

# ALLEGED MENENDEZ CO-CONSPIRATOR FRED DAIBES' LIFE JUST GOT MORE DIFFICULT

In Robert Menendez' side of the Robert Menendez bribery docket, things are going as they do at the beginning of complex prosecutions: The two sides are squabbling over protective orders and prosecutors are asking for a CIPA hearing.

Not so on Fred Daibes' side.

Daibes, you'll recall, is the long-term Menendez fundraiser implied to have given Menendez gold bars to help him beat a criminal prosecution. The indictment alleges that Menendez *tried* to intervene with the US Attorney he helped get the job, Phil Sellinger, as well as Sellinger's First AUSA, but failed to have much of an effect.

According to the indictment, Menendez did. The indictment alleges that Menendez raised Daibes before supporting Sellinger for the nomination.

In that meeting, MENENDEZ criticized the U.S. Attorney's Office for the District of New Jersey's prosecution of FRED DAIBES, the defendant, and said that he hoped that the Candidate would look into DAIBES's case if the Candidate became the U.S. Attorney. MENENDEZ did not mention any other case in the meeting. After the meeting, the Candidate informed MENENDEZ that he might have to recuse himself from the DAIBES prosecution as a result of a matter he had handled in private practice involving DAIBES. MENENDEZ subsequently informed the

Candidate that MENENDEZ would not put forward the Candidate's name to the White House for a recommendation to be nominated by the President for the position of U.S. Attorney.

And Menendez allegedly called Sellinger's First AUSA, Vikas Khanna.

b. On or about January 21, 2022, MENENDEZ called Official-3 and asked the identity of Official-3's First Assistant U.S. Attorney ("Official-4"). As a result of Official3's recusal, Official-4 had supervisory responsibility over the prosecution of DAIBES.

[snip]

d. On or about January 24, 2022, DAIBES's Driver exchanged two brief calls with NADINE MENENDEZ. NADINE MENENDEZ then texted DAIBES, writing, "Thank you. Christmas in January." DAIBES's Driver's fingerprints were later found on an envelope containing thousands of dollars of cash recovered from the residence of MENENDEZ and NADINE MENENDEZ in New Jersey. This envelope also bore DAIBES's DNA and was marked with DAIBES's return address. In or about the early afternoon of January 24, 2022- i.e., approximately two hours after NADINE MENENDEZ had texted DAIBES thanking him and writing "Christmas in January"-MENENDEZ called Official-4, in a call lasting for approximately 15 seconds. This was MENENDEZ's first phone call to Official-4. On or about

January 29, 2022—i.e., several days after NADINE MENENDEZ had texted DAIBES, thanking him and writing “Christmas in January”—MENENDEZ performed a Google search for “kilo of gold price.”

[snip]

45. Official-3 and Official-4 did not pass on to the prosecution team the fact that ROBERT MENENDEZ, the defendant, had contacted them as described in the above paragraphs, and they did not treat the case differently as a result of the above-described contacts. In or about April 2022, FRED DAIBES, the defendant, pled guilty pursuant to a plea agreement that provided for a probationary sentence.

Apparently completely unrelated to *all that*, after a series of continuances on Daibes’ sentencing after entering into a sweetheart plea deal, the judge in the case, Susan Wigenton, threw out the terms of the deal (presumably meaning the probation sentence).

TEXT ORDER as to FRED DAIBES, MICHAEL MCMANUS: All parties are hereby advised that, pursuant to Federal Rule of Criminal Procedure (Rule) 11(c)(3)(A), and as stated on the record on April 27, 2022, the date of the Courts deferred decision of acceptance of the plea agreement at the time of the entry of Defendant Fred Daibes’s plea of guilty, the Court has had an opportunity to review the presentence report (PSR). Pursuant to Rule 11(c)(5), the Court hereby rejects the plea agreement dated April 13, 2022. (D.E. 67.) Similarly, as

stated on the record on May 24, 2022, the date of the Courts deferred decision of acceptance of the plea agreement at the time of the entry of Defendant Michael McManus's plea of guilty, the Court has had an opportunity to review the PSR. Pursuant to Rule 11(c)(5), the Court hereby rejects the plea agreement dated May 5, 2022. (D.E. 76.) The Court is not required to adhere to the terms of the plea agreements, and the cases may be disposed of less favorably toward the Defendants than the plea agreements contemplated. Should any party wish to withdraw from either of the plea agreements (D.E. 67, 76), they must do so by Monday, October 16, 2023. If the pleas are not withdrawn, this Court will proceed with sentencing as scheduled. So Ordered by Judge Susan D. Wigenton on 10/5/2023. (cds) (Entered: 10/05/2023)

Daibes now has ten days to withdraw from the plea deal or accept what sounds like will be a far harsher sentence.

Meanwhile, prosecutors in the Menendez docket are curious why Daibes' lawyers from that case are now representing Wael Hana in the Menendez case, suggesting there may be a conflict, not just with the Hana representation, but also because Lawrence Lustberg is a witness to some of the events in the Menendez case.

As discussed at the October 2, 2023 initial pretrial conference, Mr. Lustberg presently represents co-defendant Fred Daibes in his pending federal case in the District of New Jersey, which case is related to the charges in this matter. See, e.g., Indictment ¶ 38. Ms. Collart likewise also represents Daibes in the pending New Jersey federal case. Since the initial conference before Your Honor earlier this week, the district judge in the District of New Jersey has rejected

Daibes's plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), increasing the likelihood of future litigation in that case. This representation presents at least a potential conflict-of-interest regarding Mr. Lustberg's and Ms. Collart's ongoing duty to Daibes, including their duty to maintain confidences. See, e.g., *United States v. Perez*, 325 F.3d 115, 127 (2d Cir. 2003).

In addition, as discussed at the initial pretrial conference, Mr. Lustberg has personal knowledge of certain facts relevant to this matter. See, e.g., Indictment ¶¶ 40, 44(c). Such knowledge raises two related, but distinct concerns: First, the Government at trial may seek to call Mr. Lustberg and/or enter into evidence materials or elicit testimony from other witnesses regarding events with which Mr. Lustberg was involved. Second, Mr. Lustberg (and his cocounsel) may be limited in their ability to make certain arguments to the Court or the jury at trial, irrespective of whether their client, Hana, wishes them to make these arguments. Although the Court need not resolve the question now, the first of these issues could present an "unsworn witness" issue regarding at least Mr. Lustberg. See, e.g., *United States v. Locascio*, 6 F.3d 924, 933-34 (2d Cir. 1993); *United States v. Kerik*, 531 F. Supp. 2d 610, 614-16 (S.D.N.Y. 2008). The Government believes that the second of these issues is waivable by the defendant. See, e.g., *Perez*, 325 F.3d at 125-27.

As I noted, I think the indictment actually presents far less clarity about what Daibes got in exchange for a good deal of cash than most commentators acknowledge.

The complications in Daibes' life might present

a way to clarify them.

In tangential news, after a series of reports on the fatal accident that led Nadine Menendez to need a new car, New Jersey has reopened that investigation.