THE GOVERNMENT REMINDS EMMET SULLIVAN THAT MIKE FLYNN ALREADY AGREED HIS CURRENT COMPLAINTS DON'T CHANGE HIS GUILT

The government used an interesting strategy in responding to Sidney Powell's nominal "reply" brief demanding Brady information but actually asking to have the entire prosecution thrown out.

The most interesting (and potentially risky): even though Sullivan ordered them to address "the new relief, claims, arguments, and information" raised in Powell's "reply," they still treat this as primarily a question of Brady obligations. In addressing Powell's demand to have the prosecution thrown out, they play dumb, noting that Powell has not presented her demand as a lawyer would, with citations and case law, and so then make an assumption that this is primarily about Brady.

> In his Reply, the defendant also seeks a new category of relief, that "this Court . . . dismiss the entire prosecution for outrageous government misconduct." Reply at 32; see also id. at 3 ("dismiss the entire prosecution based on the outrageous and un-American conduct of law enforcement officials and the subsequent failure of the prosecution to disclose this evidence . . . in a timely fashion or at all"). The defendant does not state under what federal or local rule he is seeking such relief, or cite to relevant case law.9 In order to provide a response, the government

> presumes, given the context in which this request for relief arose, that the defendant is seeking dismissal as a remedy or sanction for a purported failure to comply with Brady and/or this Court's Standing Order.
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> 9 Local Criminal Rule 47(a) specifically requires that "[e]ach motion shall include or be accompanied by a statement of the specific points of law and authority that support the motion, including where appropriate a concise statement of the facts" (emphasis added). The defendant now seeks relief from this Court for claims that he has not properly raised; the government is hampered in its ability to accurately respond to the defendant's argument because he has failed to state the specific points of law and authority that support his motion.

I'm sure Powell's response will be "Ted Stevens Ted Stevens Ted Stevens." But even if it is, that's something she could have cited in her new demand for relief and did not.

They do go on to address the claim that the FBI engaged in outrageous behavior, focusing relentlessly on the January 24 interview, rather than Powell's more far-flung conspiracy theories. But ultimately, this seems to be an attempt to do what they tried to do when they first alerted Emmet Sullivan that Powell had raised new issues, to either force her to submit her demand to have the whole prosecution thrown out as a separate motion, or to substantiate her Brady claims.

The government then lays out, for the second time, that the government already provided Brady by the time Flynn pled guilty a second time, this time before Judge Sullivan, on December 18, 2018.

> Although the defendant now complains

> about the pace of that discovery, before December 18, 2018, the defendant was in possession of all of the information on which he now bases his argument that the case should be dismissed due to government misconduct. See Reply [sic] at 1-2, 16, 26; Notice of Discovery Correspondence, United States v. Flynn, 17-cr-232 (D.D.C. Oct. 1, 2019) (Doc. 123). Thereafter, on December 18, 2018, the defendant and his counsel affirmed for this Court that they had no concerns that potential Brady material or other relevant material had not been provided to the defendant. See Hearing Transcript at 8-10, United States v. Flynn, No. 17-cr-232 (D.D.C. Dec. 18, 2018) ("12/18/2018 Hearing Tr."). The defendant further affirmed, under oath, that he wished to proceed to sentencing because he was guilty of making false statements to the FBI. See id. at 16.

Note, there's an error in this passage, calling their past filing a "Reply" rather than Response. They *should* have relied on the Reply — on Powell's own documents — to show that even her own less-detailed timeline of discovery proves that the government provided everything save some DIA files dating from well before Flynn's lies before his aborted sentencing before Judge Sullivan.

Which leads us to the tactic that should rule the day. In both that reference to complying with Brady, and in three other places, the government reminds Emmit Sullivan that Flynn had all this information last year, when Sullivan put Flynn under oath, made him plea again, and made damn sure none of these things changed his guilty plea.

They do this, for example, regarding the derogatory information about Strzok.

> The defendant also places significant weight on DAD Strzok's remark that the

> defendant had "a very 'sure' demeanor and did not give any indicators of deception." Strzok 302 at 3. Without citation or explanation, the defendant intimates that such words were edited out of an earlier draft of the interview report. See Reply at 24. There is no evidence that that occurred, or that the government attempted to suppress those statements. It informed the defendant of the assessment before the defendant signed the plea agreement and pleaded guilty, and documented DAD Strzok's assessment in a separate interview of DAD Strzok (which it provided to the defendant in discovery). Moreover, DAD Strzok's assessment does not exonerate the defendant. There is ample public evidence that the defendant also convincingly lied to other government officials about his conversations with the Russian Ambassador.

Then, after laying out how they had affirmatively asked Kelner and Flynn if the former had a conflict arising from having written Flynn's FARA filing, they remind Sullivan that he himself offered Flynn an opportunity to consult with independent counsel to make sure he had been adequately represented by Kelner last year.

> Additionally, during the scheduled sentencing hearing on December 18, 2018, the defendant declined the Court's invitation to have the Court appoint "an independent attorney to speak with [the] defendant, review the defendant's file, and conduct necessary research to render a second opinion for [the] defendant." 12/18/2018 Hearing Tr. at 9.

Finally, after refuting (such as they do) Powell's claim of abuse, they remind Sullivan that Flynn knew everything she makes a stink about when he pled guilty before Sullivan.

> For all of the above reasons, it is no surprise that with the same set of facts, the defendant and his prior counsel previously represented to this Court that the circumstances of the interview had no impact on his guilt, or guilty plea. On December 18, 2018, when the Court asked the defendant if he wished to "challenge the circumstances on which you were interviewed by the FBI," he responded, under oath, "No, Your Honor." 12/18/2018 Hearing Tr. at 8.10 The Court then asked the defendant if he understood that "by maintaining your guilty plea and continuing with sentencing, you will give up your right forever to challenge the circumstances under which you were interviewed," to which the defendant answered, "Yes, Your Honor." Id. And when the Court queried whether the defendant wanted an opportunity to withdraw his plea because one of the interviewing agents had been investigated for misconduct, the defendant stated "I do not, Your Honor." Id. at 9. His counsel likewise represented to the Court that their client was not "entrapped by the FBI," and that they did not contend "any misconduct by a member of the FBI raises any degree of doubt that Mr. Flynn intentionally lied to the FBI." Id. at 11-12.

Sullivan wisely put Flynn under oath last year and gave him an opportunity to back out of his plea. Unless he can be convinced there's anything new — and while it's shiny gaslighting, Powell's evidence doesn't back that claim — then he's obliged to hold Flynn to his plea from last year.

Or, as the government suggests, Sullivan can send this thing to trial.

> The baseline remedy for a Brady violation in this district is retrial,

> not dismissal. United States v. Pettiford, 627 F.3d 1223, 1228 (D.C. Cir. 2010) ("If we find a Brady violation, a new trial follows as the prescribed remedy, not as a matter of discretion.")

I've said before and will repeat it here, it's a fools errand to try to predict Judge Sullivan. If this ploy is going to work for anyone, it might work for Sullivan.

But Judge Sullivan's own actions may well prevent that.

There are, to be sure, interesting details in this filing. It reveals more details about what happened when Flynn was proffering in advance of a plea deal. It explains that the timing of his January 24 interview was tied not to the release of the Steele dossier, as he alleged, but to Sean Spicer's repetition of his denials on January 23 (something that's consistent with Andrew McCabe's memo on the topic). It debunks a long-standing conspiracy theory — that Lisa Page and Peter Strzok said they had to lock in Mike Flynn in a chargeable way the day Comey was fired. It reveals that the government raised — and Flynn twice waived — any concerns that Rob Kelner had a conflict tied to his role in Flynn's FARA filing.

But mostly, this filing lays out all the way that Flynn already said, under oath and to Judge Sullivan, that these issues didn't matter.

Update: I think I found another error. The government says that the only thing interesting in the February 10 redline of the 302 is *Strzok* indicating he didn't remember two details — that Flynn said he had no particular affinity for Russia, and that he didn't remember that Flynn said his government Blackberry wasn't working in the Dominican Republic.

> Contrary to the defendant's assertion, there were no material changes made after February 10, 2017, to the draft of

> the January 24 interview report. See Reply at 26. On February 10, 2017, DAD Strzok highlighted two—and only two—sentences where he did not recall a statement that the other interviewing agent included in the draft of the report.

But this must actually be Pientka not remembering these things, because both details show up in Flynn's notes.