

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA

v.

JOHN RODGERS (2)

NO. 4:20-CR-358-ALM

**DEFENDANT RODGERS’S REPLY TO UNITED STATES RESPONSE IN
OPPOSITION TO DEFENDANT JOHN RODGERS’ MOTION TO DISMISS THE
SUPERSEDING INDICTMENT**

The government’s response to Rodgers’s motion to dismiss is a classic red herring. The government fails to even address the oral representations made to counsel that led to Rodgers’s oral non-prosecution agreement. Instead, the government chose to dissect phrases and sentences from the executed proffer agreements and completely misrepresent their meaning and applicability to the issue raised by Rodgers.

I. The government misrepresents the significance and meaning of the “no-direct-use” (i.e. proffer) agreements.

As the Court is aware, “no-direct use” or “proffer” agreements are commonly executed between the government and individuals involved in a criminal investigation. “A proffer agreement is generally understood to be an agreement between an [individual] and the government in a criminal case that sets forth the terms under which the [individual] will provide information to the government during an interview, commonly referred to as a ‘proffer session.’” *United States v. Lopez*, 219 F.3d 343 fn.1 (4th Cir. 2000). All proffer agreements drafted by a Department of Justice attorney have one central purpose, which is to entice the individual to be completely candid and truthful

during the proffer. This enticement is obtained by the government's promise to not use the statements made by the individual during the proffer against them in any subsequent proceeding as long as the person tells the truth. However, proffer agreements always have some language discussing the potential consequences for the individual should the individual not hold up their end of the agreement, such as the government's right to prosecute the individual for any false statements made during the proffer.

On December 12, 2019, the parties executed a proffer agreement that pertained to Rodgers's meeting with the government on the same day.¹ Paragraph three of this agreement contains the following language:

The United States agrees that no statement made by you during the interview will be used directly against you in any legal proceeding, except that your statements may be offered in any such proceeding to impeach your testimony or to rebut evidence offered on your behalf. In addition, the United States may use any statements made in the interview in a prosecution of you for making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), or perjury (18 U.S.C. § 1621).

Dkt. No. 48-2 at ¶ 3.

In the government's response, the government isolated the second sentence in this paragraph and argued that it stands for the proposition that a future prosecution of Rodgers was anticipated. Gov. Response at 5. However, the government is taking this

¹ The government accuses Rodgers and counsel of failing to disclose to the Court the existence of two proffer agreements. However, Rodgers and counsel repeatedly used the word "proffer" throughout their motion. Given Rodgers's and counsel's understanding and belief that a "proffer" is always accompanied by a "proffer agreement," it was assumed counsel was notifying the Court of the existence of such an agreement. As this reply states, counsel adamantly disagrees with the government's position on the importance and relevance of these proffer agreements.

sentence out of context as they completely ignore the last paragraph of the agreement which states:

It is understood that our agreement *is limited to statements made during the interview on December 12, 2019*, and does not apply to any oral, written, or recorded statements made by you at any other time. This letter constitutes the entire understanding between the United States and you. Please sign and date this letter to indicate your understanding of and *agreement with the conditions for your interview* and ask your counsel to do the same.

Id. at 3 (emphasis added).

Counsel will concede that the proffer agreement could be drafted better, but when taken as a whole, the agreement clearly indicates that the purpose of the agreement is to set out in writing the terms of the December 12, 2019, meeting only. During this meeting, Rodgers is agreeing to “be truthful, fully candid, and complete” concerning the investigation. *Id.* at ¶ 2. A future prosecution for making a false statement or declaration is only contemplated *if* Rodgers was to make a false statement *during* the December 12, 2019, proffer meeting.

In addition, the government claims that paragraph four of the proffer agreement also provides notice that Rodgers’s prosecution was anticipated when it states “[t]he United States is free to use any information directly or indirectly derived from the interview to pursue its investigation and in any subsequent prosecution of you or others.” *Id.* at ¶ 4. As with previous statements, the government uses this statement out of context. First, this statement does not specifically state that Rodgers is subject to a future prosecution, it simply says the government can use the information in *any* subsequent prosecution of Rodgers *or others*. It should be noted that at the time that this proffer

agreement was executed through March 2021, the government repeatedly stated that Rodgers was just a “subject” in their investigation. The Department of Justice defines a “subject” to be “a person whose conduct is within the scope of the grand jury’s investigation.” Department of Justice Manual Sec. 9-11.151 – Advice of “Rights” of Grand Jury Witnesses. Essentially, anyone involved in the investigation can be considered a “subject.” On the other hand, a “target” is defined as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” *Id.* It is disingenuous to now argue that the government always intended to prosecute Rodgers despite the fact they were repeatedly telling counsel that he was merely a “subject” of their investigation.

In arguing that the December 12 proffer agreement contains a “merger clause,” the government again conveniently omits the language that provides context to the statement. The sentence following the so-called “merger clause” clears up any ambiguity by confirming that the purpose of the letter is to articulate the parties “understanding of and agreement with the conditions for [Rodgers’s] interview.” *Id.* The government is simply mischaracterizing the purpose of the December 12 proffer agreement and its meaning to this case.

The government correctly states that Rodgers and the government executed a second proffer agreement for a proffer session on January 27, 2021. The executed agreement for this meeting is virtually identical to the December 12 agreement; however, there is a slight deviation in the last paragraph, as it states the following:

It is understood that is agreement is limited to statements made during the interview on January 27, 2021, and does not apply to any oral, written, or recorded statements made by you at any other time. This letter and the attached Addendum *constitute the entire understanding between the United States and you in connection with this interview*. Please sign and date this letter and the Addendum to indicate your understanding of and agreement with the conditions for your interview, and ask your counsel to do the same.

Dkt. No. 48-3 at 3 (emphasis added).

The language in the January 27 agreement unambiguously states that this agreement applies only to the proffer interview. Despite the government's best efforts to misconstrue the language of these agreements, the agreements do not "constitute the Division's entire agreement with [Rodgers]." Gov. Response at 7. The government conveniently wants to ignore the conversations with counsel that lead up to Rodgers agreeing to sit for the proffer sessions. As officers of the Court, counsel and Rodgers should be permitted to rely on the government's oral promises, representations, and/or agreements to induce Rodgers to continue to cooperate.

II. An oral non-prosecution agreement was reached between the government and Rodgers.

Notably, the government does not address the oral agreements reached with counsel by the government. While the government provides a declaration of Ryan Danks, who is the Acting Chief of the Criminal Antitrust Division at the Department of Justice, absent from the declaration is a denial that oral agreements were reached between counsel and members of the Antitrust Division. Danks or any other member of the Antitrust Division simply are unable to make such a denial because such a denial would amount to committing perjury. The Fifth Circuit has clearly held that non-prosecution

agreements can “be either express or implied.” *United States v. Jimenez*, 256 F.3d 330, 347 (5th Cir. 2001). Rodgers and counsel (an officer of the Court) have proven through counsel’s declaration that an oral non-prosecution agreement was entered, and the government’s intentional failure to deny the oral conversations occurred or that an oral agreement was reached is further proof to corroborate counsel’s declaration.

Initially, counsel was orally told that it was *anticipated* that Rodgers would remain a “subject” if he continued to cooperate with the investigation. As a result of this oral representation from the government, Rodgers sat for a proffer session on December 12, 2019. Following, this proffer session, an attorney for the government made the oral agreement with counsel that Rodgers would not be charged if Rodgers continued to cooperate, which included testifying at trial. Dkt. No. 45-8 at ¶ 9. The government does not deny this conversation occurred, nor do they deny that this agreement was made.

A second proffer session was held on January 12, 2021 “in preparation for trial,” which corroborates counsel’s assertions that an oral agreement was reached on or about December 9, 2020. As stated above, there is nothing in the January 12 proffer agreement that supersedes or negates the oral non-prosecution agreement.

III. The government has failed to produce any evidence that Rodgers breached the oral non-prosecution agreement.

While the government’s decision to unilaterally decide that Rodgers breached the oral non-prosecution agreement is troubling, the more troubling aspect of their decision is their steadfast refusal to inform counsel and Rodgers how Rodgers was untruthful. Dkt. No. 45-15. Then when given the opportunity to inform the Court, the government elected

to not address the issue in their response with any substantive evidence. Instead, the government argues that:

Counsel implicitly admits [Rodgers materially breached any non-prosecution agreement] when he declares that Rodgers told the Division and the FBI substantially the same story that he told the FTC, for the Grand Jury found probable cause to believe that much of that story was false, misleading, incomplete, and part of a conspiracy and endeavor to obstruct justice.

Gov. Response at 13.

The government's argument is absurd. Counsel does not know what the Grand Jury was told in this case and how the issues were framed, as those proceedings are secretive, and the government has yet to disclose any transcript from those proceedings. To rescind a non-prosecution agreement, the government must prove by a preponderance of the evidence that:

1. The defendant actually breached the agreement, and
2. The breach was material to warrant rescission.

United States v. Castaneda, 162 F.3d 832, 836 (5th Cir. 1998).

The government has been unwilling (or unable) to provide any evidence to show that Rodgers materially breached the terms of his non-prosecution agreement. The lack of evidence of any breach falls well short of the preponderance standard required before the government can unilaterally rescind the agreement.

Conclusion

Based on the foregoing, the defendant respectfully requests the Court to grant his motion and dismiss the superseding indictment in its entirety against Rodgers.

Respectfully submitted,

/s/ Brian D. Poe

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CERTIFICATE OF SERVICE

I certify that on July 30, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court, Eastern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a “Notice of Electronic Filing” to all attorneys who have consented in writing to accept this Notice as service of this document.

/s/ Brian D. Poe

BRIAN D. POE