

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	
v.	:	
	:	NO. 03-172-2
	:	
NICHOLAS PAZ	:	
	:	
	:	

**OPINION**

Newcomer, S.J. October , 2003

**I. Introduction**

Presently before this Court is Defendant's Motion to Quash [his] Indictment for witness-tampering and conspiracy to tamper with a witness. For the reasons set forth below, Defendant's Motion is GRANTED. The facts to this point follow.

**II. Facts and Procedural History**

Shortly after being arrested in connection with a bank robbery the Defendant Nicholas Paz contacted the Government through his attorney Daniel Seal. Seal communicated to the Government Paz's desire to share information regarding certain dealings he claims to have had with an organized crime figure. Seal asked the Government for an "off-the-record" discussion, so that the Government could assess the value of Paz's information without having Paz expose himself to the risk of prosecution.

A proffer agreement (the "Agreement") was drawn up by Government attorneys and signed by the Parties. The Agreement was one and a half pages and contained the handwritten notation "applies to all statements given except information related to Sun East Federal Credit Union Robbery on 5/28/02." The relevant section of the Agreement reads: "no statements made by [Paz] or other information provided by [Paz] during the 'off-the-record' proffer, will be used directly against [Paz] in any criminal

case." Proffer Agreement, p.1 (Exhibit B, Defendant's Motion to Quash Indictment). For reasons that are unclear to this Court, the Government chose not to include a provision in the Agreement conditioning the immunity on Paz's truthfulness.

On July 30, 2002, Paz and Seal attended a proffer conference with the FBI. During the conference Paz stated that he had twice engaged in cocaine deals with a reputed organized crime figure. Some time after the conference, on the basis of facts not relevant to this opinion, the Government presented to a Grand Jury evidence that Paz tampered with a witness by trying to convince him to corroborate Paz's relationship with the organized crime figure.

Before the Grand Jury, the Government presented FBI agent Michael A. Thompson. In response to the Government's questions, Agent Thompson recited some of what Paz had said during the proffer conference, including the cocaine transactions. The Grand Jury returned an indictment against Paz and Seal for witness tampering and conspiracy to tamper with a witness.

Paz argues that the Government breached the Agreement by having Agent Thompson recite Paz's statements to the Grand Jury and that his indictment must be quashed as a result. The Government contests both points. The Parties agree that Paz was granted what is colloquially known as "use," but not "derivative use," immunity.<sup>1</sup> The question of law is thus confined to whether Agent Thompson's testimony ran afoul of the Agreement and, if it did, what must be done to remedy the violation.

### **III. The Government Violated the Proffer Agreement By Introducing Testimony on Paz's Statements to the Grand Jury**

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<sup>1</sup>Government's Response, p. 7. The fact that the Agreement's offer of immunity was not technically perfect within the meaning of the federal immunity statute is therefore immaterial. Because there is no controversy on this point, a discussion of "equitable immunity" is not called for.

The Government defends Agent Thompson's testimony by claiming first that the statements were derivative in nature and second that the statements were not used directly against Paz. Both of these arguments may be dealt with in short order.

It is difficult for this Court to see how the statements in question could be derivative. The Government, in its Reply, claims that "[t]his is not a case where Paz was charged with making a false statement in the proffer [and that] [e]vidence of the fact of the proffer does not breach the proffer agreement." Government's Reply Brief, p. 8. Here the Grand Jury was told of the content of Paz's statements during the proffer conference - not just of the fact that the proffer conference took place. The Government correctly notes that the Agreement would preclude a prosecution founded on false statements made during the conference. Why the Government admits that the content of the proffer is inadmissible for one crime and not another when the Agreement makes no such distinction is unclear.<sup>2</sup> The mere fact that the contents of the proffer conference may have been only collateral in proving the elements of the crime Paz was ultimately charged with does not matter - the Agreement, which the Government drafted, contains no exception. Thus, the Government's argument must fail.

The Agreement, the Government claims, only precludes Paz's statements being used "directly" against him. Because the statements were offered against Daniel Seal (indicted by the same Grand Jury on the same charges) the Government argues, they were properly considered and did not violate the letter of the Agreement. The Government may not escape its own draftsmanship<sup>3</sup>

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<sup>2</sup>The Agreement, as noted above, says that Paz's statements may not be used directly against him in "any criminal case" (emphasis added).

<sup>3</sup>The Parties have correctly concluded that the law of contract applies to proffer agreements.

through semantic peculiarities, however.<sup>4</sup> The effect of Agent Thompson's testimony cannot be limited by such an argument - and, as the Government concedes, there was not even so much as a cautionary instruction to the Grand Jury regarding its use of Agent Thompson's testimony.<sup>5</sup> In short, the presentation of a defendant's immunized statements for use against a co-defendant, before a Grand Jury that is investigating both parties, is unacceptable, at least on the facts presented.

#### **IV. The Appropriate Remedy in this Case is to Quash the Indictment**

The remedy for Grand Jury exposure to immunized statements is, to this Court's knowledge, an issue novel to the Third Circuit. The Government asks the Court to adopt a rule it styles as "actual prejudice." Under this rule courts would refrain from quashing indictments that are supported by additional evidence despite being based partially on improper consideration of immunized testimony. Mr. Schwartz, at oral argument, suggested that the Court "red-pen" an indictment in much the same fashion as it would a faulty search warrant. If after removing the offending material the indictment can still stand on the strength of other evidence, dismissal would be improper. The Government suggests two sources of law for this rule; the United States Supreme Court's decision in Bank of Nova Scotia v. United States

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<sup>4</sup>In Pielago, part of which the Government relies upon in its Reply, the Eleventh Circuit held that "any ambiguities in the terms of a proffer agreement should be resolved in favor of the criminal defendant." The Pielago court, in the same breath, noted that proffer agreements, though generally interpreted using contract law principles, should not be given "a hyper-technical reading . . . ." This Court holds that a proffer agreement may not be given such a technical reading as to effectively defeat the purpose it is designed, on its face, to serve.

<sup>5</sup>Assistant United States Attorney Michael Schwartz, who as usual gave a deft and able presentation of the Government's case, stated that in hindsight a cautionary instruction should have been given to the Grand Jury. The Court views the assertion that a cautionary instruction is sufficient with skepticism, but the issue does not need to be decided today.

487 U.S. 250 (1988), and the Eleventh Circuit's decision in U.S. v. Pielago, 145 F.3d 364 (11<sup>th</sup> Cir. 1998).

Nova Scotia held that "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." 487 U.S. at 254. At the outset, the Nova Scotia analysis does not apply to errors of "a constitutional magnitude." Id. at 257. Here, immunized testimony was presented to the Grand Jury in violation of Paz's Fifth Amendment rights. Further, the Nova Scotia analysis compels dismissal when there are grave doubts as to whether the impropriety caused the Grand Jury to indict. Id. at 263. Thus, this Court finds that Nova Scotia does not control given the present facts.

Counsel have presented arguments regarding the nature of Paz's proffer. The Agreement was not the result of the Government trying to secure Paz's testimony - use and derivative use immunity would be required were the Government to compel Paz to testify before a Grand Jury. If the Government had compelled Paz's presence before a Grand Jury with the constitutionally-mandated immunity from prosecution, then used the immunized testimony to secure an indictment, the issue before the Court would be much more clean-cut: the indictment would clearly have to be quashed. Here, the Agreement is not the result of a constitutionally-mandated bargain, as in Kastigar v. United States, 406 U.S. 441 (1972) (holding that transactional immunity allows prosecutors to compel grand jury testimony over a Fifth Amendment claim), but rather the Defendant's voluntary cooperation. This Court will not change the rules, however, for cases where the Defendant's testimony reaches the Grand Jury on

the tip of an olive branch rather than by the tip of a sword.<sup>6</sup>

The Government next contends that the Eleventh Circuit rule in Pielago is appropriate. In Pielago the defendant offered to cooperate with the Government after being indicted for drug crimes. After extensive testimony, given under a grant of immunity, a grand jury issued a superseding indictment that along with the original counts charged the defendant with a lesser telecommunications charge.

After the superseding indictment was issued, defendant's husband was killed, apparently in retaliation for her testimony. Defendant informed the Government that she was no longer willing to cooperate, and the Government charged her with all of the crimes in the superseding indictment. Defendant was convicted of all of the crimes except for the telecommunications charge. She appealed, claiming her indictment should have been dismissed for similar reasons to those in the Second Circuit case discussed below. The Eleventh Circuit refused to dismiss the indictment, because there was no actual prejudice to the defendant.

In Pielago, the original and superseding indictments were identical, with the exception of the identity of a co-conspirator (which would not have altered, in any way, the crimes the defendant was charged with) and the inclusion of the telecommunications charge. Defendant was not "prejudiced" by the telecommunications charge because she was not convicted of it, just as Paz would not be "prejudiced" by his indictment if he was acquitted. Likewise, the defendant in Pielago was not "prejudiced" by the Grand Jury's use of her immunized statements

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<sup>6</sup>The Government will be held to the same standard for voluntary immunity agreements used to secure cooperation and mandatory immunity agreements used to compel Grand Jury testimony. In the case at bar, the Government was the draftsman, the master of the bargain. If the Government wished to extend an immunity legally short of full "use immunity," it was free to do so in the Agreement that it authored. For whatever reason, however, the Government chose to extend what it now concedes is full "use" immunity. Therefore, the error cannot be dispensed with through the Nova Scotia analysis.

because she had previously been indicted on a legally identical charge by a grand jury that was not tainted. Clearly, therefore, the Pielago grand jury was capable of indicting the defendant without the benefit of her immunized statements. In Pielago, the fact that the grand jury did not indict due to immunized testimony is clear from the fact that the same grand jury previously issued the exact same indictment (with the exception of the identity of a co-conspirator) without the benefit of immunized testimony. The facts of the present case do not lend themselves to analysis under the Pielago framework.

The Second Circuit has adopted a per se rule of dismissal in cases where a grand jury is exposed to the immunized testimony of a person it later indicts. United States v. Rivieccio, 919 F.2d 812, 816 n.4 (2d Cir. 1990). This Court stops short of endorsing such a broad and sweeping measure for every case where an indicting grand jury is exposed to immunized testimony, however. Although the Court will quash Paz's indictment, it is not based on these grounds.

Unlike the court in Pielago, this Court is not blessed with an untainted indictment, meaning that any inquiry into the mind of the Grand Jury would be a substantial endeavor. Lacking an untainted indictment or other overwhelming evidence of why the Grand Jury indicted Paz, this Court will not substitute its judgment for the Grand Jury's; to do so would be to usurp the Grand Jury's unique role in the criminal justice system. As a rule, in situations where a Grand Jury has been improperly exposed to the immunized testimony of its target, and where the face of said testimony gives way to a reading that is prejudicial to the speaker, absent truly overwhelming evidence to the contrary this Court will assume that the Grand Jury was improperly swayed by the testimony and will quash the indictment.

Here, the substance of the improper testimony easily gives way to a prejudicial reading. There are two ways that a Grand

Jury could view the statements in question: (1) as an admission that the Defendant is a fairly large-scale drug dealer who is associated with unsavory characters in organized crime, or (2) that the Defendant is a liar who wishes that he was a large-scale drug dealer associated with unsavory characters in organized crime. Either way, it is difficult to conceive of how the Defendant would not be prejudiced.

**V. Conclusion**

Therefore, for the reasons stated above, the Court concludes that Defendant's Motion to Quash Indictment must be GRANTED.

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Clarence C. Newcomer, S.J.