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FILED VIA ECF & UNDER SEAL
Hon. Brian M. Cogan
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11217

Re: United States v. Guzman Loera, S4 09 CR 466 (BMC)

Dear Judge Cogan:

I am writing on behalf of defendant Joaquin Guzman Loera in response to the government's November 13, 2018 motion (Gov. Mot.) to strike defense counsel's partially delivered opening statement. Specifically, the government has alleged that the undersigned has argued for selective prosecution, made improper arguments, cited hearsay and argued for a public-authority defense. In doing so, the government has misstated both the standards for what constitutes a selective prosecution and public authority defense, and seeks to preclude the defense from making permissible comments regarding what the evidence in this case will actually show. Additionally, striking a party's opening statement is an extreme reaction and a jury instruction that opening statements are not evidence has been determined to be an adequate curative when one party was determined to make improper persuasive arguments. United States v. Lewis, 305 F.App'x. 86, 89 (4th Cir. 2008).

I. Selective Prosecution Argument

The government asserts that the defense's opening statements constituted a selective prosecution defense in that they argued or suggested that the government:

> (1) was out to get the defendant because of his status as a "mythical" figure; (2) had chosen to prosecute the defendant rather than other drug traffickers, specifically, his codefendant Ismael Zambada Garcia; and (3) had engaged in outrageous conduct because it was so desperate to prosecute the defendant.

See Gov. Mot., at p. 3. The government then quoted several excepts from defense counsel's opening statement which they assert support this allegedly impermissible theory. See id., at pp. 3-4. This three-prong analysis misstates what must be shown for a selective prosecution argument.

There is a two-prong showing for arguing for selective prosecution in the Second Circuit. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir 1974). The defendant must first allege that "others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against [the defendant], he has been singled out for prosecution," and then subsequently claim "the government's discriminatory selection of him for prosecution has been invidious or in bad faith i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." Id. To claim selective prosecution, the defendant must proffer that the decision about whom to charge with a crime "demonstrate[d] that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose." United States v. Armstrong, 517 U.S. 456, 457 (1996). The Second Circuit has noted that "the discriminatory effect prong requires a showing that individuals of a different [classification] were not prosecuted." United States v. Alameh, 341 F.3d 167, 173 (2d Cir. 2003) quoting Armstrong, 517 U.S. at 465 (internal quotation marks omitted). Further, a claim of selective prosecution must be based on some argued violation of the Equal Protection Clause, resulting in disparate prosecution. See Melissa Jampol, *Goodbye to the Defense of Selective Prosecution*, 87 J. Crim L. & Crimonlolgy 932, 933 (1996-1997).

Here, the defense simply never claimed that the defendant is being prosecuted because of his status in any constitutionally protected class or to deprive him of his constitutional rights (Berrios, 501 F.2d at 1211), or that he is in a different classification than Ismael "Mayo" Zambada Garcia which is causing only him to be charged. Alameh, 341 F.3d at 173. Rather than argue that the government brought charges against the defendant with discriminatory intent, the defense argued that the evidence in this case will show that Mr. Guzman has been "scapegoated," and that there will be cooperator testimony that Mayo Zambada is actually the individual who is in charge of narco-trafficking operations for this cartel. Tr. at 55:19-22; Tr. at 57: 2-5; Tr. at 57: 14-17. As noted in the exchange after the jury departed, the defense opening statement did not claim or even insinuate that Mr. Guzman was in fact trafficking drugs, and that other people were not being prosecuted for the same conduct because of some alternative classification. Tr. at 71:6-11.[1]

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[1] At no point in the government's motion do they cite a single instance where the defense indicated that Mr. Guzman was trafficking narcotics, nor was there any reference to the claims that the DEA permitted Mr. Guzman to engage in such behavior, contrary to what was alleged by the government. See generally Gov. Mot.; see also Tr. at 71:12-14.

Simply put, claiming that the evidence will demonstrate that another individual is actually the guilty party and that the defendant is being framed is not a selective prosecution argument, and even if, *aguendo*, defense counsel had made the three assertions indicated by the government in their motion, it would still not constitute a selective prosecution theory as the government utterly failed to mention or reference any claim that the reason the defendant is being prosecuted is discriminatory or violates the Equal Protection Clause. Armstrong, 517 U.S. at 457.

II. Public Authority Defense

The government alleges that defense counsel's opening statement impermissibly raised a public authority defense without providing the government the proper notice and discovery demands. Gov. Mot., at p. 8. In support of this claim they cite to a singular line in the beginning of the opening statement where counsel stated "that [a] government can allow drug kingpins to operate openly decades solely for the bribes and the economic advantages that drug dealing does for their impoverished countries but mostly for the money." Tr. at 51:24-52:3.

The Second Circuit recognizes two "closely-related," but slightly different forms of the public authority defense. United States v. Giffen, 473 F.3d 30, 39 (2d Cir. 2006). In the first, the defendant takes the position that his actions, although in violation of some statute, were lawful because he was authorized by the government to take those acts. Id. Alternatively, the other theory depends on the proposition that the government enticed the defendant into committing the illegal acts, leading him to reasonably believe he was authorized to do so. Id.[2]
Further, speculation that the government was aware of the criminal acts and did not interfere is not a public authority defense. United States v. Rosenthal, 793 F.2d 1214, 1237 (11th Cir. 1986) (public authority defense requires a real, and not merely speculative, grant of permission).

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[2] According to the Criminal Resource Manuel utilized by the Department of Justice, there are actually three possible defense theories which may constitute a Public-Authority Defense. First, the defendant honestly, even if mistakenly, believed that he was performing the crimes charged in the indictment in cooperation with the government. Second, the defendant knowingly committed a criminal act while reasonably relying on a grant of authority from a government official to engage in illegal activity. Finally, "entrapment by estoppel" occurs when a government official commits an error and the defendant violates the law while relying on that government official. See, Department of Justice, Criminal Resource Manual (DoJ Manual), Public Authority Defense:
https://www.justice.gov/jm/criminal-resource-manual-2055-public-authority-defense (last accessed November 13, 2018). In the Second Circuit, the first and second positions are considered combined into the same doctrine.

Examining that specific line in the context of the entire paragraph (Tr. at 51:17-52:3), it is clear that defense counsel was speaking generally about the behavior of governments, and not about their actions towards Mr. Guzman in particular. Moreover, the reference to impoverished nations excluded the United States from counsel's statement. The government is claiming that a general assertion that the evidence in this case will demonstrate that governments can be corrupt is somehow a claim that Mr. Guzman was not only trafficking narcotics (a claim which was never made in the opening statement and explicitly rebutted (Tr. at 68:25-69:1)), but that he was doing so under the belief that the government of Mexico was either permitting or supporting him. Giffen, 473 F.3d at 39.
While the government provides vague objections to the lack of any Rule 12.3 discovery received, they utterly fail to cite to a single line in defendant counsel's opening statement which actually supports a claim of either theory of public authority. See generally Gov. Mot. The reason for this is simple, there was no improper claim that Mr. Guzman believed he was trafficking narcotics with the permission of the government, and certainly not the United States government responsible for this prosecution.

Accordingly, the government's claim that defense counsel's opening statement improperly cited to a public authority defense is entirely without merit.

III. Witness Testimony Regarding Other Witness' Credibility

Even though the government did not raise this issue in their motion, the Court asked that the parties address the issue of one witness' testimony concerning the character trait of honesty for another witness. Tr. at 70:14-17.

While the Second Circuit has "repeatedly held that it is improper to ask one witness to express an opinion as to the credibility of another witness," (United States v. Duarte, 14 F. App'x 46, 52 (2d Cir. 2001)) this prohibition applies only to asking a witness to make a "credibility" "determination[]" regarding specific acts or lies (e.g., United States v. Richter, 826 F.2d 206, 208 (2d Cir. 1987)) -- and does not impact an attorney's ability to ask a witness concerning another witness' general character for truthfulness or untruthfulness, as permitted by Rule 608(a). See Fed. R. Evid 608(a) ("A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character") (emphasis supplied); see Hodges v. Keane, 886 F.Supp. 352, 355 (S.D.N.Y. 1995). In this manner, questions about potential lies made by another witness on the stand invade "the traditional province of the jury," (e.g., United States v. Forrester, 60 F.3d 52, 63 (2d Cir. 1995)), while general questions about a witness' truthfulness or untruthfulness do not.

IV. Conclusion

For the foregoing reasons, the defendant respectfully submits that defense counsel's opening statements neither put forth a selective argument or public authority defense, and the government's motion to strike the delivered portion of defense counsel's opening statement should be denied. Additionally, as counsel has shown, a witness is allowed to testify about another witness' character for truthfulness, or lack thereof, under Rule 608(a).

Respectfully submitted,

Jeffrey Lichtman

cc: All counsel (by email and ECF)