ALEXANDER SMIRNOV GOES MISSING — FROM JUDGE NOREIKA'S OPINIONS

The name Alexander Smirnov appears in neither Judge Maryellen Noreika's opinion rejecting Hunter Biden's immunity nor her opinion rejecting his selective and vindictive prosecution claim. Whereas it appears that Judge Mark Scarsi believes that Smirnov is not before him at all, Lowell did raise Smirnov — whose arrest postdated the reply brief deadline before Noreika and so couldn't have been included in motions filings in Delaware — as an additional authority for his selective and vindictive claim.

The detail matters because of the way Noreika handled the two motions, which she treated as related by relying on the facts laid out in her immunity opinion in her selective prosecution opinion, even though her position in those two opinions is slightly different.

For the selective prosecution opinion, Noreika used Abbe Lowell's request, in his reply brief, that she focus on David Weiss' decision to abandon the plea and diversion agreement, an approach she adopted.

> Defendant's motion sets forth a winding story of years of IRS investigations, Congressional inquiries and accusations of improper influence from Legislative Branch and Executive Branch officials within the prior administration, including former President Trump himself. (See D.I. 63 at 4-20). Yet, as Defendant explains in reply, his selective and vindictive prosecution claims are focused on "the prosecution's decision to abandon the Plea and Diversion Agreement framework it had

> signed in response to ever mounting criticism and to instead bring this felony indictment." (D.I. 81 at 2 n.1). That decision occurred in the summer of 2023. Any allegation of selective or vindictive prosecution stemming from the IRS investigations or prior administration officials or any conduct that preceded this past summer appears largely irrelevant to the present motions. Moreover, the only charges at issue in this case are firearm charges — Defendant's financial affairs or tax-related charges (or investigations thereof) also appear irrelevant. Thus, the only charging decision the Court must view through the selective and vindictive prosecution lens is Special Counsel David Weiss's decision to no longer pursue pretrial diversion and instead indict Defendant on three felony firearm charges.

But Noreika's treatment of *when* the decision occurred is fuzzy. In one place she describes that it happened in summer 2023, which could include everything from June 21, 2023 on (the day after the diversion and plea were published).

> Defendant claims that the Special Counsel's decision to abandon pretrial diversion and indict Defendant on the three felony firearm charges in this case is presumptively vindictive. (See D.I. 81 at 2 n.1). Because **that decision occurred in the summer of 2023**, his complaints about original charging decisions (or lack thereof) in this case are irrelevant, as are charging decisions for the unrelated tax offenses being pursued in another venue. Yet even as to the Special Counsel's decision to indict after failing to reach agreement on pretrial diversion, Defendant fails to identify any right that he was

> lawfully exercising that prompted the government to retaliate. [my emphasis]

Her temporal argument doesn't seem to support the point she uses it for: That Weiss' decision to *change his mind* means that what he changed it from, "are irrelevant" (this is particularly important given how she treats the dispute over immunity).

Elsewhere, she treats *the entirety of the decision* to be after the failed plea hearing.

> Defendant has made clear, however, that his selective prosecution claim is focused on the decision to abandon pretrial diversion and pursue indictment on the three felony firearm charges – a decision that **occurred after the Court's hearing in July 2023**. (See D.I. 81 at 2 n.1). [my emphasis]

It's not remotely clear how she adopted this timeframe. But by doing so, she excluded from her consideration things that clearly were part of abandoning the existing plea deal, most notably reneging on the full extent of the immunity. (She also excluded from her consideration *her own role* in the process, which as I'll show, she makes a good case was unconstitutional.)

She did so even while describing that "the government appeared to revoke the deal" when Hunter Biden insisted on the terms of immunity that had been negotiated in June.

> Having received contradictory sworn statements about Defendant's reliance on immunity, the Court proceeded to inquire about the scope of any immunity. At this point, it became apparent that the parties had different views as to the scope of the immunity provision in the Diversion Agreement. In the government's view, it could not bring tax evasion charges based on the conduct set forth

> in the Plea Agreement, nor could it bring firearm charges based on the particular firearm identified in the Diversion Agreement, but unrelated charges – e.g., under the Foreign Agents Registration Act – were permissible. (D.I. 16 at 54:13-55:9). Defendant disagreed. (Id. at 55:17-18). At that point, **the government appeared to revoke the deal (id. at 55:22)** and proceedings were again recessed to allow the parties to confer in light of their fundamental misunderstanding as to the scope of immunity conferred by the Diversion Agreement (id. at 57:1-7). The hearing resumed, with Defendant's attorney again reversing position and explaining to the Court that the immunity provision covered only federal crimes related to "gun possession, tax issues, and drug use." (Id. at 57:23-24).

For reasons I'll explain in a follow-up, Noreika *sua sponte* conducted a lengthy discussion of the scope of immunity. But just that observation that the government "appeared to revoke" the terms of the deal, paired with the uncontested claims that Hunter had been assured there was no ongoing investigation on June 19, should make Weiss' decision to chase the Smirnov claims central.

Noreika also claimed that by adopting Lowell's framework about how the deal was abandoned, it put the actions of all Trump's officials out of play.

> Yet, as was the case with selective prosecution, the relevant point in time is when the prosecutor decided to no longer pursue pretrial diversion and instead indict Defendant. Whether former administration officials harbored actual animus towards Defendant at some point in the past is therefore irrelevant. This is especially true where, as here, the Court has been given no evidence or

> indication that any of these individuals (whether filled with animus or not) have successfully influenced Special Counsel Weiss or his team in the decision to indict Defendant in this case. At best, Defendant has generically alleged that individuals from the prior administration were or are targeting him (or his father) and therefore his prosecution here must be vindictive. The problem with this argument is that the charging decision at issue was made during this administration — by Special Counsel Weiss — at a time when the head of the Executive Branch prosecuting Defendant is Defendant's father. Defendant has offered nothing credible to support a finding that anyone who played a role in the decision to abandon pretrial diversion and move forward with indictment here harbored any animus towards Defendant. Any claim of vindictive prosecution based on actual vindictiveness must fail.

Except it shouldn't. Lowell cited Barr's intervention in the FD-1023 discussion in his original motion to dismiss, intervention that happened between the time Weiss agreed to a deal and the time he started reneging on the immunity he had offered. The Brady side channel was a central part of Lowell's argument about the selective prosecution role of Trump's officials.

Plus, Noreika's silence about Smirnov matters because Noreika invests a whole lot of energy in prosecutors' claims that they couldn't be retaliating against Hunter Biden because Hunter's father runs the Executive Branch.

> To the extent that Defendant's claim that he is being selectively prosecuted rests solely on him being the son of the sitting President, that claim is belied by the facts. The Executive Branch that charged Defendant is headed by that sitting President — Defendant's father.

> The Attorney General heading the DOJ was appointed by and reports to Defendant's father. And that Attorney General appointed the Special Counsel who made the challenged charging decision in this case — while Defendant's father was still the sitting President. Defendant's claim is effectively that his own father targeted him for being his son, a claim that is nonsensical under the facts here. Regardless of whether Congressional Republicans attempted to influence the Executive Branch, there is no evidence that they were successful in doing so and, in any event, the Executive Branch prosecuting Defendant was at all relevant times (and still is) headed by Defendant's father.

This entire argument fails if, as the available evidence suggests, David Weiss asked for Special Counsel status to pursue a bribery investigation into Hunter *and his father*. Once you include the Smirnov claims, Joe Biden is the subject of the investigation, an investigation that was only made possible by reneging on the immunity agreement.

Judge Noreika clearly stated that the government appeared to revoke the deal based on Hunter's statement about immunity. If that's right, then Smirnov has to be central to her considerations. Instead, she ignored him.