

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	
Plaintiff)	
)	Criminal Case 21-CR-28
v.)	
)	Judge Amit P. Mehta
WILLIAM ISAACS)	
Defendant)	

WILLIAM ISAACS' MOTION TO EXCLUDE
EXPERT TESTIMONY OF GALIT ASKENAZI

Defendant, William Isaacs, through the undersigned counsel, hereby moves this Court to bar the Government's retained expert witness (Dr. Galit Askenazi) from testifying at trial because the Government violated a proffer agreement with Mr. Isaacs by providing videotapes of the proffer interview to Dr. Askenazi, who then viewed, relied upon, and otherwise used the videotaped proffer statement of Mr. Isaacs prior to trial and she intends to do so again.

Under the terms of a proffer agreement between the Government and Mr. Isaacs, the Government agreed that no statements of Mr. Isaacs made during the proffer would be used against Mr. Isaacs in any criminal proceeding except in very limited circumstances. More particularly, the proffer agreement is unequivocally limited to the use of Mr. Isaacs' statements to pursue "leads" and as impeachment in the event Mr. Isaacs takes an inconsistent position in a later proceeding. A copy of the proffer agreement is attached hereto as Exhibit 1.

The Government violated the precise terms of the proffer agreement by providing the videotapes of the proffer to the Government's retained expert witness

prior to trial and in anticipation of her testimony at trial. The videotapes provided to the expert included all of Mr. Isaacs' protected proffered statements. These were reviewed by the Government's retained expert so that she could use those statements against Mr. Isaacs – before he took *any* position in this proceeding, much less an inconsistent position. This misuse of the proffered statement *indisputably* violates the Government's obligations in the proffer agreement.

Mr. Isaacs requests that this Court give him the benefit of the bargain the Government struck with him. The Court should exclude from use at Mr. Isaacs' trial all testimony by the Government's expert witness who improperly used statements immunized by the proffer agreement. Her testimony would violate the plain language of the proffer agreement and Mr. Isaacs' rights under the Fifth Amendment to the U.S. Constitution.

Mr. Isaacs incorporates by reference the facts, law, and argument set forth in his Amended Motion in Limine to Suppress and Exclude Entire Proffered Evidence (Doc. 877).

I. Background

In the last few days, the Court ruled on the Government's *Daubert* motion and allowed Mr. Isaacs to present expert testimony concerning his autistic disability. In response, the Government stated it intends to call Dr. Askenazi as a witness at trial. Her testimony should not be allowed because it is poisoned by the fact that Dr. Askenazi viewed and relied on the videos taken of immunized statements made during

Mr. Isaacs' proffer. Indeed, based on the proffer, Dr. Askenazi concluded that Mr. Isaacs lied during her January 6, 2023, evaluation of him.

The Government's use of the proffered statements through Dr. Askenazi is, indisputably, a violation of the proffer agreement. She was given the proffered statements long before trial in order to defeat Mr. Isaacs in the event he should put on a defense through an expert, something the Government tried to prevent him from doing. The proffer does not allow for this flagrant misuse of the immunized statements of Mr. Isaacs. If Dr. Askenazi is allowed to testify at trial, the Government will again misuse the proffered statements through her and further compound the Constitutional violations it has already perpetrated. Therefore, the entire testimony of Dr. Askenazi should be suppressed.

II. Legal Argument

1. The Government Violated the Proffer Agreement

Proffer agreements, like plea agreements, "are in the nature of contracts [and] their scope and effects are strongly influenced by contract law principles." *United States v. McLaughlin*, 957 F.2d 12, 16 (1st Cir. 1992). Because such agreements implicate constitutional rights, however, they must also be "construed in light of special due process concerns." *U.S. v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000) (citing *United States v. Bradbury*, 189 F.3d 200, 206 (2d Cir. 1999)) (internal quotations removed).

Due process "requires the government to adhere to the terms of any plea bargain or immunity agreement it makes, and courts will enforce such agreements when the defendant or witness has fulfilled his side of the bargain." *United States v. Weaver*, 905

F.2d 1466, 1472 (11th Cir. 1990) (internal quotations omitted); *see also United States v. Giorgi*, 840 F.2d 1022, 1026 (1st Cir. 1988); *Rowe v. Griffin*, 676 F.2d 524, 528 (11th Cir. 1982) (“When . . . a promise induces a defendant to waive his fifth amendment rights . . . due process requires that the prosecutor's promise be fulfilled . . . and any attempt by the state to breach the agreement is per se a bad faith prosecution.”).

Given the constitutional implications of agreements between the Government and defendants, courts have identified certain universal principles to apply when analyzing them. Although unambiguous agreements will be enforced according to their plain terms, “[t]he government may not rely upon a rigid and literal construction of the terms of a plea or cooperation agreement.” *Baird*, 218 F.3d at 229. Rather, the court’s duty is to “determine whether the government's conduct was inconsistent with what was reasonably understood by [the] defendant.” *Id.* Moreover, any ambiguities must be strictly construed against the government because of its “tremendous bargaining power.” *United States v. Williams*, 510 F.3d 416, 422 (3d Cir. 2007) (citations and internal punctuation omitted); accord *United States v. Newbert*, 504 F.3d 180, 185 & n.3 (1st Cir. 2007). It should go without saying that no reasonable person, represented by counsel, would willingly provide all of the information demanded in a proffer to the Government under the expectation that the Government could use the information directly against him. *See Baird*, 218 F.3d at 229 (in interpreting agreements between government and defendant, court must look to “what was reasonably understood by [the] defendant”).

Mr. Isaacs' proffer agreement – which was drafted by the Government – is perfectly clear: aside from exceptions for cross examination/impeachment, and investigative leads, the Government promised that no statements by or other information provided by Mr. Isaacs during the proffer would be used against Mr. Isaacs in any criminal proceeding. On its face, the proffer agreement applies to all audio and video taken of the proffer -- *none* of this information can be used directly against Mr. Isaacs at trial unless he *first* takes an inconsistent position in a proceeding.

Here, the Government violated the proffer agreement by “using” the immunized proffer statements of Mr. Isaacs directly against him through its expert before he took any position at all in any proceeding. The Government misused the proffered statements offensively, to cut off a possible defense, *before* that defense was even raised at trial and, indeed, *before* the Court ruled as to whether the defense even could be presented.

This is a misuse of the immunized proffered statements that is absolutely barred by the proffer agreement. Thus, the proffer agreement is no longer valid.

In *United States v. Jimenez-Bencevi*, 788 F.3d 7 (1st Cir. 2015), the First Circuit *reversed* the conviction of a defendant because his proffered statements were misused when they were provided to a defense expert as part of defendant's anticipated defense, even though the defense expert never testified at trial. That case is indistinguishable from the matter before this Court.

In *Jimenez-Bencevi*, the First Circuit analyzed the facts and law and found that providing the proffered statements to the defense expert (by court order per

Government objection/request) was a violation of the proffer agreement, which mandated that the entire proffer be suppressed. Even though the defendant in that case had taken a position contrary to his proffer, using his immunized statements through an expert was not a use permitted by the proffer agreement, the terms of which are indistinguishable from the agreement controlling the proffer of Mr. Isaacs. Because the proffered statements were used in that manner, the First Circuit found harmful error, necessitating reversal of the conviction.

In the case at bar, the Government's violation of the proffer agreement is even more egregious than in *Jimenez-Bencevi* because the videotaped statements were provided to Dr. Askenazi, without any legitimate, good faith basis for doing so, prior to trial, and before Mr. Isaacs took any position in this matter.

Furthermore, there is no connection whatsoever between the proffered statements and what Dr. Ashkenazi was supposed to do. She was *supposed* to evaluate Mr. Isaacs for ASD. She was *not* allowed to act as a secret agent for the Government. This limitation on her role was a significant issue, emphasized by undersigned counsel, during a December 2022 hearing preceding Dr. Askenazi's interview of Mr. Isaacs.

Further still, there was at least an implicit Court Order and understanding that the Government was not supposed to provide Dr. Askenazi with questions to ask Mr. Isaacs so that the Government could interrogate Mr. Isaacs through her. But, by providing her with the proffer in advance of her meeting with Isaacs, they did exactly that. In effect, the Government was there at the meeting, too, and thereby violated, again, Mr. Isaacs' Fifth Amendment rights.

The only purpose of providing the proffered statements to Dr. Askenazi before she even met Mr. Isaacs was to prejudice her against him. The proffered statements were used offensively. Her opinions are tainted by the poisonous fruit of the Government's misdeeds.

Under the principles discussed in *Jimenez-Bencevi*, the Government's misuse of the proffer epitomizes bad faith and prosecutorial misconduct.

The case of *United States v. La Luz-Jimenez*, 226 F.Supp.3d 79 (DC Puerto Rico 2017) is also instructive. There, the court analyzes in depth case law construing applicable legal principles in these circumstances. The *La Luz-Jimenez* case is a little different on its facts, but it is indistinguishable on controlling legal principles.

2. Fed. Crim. Rule 11 Bars Use of the Proffer

The foregoing cases demonstrate that the Government may not use a defendant's proffer in a manner not permitted by the proffer agreement. And where the agreement is violated, the entire proffer must be suppressed because the provisions of Rule 11 control once the proffer agreement is violated, as it clearly was here.

When the Government violates a proffer agreement, that agreement is no longer valid and the safeguards of Fed.R.Crim.P. 11 are invoked. *See La Luz-Jimenez*, 226 F. Supp. 3d at 79. Rule 11 bars the use of proffered statements, which are indisputably part of plea bargain negotiations in anticipation of expected charges being considered against a person who is a target of an ongoing investigation. *Id.*; *see also Jimenez-Bencevi*. Therefore, this Court should bar the Government from calling Dr. Askenazi at trial and from otherwise using the proffered statements in any way.

3. Fed. R. Evid. 403 Bars Use of the Proffer

This Court should prohibit the testimony of Dr. Askenazi because of its unduly prejudicial nature under Rule 403 of the Federal Rules of Evidence.

III. Conclusion

For all the foregoing reasons, it is respectfully requested that the Court bar Dr. Askenazi from testifying because her testimony would result in the further misuse of immunized proffer statements. Her testimony is poisoned and tainted by the fact she was, without any legal justification, provided with Mr. Isaacs' immunized statements prior to trial. Allowing her to testify would violate Rule 11 of the Federal Rules of Criminal Procedure and Mr. Isaacs' Constitutional rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that **WILLIAM ISAACS' MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. GALIT ASKENAZI** was filed with the Clerk of the Court via ECF on 6th day, March 2023.

Respectfully submitted,

_____/s/
Charles M. Greene