STATE OF MICHIGAN
IN CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT
JACKSON COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

Nos. 20003171 FH, 20003172 FH, 20003173 FH

PAUL EDWARD BELLAR,
JOSEPH MATTHEW MORRISON,
PETE MUSICO

HON. THOMAS WILSON

Defendants.

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THE PEOPLE'S MEMORANDUM OF LAW AS TO THE INADMISSIBILITY OF QUESTIONING OF SPECIAL AGENT IMPOLA AT TRIAL AS TO UNADJUDICATED ALLEGATIONS OF PERJURY IN AN UNRELATED CASE

Introduction

This Court should enter an order prohibiting defendants from raising at trial (as impeachment or otherwise) meritless perjury allegations in an unrelated matter against FBI Special Agent Henrik Impola.

Statement of Facts

In early 2017, the United States, through the US Attorney for the Western District of Michigan, charged defendant Sameer Gadola with various federal offenses relating to Gadola's sexual misconduct involving the sexual exploitation of children and the manufacturing of child pornography. The case ultimately ended with Gadola pleading guilty to three counts of possession of child pornography on March 30, 2018, and being sentenced in September of 2018 to 10 years imprisonment, over $15,000.00 in criminal penalties, followed by five years of supervised release. One of the FBI Special Agents involved in that case was Henrik Impola, an agent who is also involved in the present matter.

Not long after sentencing, one of Gadola's attorneys – Brian P. Lennon – began accusing Special Agent Impola of misconduct and—in particular—perjury, raising his concerns with Special Agent Impola's supervisors and others in the FBI. These allegations led to Gadola filing a pro se motion in September 2019, seeking to vacate his conviction and sentence claiming in part that Special Agent Impola "committed clear perjury" during the federal proceedings. In response to this motion, the United States Attorney pointed out that Gadola's unconditional plea

barred him from collaterally attacking his conviction and sentence in this manner. Gadola then withdrew his motion by stipulation in May of 2020. Gadola has not pursued any further relief from the federal courts based on these allegations of perjury.

Instead, attorney Lennon has continued his attacks on Special Agent Impola. Even before Gadola withdrew his motion, Lennon sent a 10-page letter to the FBI dated February 11, 2020, claiming that Special Agent Impola had committed perjury during the federal criminal proceedings against Gadola and that he solicited the assistance of the Customs and Border Patrol (CBP) to violate Gadola's constitutional rights. Lennon asked the FBI to investigate Special Agent Impola's "serious misconduct" and to refer him to the United States Attorney for the Western District of Michigan to be prosecuted federally for perjury.

Defendants will likely seek to impeach Special Agent Impola with these allegations during trial in this case. This Court should issue an order in limine preventing defendants from doing so.

Argument

Any discussion of the inadmissibility of the allegations of perjury by Special Agent Impola should begin with an examination of the underlying "allegations" themselves.

Lennon claims that, during the federal criminal proceedings against Gadola, Special Agent Impola swore to search warrant affidavits indicating that there was probable cause that *evidence* of a federal crime would be located at Gadola's home and in his electronic devices. Before these search warrants were executed, however, Special Agent Impola—with the aid of CBP officers—intercepted Gadola upon his return to the United States from India—and proceeded to obtain oral and written statements from Gadola. When Gadola challenged the admissibility of these statements, a hearing was held in the federal court. At that hearing, Special Agent Impola testified under oath Gadola was not under arrest at that time and that he would not have had probable cause to arrest him then in any event. When Gadola's attorneys confronted Special Agent Impola with the previously sworn-to search warrant affidavits, Special Agent Impola asserted that those affidavits established probable cause that evidence of a crime would be found in particular locations, but that they did not necessarily establish probable cause to arrest Gadola upon his return to the United States. Equating probable cause to search for evidence of crime with probable cause to arrest an individual for a crime, Lennon says that Special Agent Impola therefore must have committed perjury in either the search

warrant affidavits or during the hearing because, in his opinion, "probable cause" is "probable cause."

But the fatal flaw in Lennon's logic is that while probable cause to search for evidence of crime and probable cause to arrest a person for a crime are often identical, they are not *necessarily* identical. As the Sixth Circuit recently stated, "the arrest and search inquiries ask different questions: Whether there is a fair probability that a person has committed a crime versus whether there is a fair probability that the person's home will contain evidence of one." *See United States v Reed*, 933 F 3d 441, 447 (CA 6, 2021), citing *United States v Savoca*, 761 F 2d 292, 297 (CA 6, 1985). Of course, the standards are very similar, and each utilize the "prudent person" benchmark, but the focus of the arrest inquiry is different from that of the search inquiry and it is entirely possible that "there may be probable cause to search without probable cause to arrest and vice-versa." *Greene v Reeves*, 80 F 3d 1101, 1106 (CA 6, 1996), (quoting 1 LAFAVE § 3.1(b) at 544).

In short, despite Lennon's allegations, Special Agent Impola did not commit perjury or otherwise misrepresent the law in the prosecution against Gadola. In other words, *there is nothing with which to impeach Special Agent Impola.*

Perhaps for this reason, no tribunal or court has made any findings that Special Agent Impola committed perjury or misconduct of any kind in the Gadola matter. These allegations of perjury are merely the product of the baseless opinion of one defense attorney that Special Agent Impola perjured himself and an incorrect one at that.

However, this Court need not necessarily resolve whether the allegations against Special Agent Impola have any merit. It can simply find that the allegations are inadmissible at trial in this case.

The Michigan Rules of Evidence govern the admissibility of impeachment evidence. To start, MRE 609 is inapplicable to support the admission of such impeachment as Special Agent Impola has not been convicted of any crime, much less perjury. So, if this impeachment is to be allowed, it must be under MRE 608(b). MRE 608 states:

> **(a) Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness has been attacked by opinion or reputation evidence or otherwise.
>
> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purposes of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness or another witness as to which character the witness being cross-examined has testified.

But though MRE 608(b) may—on its face—appear applicable, it must be considered in conjunction with other Michigan evidentiary rules. First, MRE 401 states that "relevant evidence" means "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence. Next, MRE 402 states that "[e]vidence that is not relevant *is not admissible*." (Emphasis added). Special Agent Impola's factually and legally correct testimony in the Gadola matter is simply not relevant to this case and therefore inadmissible as impeachment evidence or otherwise. But even if it were relevant under MRE 401, there is still MRE 403. MRE 403 states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." So not only is Special Agent Impola's testimony in the Gadola matter utterly irrelevant, but it would also create a completely unnecessary and distracting side-show, which perhaps explains defendants' apparent intention to so impeach Special Agent Impola.

This is exactly the finding of the federal court in the prosecution of *United States of America v Adam Dean Fox, et al*, No. 20-183, which is being heard in the Western District of Michigan and where the defendants in that case were likewise seeking to impeach Special Agent Impola with his purported perjury in the Gadola matter. In that case, the court unequivocally rejected the defendants' attempt:

> The defense seeks to ask Special Agent Impola under Rule 608(b) about previous testimony in an unrelated case that led to a defense attorney to make a complaint about perjury. Rule 608(b) permits a court to allow to question a witness on cross-examination about specific instances of conduct that are probative of the witness's character for truthfulness. On this basis, the defense argues that it should be permitted to ask Special Agent Impola about perjury allegations that had been lodged against him. (ECF No. 264-6). The government says this evidence is inadmissible under Rule 403 because it will needlessly lengthen trial, confuse the jury, and misdirect from

> the issues of this case to unrelated policy and political questions regarding the FBI.
>
> The Court finds that the evidence regarding Special Agent Impola's prior testimony is inadmissible under Rule 403. The issues referenced in the complaint against the agent inherently involve mixed questions or fact and law, and the Court sees little that is probative of a character for truthfulness. What little value there is in the evidence is substantially outweighed by the chance of confusing the jury and needlessly lengthening trial into a minitrial on public perceptions of the FBI.

Order on Motions in Limine*, United States of America v Adam Dean Fox, et al,* No. 20-183, ECF No. 439, Pages 25–26, PageID 3020–3021 (WD Mich, February 2, 2022) (Jonker, J.)(unpublished).

Although federal district court opinions and orders are not binding on this Court, they can be considered for their persuasive value. See *Abela v Gen Motors Corp*, 469 Mich. 603, 607 (2004). And here, where the defendants in this case are apparently seeking to do exactly what the federal defendants in this plot to kidnap Michigan Governor Gretchen Whitmer tried to do with respect to Special Agent Impola, Judge Jonker's well-reasoned order is particularly persuasive.

But this Court need not rely on federal decisions or orders, even one that is on all fours with this case, to rule this attempt at impeaching Special Agent Impola improper. It can instead turn to binding Michigan law. Michigan Courts have ruled that a similar attempt at cross-examining a law enforcement officer on a collateral matter is improper. In *People v Brownridge,* 459 Mich 456 (1999), the defense attempted to cross-examine the lead investigator as to an alleged false affidavit he signed in an unrelated case. The trial court stopped the defense in its

tracks and disallowed this subject on cross-examination. The Michigan Supreme Court held that the trial court did not abuse its discretion in denying the defense the opportunity to cross-examine the lead investigator as to this collateral matter. *Id.* at 465. The Supreme Court agreed with the trial court that such an inquiry would have caused a "protracted excursion" into an unrelated case and that the inquiry was of little value as to the issue of the witness's credibility. *Id.* at 464.

As in *Brownridge,* an inquiry into Special Agent Impola's testimony in the completely unrelated Gadola matter would ultimately confuse or distract a jury at trial. Instead of focusing on the credibility of the witness, the inquiry invites consideration of irrelevant collateral issues in an entirely unrelated case. Such an inquiry is likely to lead to confusion of the issues and will result in a "trial within a trial."

For all these reasons, this Court should enter an order prohibiting defendants in this case from questioning Special Agent Impola as to the baseless allegation of perjury during the Gadola matter. Such an inquiry would be of very limited relevance (if any), would tend to confuse the issues before the Court, and would needlessly extend the duration of the upcoming trial in this matter.

CONCLUSION AND RELIEF REQUESTED

This Court should enter an order prohibiting defendants at from questioning FBI Special Agent Henrik Impola at trial about his truthful testimony during the unrelated Gadola prosecution.

Respectfully submitted,

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