U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

November 5, 2017

SUBMITTED BY ECF

The Honorable Richard M. Berman
United States District Court Judge
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, New York 10007

Re: *United States* v. *Mehmet Hakan Atilla,*
No. S4 15 Cr. 867 (RMB)

Dear Judge Berman:

The Government writes in response to (i) the defendant's letter, dated November 3, 2017 (the "November 3 Letter"), seeking a second adjournment of the trial—which is currently scheduled for jury selection on November 20, 2017 and presentation of evidence on November 27, 2017—until January 2018, and (ii) the Court's Order, also dated November 3, 2017, directing that the parties meet and confer about the defendant's request and that the Government provide the Court with an update as to whether the parties had resolved the issues. On November 4, 2017, the parties conferred about the defendant's letter (the "November 4 Call") but were not been able to reach an agreement about the defendant's adjournment request. As described in more detail below, the Government agrees with the Court that the current trial date is realistic and should not be adjourned. The defendant proposes to adjourn the trial in order to take depositions pursuant to Federal Rule of Criminal Procedure 15, but has not even made an application to take those depositions, much less met the demanding threshold of "exceptional circumstances" required under the Rule. Because the defendant has not made any showing as to why an adjournment is necessary, the Government opposes the defendant's request.

First, with respect to the defendant's request for a schedule for the Government's pretrial disclosures, the Government informed defense counsel in advance of the November 4 Call that the Government intends to produce a preliminary exhibit list and to make marked exhibits available electronically on November 6, 2017, three weeks in advance of the start of trial. The Government also informed defense counsel that, assuming the parties are able to reach reasonable stipulations to streamline the presentation of evidence, the Government would produce material required by Title 18, United States Code, Section 3500, and *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), two weeks in advance of trial, notwithstanding the fact that the

Government is not obligated to make such disclosures "until [the] witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500(a).

Second, with respect to defense counsel's claim that an adjournment is required to conduct Rule 15 depositions of witnesses located in Turkey, during the November 4 Call, defense counsel did not explain their delay in making their still-unsubmitted Rule 15 application, other than to say that they had difficulties interviewing witnesses in Turkey. Defense counsel first raised the prospect of seeking evidence from foreign witnesses in their June 9, 2017 letter seeking an adjournment of the trial date. (*See* Dkt. 263 at 2 ("[W]itnesses to certain events and important documents are located in Turkey. We anticipate that we will be requesting foreign discovery under the Mutual Legal Assistance Treaty between the United States and the Republic of Turkey. Requests for foreign discovery are time consuming and often require many months to schedule and resolve.")). The Court properly denied the defendant's request for an adjournment on that basis. (*See* Order, June 12, 2017, Dkt. 265).

The defense again raised the prospect of potential witnesses located in Turkey at the bail hearing on August 15, 2017, (*see* Tr. of Bail Hearing at 6 (describing "meeting with potential witnesses" in Istanbul)), and discussed the issue more extensively six weeks ago in connection with the defendant's most recent request for adjournment, at the conference on September 25, 2017 (the "September 25 Conference"), (*see* Tr. of Conf. at 9-11). At that conference, defense counsel indicated that an adjournment to the currently scheduled trial date of November 27, 2017 would be sufficient to address the defense's anticipated need for testimony from foreign witnesses, noting "that's why we proposed it." (*Id.* at 12). Defense counsel also recognized that "we may find ourselves in the position where, if we don't have the time to do it, that your Honor has our feet to the fire and you say it's too late." (*Id.* at 11). Shortly after that conference, the Government asked defense counsel for the names of the potential witnesses, to determine whether there was any way to obviate the need for Rule 15 depositions, and arranged a call to discuss the matter on September 29, 2017. Although defense counsel indicated that they would provide the names of the witnesses, the Government was not informed as to the identity of any potential Rule 15 witnesses until the November 4 Call.

Accordingly, the Government does not agree that an adjournment to permit the untimely filing of a Rule 15 motion would be appropriate. *See United States* v. *Broker*, 246 F.2d 328, 329 (2d Cir. 1957) (affirming "sound use of . . . discretion" to deny Rule 15 motion where "circumstances were such as strongly to suggest that the motion was only a dilatory tactic"); *United States* v. *Whiting*, 308 F.2d 537, 541 (2d Cir. 1962) (affirming "the discretion of the trial court to deny the motion [for Rule 15 depositions] if it is made after unexcused delay or on the 'eve of trial'" (quoting *Broker*, 246 F.2d at 329); *United States* v. *Vargas*, 279 F. App'x 56, 61 (2d Cir. 2008) (affirming denial of defendant's motion for Rule 15 deposition made "approximately three weeks before the scheduled start of the trial"); *Chusid*, 2000 WL 1449873, at *1 ("Motions to conduct depositions in criminal cases must be made promptly and certainly are denied properly where the depositions sought would delay the trial.") (citing 2 Charles Alan Wright, Federal Practice and Procedure: Criminal 2d § 242, at 12 (1982)); *United States* v.

Gragg, 145 F.3d 1334 (6th Cir. 1998) ("affirming denial of Rule 15 motion that "was untimely and, if granted, would have been disruptive of the proceedings" where "the existence and significance of the proposed deponents had been known for some time"); *United States* v. *Aggarwal*, 17 F.3d 737, 742 (5th Cir. 1994) (affirming "the trial court's denial of Aggarwal's motion on the basis of unexcused delay. Even though the 15(a) motion was filed about a month before the case finally went to trial on its third setting, it was untimely in that it was about a month after the court's deadline for pretrial motions.").

Nevertheless, in an effort to meet and confer on the substance of the defendant's claim that Rule 15 depositions are necessary, the Government asked defense counsel to provide information necessary to evaluate such a request. Because the defendant did not make a motion to conduct Rule 15 depositions within the time set for the parties to make pretrial motions, the Government is unaware of whether the proposed depositions meet the long-established requirements "that (1) the prospective witness is unavailable for trial, (2) the witness' testimony is material, and (3) the testimony is necessary to prevent a failure of justice." *United States* v. *Cohen*, 260 F.3d 68, 78 (2d Cir. 2001). Accordingly, in preparation for the November 4 Call, the Government asked the defendant to identify the potential witnesses, to explain why they cannot travel to the United States for trial, to describe what efforts have been made to procure their appearance for trial, to identify locations outside Turkey to which those witnesses could travel, and to explain why the testimony of those witnesses is material. During the call, defense counsel provided the Government with the names of five witnesses, identified general categories of testimony that they would offer, and proffered that their testimony would be material and exculpatory, but did not identify how, and did not identify the basis of the witnesses' purported unavailability. Because "[c]onclusory or speculative statements regarding unavailability are insufficient," *United States* v. *Norman*, No. S1 07 Cr. 961 (KBF), 2012 WL 5278548, at *1 (S.D.N.Y. Oct. 24, 2012), and because materiality cannot be established solely by defense counsel's "expectations as to what these witnesses would say if examined," *United States* v. *Chusid*, No. 00 Cr. 0263 (LAK), 2000 WL 1449873, at *2 (S.D.N.Y. Sept. 27, 2000), the Government cannot agree that taking Rule 15 depositions is necessary or that an adjournment on that basis is warranted.

Defense counsel also adopted the position—first alluded to at the September 25 Conference—that they should have the Government's exhibits, witness list, and 18 U.S.C. § 3500 material prior to having to take Rule 15 depositions. When asked for any legal authority supporting this departure from typical Rule 15 practice—which typically occurs well before trial and the production of the Government's exhibits and § 3500 material—defense counsel cited only to "fairness" concerns. The Government's research confirms that there is no basis for imposing such a requirement. *See United States* v. *Cooper*, 947 F. Supp. 2d 108, 116–17 (D.D.C. 2013) (rejecting defendant's claim "that he is entitled to every piece of discovery in this case—including all Jencks, *Brady*, and *Giglio* materials that the government would have to disclose before trial—in advance of the [Rule 15] depositions," noting that "[n]either Rule 15 nor the Jencks Act suggests a disclosure obligation as sweeping as that urged"); *cf. United States* v. *Garcia*, 406 F. Supp. 2d 304, 306 (S.D.N.Y. 2005) (Lynch, J.) ("3500 material is ultimately

provided for a limited purpose. Defendants are not given such material to facilitate general trial preparation or as a form of pre-trial discovery.").

During the call, defense counsel also claimed that there was no prejudice to the Government from the proposed adjournment of the trial or their demand for early disclosure of exhibits and 3500 material prior to taking Rule 15 depositions. In its pre-call email, the Government noted that that was not true. The defendant's adjournment request comes just three weeks before trial. It comes after extensive trial preparation by the Government, including the preparation of witnesses who already had to adjust their schedules after the most recent adjournment of trial, the filing of detailed motions in limine which, among other things, revealed several of the Government's witnesses publicly, and the submission of substantial requests to charge. All of these efforts were undertaken upon defense counsel's representation that the current trial date was realistic. The defendant should not be permitted to casually brush all of that aside, particularly when he was the one who insisted on the current schedule.

Finally, the Government notes that, in the November 3 Letter, defense counsel also claimed that "[a]s part of our motions in limine, we have requested a pretrial hearing related to the recordings that the Government intends to offer." The Government has reviewed the defendant's motion and his supporting memorandum of law, and at no point in those filings does the defendant request an evidentiary hearing regarding his motion to preclude the recordings. Nor would the defendant be entitled to one if he had made such a request. Evidentiary hearings on motions *in limine* are strongly disfavored in this circuit, because they "would require this Court to undertake a mini-trial, significantly prolonging the proceedings in the case and affording the defendants a complete preview of the government's evidence." *United States* v. *Ianniello*, 621 F. Supp. 1455, 1478 (S.D.N.Y. 1985). The Government will file its response to the defendant's motion on November 6, 2017, pursuant to the schedule ordered by the Court, and no adjournment is necessary to allow for a hearing the defendant has not asked for.

In sum, the Government believes that it has made reasonable proposals to disclose exhibits and § 3500 material well in advance of trial, that the defendant has not supplied a basis for seeking Rule 15 depositions at this time, and that the Court should adhere to the current trial date. The defendant's purported need to obtain foreign evidence was the basis for his adjournment request on June 9, 2017, and the Court rightly denied it at that time. Since then, the

defendant has made no motion pursuant to Rule 15, only raising the specter of such a motion yet to come in a strategic effort to delay the trial date that the defendant explicitly asked for. He has simply tarried too long. Thus, the Government submits, the defendant's request to adjourn the trial should be denied.

Respectfully submitted,

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