

and its citizens of the right to Defendant Corey Kemp's [at the time Treasurer of the City of Philadelphia] honest services in the affairs of the City of Philadelphia, and to obtain money and property by means of false and fraudulent pretenses, representations and promises and to use the . . . mails and . . . wire communications to further the scheme to defraud. . . .

The indictment also: alleges that Holck and Umbrell committed substantive honest services mail and wire fraud; charges Defendant Hawkins with several counts of honest services wire fraud, and four counts of perjury, in addition to the conspiracy charge, and charges Kemp with numerous substantive crimes.

In a Memorandum filed October 29, 2004 (Doc. No. 224), 2004 WL 2612017, this Court sustained the allegations of the indictment as satisfying Supreme Court and Third Circuit precedent for the crime of honest services fraud, 18 U.S.C. §§ 1341,1343, and conspiracy to commit this crime.²

The Omnibus Motion of Holck and Umbrell concentrates on two separate groups of intercepted communications, the transcripts of which are attached to the motion (although filed under seal), of considerable volume, and separated into Exhibits A and B. Holck and Umbrell contend that the communications in Exhibit A, which consists of 188 intercepted communications, should not be admitted because they involve business transactions and/or fund raising by Ronald White and/or Corey Kemp with competitors of Commerce Bank, and thus

²In Defendants' reply brief, Defendants suggest that the government is attempting to prove multiple conspiracies, which is a fatal variance from the indictment charging only a single conspiracy. The government disputes this characterization of its evidence, and in its surreply brief, represents unequivocally that it will proceed against the Defendants on a single conspiracy theory, as set forth in the indictment and quoted above. The Court finds that the indictment charges a single conspiracy, as set forth above, and therefore rejects the Defendants' arguments which attempt to characterize the allegations as charging multiple conspiracies.

could not possibly concern a conspiracy to benefit Commerce Bank.

Exhibit B constitutes 27 intercepted communications which Holck and Umbrell assert are unrelated to the charge of conspiracy, and thus should be excluded as irrelevant. They assert that even though these communications may relate to Commerce Bank, they do not relate to providing any benefits to Defendant Kemp, which Holck and Umbrell assert is the focus of the alleged conspiracy.

Holck and Umbrell also assert that any evidence concerning two Commerce Bank loans, one known as the “Flores loan” and the other known as the “church loan” should also be excluded. Umbrell asks that two tape recorded calls which refer to an unconsummated plan by alleged co-conspirators to bribe Umbrell should be excluded from evidence. Holck and Umbrell press for a pretrial ruling that these 215 challenged communications, and evidence as to the Flores and church loans, and the alleged bribe, should not be admitted into evidence at trial.

I. Conspiracy Law

Before ruling on the motion, the Court will summarize several well established and relevant principles of conspiracy law as established by the Supreme Court and the Third Circuit because they impact the motion. Initially, the grand jury has alleged a wide ranging conspiracy at the center of which stood Attorney Ronald A. White and City Treasurer Corey Kemp; with White’s encouragement and facilitation, Kemp agreed, in exchange for rewards from White, Holck, Umbrell and others, to take actions favoring a number of persons and entities supported by White, including but not limited to, Commerce Bank. In this case the government asserts the common goal was to gain the benefit of White’s influence and Kemp’s decision-making, and that Holck and Umbrell knowingly participated with others in furthering this goal. See government

brief page 9.

In United States v. Perez, 280 F. 3d 318, 347 (3d Cir. 2002), the court held that a conspirator need not share in or even know all of the conduct of a co-conspirator, as long as all conspirators share a common purpose and know that they are part of a larger operation. As stated slightly differently in United States v. Boyd, 595 F. 2d 120, 123 (3d Cir. 1978), “even if a small group of co-conspirators are at the heart of an unlawful agreement, others who knowingly participate with the core members and others to achieve a common goal may be members of a single conspiracy.” Certain overt acts may be lawful acts standing alone, but to be overt acts for which a defendant may be convicted, the government must prove that they were done in furtherance of a conspiracy. In United States v. Hendricks, 395 F. 3d 173 (3d Cir. 2005), the court specifically ruled that Title III recordings are not testimonial and their use at trial does not violate Crawford v. Washington, 541 U.S. 36 (2004).

At this point, the Court also notes the significance of the Supreme Court’s opinion in Bourjaily v. United States, 583 U.S. 171 (1987), holding that the content of the out-of-court statement may be considered in determining whether the government has established by a preponderance of the evidence, the conspiracy, that the defendant joined the conspiracy, and that the statement was made during the course and in furtherance of the conspiracy. The ruling in Bourjaily led to an amendment to Rule 801(d)(2) which specifically notes, “the contents of the statement shall be considered but are not alone sufficient to establish the existence of the conspiracy and the participation therein of the declarant, and the party against whom the statement is offered. . . .”

Assuming, arguendo, that the government establishes its burden under Rule 104 as to all

defendants, then the statements and/or acts by one defendant in the course and furtherance of the conspiracy are admissible against all defendants, and the jury is permitted to consider whether this evidence is sufficient to prove beyond a reasonable doubt that each of the defendants is guilty of the conspiracy as charged.

Obviously, the government can only call one witness at a time or play one intercepted communication at a time. Many of the intercepted communications involve Ronald White, who is deceased, as one of the participants, and communications in which he was involved may not be admissible unless the government establishes some relevant exception to the hearsay rule.³ However, a great many of the conversations involving Ronald White also involve Kemp, and since he is a Defendant in this case, those intercepted communications are admissible, at least as to Kemp, as admissions, assuming that they are relevant and are not so prejudicial as to be excluded, under F.R.E. 403.⁴

Similarly, intercepted communications which contain statements by the other Defendants, Holck, Umbrell, Knight and Hawkins, may be admissible against them as admissions. F.R.E.

³See U.S. v. Weber, 437 F. 2d 327 (3d Cir.1970), cert. denied, 402 U.S. 932 (1971), which upheld the use of Title III recordings containing statements of a deceased co-conspirator.

⁴Although the Court will not make a final ruling under Rule F.R.E. 104 until trial, the Court states at this time, just to give all parties fair notice, that based on the anticipated evidence, including intercepted communications included in Exhibits A and B, some of which were played at the Carlson trial, along with facts presented at the various guilty pleas that have taken place so far, assuming this evidence is admissible and introduced in the forthcoming trial, the government will be able to establish by a preponderance of the evidence that White and Kemp did join the alleged conspiracy and thus statements by White in the intercepted communications are admissible at least against Kemp under Rule 801(d)(2).

801(d)(2)(A).⁵ Assuming the Court finds that White and Kemp were members of the conspiracy, then communications among White, Kemp, and the other Defendants may be admissible against all of them if the government proves by a preponderance of the evidence that these Defendants joined the conspiracy and the communications were in the course and furtherance of the conspiracy. F.R.E. 801(d)(2)(E).

The Court has reviewed many of the 215 communications and determines, for the reasons set forth below, that it must deny the Defendants' motion in the pretrial context, without prejudice to objections at trial. One reason why the Court cannot grant the Defendants' motion in a pretrial context is that such a pretrial order would deprive the government of an opportunity to develop evidence to demonstrate the admissibility of intercepted communications, such as live witnesses who have knowledge of facts, or documents, from which the Court, in connection with its obligations under F.R.E. 104, might conclude that a certain Defendant did (or did not) join the alleged conspiracy. F.R.E. 801(d)(2) requires evidence other than just the co-conspirators' statements.

Reading the transcripts in the abstract, in the absence of any context, does not allow for an informed judgment as to whether they meet any of the various tests under the Federal Rules of Evidence. Some communications appear likely to be admissible, as indicating that certain Defendants joined the conspiracy, and others, including many with third parties, are of dubious admissibility, but the Court will not rule until it has held a hearing under F.R.E. 104. At that time, the government will have been able to present at least some of its case, so the Court can

⁵It is relevant to note that all five Defendants are charged with at least one or more substantive offenses in addition to the conspiracy charge. See Marcus, Prosecution and Defense of Criminal Conspiracy Cases, (2004) § 5.05[3][ii] and n. 172.

rule in the context of opening arguments and some evidence, and determine whether the challenged communications satisfy one or more provisions of the Federal Rules of Evidence for admissibility. If the government is unable to satisfy the requirements for admissibility, then the Court will sustain the objection.⁶

After the government has been given an opportunity to introduce either live witnesses, intercepted communications, and/or other evidence such as documents, and subject to any offers of proof which the Court may allow at that point, the Court will then be in a position to hold the hearing under F.R.E. 104, and determine whether the government has proven, by a preponderance of the evidence, that a specific Defendant joined the alleged conspiracy. Rulings as to whether a specific statement was made in the course and furtherance of the alleged conspiracy may be made by category or individually.

II. Application to the Omnibus Motion

The effort of Defendants Holck and Umbrell, joined by Hawkins, to shortcut this procedure and secure a pretrial ruling by the Court is unsupported in caselaw⁷ and would be unfair to the government, because the Court must consider the challenged intercepted

⁶Defendants are incorrect in assuming that the Court will have to make piecemeal admissibility rulings, one by one, on each of the intercepted communications. Rather, having reviewed many of the challenged communications, the Court believes that many of them fall into several distinct categories and that once the defining lines of each category have been established, the Court can make rulings per category. Any defense counsel may assert objections to a particular communication. However, the Court advises counsel that substantive reasons and, if necessary, arguments, will be handled outside the presence of the jury, preferably after the jury has been excused for the day.

⁷See cases collected in Weinstein & Berger, Weinstein's Evidence, § 104[5] at 104-40. In U.S. v. Hendricks, *supra*, 395 F. 3d 173, n. 8, the court took no position as to whether the district court should undertake inquiries as to the admissibility of co-conspirators' statements prior to trial, or during the course of the trial as various objections arise.

communications in the context of other evidence. Although some of the challenged intercepted communications are of dubious admissibility, such as those between Ronald White and third parties who are not defendants in this case, and whose connection to this case has yet to be established, the Court cannot say, even as to these communications, pretrial, that they are inadmissible as a matter of law. They may not be hearsay, i.e., they may be admitted not for the truth of the matter asserted, but only to show that the declaration was made; or they may be admissible because one or more of these third parties were acting as an agent of a Defendant, etc.⁸

The Court rejects the argument of Holck and Umbrell that merely because some of the calls may have constituted efforts of White and/or Kemp to help other entities, which were competitors of Commerce Bank for city business, that therefore these communications are, as a matter of law, inadmissible against Holck and Umbrell. Rather, the government is entitled to show, assuming it can satisfy its burden under Rule 104, that the conspiracy was far reaching, and that members of the conspiracy attempted to secure favors for Kemp from other entities, such as competitors of Commerce Bank.

The substantive argument of Holck and Umbrell is rejected as contrary to established conspiracy law summarized above. If the Court finds under Rule 104 that the government has proven by a preponderance of the evidence that Holck and Umbrell joined the conspiracy, then all of the statements and acts of all co-conspirators made in the course and furtherance of the

⁸See Judge Pollak's thorough discussion in U.S. v. Maleno, 604 F. Supp. 971 (E.D. Pa. 1985), and the extensive discussion on what constitutes hearsay and exceptions to the hearsay rule in U.S. v. Reilley, 33 F. 3d 1396, 1409-15 (3d. Cir. 1994). See, also, the cautionary notes on admitting hearsay statements not offered for the truth of the matter asserted in U.S. v. McGlory, 968 F. 2d 309, 332-33 (3d Cir. 1992), and Weinstein & Berger, Weinstein's Evidence, § 801.11.

conspiracy are admissible against each other, and actions that any one conspirator may have taken to benefit a certain entity, even a competitor of Commerce Bank, would be admissible against Holck and Umbrell.

Holck and Umbrell have set up a “straw man argument” by attempting to persuade the Court to find that the goal of the conspiracy was only to benefit Commerce Bank, and/or that Holck and Umbrell can only be responsible for overt acts that constitute benefits to Commerce Bank. As with most “straw man” arguments, this one is doomed to fail because it assumes incorrect facts. The indictment clearly alleges that a number of individuals and entities were the intended beneficiaries of the conspiracy, and Commerce Bank is merely one of these entities. Although it is certainly correct that Holck and Umbrell worked only for Commerce Bank, if the government is able to prove that Holck and Umbrell joined the conspiracy, then like any co-conspirator, the jury may find they are responsible for all acts of all co-conspirators, committed in the course and in furtherance of the conspiracy.

Turning to the Defendants’ allegations that the Flores and church loans should be stricken from the indictment and evidence of those loans should be excluded, the Court rejects the Defendants’ arguments in a pretrial setting. Assuming *arguendo* that the Defendants are correct that the allegations of the indictment are insufficient to warrant a conviction of Kemp on this count under the “violation of ethics” prong on the honest services theory, see Memorandum of October 29, 2004 at 2004 WL 2612017, *4 - *6, the Court finds from the allegations of the indictment, and the representations in the government’s responsive brief, as to the evidence the government will present, that there may be sufficient evidence to allow the jury to consider these loans under the second prong of the honest services theory, relating to *quid pro quo* or bribery.

See U.S. v. Antico, 275 F. 3d 245, 262 (2d Cir. 2001).

The Court declined to rule whether the indictment asserts the bribery theory of honest services fraud, 2004 WL 2612017 at *6, and will not rule at this time in the abstract, but will defer ruling until evidence has been presented at trial. The government asserts that the evidence will support a jury finding that the Defendants benefitted Mr. Flores and the church in exchange for official actions by Kemp, and in support, the government asserts that there was no relationship between the Defendants Holck and Umbrell, and Flores and the church, to warrant a deviation from normal banking rules in dealing with the loan applications. The government represents that the intercepted communications discussing these loans will demonstrate the validity of its theory. The Court does rule that the mere absence of the word “bribery” or reference to bribery statutes in the indictment does not foreclose the government from proceeding on this theory at trial. What remains to be determined is whether the evidence will support the theory.

Similarly, for the reasons stated above, the Court rejects the Omnibus Motion to the extent it attempts to exclude the transcripts in Exhibit B, which concern activities, although engaged in by Holck and/or Umbrell, which were not intended to, and/or did not, benefit Kemp. Once again, Holck and Umbrell attempt to evade the full force and effect of conspiracy law, assuming the Court finds the evidence sufficient that they did join the conspiracy, and that the acts and/or statements were in the course and furtherance of conspiracy.

Lastly, concerning the possible bribe of Umbrell, which Umbrell asserts was merely discussed between Kemp and McCracken and never broached to Umbrell, the Court agrees that this could be highly prejudicial to Umbrell. For this reason, without making a final ruling on this

issue in the abstract, the Court will direct counsel for the government not to mention this item of evidence in their opening statement or in any other evidence without first bringing it to the attention of the Court outside of the hearing of the jury. The government agrees the evidence is not admissible against Umbrell and will not be offered against Umbrell, but is admissible against Kemp. If the Court determines that the prejudice against Umbrell is so great, the Court may decline to admit it under F.R.E. 403, or the Court may allow the evidence against Kemp without any mention of Umbrell's name, such as requiring the government to produce the evidence but redacting or excluding any reference to Defendant Umbrell by name.

The last point in Defendants' motion is to preclude the government from using the term "pay to play." The government has responded that it does not intend to use the phrase in describing the Defendants' conduct. However, if any defense counsel or Defendant uses the term, then the government cannot necessarily be deprived of reference to it.

Two further matters require brief discussion:

A. Preliminary Instructions to the Jury

There has been discussion in the various briefs about instructions to the jury on political contributions, their validity and their potential for abuse. The Court welcomes "plain vanilla" requests for instructions on this point, which would be given prior to the opening arguments on February 22, 2005, and should be descriptive of the First Amendment and legislative authorization of political contributions. Citations are not necessary. Of course, any party may submit additional requests for the charge to be given at the end of the case.

B. Filing of Trial Exhibits

The Court will continue to review the transcripts attached to the Omnibus Motion.

However, bearing in mind the position of Philadelphia Newspapers, Inc. (“PNI”) that trial exhibits should be made available to the public in a pretrial context, the Court has thoroughly considered the various factors under the case law reviewed in the Court’s prior Opinion of January 21, 2005.

The Court agrees with PNI that once the government has submitted its trial exhibits to the Court, the public has a right of access. The Court will need to review, before the arguments and testimony begin, the government’s trial exhibits, and a trial brief by the government which references the specific recordings and other exhibits it intends to use, and specifically the evidence it will present, other than the hearsay statements themselves, to satisfy its burden under Rule 801(d)(2)(E).

The Court also relates to the experience in selecting a jury for the Carlson case and the extensive publicity that accompanied the Carlson trial on a daily basis, including the fact that one newspaper column published by PNI referred to Carlson as a “liar.” Because of the shortness of time between the issuance of this Opinion and the selection of the jury, the fact that the government’s evidence is quite voluminous, and the right of the public to have access to the evidence to be used at the trial, the Court has concluded that all prior restrictions on counsel filing trial exhibits will be lifted as of February 16, 2005. One of the reasons for the Court selecting this date is to give the government a chance to prepare the exhibits and trial brief, and also because the Court anticipates the jury selection process will have been completed by February 16. Defense counsel may file their exhibits at that time or may withhold filing their exhibits until they are actually used at the trial.

An appropriate Order follows.

exhibits and supplemental trial briefs describing the evidence for subsequent weeks. These briefs should also list the intercepted communications to be played at the trial by exhibit number, in the order in which the government intends to play them before the jury, and shall also, separately, list the live witnesses it intends to call in the appropriate order that it believes will be followed at trial.

4. The parties may submit preliminary instructions of law by February 18, 2005, preferably by electronic filing by 12:00 noon on that date.

5. All counsel and the Defendants shall appear in Courtroom 3A on February 14, 2005 at 9:00 a.m. where the Court will rule on voir dire issues and explain, subject to objections and comments by counsel, the procedure that will be used for the voir dire and selection process of the jury. The Court rejects the questionnaire filed by certain Defendants, but some of the questions suggested in the questionnaire will be used in the voir dire. All concerned will then go to the Ceremonial Courtroom where the entire venire will be addressed and general questions asked. Questions as to hardship and publicity will be asked of each venire person individually in Courtroom 3A, together with other questions that may be appropriate depending on the responses to the questions addressed to the entire venire.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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