

SDNY RULES: A TALE OF THREE FRAUDSTERS

I was thinking, as I was watching last week's Hunter Biden impeachment hearing that there ought to be a pause where someone could explain how Southern District of New York works (or doesn't) with cooperators.

After all, two of three witnesses in the hearing, Jason Galanis and Lev Parnas, had been convicted of fraud by SDNY.

Galanis claimed (after 2:01 and his opening statement) that he tried to implicate Hunter in his crimes, only to have those inquiries be "quashed" on order of SDNY.

Parnas claimed, both in his opening statement and then in an exchange with Ro Khanna (after 2:28), that he was arrested to shut him up.

Parnas specifically said that he and his attorney tried to reach out to Scott Brady.

Parnas did not mention SDNY, though both pretrial and during sentencing, SDNY described that Parnas attempted to proffer testimony but SDNY was unimpressed with Parnas' candor.

As SDNY wrote in one of those filings, "public spectacles, leaks, and social media postings could undermine his credibility and diminish his value as a potential cooperating witness." They also disputed whether Parnas was telling the full truth.

I have questions myself, as Parnas (in his hearing statement) claimed he had been "smeared" by allegations that he tried to get Marie Yovanovitch fired.

I was initially accused of being involved in a plot to remove Marie Yovanovitch, the U.S. Ambassador to Ukraine whom Trump had fired in April 2019. I was smeared by this false

information.

It wasn't false! Here's how Parnas, in his book, describes telling Trump that Yovanovitch had to go in 2018.

She was unpopular with Ukraine's wealthy and those who planned to be. They were well aware that any serious investigations would easily expose them and their alignment, if not outright fealty, to the power brokers in Russia, not their own country (including more than a few elected politicians). With my many connections in various fields, there was a consensus about Yovanovitch – she had to go.

[snip]

In fact, more of the Ukrainians I knew were complaining about her than they were about Putin or the war. When I pressed them on what really made Yovanovitch a problem, they told me that she had been saying terrible things about Trump.

So, at the table, I started to tell him about her. Where we start is ... we gotta get rid of the ambassador, I tell him.

At times, in his book, Parnas is quite oblique about whom he was dealing with in Ukraine who might have said such things (though elsewhere the memoir is quite clear he was working with mobsters and oligarchs). And given that Parnas alleged in the hearing that Pete Sessions, whose letter calling for Yovanovitch's ouster Parnas personally delivered to Trump, was involved in his actions, he was tacitly admitting that Yovanovitch's firing was a part of it. Effectively Parnas appears to be packaging this as all derivative of Trump's efforts, starting later in 2018, to get dirt on Hunter Biden. And the reason Parnas was ultimately not charged with FARA for those efforts likely has as much

to do with Rudy Giuliani's corrupted phones and Victoria Toensing's JD as anything else.

SDNY has rules about what it demands from cooperators. That requires coming clean on all criminal exposure.

And that's important background to efforts to hold Trump accountable.

SDNY laid some of this out in its Michael Cohen sentencing memo, years ago.

With respect to Cohen's provision of information to this Office, in its two meetings with him, this Office assessed Cohen to be forthright and credible, and the information he provided was largely consistent with other evidence gathered. Had Cohen actually cooperated, it could have been fruitful: He did provide what could have been useful information about matters relating to ongoing investigations being carried out by this Office. But as Cohen partially acknowledges, it was his decision not to pursue full cooperation, and his professed willingness to continue to provide information at some later unspecified time is of limited value to this Office, both because he is under no obligation to do so, and because the Office's inability to fully vet his criminal history and reliability impact his utility as a witness.

Indeed, his proffer sessions with the SCO aside, Cohen only met with the Office about the participation of others in the campaign finance crimes to which Cohen had already pleaded guilty. Cohen specifically declined to be debriefed on other uncharged criminal conduct, if any, in his

past.⁴ Cohen further declined to meet with the Office about other areas of investigative interest. As the Court is undoubtedly aware, in order to successfully cooperate with this Office, witnesses must undergo full debriefings that encompass their entire criminal history, as well as any and all information they possess about crimes committed by both themselves and others. This process permits the Office to fully assess the candor, culpability, and complications attendant to any potential cooperator, and results in cooperating witnesses who, having accepted full responsibility for any and all misconduct, are credible to law enforcement and, hopefully, to judges and juries. Cohen affirmatively chose not to pursue this process. Cohen's efforts thus fell well short of cooperation, as that term is properly used in this District.⁵

For this reason, Cohen is not being offered a cooperation agreement or a 5K1.1 letter. Within the confines of the SCO investigation itself, the Office does not dispute that Cohen's assistance to the SCO was significant. But because Cohen elected not to pursue more fulsome cooperation with this Office, including on other subjects and on his own history, the Office cannot assess the overall level of Cohen's cooperation to be significant. Therefore, the Office submits that, in fashioning a sentence on *its* case, the Court afford Cohen credit for his efforts with the SCO, but credit that accounts for only a modest variance from the Guidelines range and does not

approach the credit typically given to actual cooperating witnesses in this District.

4 At the time that Cohen met twice with this Office, through his attorneys, he had expressed that he was considering – but not committing to – full cooperation. Cohen subsequently determined not to fully cooperate.

5 Cohen’s provision of information to the Office of the New York Attorney General (“NY AG”) warrants little to no consideration as a mitigating factor. This Office’s understanding is that the information Cohen provided was useful only to the extent that he corroborated information already known to the NYAG. More importantly, Cohen provided information to the NY AG not as a cooperating witness who was exposing himself to potential criminal or civil liability but instead as a witness who could have been compelled to provide that testimony. Fulfilling that basic legal responsibility voluntarily does not warrant a reduced sentence – particularly when one waits until he is charged with federal crimes before doing so.

Similarly, this Office’s understanding is that the New York State Department of Taxation and Financial Services (“NYSDF”) subpoenaed Cohen for information about the payment of his own state taxes, and any claimed “cooperation” with NYSDTF appears to consist solely of providing that entity information that they would otherwise have obtained via subpoena.

Cohen’s failed SDNY cooperation may become an issue in today’s NYDA hearing on Trump’s fraud to cover up the Stormy Daniels hush payments. Judge Juan Merchan will review the dispute

regarding NYDA's efforts to get the Cohen file from SDNY, which Christopher Conroy laid out in this declaration. The short version is that NYDA provided Cohen's SDNY related materials, but not the tax records otherwise collected from SDNY or Mueller-related 302s that SDNY did not yet have.

But in both cases, with Cohen and Parnas, any cooperation came amid Bill Barr's efforts to shelter Trump from implication in their crimes. And while I do think Parnas is engaged in some repackaging of his past actions, I also think there's increasing evidence that Barr was worried about his own implication in Parnas' crimes.

As we may see in Alvin Bragg's case, this adds difficulty to using a witness like Cohen, whose candor might be questioned (but who, like Parnas, has receipts). Because Barr had a habit of making such things worse.