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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
SERGIO SYJUCO, et. al.,
Defendants.

NO. CR 12-37-RGK
REPLY TO GOVERNMENT'S
OPPOSITION TO MOTION TO
DISMISS INDICTMENT FOR
DESTRUCTION OF EVIDENCE

Defendant Sergio Syjuco, by and through his counsel of record, Deputy Federal
Public Defender John Littrell, hereby submits his reply to the Government's
Opposition to his Motion to Dismiss Indictment for Destruction of Evidence.

Respectfully submitted,
SEAN K. KENNEDY
Federal Public Defender

DATE: November 1, 2012

By /s/ John Littrell
JOHN LITTRELL
Deputy Federal Public Defender

1 I.

2 **Reply**

3 In its opposition, the government admits that the undercover agent failed to
4 preserve any of the outgoing text messages he sent during the 18-month investigation
5 in this case. The government's excuse for the undercover agent's failure to preserve
6 his outgoing messages from September 2010 to May 2011 (the "first phone") was that
7 he lost the phone in a taxi in Manila. Gov. Opp. at 2, n.1. Its excuse for the
8 undercover agent's failure to preserve his outgoing text messages from May 2011 to
9 January 5, 2012 (the "second phone"), was that the "undercover phone did not save
10 outgoing text messages, and they are "not available on the undercover telephone."
11 Gov. Opp. at 4. The government does not explain *why* messages are unavailable on
12 the second phone, and it does not attach a declaration from the agent. It does not rule
13 out the possibility that the undercover agent deliberately lost the first phone, or
14 deleted the messages or altered the settings on the second phone to prevent it from
15 saving outgoing texts. The government says only that "there were no messages in the
16 "sent" box." This explanation is not complete, and it is not convincing.

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18 **A. The Government's Failure To Provide A Sworn Declaration From Its**
19 **Agent Is Circumstantial Evidence of The Agent's Bad Faith**

20 As the government points out in its opposition, whether or not the agent acted in
21 "bad faith" in failing to preserve the outgoing text messages is critical to the
22 Youngblood analysis. Accordingly, the undercover agent's knowledge of the
23 potential exculpatory value of the text messages in this case, and his steps to either
24 preserve them or fail to preserve them are the heart of the matter. Yet the government
25 fails to present easily available evidence of the agent's knowledge and intentions with
26 respect to those text messages -- a sworn declaration from him.

27 The government states that there is "no evidence that the government
28 intentionally deleted or destroyed outgoing messages to the defendants." Gov. Opp.

1 at 9. Similarly, the government states, without any foundation (save for an e-mail
2 sent from the undercover agent in his undercover persona) that the first phone was
3 lost in a taxi cab in Manila. If those statements are true, then the government should
4 submit a sworn declaration affirming them. The e-mails written by the undercover
5 agent throughout the course of this investigation are mostly lies built on the premise
6 the agent's name is "Richard Han." An email written by the undercover agent during
7 the investigation is not a substitute for a sworn declaration by the agent as himself.

8 Rather than focus on describing the knowledge and intention of its *agent*, the
9 government argues that *prosecutors* have been "prompt and generous" in satisfying
10 discovery obligations. Gov. Opp. at 8. The defense disagrees that the prosecution has
11 been generous with discovery. See Dkt. No. 68. But that misses the point. The fact
12 that the prosecutors may have turned over emails and text messages authored by the
13 defendants, as it is required to do under Rule 16(a)(1)(B), does not excuse the
14 undercover agent's failure to preserve and produce evidence of his own statements,
15 which are not only required by both Rule 16(a)(1)(E) because they are material to the
16 preparation of a defense, but also by Brady v. Maryland, 373 U.S. 83 (1963). It is the
17 undercover agent's bad faith that compels dismissal, not that of the prosecutors.

18 The government also points out that it sent the undercover agent's second phone
19 to a FBI laboratory for analysis, and produced the results to defense counsel. Gov.
20 Opp. at 4. But the government's forensic report includes no opinion regarding the
21 issue that this motion presents: (1) whether or not the undercover agent's phone was
22 capable of storing outgoing text messages, and (2) whether or not those outgoing text
23 messages were deleted by the undercover agent (or the settings of the phone were
24 altered such that the outgoing text messages were not preserved).

25 Finally, the government argues that its agent did not show bad faith, but only bad
26 judgment, in failing to "select a device, if available, that had more memory." Gov.
27 Opp. at 8. But the memory of the second phone is not the issue. It was, after all,
28 capable of storing hundreds of *incoming* text messages spanning a period of several

1 months, so there is no reason to believe that it was incapable of storing a similar
2 number of *outgoing* text messages. The issue is what happened to the outgoing text
3 messages. If the agent deleted the messages, or altered a setting on the phone so that
4 they would not be saved in the phone's "out box," then the agent is to blame, not his
5 phone. The government's forensic analysis fails to answer these questions.

7 **B. The Exculpatory Value of the Outgoing Texts**

8 The government contends that there is "no hint of exculpatory evidence" in the
9 emails that it has already produced to the defense, and therefore, there must be no
10 exculpatory value to lost or destroyed text messages. Gov. Opp. at 9. But even if it
11 were true that the emails authored by the agent did not contain exculpatory evidence,
12 that does not prove that text messages would not prove to be exculpatory. Because
13 text messages can be sent instantly, from anywhere, they are more akin to an informal
14 conversation than an email. And the statements the undercover agent made in his
15 informal conversations with the defendants are clearly exculpatory.

16 For example, on January 4, 2012, when he picked up the defendants from the
17 airport in Los Angeles, the undercover agent mocked Syjuco, who he calls "Yogi,"
18 saying that he is going to take Syjuco to Hollywood, because "there's a lot of gays out
19 there." Exhibit C (audio-enhanced excerpts from 1/4/2012 audio recording) at Track
20 4. When Syjuco protested that he liked girls, and in particular, "Russian" girls, the
21 agent responded by saying "Russian girls or Russian boys!" *Id.*

22 In the same recording, the undercover agent is heard discussing a prostitute
23 named "Sofia" from "Classmates." *Id.* "Classmates" is a brothel in Manila, like Air
24 Force One. See <http://classmatektv.thegentlemansclub.com.ph/main> (visited on line
25 on October 30, 2012). The agent asks Syjuco if he "tried" Sofia from Classmates.
26 (Syjuco says that he did not). *Id.* In context, the agent's comment can only be
27 understood as an inquiry as to whether Syjuco paid Sofia to have sex with him.

28 Later that night, as the undercover agent was driving the defendants to two strip

1 clubs in the United States that he had chosen: Spearmint Rhino and Deja-Vu, he again
2 singles out Syjuco and implies that he is gay. The agent says:

3 “We’re going to drink a little bit. We’re going to go to places. I know Arjyl
4 is excited. I know he likes girls. I know Arvi likes girls too. Yogi?
5 [laughter]. While we’re having a good time, Yogi’s going to be waiting in
6 the car.”

7 Id. at Track 5. There is no reason to suspect that the agent would be less candid in his
8 text messages than he was in his informal conversations with the defendants.

9 The government points out that there are also text messages from the defendants
10 which, read in isolation, weaken the defense case. See Gov. Opp. at 11. But this
11 makes the lost or destroyed text messages authored by the undercover agent even
12 more important. If the government is permitted to present to the jury only the
13 incoming text messages, which are harmful to the defense, but none of the outgoing
14 text messages, which are potentially very helpful to the defense, the jury will hear
15 only half of the story -- the half that favors the government’s case.

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17 **C. There Is No Substitute For the Actual Text Messages Lost By the Agent**

18 The government argues that because “the defendants themselves” were the
19 recipients of those texts, they “have information about what those messages
20 contained.” Gov. Opp. at 11. But this argument presupposes (1) that the defendants
21 remember exactly what the government’s text messages contained, (2) that they wish
22 to testify, and (3) that a jury would believe their characterization of what the text
23 messages said. Even assuming that the defendants could recall the precise statements
24 of the agent in his text messages, the defendants should not be forced to waive their
25 constitutional right to remain silent as a result of the government’s bad faith
26 destruction of evidence. See Griffin v. California, 380 U.S. (1965). And even
27 assuming that the defendants wished to testify in their own defense, a jury may doubt
28 their characterization of the undercover agent’s text messages. Many jurors would

1 not want to believe that an agent of the United States government would taunt,
2 humiliate, and mock the defendants as he did. Jurors may not want to believe that the
3 undercover agent solicited prostitution of minor girls. No doubt the government
4 would wish to cross-examine the defendants to undermine their testimony.

5 The government has also suggested that it does not believe that it seized the
6 cellular phones that the defendants used to communicate with the undercover agent,
7 and thus “the messages sent by the undercover agent should be available on the
8 defendants’ own cellular phones.” The government has made the phones it seized
9 from the defendants available, and a defense expert has searched them. The defense
10 has been able to recover no text messages from the undercover agent on any the
11 phones provided. The defense is investigating the possibility that other phones in the
12 Philippines may have been used to communicate with the undercover agent, but it has,
13 to date, been unable to obtain those phones in order to have them searched. If the
14 defense is able to recover text messages sent by the undercover agent by other means,
15 it will certainly do so. If not, then that should not be held against them. The
16 defendants, who did not know that they were the target of a criminal investigation,
17 had no obligation to preserve text messages sent to them. The undercover agent, on
18 the other hand, clearly did have an obligation to preserve those messages.

19 20 **D. Evidentiary Sanctions**

21 In the event that the Court does not dismiss the indictment, it should, at
22 minimum, impose severe evidentiary sanctions against the government. District
23 courts have substantial discretion to impose evidentiary sanctions where the
24 government destroys, or allows to spoil, potentially exculpatory evidence and where
25 the government's conduct prejudices a criminal defendant. See United States v.
26 Belden, 957 F.2d 671 (9th Cir. 1992); see also United States v. Cooper, 983 F.2d 928,
27 931 (9th Cir. 1993). Courts are given such discretion “to avoid the impairment of
28 judicial integrity that would occur if the prosecution were allowed to manipulate court

1 processes, and protective ruling or sanctions may be required both to insure a fair trial
2 in a specific case and to deter future violations.” United States v. Loud Hawk, 628
3 F.2d 1139, 1151 (9th Cir. 1979) (*en banc*), overruled on other grounds by United
4 States v. Grace, 526 F.3d 499 (9th Cir. 2008). “The usual sanction when the
5 government has lost or destroyed evidence is suppression of secondary evidence.”
6 United States v. Jennell, 749 F.2d 1302, 1308 (9th Cir. 1985) (citations omitted).
7 Whether a court should impose sanctions for destruction of evidence depends on a
8 balancing of “the quality of the Government's conduct and the degree of prejudice to
9 the accused.” Loud Hawk, 628 F.2d at 1152. When the prejudice of the destruction
10 of evidence to the defendant is severe, “suppression or other sanctions would be
11 appropriate without regard to the good faith or culpability of the Government.” Id.

12 If the Court does not dismiss this indictment for the reasons set forth above, then
13 at minimum, the Court should impose the following evidentiary sanctions:

14 First, the government should not be permitted to introduce into evidence any of
15 the text messages its undercover agent received from the defendants.

16 Second, the jury should be instructed that the undercover agent had the duty to
17 preserve his outgoing text messages, and that it may infer from his failure to do so
18 that the contents of those text messages would not have been favorable to the
19 government. The defense will submit a proposed instruction prior to trial.

20 Third, if the defendants elect to testify about the contents of the undercover
21 agent’s text messages, the Court should strictly limit the government’s cross-
22 examination of the defendants regarding their characterization of those text messages.

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II.
CONCLUSION

For the foregoing reasons, the Court should dismiss the indictment. In the alternative, the Court should impose evidentiary sanctions as set forth above.

Respectfully submitted,
SEAN K. KENNEDY
Federal Public Defender

DATE: November 1, 2012

By /s/ John Littrell
JOHN LITTRELL
Deputy Federal Public Defender