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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,	}	CR 03-434 FMC
Plaintiff,	}	ORDER GRANTING
vs.	}	DEFENDANT'S MOTION TO
	}	DISMISS
KATRINA LEUNG	}	
Defendant.	}	
_____	}	

Defendant moves to dismiss the criminal charges against her on the grounds of prosecutorial misconduct. The Court has read and considered the parties' briefs and evidentiary submissions, together with documents submitted to the Court *in camera* in response to Defendant's subpoena.

Procedural Background

Defendant, Katrina Leung, has been indicted and charged with crimes in connection with her activities as an asset for the FBI. Also arrested and charged, in a separate proceeding, was Special FBI Agent, James J. Smith, who had been Ms. Leung's handler. Smith and Leung and their attorneys entered into a joint defense agreement.

In May 2004, Smith entered into a plea agreement with the United States. One of the provisions in that plea agreement has generated the instant motion.

1 Smith, who had been facing five serious felony charges, was allowed to plead to a
2 substantially reduced single charge of making a false statement to a federal
3 agency, and face probation, in exchange for his agreement to cooperate with the
4 government.

5 **Plea Agreement**

6 In addition to his obligation to cooperate with and assist the government,
7 Smith agreed, at Paragraph 15(d) of the agreement, to:

8 Withdraw from any joint defense agreement (written or oral) relating to this
9 case, including any such agreement with Katrina Leung, counsel for
10 Katrina Leung, or the employees of counsel for Katrina Leung, *and to have*
11 *no further sharing of information relating to this case with Leung, counsel*
12 *for Leung, or the employees of counsel for Leung.* In particular, defendant,
13 counsel for defendant, and the employees of counsel for defendant agree
14 not to disclose to Leung, counsel for Katrina Leung, or the employees of
15 counsel for Katrina Leung any information which they learn as a result of
16 defendant's potential cooperation with the government. (emphasis added)

17 On learning of the existence of the preceding clause, Defendant moved to
18 dismiss the charges against her, contending that the government has prohibited
19 Smith from talking to her attorneys, obstructing her right of access to a critical
20 witness in her case.

21 It is well established that the government may not interfere with defense
22 access to witnesses. *United States v. Black*, 767 F.2d 1334, 1337 (9th Cir. 1985).
23 The government has several responses to the allegations in this case, which may
24 be summarized as follows:

25 1) The language in the plea agreement is ambiguous; it does not prohibit
26 Smith from being interviewed by Leung's attorneys;

1 investigating agents or his attorneys and was to tell anyone else who inquired
2 about the case that he was not at liberty to discuss it. The government explains
3 that this admonition was triggered by an e-mail Smith had sent to former co-
4 workers, inviting inquiries. That explanation is not implausible and would be
5 more persuasive but for other evidence in this case.

6 Third, and most telling, is an e-mail communication from Robert Wallace,
7 Senior Trial Counsel with the Department of Justice, Counterespionage Section,
8 to Assistant United States Attorney Emmick.¹ Mr. Emmick had sent an e-mail to
9 a number of attorneys involved in the Smith case, including Wallace, advising
10 them that Leung had filed a motion to dismiss based on a provision in the Smith
11 plea agreement that prohibits Smith from speaking to Leung's counsel. Emmick
12 asked for information about how and why the provision was included, to assist
13 him in responding to the motion. On November 18, Wallace sent the following e-
14 mailed response:

15 My understanding on the inclusion of this provision in the Smith plea
16 agreement is that CES wanted this provision preventing Smith from being
17 interviewed by Leung's counsel because we consider Smith to be a
18 repository of classified information who has a continuing obligation of
19 non-disclosure. The Section 5(a) filing by Smith and the 302s of Smith's
20 debriefing set forth the classified information potentially at risk in any such
21 interviews by counsel for Leung. Furthermore, Smith's previously
22 demonstrated lack of concern or regard for his non-disclosure obligations

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24 ¹After receiving the government's Opposition to the Motion to Dismiss, Defendant
25 subpoenaed a number of documents, including drafts of the Smith plea agreement, and all
26 correspondence and e-mails concerning the plea agreement. The government moved to quash
27 the subpoenas. The Court ordered that the subpoenaed material be turned over to the Court *in*
28 *camera*. Included in that material was the Wallace e-mail, together with a declaration of Mr.
Emmick.

1 raise significant concerns whether Smith would honor those continuing
2 obligations now in an interview by counsel for Leung. We obviously
3 would not be allowed to monitor those interviews nor even proscribe what
4 subjects are off-limits (which, by the way, would give Leung’s counsel a
5 nice start on a Sec. 5(a) filing themselves.)

6 In the face of that e-mail, anything short of an admission and apology on
7 the part of the government is difficult to imagine. Mr. Emmick did neither.
8 Rather, he chose to ignore the e-mail. He had spoken to the two prosecutors
9 handling the Smith case, who had been responsible for drafting the agreement.
10 He believed their explanation that the clause was “simply intended to be an
11 explanation of one of the consequences of the clause requiring Smith to withdraw
12 from the joint defense agreement,” and disregarded Wallace’s explanation. He
13 assumed Wallace must have been referring to some other non-disclosure
14 provisions in the agreement. He neither called Wallace nor made any attempt to
15 contact him about the damaging admission he had received.

16 Mr. Emmick’s declaration further states that when he spoke to Wallace in
17 mid-December, he learned that Wallace had not yet read the motion when he sent
18 the e-mail. When Wallace read the motion later that same day, he realized he had
19 been referring not to Paragraph 15(d) but to the non-disclosure provisions in the
20 Agreement.² He, however, did not contact Emmick with that explanation,
21 because he was certain Emmick would work it out on his own. Even more
22 remarkably, Wallace explained that he referred in his e-mail to “preventing Smith
23 from being interviewed” by Leung’s counsel as a “shorthand” way of describing
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25 ²Paragraphs 18 through 21 of the agreement are entitled “Nondisclosure Agreements.”
26 They affirm the continuing vitality of the FBI Nondisclosure Agreements Smith had earlier
27 signed when he was an agent. Smith promises not to reveal classified information without
28 authorization.

1 the defense allegations. He did not really believe that any part of the agreement
2 would prohibit such an interview.

3 In a stunning example of understatement, Mr. Emmick states in his
4 declaration that “The e-mail might be construed as being inconsistent with one of
5 the positions taken by the Government in its filings.”

6 The e-mail is, of course, entirely inconsistent with the government’s
7 position. What is of great concern to the Court is that Mr. Emmick was in
8 possession of the information in the e-mail some six days before filing his
9 Opposition to the Motion to Dismiss which not only makes no reference to it, but
10 states categorically that the government never intended to prohibit Smith from
11 being interviewed by Leung’s counsel. The Court is reminded of the very apt
12 observation of Judge Kozinski writing for the Ninth Circuit Court of Appeals in
13 *U.S. v. Kojayan*, 8 F.3d 1315, 1318 (9th Cir. 1993):

14 Anyone can make a mistake. Words uttered spontaneously sometimes
15 come out wrong; the exigencies of trial may make it hard to consider all the
16 implications of a particular assertion. The mere fact of a misstatement to
17 the jury therefore isn’t the end of the matter. In determining the proper
18 remedy, we must consider the government’s wilfulness in committing the
19 misconduct and its willingness to own up to it.

20 The evidence makes it abundantly clear to the Court that the government,
21 in negotiating and drafting a plea agreement for Smith, wanted to secure his
22 promise that he would not talk to Leung or her attorneys. The clause was
23 intentionally placed in the agreement to accomplish that purpose. When
24 confronted with Ms. Leung’s motion to dismiss, the government proffered an
25 assortment of explanations and denials. Such conduct compounds the problem by
26 undermining the Court’s confidence in the integrity of the process.

1 **Letter of Explanation**

2 On the same day the government filed its Opposition to the instant motion,
3 it sent a letter to Smith’s counsel, explaining that the plea agreement provision
4 was never intended to prohibit Smith from being interviewed by Leung’s counsel.
5 The government argues that any misunderstanding about the clause has now been
6 cleared up, and any harm has been cured. The Court will assess the effect of this
7 letter in its discussion of prejudice.

8 **Misconduct**

9 The government has engaged in wilful and deliberate misconduct,
10 depriving defendant of her right of access to a critical witness in her defense.

11 The right of an accused to have compulsory process for obtaining
12 witnesses in his favor stands on no lesser footing than the other Sixth
13 Amendment rights that we have previously held applicable to the States.
14 This Court had occasion in *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92
15 L.Ed. 682 (1948), to describe what it regarded as the most basic ingredients
16 of due process of law. . . .

17 The right to offer the testimony of witnesses, and to compel their
18 attendance, if necessary, is in plain terms the right to present a defense, the
19 right to present the defendant’s version of the facts as well as the
20 prosecution’s to the jury so it may decide where the truth lies. Just as an
21 accused has the right to confront the prosecution’s witnesses for the
22 purpose of challenging their testimony, he has the right to present his own
23 witnesses to establish a defense. This right is a fundamental element of due
24 process of law.”

25 *Washington v. Texas*, 388 U.S. 14, 18 (1965).

26 In *United States v. Little*, 753 F.3d 1420 (9th Cir. 1985), the Court cited a
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1 line of cases “which support the proposition that substantial government
2 interference with a defense witness’s free and unhampered choice to testify
3 amounts to a violation of due process.” *Id.* at 1438; *see also United States v.*
4 *Vavages*, 151 F.3d 1185, 1188 (9th Cir. 1998) (“It is well established that
5 ‘substantial government interference with a defense witness’ free and
6 unhampered choice to testify amounts to a violation of due process.”).

7 The government’s misconduct is, therefore, of constitutional dimensions.
8 Deliberate misconduct which rises to the level of a due process violation warrants
9 dismissal of criminal charges if it results in substantial prejudice to the defendant.
10 *United States v. Lopez*, 4 F.3d 1455, 1463-64 (9th Cir. 1993); *United States v.*
11 *Woodley*, 9 F.3d 774, 777 (9th Cir. 1993).

12 **Prejudice**

13 The Court’s research has disclosed no cases with facts similar to these.
14 Numerous cases stand for the proposition that a prosecutor may not interfere with
15 a defendant’s access to witnesses, but they are significantly distinguishable. In
16 cases where a government witness has been admonished not to speak to anyone
17 representing the defendant, or not to consent to an interview without the
18 prosecutor being present, the harm to the defendant was easily cured. An
19 explanation by the judge, or the prosecutor, that the witness is, in fact, free to be
20 interviewed if he wishes, is sufficient to undo the damage.

21 Here, Smith was facing trial on five serious felony charges alleging
22 deprivation of honest services, wire fraud, and removal of national defense
23 information. Conviction could have resulted in a sentence of many years in
24 federal prison. He was also, according to his e-mail to his former coworkers,
25 facing the loss of his federal pension. Pursuant to the terms of his plea
26 agreement, he anticipates that he will be placed on probation, stand convicted of a
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1 relatively minor offense, and will not lose his pension. Smith, of course, has not
2 yet been sentenced, and if routine practices are followed, he will not be sentenced
3 until after Ms. Leung's trial. Suspended over his head, like the proverbial Sword
4 of Damocles, is the sure knowledge that if he violates any of the terms of his plea
5 agreement, the deal is canceled, and his future returns to its former bleak state.

6 In considering the impact of the government's letter to Smith's counsel, the
7 Court cannot turn a blind eye to the realities of this case. Mr. Smith knows what
8 is expected of him, and the possibility that he would now feel free to be
9 interviewed on behalf of Ms. Leung is ephemeral at best. Of course, we do not
10 know if he would have consented to such an interview in the absence of the "no-
11 information-sharing" clause. The government argues that this establishes there is
12 no substantial prejudice to the defense.

13 But, as the defense points out, this is Ms. Leung's main witness. He
14 worked with her for eighteen years, knows details of the kind of work she did,
15 whether her work was of assistance to the United States, whether she was
16 trustworthy and loyal to this country – all issues that go to the heart of the defense
17 of Ms. Leung. And according to Smith's e-mail, he believed he had ample
18 reason to trust and believe in Ms. Leung during the years they worked together.
19 Additionally, Smith and Leung had an intimate relationship for many years. All
20 of the foregoing supports the likelihood that Smith would have been willing to
21 talk to Ms. Leung's attorneys but for the prohibition.

22 This case is, therefore, significantly different from the reported decisions in
23 this area: the witness is critical to the defense; the witness has everything to lose
24 by defying the government's wishes with respect to Ms. Leung's case; the
25 admonition against talking to the defense was not just an instruction from the
26 prosecutor, but was made a condition of what the defense has accurately
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1 described as his “sweetheart deal.”

2 The Court finds the defendant has suffered substantial prejudice as a result
3 of the prosecutor’s due process violation.

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5 **Dismissal**

6 ““The district court may dismiss an information based on outrageous
7 government conduct if the conduct amounts to a due process violation.”” *United*
8 *States v. Doe*, 125 F.3d 1249, 1253 (9th Cir. 1997) (quoting *United States v.*
9 *Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991)). Even if the conduct does
10 not amount to a due process violation, a court may nonetheless dismiss charges
11 “under its supervisory powers. The court may exercise its supervisory powers ‘to
12 remedy a constitutional or statutory violation; to protect judicial integrity by
13 ensuring that a conviction rests on appropriate considerations. . .; or to deter
14 future illegal conduct.”” *Id.* at 1253 (citations omitted).

15 Certainly the sanction of dismissal is an extreme remedy, which should not
16 be imposed if any lesser sanction will serve. *United States v. Lopez*, 4 F.3d 1455,
17 1464 (9th Cir. 1993). In this case, no other sanction could remedy the harm done.
18 An instruction to Smith from the Court that he was free to talk to Leung’s counsel
19 would, under the circumstances of this case, be no more effective than the
20 prosecutor’s letter. It does not appear to the Court that any other sanction would
21 remedy the due process violation suffered by defendant.

22 The Court also believes that this is an appropriate case to dismiss under the
23 Court’s inherent supervisory powers. “[E]xercise of supervisory powers is an
24 appropriate means of policing ethical misconduct by prosecutors. We also have
25 expressly recognized the authority of the district court to dismiss actions where
26 government attorneys have ‘wilfully deceived the court,’ thereby interfering with
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1 ‘the orderly administration of justice.’” *Lopez*, 4 F.3d at 1463 (citations omitted)
2 (quoting *United States v. Nat’l Medical Enters., Inc.*, 792 F.2d 906, 912 (9th Cir.
3 1986)).

4 As detailed above, the government has misrepresented to the Court its
5 purpose and intent in creating the “no-further-sharing” clause in the plea
6 agreement. While a certain amount of shading of the truth may be tolerated, even
7 in judicial proceedings, prosecutors are subject to constraints and responsibilities
8 beyond those which apply to other lawyers. *Berger v. United States*, 295 U.S. 78,
9 88 (1935), *overruled on other grounds by Stirone v. United States*, 461 U.S. 212
10 (1960). A prosecutor’s first obligation is to serve truth and justice, and assure
11 that those accused are given a fair trial. *United States v. Hill*, 953 F.2d 452, 458
12 (9th Cir. 1991); *Donnelly v. CeChristoforo*, 416 U.S. 637, 648-49 (1974)
13 (Douglas, J., dissenting). In this case, the government decided to make sure that
14 Leung and her lawyers would not have access to Smith. When confronted with
15 what they had done, they engaged in a pattern of stone-walling entirely
16 unbecoming to a prosecuting agency.

17 **Conclusion**

18 Defendant’s Motion to Dismiss is granted. All charges in the indictment
19 filed May 8, 2003 are hereby dismissed.

20
21 January 6, 2005

22 _____
23 FLORENCE-MARIE COOPER, JUDGE
24 UNITED STATES DISTRICT COURT
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