



U.S. Department of Justice

United States Attorney
Southern District of New York

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November 19, 2013

EX PARTE SUBMISSION
REQUEST TO BE FILED
UNDER SEAL

BY EMAIL

The Honorable William H. Pauley III
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: United States v. Richard Ammar Chichakli,
S3 09 Cr. 1002 (WHP)

Dear Judge Pauley:

The Government respectfully submits this letter in advance of calling Drug Enforcement Administration ("DEA") Special Agent Robert Zachariasiewicz and [REDACTED] as witnesses at trial. The Government seeks a ruling *in limine* precluding disclosure and cross-examination of these witnesses on the matters described below because these matters do not have any bearing on the witnesses' credibility, nor are they relevant to the events at issue at trial.¹

BACKGROUND

1. DEA Special Agent Robert Zachariasiewicz

The Government plans on calling Special Agent Zachariasiewicz at the upcoming trial as a chain of custody witness for a Hitachi brand laptop seized in March 2008 from Viktor Bout in

¹ Because this letter addresses non-public information concerning law enforcement officers, the Government respectfully requests that it be filed under seal. In addition, because of the defendant's *pro se* status, and because the Government believes that the information in this letter is not material impeachment evidence, the Government is filing this motion *ex parte*. See *United States v. Preldakaj*, 456 Fed. Appx. 56, 59 (2d Cir. 2012) (approving of the Government's *ex parte* submission to preclude cross examination because, among other things, "only material impeachment evidence must be disclosed") (emphasis in original)).

Thailand at the time of Bout's arrest (the "Bout Laptop"). He is generally expected to testify that Viktor Bout had a briefcase beside him at the time of his arrest, that the Thai police seized this briefcase and other evidence at the time of Bout's arrest, and that he then accompanied the Thai police back to the Thai police station. When he arrived at the Thai police station, Agent Zachariasiewicz inspected the contents of the briefcase and saw the Hitachi laptop. Other witnesses will then testify to the forensic image law enforcement made of the Bout laptop and the chain of custody of this forensic image from Thailand to the DEA's offices in the United States. The Government does not intend to ask Agent Zachariasiewicz about anything else related to the arrest of Bout, or his involvement in the investigation of the defendant.

A. Agent Zachariasiewicz's Testimony in *United States v. Viktor Bout*, 08 Cr. 365 (SAS)

Agent Zachariasiewicz was one of the lead case agents in the case *United States v. Viktor Bout*, 08 Cr. 365 (SAS), in which Bout was convicted of conspiring to kill Americans and conspiring to provide material support to terrorists, among other crimes.² In connection with a suppression motion Bout filed in that case challenging the voluntariness of his post-arrest statements to the DEA, Agent Zachariasiewicz testified at a suppression hearing before the Honorable Shira A. Scheindlin about the circumstances of Bout's arrest, and his interview of Bout.

On August 24, 2011, Judge Scheindlin issued an opinion and order suppressing Bout's post-arrest statements to the DEA. (8/24/11 Opinion and Order, attached as Exhibit A). In her opinion, Judge Scheindlin found that Agent Zachariasiewicz and another DEA Agent, Louis Milione, did not testify credibly about various events surrounding the interview of Bout, including about whether they knew that Bout told the Thai police before he was interviewed by the DEA that he wanted an attorney and to speak with a representative of the Russian Embassy, and whether they had insinuated to Bout that he would face extreme consequences if he did not cooperate with the DEA. (See Exhibit A, pp. 8-10).

The next day, on August 25, 2011, Judge Scheindlin ordered that her August 24, 2011 opinion and order be "withdrawn, effective immediately." (8/25/2011 Order, attached as Exhibit B). That same day, Judge Scheindlin issued a revised Opinion and Order on Bout's suppression motion, which again granted Bout's suppression motion, but did not contain any adverse credibility findings about the testimony of Agent Zachariasiewicz or Agent Milione. (See 8/25/11 Opinon and Order, attached as Exhibit C, p. 9) ("Although Bout's account of the treatment he was told he would face in a Thai jail differs from the accounts of the agents, I need not determine which version to credit in order to decide this motion.")).

² The Bout Laptop is the only evidence in that case directly related to the charges against the defendant in this case. The criminal conduct at issue in the two cases is entirely different.

B. Agent Zachariasiewicz's Discipline in 2007

In interviewing Agent Zachariasiewicz, the Government learned that, in around 2007, he was disciplined for leaving his government issued firearm in his car overnight, in violation of the DEA's administrative policy. On the night Agent Zachariasiewicz left the firearm in his car, his car was broken into and the firearm was stolen. When Agent Zachariasiewicz realized early that next morning that the firearm had been stolen, he immediately notified the DEA, reported the firearm stolen, and admitted that he had left the firearm in his car overnight. For violating this administrative policy, Agent Zachariasiewicz was suspended for three days without pay.

[REDACTED]

DISCUSSION

Rule 402 of the Federal Rules of Evidence provides, in relevant part, that "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Rule 608(b) of the Federal Rules of Evidence provides that:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

Fed. R. Evid. 608(b). Under Rule 608(b), the Court first must determine whether the specific conduct is probative of the witness's character for truthfulness or untruthfulness. The Court must next decide whether the probative value of the evidence is substantially outweighed by unfair prejudice. Rule 611 makes clear, however, that "cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witnesses." That Rule also provides that the Court should "protect witnesses from harassment or undue embarrassment." Fed. R. Evid. 611.

It is well settled that the scope and extent of cross-examination is within the sound discretion of the Court, *see, e.g., United States v. Wilkerson*, 361 F.3d 717, 734 (2d Cir. 2004); *United States v. Salameh*, 152 F.3d 88, 131 (2d Cir. 1998), and that the Court may properly bar cross-examination which is marginally relevant to the issues before the court. *United States v. Maldonado-Rivera*, 922 F.2d 934, 956 (2d Cir. 1990). "[T]he decision to restrict cross-examination will not be reversed absent an abuse of discretion." *United States v. Lawes*, 292 F.3d 123, 131 (2d Cir. 2002) (internal citations omitted).

1. Agent Zachariasiewicz

Judge Scheindlin withdrew her adverse credibility finding as to Agent Zachariasiewicz the day after it was issued. In her revised opinion, which superseded her previous opinion, she did not make any credibility findings about Agent Zachariasiewicz. In short, there was no adverse credibility finding. Accordingly, the defendant should not be permitted to cross-examine Agent Zachariasiewicz about an adverse credibility finding that was withdrawn and therefore has no legal significance or effect.

Moreover, if the Court permits questioning of Agent Zachariasiewicz about the withdrawn adverse credibility determination and the underlying accusations Bout made in support of his suppression motion, those matters would almost certainly take as long, if not longer, than the inquiry about his limited involvement as a chain of custody witness in this case. Under such circumstances, any even potentially marginal probative value would be outweighed by risks of undue delay and unfair prejudice.

As to the discipline Agent Zachariasiewicz received for leaving his firearm in his car overnight, that conduct is entirely irrelevant to, and has no bearing on, any issue at trial with respect to his testimony. Nor does that discipline have anything to do with his credibility. Indeed, once Agent Zachariasiewicz realized his firearm had been stolen, he immediately reported the theft to the DEA and accepted his punishment. To allow the defendant to cross-examine Agent Zachariasiewicz about this discipline would serve no purpose other than to harass and embarrass the witness and distract the jury from the issues being litigated at trial – neither of which is a legitimate purpose of cross-examination.

■ [REDACTED]

[REDACTED]

[REDACTED]

