agents or informants, operating under the supervision of a Department Attorney, there is no applicable judicial precedent in Georgia that has either found the activity in this case permissible under this Rule or has found Rule 4.2 inapplicable to the situation in this case where Agents under the direct supervision of Attorney St. Matthew-Daniel approached Pedrick directly in an effort to interview him.

Comment [5] to Rule 4.2 provides that the rule only applies,

> ". . . in circumstances where the lawyer knows that the person is actually represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. *See 1.0.* Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious." (Emphasis added).

In 2008, then Chief Judge of the Southern District of Georgia, William T. Moore, Jr, surveyed the history of the no-contact Rule in *United States v. Tapp, 2008 U.S. Dist. LEXIS 44212 (S.D. Ga. 2008).* Judge Moore drew a number of conclusions from his review. First, he found that

no court has ever held that federal prosecutors are completely exempt from the no-contact Rule. *Id*. at 13. He further found that no court has ever found that the Thornburgh Memorandum (in which the Department of Justice sought to exempt its lawyers from state ethics rules) had any legal force that would preempt either state or federal ethics rules. *Id.* Third, he noted that no court has found any other case law or federal statutes suggesting that federal prosecutors are exempt from the no-contact rule. *Id*. Thus, Judge Moore concluded, ". . . at the very least, there seems to be a unified perception by the courts that the No-Contact Rule should apply to all lawyers, including federal prosecutors." *Id*.

In addition to the foregoing, Judge Moore concluded that the no-contact rule applies both before and after an Indictment has been returned against a person. Judge Moore noted that courts that have found the rule does not apply pre-Indictment have usually focused on protecting undercover operations such as the use of wiretaps or informants. *Id.* at 14. Those courts also sometimes argued that pre-Indictment there was less of a chance of a person being "tricked" into giving away their cases than post-Indictment when the charges are clear, *Id.,* or whether people under investigation might hire "house counsel" in an effort to thwart such tactics. *Id*.

Rejecting these arguments, Judge Moore adopted the reasoning of the Second Circuit in *United States v. Hammad, 858 F.2d 834 (1988)*, which noted that '[t]he timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances." *Id*. at 839. The Second Circuit also refuted the idea that prosecutors would not use "artful" techniques during the investigation phase. *Id*. Finally, the *Hammad* court observed that if there was ambiguity in whether the rule should apply pre-Indictment, that ambiguity should resolved in favor of the defendant, noting that ethical rules urge attorneys to

maintain the "highest standards of ethical conduct". *Id.* As Judge Moore noted, the goal of the no-contact rule is to protect defendants from being tricked into making statements that could help the prosecution sway a jury against them. The instant case is even more egregious in that the uncounseled statements elicited from Pedrick constitute the government's false statements case against him as set out in Count Two of the Indictment.

Judge Moore agreed with the Second Circuit that courts should exercise restraint in pre-Indictment situations and that these matters need to be considered on a case-by-case basis. *Tapp*, *supra*, at 14. He noted, however, that "pre-indictment contact with represented persons should not be the Government's standard practice. For the Government to go behind a lawyer's back is a practice that leads to mischief. *Id*.[10]

While Judge Moore left no doubt that the no-contact rule applies to federal prosecutors, he also found that in most cases, the relief for a violation of the rule should be sanctions against the prosecutor or prosecutors responsible for the ethical violation, and not substantive relief like dismissal of the Indictment or suppression of evidence. *Id.* At 15. He cited *United States v. Lowery, 166 F.3d 1119, 1125 (11th Cir. 1999)* for the proposition that state rules of professional conduct do not provide authority for exclusion of evidence in federal court. *Id.*

Despite the foregoing analysis, however, Judge Moore also expressly stated that "[w]here there is a constitutional violation, the court has the uncontroverted power to uphold the Constitution and to suppress evidence or reverse a conviction." *Tapp, supra,* at 15. Indeed, putting a finer point

[10] This is not the only case where the Antitrust Division has had issues with the no-contact Rule. In July, 2021, the Antitrust Division was ordered to "halt all non-attorney contacts with represented parties" when it allegedly directly contacted employees of a represented company in an indicted case. Order, *United States v. Teva Pharm. USA, Inc*., 20-CR-200, Dkt. 120 (E.D. Pa July 28, 2021).

on the matter, Judge Moore wrote that while "ethical rules are demeaned when they are used as a procedural weapon to enforce substantive rights and they are not meant to be used in this manner", *Id.* at 16, "[t]his should not suggest, however, that a violation of Rule 4.2 could never rise to the level of a constitutional violation." *Id*. at footnote 42.

Other courts have noted that suppression of evidence may be the appropriate remedy in cases involving prosecutors violations of the no-contact rule. In *United States v. Killian,*639 F.2d 206, (5th Cir. 1981), the U.S. Attorney's Office, DEA and FBI removed a represented defendant from his jail cell and interrogated him at FBI offices. The Fifth Circuit observed that "[s]uppression of the statements would probably have been the appropriate sanction in this case, were it not for the refusal of the government to use those statements" at trial. *Id.* at 210.

In *United States v. Hammad,* 858 F.2d 834, 840 (2d Cir. 1988), the prosecutor sent an informant to elicit incriminating evidence from a represented defendant. In its decision, the court reviewed the no-contact rule and its purposes in assessing whether a violation of it by a prosecutor could have consequences in a criminal case. Although it declined to approve the suppression of the incriminating evidence in that case, the Second Circuit stated "[we] now hold that, in light of the underlying purposes of the Professional Responsibility Code and the exclusionary rule, suppression may be ordered in the district court's discretion." *Id.* at 840. In *United States v. Koerber,* 966 F. Supp. 2d 1207 (D. Utah 2013), a federal prosecutor violated the no-contact rule by instructing investigators to initiate pre-indictment *ex parte* contact with the target of investigation who the prosecutor knew was represented by counsel. The investigators elicited incriminating statements from the target in the course of several uncounseled interviews. In a detailed opinion in which he exhaustively reviewed the law underpinning the no-contact rule, District Court Judge Clark Waddoups found the ethical misconduct of the prosecutor to be so egregious that, in order to

protect the defendant's due process rights, the remedy was suppression of the tainted evidence and all fruits derived therefrom. *Id.* at 1245. In explaining his decision, Judge Waddoups stated:

> "And, from a policy perspective, excluding the evidence under the circumstances of this case will help overcome a natural disincentive within the agencies involved to monitor the conduct of their attorneys and agents and ensure their compliance with internal procedures that protect citizens' rights and implicate due process. In addition, suppression in this case will help prevent the erosion of 'citizens' faith in the even-handed administration of the laws.'" *Id.*

In the instant case, the Government's violation of the no-contact rule not only violated Rule 4.2 of the Georgia Rules of Professional Conduct, it rose to the level of a constitutional violation. As discussed above, the Antitrust Division's lead attorney, Attorney St. Matthew-Daniel, knew or should have known, Pedrick was represented by counsel. The Government approached Pedrick directly, not by an undercover operation. The Government knew Pedrick was a target of its investigation. It had Pedrick in its cross-hairs. Under these circumstances, approaching Pedrick without first notifying his attorney enabled the Government to elicit the very uncounseled statements upon which Count Two of this Indictment is based.

The situation in this case goes beyond the mere acquisition of evidence which could help the Government "sway" a jury. This was an operation that generated the very evidence upon which Count Two of the Indictment against Pedrick is based. If Pedrick's attorney had been contacted before the surprise interview, he would have had the chance to counsel Pedrick not to talk to the investigators. Instead, acting under the direction and control of Department Attorney St. Matthew-Daniel, and during a surprise knock-and-talk at his residence, the investigators engaged Pedrick in a disastrous, uncounseled interrogation.

This effect of this tactic in this case is so egregious that simply sanctioning the prosecutor while leaving intact Count Two of the Indictment would only reward the Government for engaging

in such ethical violations. Prosecutors are interchangeable. Indeed, Attorney St. Matthew-Daniel is long gone from the case. But, the Count of the Indictment achieved on her watch through underhanded, unethical means remains.

Pedrick also notes that even after Pedrick told the investigators he had been represented by a lawyer in this same investigation, something that should have triggered a reconsideration of this unethical course of action, the investigators went ahead and questioned him anyway. Further, even though Pedrick attempted to recant those statements the next day, February 6, 2018, the Government nevertheless indicted him for his words at the February 5, 2018 interview.

It is unusual for the Government to indict a person for false statements when that person has recanted the allegedly incriminating statements in a timely manner. Faced with the situation created by Pedrick's two uncounseled interviews, his attorney, Donnie Dixon, trying to clean up the mess created by the Government's unethical tactics, agreed to allow Pedrick to be interviewed again on September 25, 2018, with counsel present. According to memoranda prepared by Government investigators, Pedrick again attempted to correct the record. Despite his second effort to cooperate, Pedrick was nonetheless indicted for what he told the investigators during the uncounseled February 5, 2018 interview.

In this case, the Government's violation of the no-contact rule rose to the level of a substantive, constitutional violation of Pedrick's right to due process of law under the Fifth Amendment and his Sixth Amendment right to counsel. Moreover, it violated the McDade Amendment to the Citizen's Protection Act, the Code of Federal Regulations, and specific Justice Department policies, including its policy regarding direct contact with targets. This conduct also violated the local rules of this Court and Rule 4.2 of the Georgia Rules of Professional Conduct, a Rule whose maximum penalty for a violation is disbarment.

As noted above, to allow the prosecution of Pedrick for false statements under these circumstances, with the only relief being possible sanctions against Attorney St. Matthew-Daniel, would permit the Government to trick targets into committing indictable offenses through illegal and unethical practices, and then be allowed to proceed onward with the tainted prosecution regardless of the manner and means by which it obtained the very evidence which forms the basis for the charge.

Regarding proof of actual or inferred knowledge of Attorney St. Matthew-Daniel, such evidence can only be developed from a pretrial hearing on this Motion. At that hearing, counsel for Pedrick can examine Attorney St. Matthew-Daniel, as well as Agents Spurlock and Mills, and possibly other Government attorneys and agents who worked on this investigation at various times in the past. It will also be necessary for the files and records of the Government to be searched to locate any and all memoranda and other documents, as well as emails and other communications between and among government lawyers and agents, which show it was known to the government that Attorney Dixon represented Pedrick, was on the receiving end of a "reverse proffer" regarding Pedrick by Department of Justice Attorneys in December, 2013, and was mentioned in the Declination Memorandum in June 22, 2016 as having told the DOJ his client had no cooperation to offer. Evidence that the Antitrust Division was provided a copy of the Declination Memorandum or a draft thereof, together with any evidence that Attorney St. Matthew-Daniel had communications about, or possessed a copy of, said Declination Memorandum in her files, would be very important. As we have also shown, Attorney St. Matthew-Daniel was also told three times in October, 2017, in interviews of Young, Jason Wells and Mark Turner, that Pedrick was represented by counsel. The remedy for these violations of federal law and regulations, Justice Department policies, local rules of this Court, and state ethical rules to which Attorney St. Matthew-Daniel was bound, should

be the suppression of any statements Pedrick made at the uncounseled interviews on February 5 and 6, 2018 as well as statements he made at the September 25, 2018 interview and for Count Two of the Indictment to be dismissed.

Wherefore, for the foregoing reasons, Defendant Pedrick requests an evidentiary hearing on this Motion and further requests leave of Court to serve on the Government requests to produce such documents and information in its possession, custody or control as are relevant to this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served all parties in this case with the attached Motion to Suppress or in the Alternative to Dismiss Count Two of the Indictment in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a

result of this electronic filing.

This 18th day of July, 2022.

Respectfully submitted,
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