UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 08 CR 888
	)	Hon. James B. Zagel
ROD BLAGOJEVICH, et al.	)	

GOVERNMENT'S MOTION TO BAR ARGUMENTS OR EVIDENCE DESIGNED TO ELICIT JURY NULLIFICATION

The United States of America, by its attorney, Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, respectfully moves the Court, *in limine*, as follows:

I. Forms of Argument or Evidence Designed to Elicit Jury Nullification

The government respectfully moves this Court to preclude the defendants from arguing, or otherwise presenting evidence or pursuing lines of inquiry designed to elicit, jury nullification.

The law is plain that it is improper for the defendant to suggest in any way that the jury should acquit the defendant even if it finds that the government has met its burden of proof. *See, e.g., United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996) ("An unreasonable jury verdict, although unreviewable if it is an acquittal, is lawless, and the defendant has no right to invite the jury to act lawlessly. Jury nullification is a fact, because the government cannot appeal an

acquittal; it is not a right, either of the jury or of the defendant.") (citing *United States v. Kerley*, 838 F.2d 932, 938 (7th Cir. 1988) and *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993)); *see also United States v. Bruce*, 109 F.3d 323, 327 (7th Cir. 1997) ("Jury nullification 'is not to be positively sanctioned by instructions,' but is to be viewed as an 'aberration under our system.'") (quoting *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)); *see generally Scarpa v. Dubois*, 38 F.3d 1, 11 (1st Cir. 1994) (noting that "defense counsel may not press arguments for jury nullification in criminal cases"); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993) ("[N]either the court nor counsel should encourage jurors to exercise [nullification] power. . . . A trial judge, therefore, may block defense attorneys' attempts to serenade a jury with the siren song of nullification."); *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983) ("Appellant's nullification argument would have encouraged the jurors to ignore the court's instruction and apply the law at their caprice. While we recognize that a jury may render a verdict at odds with the evidence or the law, neither the court nor counsel should encourage jurors to violate their oath."); *see also* Seventh Circuit Committee Federal Criminal Jury Instructions (1999) 1.01.

Although the government is unable to anticipate each form of "jury nullification" argument or evidence that defendants may seek to interject into

this trial, the government does note the following examples:

A. Politics as Usual

The defendants may well suggest that the law is unfair or burdensome because their conduct is simply consistent with the way the political system is set up. Likewise, the defendants may argue that their conduct is simply what all politicians do and, to the extent their conduct violates the law, then the law is unrealistic or unfair. Such argument, which concedes the conduct but simply suggests to the jury that even if such conduct is technically illegal it is proper, necessary, or simply the way of life in politics, seeks jury nullification and should be barred. *See, e.g., United States v. Warledo*, 557 F.2d 721, 730 (10th Cir. 1977) (affirming exclusion of evidence offered to explain the defendants' motives as irrelevant to whether their activity was "wrongful" under the Hobbs Act); *United States v. Boardman*, 419 F.2d 110, 114 (1st Cir. 1969) (affirming exclusion of evidence regarding the defendant's political beliefs because it was irrelevant to whether he acted knowingly and deliberately).

In addition, any defense premised on a theory that defendant's actions were "politics as usual" would necessarily implicate evidence or argument (or both) related to politics, politicians, or activities not relevant to the instant charges. In an analogous situation, the Second Circuit in *United States v. Stirling,* 571 F.2d 708, 735 (2d Cir. 1978) strongly denounced efforts to defend

a securities fraud case on the basis of defense questioning which implied that the charged criminal activities amounted to proper and routine business practice:

> [The defendants] argue that they were prejudiced by the district court's decision to bar questions put by them to their witnesses regarding the "normalcy" or "usualness" of certain Greater Gulf practices. The district court instructed counsel not to ask witnesses about "the legal consequences of things," such as whether activities were "wrong," "misleading," "proper," or "ethical." For example, in response to a question from counsel for the appellants, a state court judge from Mississippi testified that because prominent people with good reputations were involved in Greater Gulf, he assumed that it was "normal" for a non-profit corporation to be used to implement the project. Such testimony is not even arguably admissible. It would have been an abdication of responsibility if the trial judge had not interrupted, as he did, to instruct counsel not to ask such questions.
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> 571 F. 2d at 735-36.

Evidence regarding the acts or conduct of other politicians or individuals is irrelevant to the issues in this case and, if allowed, would distract and confuse the jury. No one is on trial in this case other than the defendants, and the jury should not be presented with evidence and counter-evidence as to whether other individuals committed similar acts.

Accordingly, defendant should be precluded from making argument or presenting evidence regarding similar "political" acts engaged in by others or suggesting that defendant's conduct was simply part of politics or "politics as usual."

B. Selective Prosecution

The defendants should also be barred from arguing that the government has selectively chosen to prosecute them and, therefore, the jury should acquit them. In particular, defendant Rod Blagojevich has repeatedly suggested that he is being unfairly singled out while other individuals participate in misconduct and are not prosecuted. Alternatively, the defendants may generally suggest they are being singled out despite the fact that their conduct is simply the way "politics works."

As the Supreme Court has plainly stated, "[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). "In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" *Id.* at 464 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

Claims of selective prosecution must be raised before trial and resolved outside the presence of the jury. *See United States v. Washington*, 705 F.2d 489, 495 (D.C. Cir. 1983) (finding that "the issue of selective prosecution is one to be

determined by the court"); *United States v. Jarrett*, 705 F.2d 198, 204-05 (7th Cir. 1983) (finding claims of selective prosecution must be raised before trial).

Further, evidence bearing on the government's decision to prosecute is "extraneous and collateral" and thus excluded from trial. *United States v. Johnson*, 605 F.2d 1025, 1030 (7th Cir. 1979) (affirming the exclusion of evidence offered to show that the "indictment was a political instrument"); *United States v. Berrigan*, 482 F.2d 171, 174-76 (3rd Cir. 1973) (affirming exclusion of evidence relating to "discriminatory prosecution").

The defendants should also be precluded from arguing issues related to other individuals who have not been charged with crimes arising from the criminal activity at issue in the instant case, excepting of course those government witnesses who have been immunized. This is sometimes referred to as the "empty-chair defense" and is attempt by the defense to have the jury focus on individuals potentially involved with criminal conduct with the defendants who are not on trial. *See United States v. Young*, 20 F.3d 758, 765 (7th Cir. 1994) (upholding the exclusion of evidence that another person was arrested with the defendant but not charged with a crime). Again, these arguments related to prosecutorial decisions and motives are simply jury nullification.

To date, the defendants have not filed a selective prosecution claim. Such

a motion, however, is the only proper way to resolve allegations of selective prosecution. Attempting to argue selective prosecution to the jury, in any form, should be barred by the Court as an attempt at jury nullification.

C. Argument or Evidence of "Outrageous Government Conduct"

There is an "increasing tendency in criminal cases to try some person other than the defendant and some issues other than his guilt." *United States v. Griffin*, 867 F. Supp. 1347, 1347 (N.D. Ill. 1994) (citation omitted) (Zagel, J.). The "thrust of the defense" in these types of cases "is this: the prosecution was not nice or could have done it better and so the jury ought to acquit, whether or not guilt has been proved beyond reasonable doubt." *Griffin*, 867 F. Supp. at 1347. In the face of this increasing tendency to interject themes of "government misconduct" into a defense strategy, courts routinely have granted motions *in limine* "to bar defendants from presenting evidence or making arguments to the jury suggesting that they should be acquitted because the government engaged in misconduct in the course of its investigation." *United States v. Shields*, 1991 WL 236492, at *3 (N.D. Ill. 1991); *United States v. Finley*, 708 F. Supp. 906, 913-914 (N.D. Ill. 1989) (granting motion *in limine* to preclude evidence "which is not relevant to defendants' guilt but is designed only to persuade the jury that defendants should be acquitted because the government engaged in misconduct

during its investigation."); *United States v. Katz*, 1992 WL 137174, at *5 (N.D. Ill. 1992).

The impropriety of arguing allegations of governmental misconduct to the jury is twofold. First, and most fundamentally, the Seventh Circuit has rejected the outrageous government conduct defense and has held that such claims afford no defense to a criminal prosecution as a matter of law. *United States v. Boyd*, 55 F.3d 239, 241-42 (7th Cir. 1995). *Boyd* is unequivocal in its holding that "outrageous government conduct" is no defense to a criminal charge, and the jury thus should not be exposed to irrelevant allegations of this sort. Second, even before the *Boyd* decision, the Seventh Circuit held that the issue of government misconduct was a matter of law for determination by the court: "the issue of outrageous government conduct is not an issue for the jury." *United States v. Swiatek*, 819 F.2d 721, 726 (7th Cir. 1987) (noting that every circuit which has considered the issue has held that the issue is not a jury question) (citations omitted); *see also Katz*, 1992 WL 137174, at *5 ("[T]he government is right in attempting to preclude any argument by [defendant] before the jury that the government's conduct in investigating and prosecuting this case is outrageous."); *United States v. D'Arco*, 1991 WL 264504 (N.D. Ill. 1991); *Shields*, 1991 WL 236492, at *3; *Finley*, 708 F. Supp. at 913-914.

There are numerous ways in which the defendants may attempt, either

directly or subtly, to improperly argue alleged government misconduct as a defense. Certain of these arguments may occur in statements to the jury, while others may occur through improper cross-examination of either government or defense witnesses. By way of illustration, the defendants could attempt to improperly argue alleged government misconduct as a defense by suggesting the government's investigation was abusive and, itself, violated the law or ethical requirements. None of these allegations are appropriate for consideration by the jury and merely attempt to shift the focus from the defendants' criminal conduct to the government's conduct, which is not an issue for the jury. Indeed, none of the arguments are legally relevant and simply invite the jury to acquit the defendant without regard to admissible evidence. To the extent the defendants wish to raise these issues, they are only appropriate for consideration by the Court, not the jury.

In addition to the potential improper arguments of "outrageous government conduct" noted above, the following are also potential government conduct arguments that should be barred.

1. Government Conspiracy

Defendant Rod Blagojevich has repeatedly suggested that somehow this prosecution is motivated by the ill will of the government, or the government working as part of a conspiracy with other individuals to bring about his

downfall. Such arguments are wholly improper before the jury. To the extent that either defendant believes their due process rights have been violated based on improper government conduct, those issues should be raised with the Court and decided by the Court. Although the government cannot anticipate each and every theory by which the defendants may attempt to suggest that their predicament was somehow brought about by the improper conduct of the government, perhaps working in conjunction with some unknown "others," any such arguments should be barred. *See Johnson*, 605 F.2d at 1030 (affirming the exclusion of evidence offered to show that the "indictment was a political instrument").

2. Propriety of Defendant Rod Blagojevich's Arrest

Defendant Rod Blagojevich has repeatedly suggested that the government acted improperly in arresting him. To the extent the defense seeks to question government agents or other witnesses about why the government arrested defendant Rod Blagojevich or John Harris, or suggest that such arrests were improper, it should be barred from doing so. The government's subjective reasons for arresting defendant Rod Blagojevich have nothing to do with his factual guilt or innocence.

Indeed, as a general matter, it is well settled that the *subjective motivations* of government prosecutors or agents are wholly immaterial to the

issues before the jury, and inappropriate issues for defense questions or arguments at trial. *See, e.g.*, *United States v. Goulding*, 26 F.3d 656, 667 (7th Cir. 1994) (noting that, even in the context of an entrapment defense, it was proper for the trial court not to "allow the defense to mount an inquiry into the mental states of the investigating officers since such an inquiry was irrelevant"); *United States v. Katz*, 1992 WL 137174, at *7 (N.D. Ill. 1992) (granting government's motion in limine to preclude inquiry regarding "[t]he subjective intentions or motivations of the agents involved in this case."); *United States v. Shields*, 1991 WL 236492, at *3 (N.D. Ill. 1991) (precluding evidence concerning discussions between supervising agent and cooperating witness and noting, "evidence of conversations between the government and its cooperating witness are immaterial; rather what matters is what the witness said to the defendants").

If defendant Rod Blagojevich seeks to challenge the legality of his arrest, he must do so before the Court, not the jury. And even if defendant Rod Blagojevich opts to challenge his arrest, the subjective motivations of the government agents would remain irrelevant. *Ochana v. Flores*, 347 F.3d 266 (7th Cir. 2003) ("[A]n arresting officer's subjective beliefs are not relevant."), (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

The presentation of allegations and testimony about defendant Rod

Blagojevich's arrest to the jury, as opposed to the Court, would amount to a sideshow of irrelevant evidence, as the government presumably would have to outline, for the jury, the government's reasons for arresting Rod Blagojevich (and John Harris) to rebut the defendant Rod Blagojevich's false allegations regarding his arrest. Avoiding such a sideshow is but one reason why the law is settled that jury nullification arguments related to subjective government motives are issues that should and must be raised before the Court, not the jury.

Accordingly, the Court should bar as an attempt at jury nullification any defense questions to government agents or other witnesses about why the government arrested defendant Rod Blagojevich and John Harris, or any suggestions that such arrest was improper.

3. The Use of Cooperating or Immunized Witnesses

It is improper to argue the jury should acquit the defendants because jurors should not condone the government's use of cooperating individuals, the decision to enter into plea agreements with certain individuals, or the decision to immunize individuals in order to obtain testimony. Of course, the defendants may properly cross-examine any witness as to the benefits they received as a cooperating individual, the nature of their plea agreement with the government, or any grant of immunity, so as to raise issues regarding the credibility of the particular witness as a consequence thereof. However, while the defendants

may permissibly argue that none of the cooperating witnesses testifying in the case should be believed because of benefits they have received, the defendants should not be permitted to argue that the jury should acquit them because it is, or should be, improper for the government to engage in the practice of using cooperating individuals, or offering plea agreements or immunity to witnesses in exchange for testimony. Such an attack upon the prosecutorial decisions in this case constitutes a "government misconduct" argument, as discussed above, and seeks only to incite jury nullification.

4. The Use of Wiretaps to Obtain Evidence

In the instant case, the government obtained evidence through a variety of methods including through legal, court-authorized wiretaps. Defendant Rod Blagojevich has repeatedly suggested that the government's use of wiretaps in this case was abusive. The methods used to gather evidence in this case are supported by law and, to the extent they have been challenged, have been determined to be legal and appropriate. Accordingly, the defense should not be permitted to call into question the legality of the methods and should be barred from arguing or implying that the tactics used by the government were improper.

In addition, the defendants have raised with the government questions about how certain conversations or call sessions were recorded on government

equipment and how certain information related to the wiretaps was memorialized on internal government documents. To the extent the defendants have any issues with the technology used to monitor the wiretaps, the various "sessions" the government computer equipment recorded (including "sessions" that had no audio because, for instance, they were text messages or related to cell phone towers communicating with cell phones), or the methods used by the agents in monitoring the wiretaps, those issues should be raised before the Court, not the jury, as they are only relevant to the admission of the recordings. Once the Court determines the recordings are admissible, the defendants should not be permitted to suggest, either through argument or cross-examination, that the wiretaps were improperly managed.

Accordingly, any objections to the investigative methods utilized in the instant case are properly raised only before the Court, not before the jury.

D. Family Needs

While the government acknowledges that a defendant is permitted to introduce limited testimony concerning his background, the government respectfully moves this Court to preclude evidence and argument regarding the defendant's family needs, including any arguments or evidence designed either to imply a motive or excuse for defendant's criminal conduct or to invoke sympathies regarding the impact of a conviction upon the defendant's family.

Such evidence is irrelevant to the defendant's factual guilt and is designed for no other purpose than to invoke improper appeals for jury nullification. Accordingly, such evidence or argument is properly excluded. *See, e.g., D'Arco*, 1991 WL 26504, at *4 (holding that "no testimony or argument will be allowed regarding the impact of the trial or possible conviction upon a family member"); *Shields*, 1991 WL 236492, at *4 (granting motion *in limine* precluding "any testimony regarding the possible impact which a conviction might have upon any family member"). Indeed, the law is clear that the jury may not consider punishment in any way in reaching its verdict. *See Shannon v. United States*, 512 U.S. 573, 579 (1994) ("It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" (quoting *United States v. Rogers*, 422 U.S. 35, 70 (1970)). Accordingly, defendant should be barred from discussing family needs.

II. Conclusion

For the aforementioned reasons, the government respectfully requests that its motions *in limine* be granted.

Respectfully submitted,
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BY: /s/ Reid Schar

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following documents:

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were served on April 19, 2010, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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