

EMMET SULLIVAN JUST LEARNING OF SIDNEY POWELL'S BAIT-AND- SWITCH

As I noted the other day, the filing Sidney Powell submitted last week, while called a "reply" to the government's response, was instead a brand new argument that her client should have his entire conviction thrown out, complete with brand new bullshit claims.

Last night Sidney Powell submitted what procedurally is called her "reply" brief in a bid to compel Brady production. Even if her object were to obtain Brady, this is best thought as her opening bid, as it for the first time she presents this argument. But on page 2, she admits she's not actually seeking Brady (which makes me wonder whether this entire brief is sanctionable), but instead is seeking to have her client's multiple guilty pleas dismissed.

The government works hard to persuade this Court that the scope of its discovery obligation is limited to facts relating to punishment for the crime to which Mr. Flynn pleaded guilty. However, the evidence already produced or in the public record reveals far larger issues are at play: namely, the integrity of our criminal justice system and public confidence in what used to be our premier law enforcement institution.

Judge Emmet Sullivan may not have started

reading it yet – or maybe he was just impressed with the gaslighting – because yesterday he canceled the November 7 hearing where everyone was going to have an intriguing argument about whether his standing Brady order includes Giglio information impeaching government witnesses like Peter Strzok.

MINUTE ORDER as to MICHAEL T. FLYNN. In view of the parties' comprehensive briefing concerning 109 Defendant's Motion to Compel Production of Brady Material, the Court cancels the motion hearing previously scheduled for November 7, 2019. Signed by Judge Emmet G. Sullivan on 10/28/2019.

The government, unsurprisingly, did not miss what I laid out. They responded to Sullivan's order noting that Flynn's reply wasn't a reply, but an entire new request to have his conviction thrown out.

This "Reply," however, seeks new relief and makes new claims, based on new arguments and new information. In an extraordinary reversal, the defendant now claims that he is innocent of the criminal charge in this case. See, e.g., Reply at 2 ("When the Director of the FBI, and a group of his close associates, plot to set up an innocent man and create a crime"). For the first time, the defendant represents to this Court that he "was honest with the agents [on January 24, 2017] to the best of his recollection at the time." Reply at 23. He makes this claim despite having admitted his guilt, under oath, before two federal judges (including this Court). The defendant also argues—based almost entirely on evidence previously provided in discovery—that the government engaged in "conduct so shocking to the conscience and so inimical to our system of justice that it requires the dismissal of the charges

[sic] for outrageous government conduct.” Reply at 2. The Reply then seeks a new category of relief, that “this Court . . . dismiss the entire prosecution for outrageous government misconduct.”¹ Reply at 32.

They went on to note just some of the new requests and claims Flynn made.

To the extent the defendant refers to potential Brady material, the subject of the original motion, he raises numerous arguments and claims for the first time in his Reply. For example, he asserts, inter alia, that the government had an obligation to provide Brady material to him prior to charging him in a criminal case (Reply at 4, 18-20); that the government suppressed the “original 302” of his January 24, 2017 interview with the Federal Bureau of Investigation (“January 24 interview”) (Reply at 23-24); that the government fabricated certain January 24 interview notes and reports documenting his false statements (Reply at 23-24); that the government suppressed text messages that “would have made a material difference” to the defendant (Reply at 6); that the defendant’s false statements were not material (Reply at 27-28); that the defendant’s attorneys were acting under an “intractable conflict of interest,” which the government exploited to extract a guilty plea (Reply at 17-18); and that the “FBI had no factual or legal basis for a criminal investigation” (Reply at 14-16). Each new argument or claim is unsupported by fact or law.

At the end, they made it clear what Sullivan’s obvious response to such a filing should be: an order that Powell submit her request for new relief – that Flynn have his conviction thrown

out – as a separate motion or that he simply ignore all of Powell’s new BS.

In light of this minute order, it may be that the Court intends to strike any arguments or claims raised for the first time by the defendant in his Reply. And it may be that the Court plans to require the defendant to raise any new claims for relief in a properly pled motion to which the government can respond fully.

Sullivan responded by agreeing to let the government file a surreply, with Flynn granted a response (though warned, this time, not to introduce any new arguments).

MINUTE ORDER as to MICHAEL T. FLYNN. In view of [131] Government’s Notice of Claims Raised for the First Time in Reply, the government is hereby DIRECTED to file a surreply by no later than 12:00 PM on November 1, 2019. The surreply shall address the new relief, claims, arguments, and information raised in Defendant’s Reply Brief, ECF No. [129-2]. Mr. Flynn is hereby DIRECTED to file a sur-surreply by no later than 12:00 PM on November 4, 2019, and the Court shall strike any new issues raised in the sur-surreply. No further pleadings concerning Defendant’s Motion to Compel Production of Brady Material, ECF No. [109], shall be filed after the sur-surreply.

To be honest, Powell has already won the interim battle, because Sullivan has neither simply ignored her new request and claims nor told her to file a new motion, and instead has ordered the government to reply not just to the new Brady requests, but the bid to have the prosecution thrown out as part of their surreply.

That suggests Powell may well have wowed Sullivan with her ploy.

That said, Powell is in a precarious place. Her own brief accuses her client of lying in the January 24, 2017 FBI interview (albeit about a non-charged topic). Her Exhibit 15 makes it clear that the government provided Flynn with everything that was Brady information (as distinct from 5 year old records, some of the inculpatory, from DIA, or the Joseph Mifsud phones that DOJ has officially informed her are not helpful to Flynn) three days before Flynn pled guilty under oath to Sullivan last December, something Sullivan himself noted in the last hearing. One of her new claims – that Rob Kelner was too conflicted to advise Flynn to plead guilty – flies in the face of Sullivan's own colloquy last year.

That said, Sullivan has broad leeway to decide he means his standing order on Brady will include Giglio, and that's where Powell may well succeed.