

[REDACTED VERSION]

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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United States of America

CR-92-0351 (CPS)

- against -

MEMORANDUM  
AND ORDER

Theodore Persico, Jr., et alia,

Defendants.

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SIFTON, Chief Judge

On April 20, 1994, defendants Joseph and Anthony Russo, Theodore Persico Sr., Joseph Monteleone, Sr., and Lawrence Fiorenza were convicted on violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(c) and (d), and other charges. The indictment in this case arose primarily out of an internal war within the Colombo organized crime family.<sup>1</sup>

Several post-trial motions have been filed by the defendants jointly and individually pursuant to Fed. R. Crim. P. 29 and 33. The bulk of the motions center on the role of Gregory Scarpa, Sr., who at the trial of this matter was alleged by the government to be a co-conspirator and participant in many of the crimes alleged. However, as discussed below, it subsequently came to light over the course of subsequent trials involving other members of the Colombo family that Scarpa was also a long-

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<sup>1</sup> For other aspects of the war, see *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994).

- 46 -

Defendants were not the victims of De Vecchio's horrendous errors of judgment; the families of those shot in the war were. No concept of due process, decency or civilized behavior requires that those convicted of being Scarpa's cohorts in the war should be immunized from prosecution because of the dire consequences of the Scarpa/De Vecchio connection for others.

The defendants argue that the FBI's misconduct is magnified by the failure of the United States Attorney's office to disclose the information in its possession relating to Scarpa and his relationship with the FBI in a timely fashion. Defendants refer not only to the absence of any pretrial disclosure of these matters but also to the piecemeal post-trial disclosure.

The balance recognized by Judge Friendly in *DeSapio* is even more easily struck in favor of law enforcement in connection with the disclosure issues. Agent Favo's erroneous decision to withhold the "Girlfriend 302" in the face of the Court's direction that Mazza's 302s be produced is not to be excused but also not appropriately characterized as "outrageous" given the pending OPR investigation of De Vecchio and the intra-agency tensions surrounding it, particularly given the slight bearing of the 302 on Mazza's credibility. AUSA Weissmann's myopic withholding of information must also be viewed in the same context: while reprehensible and subject, perhaps, to appropriate disciplinary measures, it does not begin to approach

- 47 -

the level of uncivilized and indecent behavior that would necessitate the extraordinary relief which defendants seek.

As discussed below, *Brady* and its progeny provide the proper framework for redress of the prosecutor's failure to disclose. It is well established that the good or bad faith of the prosecutors is not a factor to consider in the *Brady* inquiry. The Supreme Court has repeatedly held that the prosecutor's constitutional obligation of disclosure is not "measured by the moral culpability, or the willfulness of the prosecutor." *United States v. Agurs*, 427 U.S. 97, 110 (1975) (citing *Brady*, 373 U.S. at 87); see also *Smith v. Phillips*, 455 U.S. 209, 220 (1982) (grant of new trial was error when based on "prosecutorial misconduct alone" in failing to disclose grounds for juror bias). Even where the willful misconduct of the prosecutor is raised, the proper remedy remains only the grant of a new trial, and then only if the *Brady* test is met. *Id.* at n.10; *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *United States v. Kearns*, 5 F.3d 1251, 1254 (9th Cir. 1993); *United States v. Garcia*, 780 F. Supp. 166, 177 (S.D.N.Y. 1991) (precedent for dismissal of indictment under court's supervisory power over grand jury does not extend to failure to turn over *Brady* or 18 U.S.C. §3500 material). As the court held in *Garcia*, dismissal of an indictment is "an extraordinary remedy," and, as is true here, "[d]efendants have cited neither facts nor precedent demonstrating that dismissal of the indictment is a proper remedy in the circumstances of this case." *Garcia*, 780 F. Supp. at 177.

- 100 -

events that occurred during all the defendants' confinement." Persico has provided no showing of prejudice or violation of any agreement with either Mazza or the government; he is, accordingly, in no position to reopen an issue he has apparently waived prior to trial.

Joseph Monteleone

Joseph Monteleone has filed no individual Rule 29 or 33 motions.


**CONCLUSION**

A new trial is ordered with respect to defendants Joseph and Anthony Russo and defendant Joseph Monteleone on Counts 1, 2, 5, 6, 9, and 12. Except as to that relief, all defendants' post-trial motions are, in all respects, denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York  
February 18, 1997

  
United States District Judge



U.S. Department of Justice

AA 000793

*United States Attorney  
Eastern District of New York*

*United States Attorney's Office  
1 Pierrepont Plaza  
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February 21, 1997  
[corrected copy]

Honorable Charles P. Sifton  
Chief Judge  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: United States v. Theodore Persico, et al.  
92 CR 351 (S-9) (CPS)

Dear Chief Judge Sifton:

This is to request that you amend your memorandum and order dated February 18, 1997 in the above-captioned case to delete the name of AUSA Andrew Weissmann from the sentence in which it appears on page 46 of the opinion. We make this request for two reasons.

First, the sentence is inaccurate insofar as it suggests that AUSA Weissmann in particular, among the three trial lawyers and their several supervisors, bears special responsibility for the failure to disclose certain information. In fact, all three trial lawyers presented witnesses who recounted Mr. Scarpa's out-of-court statements, and thus if disclosure was required to impeach the out-of-court declarant, all members of the trial team were equally responsible. AUSA Weissmann was not the lead trial lawyer and was not in a position more than any other AUSA to make or impose a decision not to disclose information. Moreover, as it occurred to none of them, or to their supervisors, that there was any legal principle compelling disclosure, no one of them in fact made the conscious decision to take the position now criticized by the Court.

The Court may have inferred from a sentence in AUSA Corcella's affirmation, recounted at page 33 of the opinion, that a decision on the issue was made by AUSA Weissmann, and made on the (erroneous) ground that Brady requires the disclosure only of exculpatory information and not, for example, of impeachment

material. In fact, however, the exchange described in the Corcella affirmation was a casual conversation between Corcella, who was new to the case in the summer of 1993, and Weissmann, who had until then been the junior member of the trial team. Weissmann was simply passing on to Corcella the fact, known to other members of the trial team, that Scarpa had been an informant, and in response to her question he reported that neither he nor any of his colleagues or supervisors had previously considered Scarpa's informant status to be disclosable. His response to her, though perhaps inartfully stated or recounted, was not intended to suggest that Brady is limited to information that serves to exculpate rather than merely to impeach, but that Brady is limited to information that is material to the issues in the case. Until the summer of 1994, well after the trial in this case, when the defense first propounded their theory of materiality in pretrial motions in the Alphonse Persico case, the prosecutors working on these cases had not considered that Scarpa's informant status might be relevant to the issues in any of these cases.

Second, while the court has determined that the failure to make the disclosure was error, the nondisclosure cannot fairly be characterized as the kind of egregious misconduct that warrants castigating an attorney by name in a published judicial opinion. As the court is well aware, substantial legal authority supports the proposition that disclosure of impeachment material for hearsay declarants is not required; it can hardly be regarded as egregious or unprofessional misconduct for an attorney to follow that authority, even if on the facts of this case this court takes a contrary view.

The Court of Appeals for the Second Circuit has traditionally viewed the naming of an AUSA in a published opinion as a sanction for unusually serious prosecutorial misconduct. For example, in one case in which the Court found that the AUSA made improper remarks in summation, the Court observed:

We note that appellate courts have generally been reluctant to name the individual prosecutors whose comments have been found improper. Among the many reported decisions of this Court in the last decade, apparently only two identify the prosecutor. . . . We refrain from naming the prosecutor in this case because his improper remarks, though ill-advised, were not instances of deliberate misconduct.

United States v. Modica, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981) (per curiam), cert. denied, 456 U.S. 989 (1982) (citations omitted, emphasis added).

There is no basis on this record for a finding that Mr. Weissmann had particular responsibility for the failure to

disclose this information, much less that he failed to disclose it deliberately, or for any improper purpose. Under these circumstances, it would seem more appropriate to attribute any responsibility for any nondisclosure to "the government" rather than to Mr. Weissmann as presently set forth at page 46 of the opinion.

For both of the above reasons, we respectfully request that the Court delete Mr. Weissmann's name from the opinion.

Very truly yours,



ZACHARY W. CARTER  
UNITED STATES ATTORNEY

cc: All defense counsel