UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Joaquin Mario Valencia-Trujillo,

Petitioner,

vs. **Case No. 11-CV-00428-EAK-EAJ**

United States of America,

Respondent.
_____/

RULE 6 MOTION FOR A *SUBPOENA DUCES TECUM* TO COMPEL INTERNATIONAL SEARCH TO PRODUCE *ALL* DIPLOMATIC NOTES AND COMMUNICATIONS

Petitioner Joaquin Mario Valencia-Trujillo (hereinafter "Petitioner"), through undersigned counsel, respectfully moves for the issuance of a *subpoena duces tecum* to compel an international search for production of ***all diplomatic notes and all other documented communications*** related to his extradition from his native Colombia to the United States, which essential production was thrice promised by the case prosecution, Docs. 130, 132, and 134, before it decided to stonewall. Doc. 138 (claiming documents are "confidential" without legal support). Confronted with law, AUSA Ruddy provided incomplete discovery *off-the-record*. *See* Exhibit A (December 4, 2015 e-mail attaching one list and 17 diplomatic documents). The instant motion is based on Rule 6 of the rules governing proceedings under 28 U.S.C. § 2255 and Federal Rule of Civil Procedure 45.

THE INITIAL DISCOVERY REQUEST FOR *ALL* DOCUMENTS

On August 15, 2015, Petitioner requested the "***necessary discovery of all diplomatic notes*** sent and received by members of the governments of the United States of America and Colombia regarding this extradition case from 2003 through today, including any and all attachments or enclosures." Doc.128 ("Discovery Request Pursuant to Rule 6 of the Rules Governing Proceedings Under 28 U.S.C. §2255") at p.1 (emphasis added). Therefore, Petitioner clearly requested the necessary full disclosure of ***all documents***.

Rule 6 of the rules governing proceedings under 28 U.S.C. § 2255 provides for "discovery" in relevant part, as follows:

> (a) Leave of Court Required. ***A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of*** Criminal Procedure or ***Civil Procedure***, or in accordance with the practices and principles of law. … (b) Requesting Discovery. ***A party requesting discovery must provide reasons for the request. The request … must specify any requested documents.***

(Emphasis added).

The initial request specified that ***all documents*** were needed so that all officers of the court involved could perform their professional duties. Indeed, counsel for the Petitioner submitted that the required "good cause" to conduct discovery is "***the professional responsibility of both the court and counsel to fully analyze a legal issue that may entitle petitioner to repatriation to his native Colombia***." Doc.128 at p.2 (emphasis added).

Petitioner´s counsel explained that ***the critical threshold issue of petitioner´s standing***[1] to assert a violation of the cardinal rule of specialty governing extraditions "can only be responsibly analyzed … by reviewing ***the entire history of diplomatic notes exchanged between members of the governments of the United States and Colombia*** (***with special emphasis placed on the formally registered protest by the government of Colombia in response to allegations made in writing by the prosecution acting for the government on or about March 9, 2005***)." *Id.* (emphasis added). It is undeniable that the government of Colombia registered a formal protest during ***March 9-17, 2005***, as the protest resulted in swift corrective action. *Compare* Doc. 89 (response filed ***March 9, 2005***) *with* Docs. 96-97 (notice of withdrawal filed ***March 17, 2005*** with amended response abandoning the government contention that Article 35 of the Constitution of Colombia constituted an overt act of the charged conspiracies as the product of the successful bribery of Colombian President Ernesto Samper and other Colombian politicians).[2] The action taken by the Department of Justice within eight days did not occur "*in a vacuum*." Indeed, it was accompanied by diplomatic action taken by the Department of State, which required the personal intervention of the United States Ambassador to Colombia.

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[1] *See United States v. Valencia-Trujillo*, 573 F.3d 1171 (11th Cir. 2009) (holding that petitioner lacked standing to raise rule of specialty violations in the absence of a formal ratified extradition treaty); Harvard Law Review [Vol. 123:572-579 2009] (discussing the appellate decision in this case).

[2] The docket entries cited on this page are from the criminal case docket.

As reported by a local newspaper article mid-trial, "[i]n March 2005, [AUSA] Ruddy ***nearly caused an international incident*** when one of his court filings contained the accusation that the Colombian president was taking bribes." *See* Weimer, C. (2006, July 9) Drug Trial Could Shake Colombia, *Tampa Bay Times* (emphasis and brackets added). According to published reports, William Wood, then the U.S. Ambassador to Colombia, personally brought the ***March 17, 2005*** notice of withdrawal (and amended response) to President Álvaro Uribe (and his Minister of Foreign Affairs) and made ***a televised statement*** from the Presidential Palace promising that the government would abide by Article 35 of the Colombian Constitution. Given the flurry of activity ***between March 9, 2005 and March 17, 2005***, Colombian government officials clearly registered a formal protest during the intervening days, but the critical documents memorializing the protest are being withheld. The reported protest is crucial to the issue of standing. Evidence spoliation supports the inference that an official protest was sent. All extraditions were put in jeopardy according to Colombian officials. *See* Exhibit B (March 18, 2005 AP report *quoting* the Colombian Ambassador).

Counsel has underscored "his professional duty to review the precise legal language used in the 2005 pre-trial protest registered by the government of Colombia because testimony that petitioner contributed to a $5 million cash fund in 1994 to influence Ernesto Samper was presented during the government´s rebuttal case before the trial jury." Doc.128 at p.3

(*citing* Trial Transcript, October 16, 2006, at pp.128-137). Counsel submitted that "review of ***the entire history of diplomatic notes*** exchanged in this extradition case is ***necessary*** to intelligently brief the court on the issues of 'standing' and the violations committed, which breaches, once established, should require petitioner´s repatriation… ." Doc. 128 at p.3 (emphasis added).

This Court entered an order requiring the government to respond to the motion by September 10, 2015. Doc.129. On September 15, 2015, the government requested a 14-day extension of time "***to provide the requested materials***." Doc. 130 at p.1 (emphasis added). This Court granted the extension of time. Doc.131. On September 28, 2015, the government filed a "second motion" for another 14-day extension of time "***to provide the requested materials***." Doc. 132 at p.1 (emphasis added). This Court granted the extension of time. Doc.133. On October 13, 2015, the government filed a "final motion" for another 14-day extension of time "***to provide the requested materials***." Doc.134 at p.1 (emphasis added). Seven days later, on October 20, 2015, this Court granted the government´s "final motion" for an additional 14-day extension. Doc.135. Despite the court´s solicitude in granting three extensions, the deadline expired without the prosecution keeping its word "***to provide the requested materials***", as thrice promised. Docs.130, 132, and 134.

THE GOVERNMENT FAILED TO PROVIDE *ALL* DOCUMENTS

This Court had to issue an Order on November 10, 2015 requiring the government to respond by no later than November 13, 2015. Doc.137. On November 13, 2015, instead of keeping its thrice repeated promise "***to provide the requested materials***", the government submitted that the communications were "confidential" ***without citing any legal authority in support of its baseless position***. Doc. 138 at p.1.

> The Department of State would object to the disclosure of the actual diplomatic notes, since these communications are considered by both sovereigns to be confidential. ***The Department of Justice would propose that the Department of State be allowed to submit an affidavit regarding the contents of the diplomatic notes***, along with a protective order barring further disclosure.

Id. at p.1 (emphasis added).

On November 17, 2015, petitioner moved to compel production of ***all diplomatic notes and communications related to extradition*** submitting that the Court should decline the government´s invitation to stonewall, as it would patently violate the fundamental due process right of the petitioner to present his defense. Doc.139 at p.6 (*quoting Unites States v. Trabelsi*, 2015 WL 5175882, *3 (D.D.C. 9/3/2015) (Roberts, C.J.) ("the government cannot simply say that documents … are exempt from discovery without providing some recognized legal support for this claim. … Expectations of confidentiality, even those shared by a foreign sovereign … are not enough to establish a legally recognizable privilege.")).

Undersigned counsel noted that "the government's sudden resistance to providing the requested materials raises a reasonable inference that disclosure of the contents of the requested communications would be most favorable to the petitioner." Doc.139 at p.6. Counsel also underscored the ***indispensable necessity*** involved. *Id.* ("Without the discovery requested, counsel would be unable to perform the defense function, as review of the requested documents by counsel and an expert in extradition law is indispensable given that asserted violations of the rule of specialty governing extraditions are the central issue in this case.").

On November 19, 2015, the Court ordered the government to support its position regarding the diplomatic notes in a supplemental response to petitioner´s motion for discovery by no later than November 30, 2015. Doc.140. The government then filed its response on November 25, 2015, which contained an unsettling *non-sequitur* recklessly representing that the Department of State file could not be located, even though it had proposed to file an affidavit "regarding the contents" of the notes 12 days earlier. Doc.141 at pp.1-2 ("The United States has determined that the Department of State is unable to locate its file for the instant case. The Department of Justice has some, if not all, of the diplomatic notes in the instant matter. After consultation with the Department of State, the Department of Justice, Office of International Affairs and the Government of Colombia, the United States is prepared to provide all diplomatic notes in the possession

of the Department of Justice, Office of International Affairs, ***not previously filed in the companion criminal case***") (emphasis added). Rather than file the diplomatic notes delivered, AUSA Ruddy provided partial disclosure of the diplomatic notes through an e-mail received on December 4, 2015. *See* Exhibit A (AUSA´s e-mail attaching one list and 17 diplomatic documents) ("Counsel – attached are the Diplomatic Notes in the possession of the Office of International Affairs, United States Department of Justice. *These do not include the Extradition Documents that are part of the Court Docket and provided to trial defense counsel in Discovery*.") (emphasis added).[3]

[3] ***Undersigned counsel has a professional duty to request the intervention of the Department of Justice Office of Professional Responsibility*** with respect to this discovery request because the case record demonstrates that the same prosecutor has been engaged in a long-term pattern of incredible discovery violations noted by counsel. *See* Trial Transcript, July 12, 2006, at p.203 ("***I just find it amazing that the entire file is intact, and two documents are somehow mysteriously sucked out and disappear into the universe***"); Trial Transcript, August 11, 2006, at p.6 (counsel complaining *Brady* material was withheld) ("***we´ve heard every excuse in the book… from the World Trade Center to it got lost in the move***"); Trial Transcript, August 21, 2006, at pp.6-15 (counsel providing examples of AUSA Ruddy misinforming defense about document availability) ("***we no longer have faith in the representations being made***"); Trial Transcript, September 6, 2006, at pp.3-15 (counsel itemizing missing discovery) ("And if they don't exist, then the person who's responsible for their care and custody I would request to be brought into this courtroom, because ***the credibility of the government at this point is absolutely ridiculous***.") (emphasis added); *cf.*, Trial Transcript, July 24, 2006, at p.175 ("***Mr. Ruddy better be prepared, because we're going to show not only a manipulation, but an absolute deliberate doctoring of evidence***."). ***Now, nearly a decade later, the same government prosecutor claims that the Department of State cannot locate the critical file on this case, within days of offering an affidavit from the Department of State regarding the contents of the notes***. Doc.138 at p.1.

Undersigned counsel finally notes that it is patently unreasonable for government counsel to withhold documents and shift the burden of finding the "extradition documents that are part of the court docket and provided to trial defense counsel in discovery" a decade ago prior to the 2006 jury trial. *See* Exhibit A. AUSA Ruddy provided scattered diplomatic notes from 2003, 2004, 2008, 2011, 2012, 2014 and 2015 rather than the documents requested - ***all diplomatic notes and all documented communications exchanged between members of the governments of the United States and Colombia from 2003 to the present (with emphasis on March 9-17, 2005)***.

The Department of State has custody and control over documents maintained by all of its embassy and consulate facilities worldwide. ***The Department of Justice similarly has custody and control over documents maintained by all its subordinate agency offices worldwide***. *Please see Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 147-148 (S.D.N.Y.2011) ("If the party *subpoenaed* has the practical ability to obtain the documents, the actual physical location of the documents—even if overseas—is immaterial.") (New York branch of international bank had "custody and control" over records in its China branch for purposes of responding to *subpoena duces tecum* seeking transactions records related to defendants in trademark infringement suit, as *subpoena* had been directed to corporate entity in its entirety and all branches were part of same entity); *see also* Department of State regulations, 22 C.F.R. §§ 172.1, *et seq.*

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Honorable Court order the issuance of a *subpoena duces tecum* requiring ***both the Department of State and the Department of Justice*** to conduct an international search to produce all diplomatic notes and communications regarding this extradition case sent and received by members of the governments of the United States and Colombia from 2003 through today, including any and all attachments or enclosures. ***The comprehensive search to be conducted must include but is not limited to a search for documents maintained by the Department of State at its U.S. Embassy and Consulates in Colombia***. ***The Department of Justice must search for the documents maintained by its Office of International Affairs, the FBI, DEA, and all agencies operating under its umbrella***. *See* Rule 6, *supra*, and Federal Rule of Civil Procedure 45 (governing the issuance of a court *subpoena duces tecum* for the production of documents). The appropriate U.S. Department of State custodians of records, or the Secretary of State, John Kerry, himself should be *subpoenaed* to produce the entire extradition file that AUSA Ruddy claims cannot be located. *See* Department of State regulations, 22 C.F.R. §§ 172.1, *et seq*. Likewise, the appropriate U.S. Department of Justice custodians of records, or the Attorney General, Loretta Lynch, herself should be *subpoenaed* to produce the entire extradition file.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December, 2015, the undersigned counsel filed the above pleading with the Clerk via CM/ECF.

_____/s/_____
Stephen H. Rosen, Esq.