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October 31, 2017

By ECF
Hon. Andrew L. Carter
United States District Judge
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: United States v. Murray Huberfeld, et ano.
16 Cr. 467 (ALC)

Dear Judge Carter,

We submit this letter brief to address the issue of whether certain documents which the defendant has used during cross-examination are admissible in evidence notwithstanding FRE 608. Specifically, during cross examination of Mr. Rechnitz yesterday and today, the government claimed that certain extrinsic evidence was inadmissible under F.R.E. 608(b). We believe that claim rests on a misunderstanding of the Rule. We will first address the correct meaning and reach of Rule 608(b) and then address why certain specific extrinsic evidence, to be discussed below, should be admitted to impeach Mr. Rechnitz.

1. Rule 608(b)

Rule 608(b) does not prevent the use of extrinsic evidence for all impeachment purposes. Rather, by its express terms, it limited to use of extrinsic evidence to "attack …the witness's character for truthfulness." "[T]he admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity)" is left "to Rules 402 and 403." Committee Notes on the Federal Rules of Evidence—2003 Amendment. *See also, e.g., United States v. Beverly,* 5 F.3d 633, 639 (2d Cir. 1993) ("The government's questioning arose in the form of impeachment of specific falsehoods, not as an attack on his general character for truthfulness,"); *United States v. Figueroa*, 548 F.3d 222, 229-229 (2d Cir. 2008) (holding that Rule 608(b) does not prevent the use of extrinsic evidence to impeach by bias).

For this reason, the 608(b) limits on extrinsic evidence do not apply to impeachment by contradiction. *See United States v. Ramirez,* 609 F.3d 495, 499 (2d Cir. 2010) ("impeachment by contradiction … operates as a limited exception to Rule

608(b)"); *United States v. Ingram*, 490 F. App'x 363, 366 (2d Cir. 2012) ("This claim has no merit because the license application was admitted to impeach Dodakian by contradiction, whereas Rule 608(b) addresses extrinsic evidence admitted to impeach by demonstrating character for untruthfulness."). *Cf. United States v. Winchenbach*, 197 F.3d 548, 558 (1st Cir. 1999) (distinguishing impeachment by prior inconsistent statement from impeachment by character for untruthfulness). Simply put, "when a witness puts certain facts at issue in his testimony, the [opposing party] may seek to rebut those facts, including by resorting to extrinsic evidence if necessary." *Ramirez*, 609 F.3d at 499; *accord Jones v. S. P. R.R.*, 962 F.2d 447, 450 (5th Cir. 1992) ("Of course, if the opposing party places a matter at issue on direct examination, fairness mandates that the other party can offer contradictory evidence even if the matter is collateral."). This prevents Rule 608(b), intended as a shield, from turning into a sword. *Ramirez*, 609 F.3d at 499; *United States v. Fleming*, 19 F.3d 1325 (10th Cir. 1994).

In addition, Rule 608(b) does not create a *per se* rule against the use of extrinsic evidence to impeach by character of untruthfulness. The Rule expressly grants the trial judge the discretion to allow an attorney to use extrinsic evidence on cross if it is "probative of the character for truthfulness or untruthfulness of the witness." In exercising this discretion, the court must "give wide latitude to a defendant in a criminal case to cross-examine government witnesses." *United States v. Cedeño*, 644 F.3d 79, 82 (2d Cir. 2011) (internal quotation marks omitted).

2. The Court Should Admit Extrinsic Evidence That Mr. Rechnitz Bribed A Witness To Create Fake Documents

Mr. Rechnitz testified on direct that he stopped committing crimes once he entered into a cooperation agreement with the government. In addition, the government introduced in evidence Mr. Rechnitz's cooperation agreement with the government and elicited testimony from Rechnitz that Rechnitz believes that if he lies while testifying or commits another crime after he signed the cooperation agreement that he could lose his deal. The prosecutor read to the jury the language in the cooperation agreement stating that Mr. Rechnitz was required to disclose all of his criminal conduct to the government and specifically asked Rechnitz "do you believe that you have disclosed all of the crimes you committed to the United States Attorney's Office?" Rechnitz responded, "I do." Tr. 876-7. Finally, the government asked Mr. Rechnitz to explain what the cooperation agreement meant with respect to him obtaining a 5k letter and he testified, "if I tell the truth and honor the terms of this agreement and I don't commit any further crimes, … the government will issue what is called a 5k letter at my sentencing to my sentencing judge, which will serve as a hope for leniency for me at my sentencing." Tr. 877.

Thus, the government elicited testimony from Mr. Rechnitz on direct examination that he hopes to get a 5k letter, and that he understands that in order to do so he cannot testify falsely and cannot commit any crimes. This fear of losing his cooperation agreement, the government will argue in summation, provides a substantial motive for Mr. Rechnitz to testify truthfully.

The defense is entitled to rebut the testimony about Mr. Rechnitz's fear of losing the benefits of the cooperation agreement and show that Mr. Rechnitz has perjured himself by claiming that he has disclosed all his prior criminal conduct and not committed any crimes since he started cooperating by introducing evidence that Mr. Rechnitz has in fact committed other crimes since cooperation which he has not disclosed to the government. Specifically, pursuant to *United States v. Wallach,* 935 F.2d 445 (2d Cir. 1991). In *Wallach* a cooperating witness was instructed by the United States Attorney's Office not to gamble any more after he began cooperating. He did gamble more and then when he was cross-examined about specific instances of gambling since he began cooperating, the witness lied and denied gambling. The defense attempted to call a witness who would testify that the witness gambled but the Court precluded this testimony pursuant to Rule 608(b).

On appeal the Second Circuit held that it was reversible error to preclude this testimony finding that evidence that a witness perjured himself is always relevant and critical to the defense. Furthermore, where the government argued that the witness had signed a cooperation agreement and would not lie then this evidence became even more relevant and admissible. Failure to allow the defense to present this evidence at trial was reversible error.[1]

Similarly, in cross examination here we cross examined Rechnitz on a specific crime he committed since he began to cooperate in which he flew an individual named Gross from New York to California to stay in a luxury hotel, the Four Seasons Beverly Hills, gave Gross $2000 in cash, and paid for all of Gross' expenses at the hotel, including massages and room service and a rental car. This was exactly the type of thing which Rechnitz had done in the past when he paid for trips for police officers and politicians and has now testified that these payments were bribes, intended to influence the actions of the recipients. Thus, there is a good faith basis to argue that Rechnitz was bribing Gross.

The evidence further shows that in return for this bribe, Gross helped Rechnitz obtain a false email from a person, Mr. Blau, who Rechnitz had caused to sign a phony loan. This was an issue that Rechnitz knew the defense was investigating at the time and the email was intended to deceive the government and hide Rechnitz's criminal activity.

We seek to introduce the following specific extrinsic evidence to show that Rechnitz bribed Gross in August 2017.

MH409 – Invoice of Four Seasons Hotel

[1] In *Wallach* there was an issue about whether the government knew the witness was committing perjury and newly discovered evidence. Undoubtedly those issues contributed to the reversal of the guilty verdict. However, the beginning error, which was the foundation for the other problems in the case, was the court's failure to allow the defendant to introduce extrinsic evidence which showed that the witness had committed perjury.

MH410 and MH411 – Photograph of bribe money and note to Blau

This evidence, although admittedly extrinsic, is admissible for multiple reasons. One, as discussed above, it is "impeachment by contradiction" and so, pursuant to *Wallach,* and the other cases cited above, *not* excluded by Rule 608(b). Second, we are introducing it not to show Mr. Rechnitz's general character for untruthfulness but to rebut Mr. Rechnitz's testimony that he would not commit a new crime since entering into his cooperation agreement or lie during his testimony because doing so would violate his cooperation agreement.

The extrinsic evidence that we seek to introduce is similar to the evidence the government introduced on direct examination to establish that Rechnitz bribed cops. We seek to introduce this evidence to establish that Rechnitz continued to commit this behavior after he began cooperating. The fact that he has continued to commit bribery specifically contradicts Rechnitz's prior testimony that he is so afraid of violating the cooperation agreement that he would not lie at trial.

3. The Court Should Admit Extrinsic Evidence To Show That Mr. Rechnitz Told Family Members On Two Occasions That He Could Lie And Blame His Wrongdoing On Others And That The Government Would Believe Him

On cross-examination today we asked Mr. Rechhnitz about a taped telephone conversation, MH229. In this conversations Rechnitz instructed his father in law on how to commit a crime.

We ask the court to permit us to introduce this tape recording and transcript.It is admissible to show that in this specific case Rechnitz had a plan to lie and deceive and make up a story to deceive authorities.

Specifically, MH229 is a tape recording dated April 30, 2015 between Rechnitz and his father-in-law David Kahn. Kahn had invested in the ticket business and the liquor business with Rechnitz and had received money in cash. Rechnitz and Kahn were discussing how the government was now investigating Peralta and were discussing how they could lie to the government. They stated:

Jona:	Also, that – I was telling it to you yesterday, you didn't need to say – I stopped you from saying something
	UI
David	Right, Yes, I understood that.
Jona	It's a very clear that's a given. Okay?
David	Yes
Jona	That never, ever, ever happened.
David	And if they were to call -
Jona	Or show up, it -
David	Yeah
Jona	Whatever they do.

David	Yeah
Jona	That's – it's something that has to be very solid. Like, that never happened.
David	Yeah, I guess – yeah. But weren't there – there were checks that were that were, I think were payable to them, right? Didn't I – wait, you think I did it to you. Did you (UI) –
Jona	No, no. Of course, you have payable to them. He should. Why not?
David	Yeah.
Jona	It's a very simple story. It's the truth. The truth is always the best. I called you, you never met him.
David	Right.
Jona	I – you – you're – I'm your son-in-law. You come into real estate deals with me and stuff. And whenever –
David	That's right.
Jona	It doesn't matter what deals.
David	Right.
Jona	-that you do I call you and I told you that there's an opportunity, a guy I know. I trust him. He makes a lot of money on his business and we make a loan, you make your loan, and you're going to get back your return, and you get back your return. And each time until the last time, you got it back.
David	I see. (UI)

MH229, p4-5.

The defense in this case is that Rechnitz took what really happened – the truth – and mixed in lies to come up with a false story to shift blame from himself. In this tape, he is caught schooling his father in law to do just that, to mix the truth, which he describes as "always the best" with a lie, to deflect attention from themselves. Thus, this tape is not extrinsic evidence offered to attack Rechnitz's character of honesty and therefore admission of this tape does not violate FRE 608. Instead, this tape is direct evidence of Rechnitz's method of operating and his scheme in this case to blame his wrongdoing on other people and escape trouble himself. As such it is relevant and admissible evidence and not precluded by FRE 608.

4. Mr. Rechnitz's Credit Card Statements Should Be Introduced In Evidence To Specifically Impeach His Testimony On Direct Examination That He Could Not Pay His Tax Returns Because He Was Missing The Credit Card Payments Made By Nissan On His Behalf

Reichnitz testified on direct examination that he had not filed his tax returns since 2014 because "I am missing the credit card payments that Jason made for me which would be treated as income." In other words, Mr. Rechnitz blamed his failure to file his tax returns – a crime – on Jason Nissen.

We seek to introduce Rechnitz's credit card statements as impeachment by contradiction. The credit card statements show exactly what Mr. Rechnitz owed in credit card charges every month. In evidence already are Mr. Rechnitz's bank account

statements – both business and personal. The combination of these two sets of documents – credit card charges and bank account statements - will allow the defense to show that Mr. Rechnitz could easily have filed his tax returns if he chose to do so. In doing so we will show that Mr. Rechnitz lied when he blamed his failure to file his tax returns on Nissan's failure to provide Mr. Rechnitz with certain information.

Rechnitz's false story on direct exam about why he did not file his tax returns is powerful evidence for the defense about how Rechnitz blames his criminal activity on other people.

5. Photographs Of Jona Rechnitz's Current Home, His Prior Apartment Building, A Floor Plan of His Prior Apartment, Credit Card Statements, And A Photograph of Rechnitz at The World Series Should Be Allowed In Evidence To Rebut Rechnitz's False Testimony

At the end of the day today Mr. Rechnitz testified as follows:

Q. And your life has not altered a bit since you pled guilty in June of 2016.

A. So that is the biggest mischaracterization. I have suffered tremendously in many ways, and it has altered very much.

Q. But you haven't lost the most important thing, sir, right, your own liberty?

A. I have. I'm restricted where I travel. I have, as you know, all your investigators all over me all day long, public scrutiny, and I have been living miserably for the last few years because of this crime that I committed.

This self pitying testimony is false and the defense is entitled to show the jury that it is false. Specifically, we are entitled to show the jury a picture of the enormous house that Mr. Rcchnitz currently lives in, a floor plan of the enormous apartment he lived in on the upper west side of NY until he recently moved to California, a photograph of Rechnitz at the World Series game in Chicago, Rechnitz's bail conditions showing that he is free to travel all around New York, and credit card statements showing that Rechnitz has continued to live lavishly.

This extrinsic evidence is admissible because it contradicts Mr. Rechnitz's testimony that "he has suffered tremendously" since he began to cooperate and therefore is impeachment by contradiction, an exception to Rule 608.

Conclusion

The government in its direct examination showed that it fully understands that "a picture is worth a thousand words." In order to make sure that the jury fully understood the impact of the testimony of its witness, the government showed the jury document after document and picture after picture. Much of this concerned extrinsic topics or issues not in dispute.

Thus, for example, the government showed the jury a video of Jeremy Reichberg, Phil Banks, Mike Harrington, and another police officer smoking cigars in Banks' office. This had nothing to do with the charges in this case but instead was extrinsic evidence to prove that Reichnitz had been bribing police officers.

So too, the government introduced photographs of Rechnitz with Mayor DiBlassio and others, to show Rechnitz's close contacts with DiBlassio. Again, this was extrinsic evidence introduced to bolster Rechnitz's credibility and had nothing to do with the evidence in this case.

In addition, the government spent significant time introducing numerous photographs of things which were not in dispute, such as a pictures of the Ferragamo store, pictures of Jeremy Reichberg, and a picture of the Prime Grill. These pictures were not about anything in dispute but helped the jury visualize the issues.

On cross-examination, however, the government has prevented the defense from showing *any* of its exhibits to the jury, arguing that these are all "extrinsic evidence" of other bad acts which is barred by FRE 608(b). Indeed, the government complained today that the defense was attempting to change the rules of evidence on extrinsic evidence – a rule which the government has not followed in its own presentation of evidence.

The defense must be allowed to show evidence to the jury which establishes that this witness has perjured himself and created a false impression in his testimony. This evidence is not barred by FRE 608 and failure to allow the defense to present this evidence violates due process and basic notions of fundamental fairness.

Respectfully submitted,

/s/ Henry Mazurek
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Henry Mazurek

cc: All counsel (via ECF)