

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	
Plaintiff)	Criminal Case 21-CR-28
)	
v.)	Sentencing: August 31, 2023
)	
WILLIAM ISAACS)	Judge Amit P. Mehta
Defendant)	

REPLY IN SUPPORT OF MOTION FOR A NEW TRIAL

Defendant William Isaacs, by and through his counsel, and pursuant to Fed. R. Crim. P. 33, hereby replies in opposition to the United States' Response (Doc. 950) to his motion for a new trial (Doc. 932). In this Reply, Mr. Isaacs focuses on two points.

I. The Motion was Filed Timely.

The government's Response mistakenly suggests that Mr. Isaacs' motion was untimely. However, this argument ignores a Court Order that extended the pertinent filing deadline. On May 15, 2023, this Court's Minute Order entry granted, Mr. Isaacs' motion for an extension of time to file a Rule 33 motion (Doc. 928). Under the May 15 Order, Mr. Isaacs and Defendant Connie Meggs, who joined the motion, were granted until May 29, 2023 to file a motion for new trial. Mr. Isaacs' Rule 33 motion was timely filed on May 29, 2023, within the extended period for filing .

II. The Use of the Proffer in Any Form was a Manifest Injustice.

The government's Response downplays the issue of whether the use of the proffer *in any form whatsoever* was a manifest injustice.

In arguing that the use of the proffer was not in error, the government's Response is imprecise and misleading with respect to what the parties agreed in writing (much less orally) *before* the proffer was actually conducted. (*See* Docs. 877, 880, and 874) The government suggests that any error or misunderstanding about the proper use of the proffer was orally cured by an impromptu meeting-of-the-minds about the recording. In the opening seconds of the proffer, an agent made a completely unsolicited and unanticipated comment: "[H]opefully it's recording. We're good to go." This "good to go" comment was neither raised, debated, nor negotiated before the agent's fleeting comment. And for good reason: the proffer session would never have occurred if Mr. Isaacs and counsel had been informed that the terms of the proffer letter would include the option of a recording. In essence, Mr. Isaacs' constitutional rights under the Due Process Clause should not have to hang in the balance because of a terse "bait-and-switch" comment made by an agent.

In addition, the government claims that it is "unambiguously false" for Mr. Isaacs to assert that there was "no indication verbally or in writing that it would be a *recorded* event[.]" (Doc. 932, p. 2) The government neglected to include a key phrase from the relevant sentence from which it is quoting page 2 of our Rule 33 motion. The relevant portions of our sentence properly read as follows: "Mr. Isaacs continues to respectfully submit that the use *for any purpose whatsoever* of Mr. Isaacs' March 18, 2021,

proffer, *before which* there was no indication verbally or in writing that it would be a *recorded* event, was a fatal error.”

We herein have italicized “before which” in this sentence for a purpose. The government has completely ignored its meaning, which is important to Mr. Isaacs’ argument. The government cannot cite to any instance *before* the proffer letter was signed and *before* the proffer was conducted that day, by which Mr. Isaacs was informed that the proffer would be recorded. That Mr. Isaacs was given no *advance* notice of the recording is unrefuted and quite telling.

Moreover, the government seems to claim that Mr. Isaacs gave a nunc pro tunc blessing to the use of the recording. How? By “initially objecting” to the dissemination of the recording to other defense counsel, but “fail[ing] to file a motion to prevent” the disclosure to defense counsel. At all events, a weak argument, indeed. The failure to file an objection to dissemination does not by any means lead to the broad conclusion that Mr. Isaacs waived his right entirely to object to its use during these proceedings.

Further, the government wrongly asserts that Mr. Isaacs’ counsel somehow waived any objections to the use of the videoed proffer. At the time of the government’s rebuttal case, the Court had made it clear that the proffer agreement had not been violated--and that the statements and video could be used. The Court noted that the government was entitled to show Mr. Isaacs’ demeanor during the very controlled, calm, and relaxed proffer, especially if Mr. Isaacs’ counsel were to mention Mr. Isaacs’ “demeanor” on the stand in asking the jury to “imagine what it was like for him” on January 6. In a classic example of a Hobson’s Choice, Mr. Isaacs’ counsel

rightly understood that a crucial part of his closing would be proscribed, if he did not allow the use of the videos in rebuttal. While continuing to voice opposition to the use of the proffer, Mr. Isaacs' counsel, when faced with this Choice, agreed to allow use of the proffered statements (in agent testimony and by video) to avoid what could have been a *blanket* prohibition on mentioning Mr. Isaacs' demeanor in closing argument.

Mr. Isaacs' does not consider this decision to be a waiver of our objection to the improper use of the proffer. He never withdrew our argument that the use of the proffer for any purpose was prohibited. The decision by counsel to "take a risk" was made with the understanding that Mr. Isaacs' closing would be eviscerated if this concession were not made. This decision was necessary for counsel to argue in closing that Mr. Isaacs could not have formed the intent for the crimes because of his ASD.

CONCLUSION

We ask this Honorable Court to grant our motion for a new trial under Rule 33.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that the **REPLY IN SUPPORT OF A MOTION FOR A NEW TRIAL** was filed with the Clerk of the Court via ECF on Friday, July 14, 2023.

Respectfully submitted,

/s/
Gene Rossi, Esquire