IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Criminal No. 09-335 (RJL)**
	)	
PANKESH PATEL,	)	
	)	
Defendant.	)	

DEFENDANT PANKESH PATEL'S OPPOSITION TO GOVERNMENT'S MOTIONS TO PRECLUDE CERTAIN EVIDENCE, IMPEACHMENT AND ARGUMENTS

The government filed numerous eleventh-hour motions attempting to eliminate as issues for trial the integrity, good faith and credibility of its undercover sting operation, and that of its chief architect, Richard Bistrong. *See* Government's Motions *In Limine* to Preclude Defendants from Improperly Offering Out-of-court Statements (D.E. 354) (the "Hearsay Motion"), to Preclude Improper Impeachment of Non-testifying Cooperating Witnesses (D.E. 356) (the "Rule 806 Motion") and to Exclude Certain Defense Arguments and Evidence (D.E. 361) (the "Omnibus Motion") (collectively, the "Motions"). The Motions represent the government's last-ditch effort to hide from the jury and this Court the defining features of this prosecution: that the case is built entirely around an irredeemably corrupt con-man, Richard Bistrong, and that, by mishandling him and by other misconduct, the government allowed Bistrong to contaminate every aspect of the operation. However, neither the Rules of Evidence nor the Constitution permits the government to shield the investigation from attacks on the government's improper conduct, or, given his role in devising and conducting the operation, attacks on Bistrong's credibility. The government's motions should be denied.

Preliminary Statement

The government filed the Motions after the defendants identified certain tapes and transcripts, which were not on the government's exhibit list, as potential trial exhibits. The defendants, consistent with this Court's orders, identified that evidence in advance of trial simply to resolve any potential objection as to the transcriptions of the tapes. The defendants did not make any representation concerning the purpose or purposes for which the defendants may seek to admit that evidence.

Those tapes, along with other evidence, show that Bistrong and his handlers were so personally invested in the operation and its outcome that they were willing to interfere with legal advice obtained by targets, including by providing assurances to represented parties that the Gabon deal was legal, and to prevent targets from conveying their concerns about the lawfulness of the deal to others. Speculating as to the purposes for which one or more of the defendants may introduce such evidence, the government seeks pre-trial rulings excluding it and whole other categories of other evidence.

First, by the Hearsay Motion, the government seeks to prevent defendants from impeaching trial witnesses with out-of-court statements. The government contends that they are inadmissible except for the narrow purpose of showing "a prior consistent statement." *See* Hearsay Motion (D.E. 354) at 1; 2 n.1. The government is wrong. The rules of evidence plainly permit the use extrinsic evidence, including out-of-court statements, to impeach the credibility of prosecution witnesses by showing bias. Further, and in any event, Bistrong's statements to certain codefendants that the Gabon deal was legal may otherwise be introduced for the non-hearsay purpose of showing that the undercover operation deliberately included false assurances of legality.

Second, by the Rule 806 Motion, the government seeks to prevent defendants from attacking the credibility of any non-testifying witness. The prosecution contends that, if they do call Richard Bistrong as a witness during their case-in-chief (but instead simply play tapes of his statements), that defendants may not introduce evidence regarding his credibility. *See* Rule 806 Motion (D.E. 356).[1] The government, however, cannot avoid trying the issues of the integrity, good faith and propriety of the investigation devised and conducted by Richard Bistrong, simply because the prosecution elects not to call him and because such defense may also impugn his credibility.

Third, in the Omnibus Motion, the government seeks to exclude any evidence of, or arguments about, improper conduct on the part of the government, including evidence that the government led defendants to believe the Gabon deal was lawful. The government claims that evidence of improper government conduct is not relevant at trial because it is to be decided as a matter of law, or that, if otherwise relevant, it is unfairly prejudicial to the government. *See* Omnibus Motion (D.E. 361) at 1-3, 9-11 (Motion Nos. 1 & 4). This Court, however, has already ruled that defendants may point to evidence of government misconduct to argue for dismissal and, failing that, may make similar arguments to the jury in seeking an acquittal. *See* Feb. 4, 2011 Hearing Tr. at 63.

Fourth, in the Omnibus Motion, the government seeks to prevent the defendants from arguing that awareness of unlawfulness under the laws of the United States is an element of the FCPA violation. *See* Omnibus Motion (D.E. 361) at 7 (Motion No. 3). However, in order to

[1] The Court has expressed doubt about the government's ability to put on its case without calling Bistrong: "I can't envision any scenario where he doesn't take the stand . . . I can't envision it. Now, there may be law out there somewhere that they could convince me that they are entitled to, you know, not use him, not put him on and blah, blah, blah, blah, we just want to use the tapes -- but that's really a hard scenario for me to right now to envision." Dec. 23, 2010 Hearing Tr. at 29-30.

have any meaning at all, knowledge of unlawfulness must necessarily refer to a law. Obscuring the source of such law (the United States in this case) would only confuse the jury.

Fifth, in the Omnibus Motion, the government seeks to prevent the defendants from arguing on the basis of missing prosecution witnesses. The government contends that the mere fact that witnesses could be called by the defendants at trial forecloses such arguments. *See* Omnibus Motion (D.E. 361) at 11-12 (Motion No. 5). The standard, however, is not mere physical availability. The defendants, for example, may comment on the absence of Bistrong or lead case agent Christopher Forvour from the government's case-in-chief because they are, as a matter of law, effectively under the government's control.

Not only is the government wrong on the law with respect to the Motions, it is not practical or possible by a pre-trial ruling to define and police the boundaries of the categories of evidence and types of arguments they seek to exclude, or to foresee all of the myriad ways in which some of them may be properly admissible at trial. The government's motions are thus misplaced and should be denied.

Argument

I. BISTRONG'S OUT-OF-COURT STATEMENTS ARE ADMISSIBLE FOR NON-HEARSAY PURPOSES

In the Hearsay Motion, the prosecution argues that out-of-court statements are admissible only "for the limited purpose of impeachment by a prior consistent statement." *See* Hearsay Motion (D.E .354) at 1. They are wrong.

It is hornbook law that defendants may use extrinsic evidence, including out-of-court statements, to impeach the credibility of prosecution witnesses by showing they have a penchant for lying, are biased in favor of a party or prejudiced against another, have an interest in the outcome of the case or an improper motive for giving testimony, or for any other proper

impeachment purpose. Cross-examination "directed toward revealing possible biases, prejudices, or ulterior motives of the witness . . . is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (quoting 3A J. Wigmore, EVIDENCE § 940, 775 (Chadbourn rev. 1970)). A defendant in a criminal case has the right under the Sixth Amendment's Confrontation clause to show that a prosecution witness may be biased. *See generally id.*; *see also Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) ("[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.").

It would thus, for example, be perfectly proper to impeach Bistrong or his FBI handlers with evidence showing they were so personally invested in the operation and its outcome that they were willing, by thinly-veiled threats or by assurances of legality, to prevent targets from conveying their concerns about the lawfulness of the deal to other targets. The notion that the defendants would be somehow narrowly limited to using out-of-court statements as consistent or inconsistent with particular trial testimony should be dismissed out of hand and the Hearsay Motion denied.

In any event, the defendants may offer Bistrong's false assurances that the Gabon deal was legal for the non-hearsay purpose of showing how this undercover investigation was compromised and improperly conducted. In that circumstance, the attendant statements of the codefendants on those recordings are not hearsay, as they are offered only to provide context for Bistrong's statements.

II. DEFENDANTS MAY ATTACK THE INTEGRITY OF THE UNDERCOVER OPERATION AND ITS ARCHITECT

Under Rule 806 of the Federal Rules of Evidence, a litigant can attack the credibility of the declarant of an out-of-court statement if the statement is offered to prove the truth of the

matter asserted (if it is hearsay) or if it was offered as an authorized party admission, admission by a party's agent, or a statement by a coconspirator of a party. *See* Fed.R.Evid. 806, 801(d)(2)(C-E). With respect to the Rule 806 Motion, the crux of the government's argument is that it can play tapes at trial of Richard Bistrong's statements, so long as they are not admitted to prove the truth of the matter, and prevent defendants from attacking Bistrong's credibility. *See generally* Rule 806 Motion (D.E. 356). The government's argument is misplaced for several reasons.

First, the government's argument misses the point. Whether or not the government offers any of Richard Bistrong's particular utterances at trial, the propriety of his statements and conduct are fair game for the defense in this case because the integrity of the government's investigation is. The government's argument would otherwise be, and presumably not without irony, that the defendants may not offer evidence of the impropriety of the government's investigation precisely because that investigation is so inextricably bound up with Richard Bistrong, whose credibility is somehow insulated from attack by operation of Rule 806. Given the circumstances, the defendants have good reason and the right to challenge Bistrong's integrity and credibility as the architect of the undercover operation.

Second, Bistrong's out-of-court statements implicate the defendants' right to confront him pursuant to the Confrontation clause of the Sixth Amendment. Third, owing to the circumstances of this case, because Bistrong's statements (which were scripted under the supervision of government) are admissible against the government as authorized or agent admissions pursuant to Rule 801(d)(2)(C) or (D), his credibility may be attacked pursuant to Rule 806.

a. Background

This prosecution is the result of the FBI's collaboration with Richard Bistrong. The Court is by now very familiar with the fake Gabon deal and accompanying sting operation devised by Bistrong and the FBI, and is referred to the defendants' other filings for a detailed description. In the context of the Rule 806 Motion however, a few points call for special emphasis:

First, the initial idea behind the sting operation came entirely from Bistrong and he was relied upon to identify or develop predicates for targeting the defendants in the first instance. And Bistrong continued to direct operations throughout, and tellingly, when the FBI reviewed the investigation part way through, they not only interviewed the case agent to see how Bistrong was performing, but also sought Bistrong's feedback on the case agent's performance.

Further, the communications between Bistrong and the targets of the investigation were the result of scripting and close collaboration between Bistrong and the government. The FBI even gave Bistrongr real-time guidance via text messaging during phone calls between Bistrong and targets, and the government and Bistrong evaluated prior communications and together refined their tactics as they went from one target to the next. For example, not telling the targets the deal was illegal or that the commissions constituted bribes, and insisting to those who questioned the legality of the deal that it was perfectly legal and threatening them not to alert others that the deal was not legal, were deliberate decisions by Bistrong and the government.

b. Discrediting the Government's Investigation and Case

Given the nature and extent of Bistrong's involvement in this case, his statements, conduct and credibility are highly relevant to a defense based on discrediting the government's investigation and proving its lack of good faith. The court, in *United States v. Quinn*, 537 F.

Supp. 2d 99 (D.D.C. 2008), discussing the prejudice attendant to its deprivation, confirmed the availability and vitality of that defense by reference to a case involving similar circumstances:

> In discussing the prejudice that ensued, which warranted a new trial, the [United States Supreme] Court explained how the defendant was robbed of the opportunity to attack the thoroughness and good faith of the government's investigation. Even if the informant did not testify at the trial, "the defense could have examined the police to good effect on their knowledge of [the informant's] statements and so have attacked the reliability of the investigation in failing even to consider [the informant's] possible guilt." (citing *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation."), and *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (awarding a new trial because withheld *Brady* evidence "carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case")). Similarly here, Quinn could have used the information regarding the government's suspicions of Tatum to conduct a pointed attack on the government's investigation, with its uncritical reliance on Tatum.

Quinn, 537 F. Supp. 2d at 115-16 (discussing and quoting *Kyles v. Whitley*, 514 U.S. 419 (1995)).

Further, depriving the defendants of the opportunity to discredit the government's investigation would have Due Process implications. In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the United States Supreme Court reversed a murder conviction where the trial court, pursuant to state law, excluded the defendant's evidence that a third party committed the crime. *See id.* at 321. The Supreme Court held that the "Due Process Clause of the Fourteenth Amendment . . . guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" and that "[t]his right is abridged by evidence rules that...are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* at 324 (citations omitted). Thus, an unreasonable application of an otherwise reasonable rule may violate Due Process if it prevents the defendant from putting on a complete defense.

c. Bistrong's Out-of-Court Statements Implicate the Confrontation Clause

The Confrontation clause of the Sixth Amendment states: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *U.S. Const. Amend. VI*. Beginning with *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court articulated a new standard for applying the Confrontation clause to out-of-court statements. Under *Crawford*, a statement is subject to the Confrontation clause if it is found to be "testimonial." *Crawford*, 541 U.S. at 52. The Supreme Court gave three formulations of "testimonial:" (1) "ex parte in-court testimony or its functional equivalent," (2) "extrajudicial statements . . . contained in formalized testimonial materials," and (3) "statements that were made under circumstances which would lead an objective witness *reasonably to believe that the statement would be available for use at a later trial*." *Id*. at 51-2 (emphasis added).

The third formulation—statements made under a reasonable belief that they would be later used at trial—was the emphasis of the Court's subsequent decisions in *Davis v. Washington*, 547 U.S. 813 (2006), and *Michigan v. Bryant*, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). As those cases make clear, a statement is "testimonial" when its "primary purpose" is to (1) "establish or prove past events potentially relevant to later criminal prosecution," *Davis*, 547 U.S. at 822, or to (2) "[create] an out-of -court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155, 179 L. Ed. 2d at 107. For example, a declarant's frantic statements to a 911 operator while being assaulted were not "testimonial," *see Davis*, 547 U.S. at 828, whereas statements to the police made after the assault were "testimonial." *See id.*

To be sure, Bistrong's recorded statements were made for the purpose of "creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155, 179 L. Ed. 2d at 107.

And the statements need not be directly accusatory to be "testimonial." As the Supreme Court stated in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), there are only two kinds of witnesses: "those against the defendant and those in his favor," and "[c]ontrary to [the State's] assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." 128 S. Ct. at 2534. Further, whether the statements are or are not hearsay is of no moment to the Confrontation clause analysis. *See id.* at 2531 ("core class of testimonial statements" includes confessions, which are not hearsay under Federal Rule of Evidence 801(d)(2)(A)).

The recorded statements at issue here are not natural conversations intercepted by government eavesdropping, but are contrived recitations from a well-rehearsed play. Given the testimonial character of his statements, the government should be prohibited from introducing anything said by Bistrong for any purpose, unless the defendants are permitted to meaningfully confront him.

d. Bistrong Statements as Party Admissions

Under Rule 806, the credibility of declarants of out-of-court statements can be tested at trial where the statements are made by a person authorized by a party to make a statement concerning the subject, or by a party's agent concerning a matter within the scope of the agency, made during the existence of the relationship. *See* Fed.R.Evid. 801(d)(2)(C-D), 806. For example, in *United States v. Branham*, 97 F.3d 835 (1996), the court instructed:

> The government concedes that Rule 801(d)(2)(D) contemplates that the federal government is a party-opponent of the defendant in a criminal case, but argues, nonetheless, that the conversations at issue were not within the scope of the agency between [the paid informant] and the government. We disagree. Arguably, [the informant] conversed with [the defendant] on a regular basis in order to establish a trusting relationship. Whatever [the informant] said during these conversations was in furtherance of that goal, and thus within the scope of the existing agency.

Branham, 97 F.3d at 851.

Here, because Bistrong's recorded statements were scripted and specifically authorized by the government as part of a sensitive undercover operation under the supervision of DOJ attorneys, those statements are chargeable to the government. As a consequence of Rule 801(d)(2), Bistrong's statements may be admitted against the government. And once they are, as a consequence of Rule 806, his credibility may be attacked "by any evidence which would be admissible for [that purpose] if the declarant had testified as a witness." Fed.R.Evid. 806. Accordingly, and for all the foregoing reasons, the government's Rule 806 Motion should be denied.

III. DEFENDANTS' EVIDENCE OF GOVERNMENT MISCONDUCT MUST BE HEARD

By Motion Nos. 1 and 4 of the Omnibus Motion, the government seeks to prevent defendants from introducing evidence and making arguments at trial that the government acted improperly in its investigation, including by the provision of false assurances of the legality of the Gabon deal to certain of the defendants and by threatening those that had concerns about the legality of the Gabon deal that they better not alert the other defendants about those concerns. *See* Omnibus Motion (D.E. 361) at 1-3, 9-11. Specifically, the prosecution contends that such matters are exclusively within the province of the Court to consider. *See id.* at 1-3. They are wrong.

In *United States v. Cuervelo*, 949 F.2d 559 (2d Cir. 1991), which the government cites for this proposition, the court stated that following the development of sufficient facts of outrageous governmental conduct, either at an evidentiary hearing ***or at trial***, the court could proceed to determine whether any Due Process violation occurred. Indeed, the court further instructed that a judge may defer ruling on a motion to dismiss for outrageous governmental conduct "until all

the evidence has been submitted at trial and, if the defendant is convicted, the judge may handle the motion to dismiss as a post-verdict motion," continuing:

> Frequently, this approach can have several advantages: it is fair to both the defendant and the government; it conserves judicial resources; and, in a multi-defendant case, such as this one, it allows for consideration of the allegations raised by a single defendant without further delaying the prosecution of the government's case against that defendant or the co-defendants.

Cuervelo, 949 F.2d at 567-68. Plainly, with respect to evidence of governmental misconduct, the Court may elect between holding an evidentiary hearing and allowing the defense to offer the evidence of misconduct at trial.

In this case, however, the Court has already ruled that defendants will be able to adduce evidence of government misconduct at the trial. In December 2010, defendants filed a motion seeking an evidentiary hearing (D.E. 200), and in January 2011, filed a motion to dismiss (D.E. 219), each with respect to allegations of government misconduct, including the failure to preserve and the destruction of evidence. The Court granted neither of those motions, but ruled as follows:

> Well, on that issue you would get two bites at that apple because you will get a chance to convince the Court should the evidence unfold in such a way that demonstrates bad faith in some form of conduct along those lines that it were calculated to prejudice the Defendants, you will be able to argue for dismissal of the case at that point; and if you don't succeed, you get a second bite at the apple and you can argue to that jury that you should not reward the Government for conduct like this in the conducting of an undercover operation with a verdict of guilt. You, ladies and gentlemen, you have the opportunity on behalf of the community to not reward conduct like this that has been demonstrated to you to be so egregious by the FBI.

Feb. 4, 2011 Hearing Tr. at 63.

That ruling is the law of the case. *See, e.g.*, *Arizona v. California*, 460 U.S. 605, 618-19 (1983) ("the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case").

Consistent with that ruling, the Court has instructed:

> [T]his is a target rich environment for the defense counsel in this case, that the amount of stuff that you will have at your disposal to go after Mr. Bistrong is going to be so vast it will not only enable you to more than effectively cross-examine him, *but will raise serious questions as to how the Government is relying on him in the first place*.

July 29, 2010 Hearing Tr. at 59 (emphasis added).

> THE COURT: You would be in a position to argue to that jury, you heard that statement that Bistrong made, or the FBI agent made; well, who can believe that, ladies and gentlemen? You heard him admit that his own regulations that the FBI required him to comply with he failed to comply with. Well, there is no -- it's obvious, ladies and gentlemen, why he didn't comply here, because he didn't want to comply because he knew, if he did, you know, blah, blah, blah, blah.
>
> MR. DUBELIER: I understand.
>
> THE COURT: I don't need to tell you what to argue. You know what to argue. They are going to decide whether he lied or didn't, whether Bistrong lied or he didn't, *if they get over Rule 29*.

Dec. 23, 2010 Hearing Tr. at 28 (emphasis added).

Further, in opposing the defense's motion for an evidentiary hearing before trial in this case, Mr. Lipton, the government's lead prosecutor in this matter, had this to say to the Court:

> Mr. Madigan and the rest of the defense counsel, if there is a trial, we will have a chance to cross-examine every FBI agent they want. I know your Honor will let them. Your Honor has indicated that. I am sure this is something that's going to be part of entrapment motion and something that will likely part of the trial. *We relish that issue and we have no issues of putting Mr. Forvour on the stand and having him talk about the entire investigation. This is not going to be an issue for us.*

Nov. 5, 2010 Hearing Tr. at 38 (emphasis added).

Now, on the eve of trial, the government has completely reversed course and disingenuously argue that trial is no place to discuss "the entire investigation." The government should not be allowed to have it both ways. In vehemently objecting to having any kind of pre-trial hearing regarding the integrity of this investigation, they now should be held to their own

demand that the integrity of the investigation should be challenged at trial both for the benefit of the Court and, if need be, the jury. Accordingly, the government's motion seeking to prevent any opportunity for defendants to present evidence of the government's misconduct should be denied.

IV. KNOWLEDGE OF UNLAWFUL CONDUCT NECESSARILY REFERS TO U.S. LAWS

By Motion No. 3 of the Omnibus Motion, the government seeks to prevent the defendants from arguing that the government must prove that each defendant acted with knowledge that his conduct was unlawful under the laws of the United States. The government contends that, to be guilty, the defendants must be shown only to have known that their actions "were in some way unlawful." *See* Omnibus Motion (D.E. 361) at 7.

The defendants agree with the government that a defendant need not be aware of the *specific statute* his conduct may be violating. The defendants and the government disagree, however, about the sufficiency of a charge that "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *See id.* (citing *Bryan v. U.S.*, 524 U.S. 184, 191-92 (1998)). The government contends that it is somehow an unwarranted burden for it to have to prove knowledge that conduct was "in some way 'unlawful' … under the laws of the United States" versus knowledge that it was "in some way unlawful." *See* Omnibus Motion (D.E. 361) at 7. However, the government's formulation in this case will only invite confusion.

"Willfully," for purposes of the FCPA, and if to have any meaning at all, necessarily refers to the laws of the United States. The FCPA does not invoke any notions of cross-cultural morality, good versus evil, or universal principles. Indeed, it criminalizes conduct which is commonplace in much of the world. In other words, knowledge of unlawfulness with respect to the FCPA cannot be understood except by reference to some body of law, as it does not naturally

lend itself to interpretation by reference to generic notions of wrongfulness or bad purpose. Because there are foreigners among the defendants, the jury should have clarity and not confusion as to the law referenced by the willfulness instruction, namely, that of the United States.

V. DEFNENDANTS MAY COMMENT ON MISSING PROSECUTION WITNESSES

By Motion No. 5 of the Omnibus Motion, the government seeks to prevent the defendants from arguing on the basis of missing prosecution witnesses. The prosecution contends that the mere fact that witnesses could be called by the defendants at trial forecloses such arguments. *See id.* at 11-12. They are wrong.

Ordinarily, a party may not comment on the absence of a witness if that witness is equally available to both sides. However, the control requirement is met "both when a witness is physically available only to the opposing party and when the witness has a relationship with the opposing party that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability." *U.S. v. Mahone*, 537 F.2d 922, 926 (7th Cir. 1976) (citations omitted), *cert. denied,* 429 U.S. 1025 (1976).

In *United States v. Mahone,* 537 F.2d 922 (7th Cir. 1976), the trial court had refused to permit the defendant's attorney to comment during closing argument on the absence of a prosecution witness. The missing witness was a state police officer who had cooperated with the United States Attorney in developing the case. The Seventh Circuit found that, although the officer was physically available to both sides, his cooperation with the federal government and his interest in "seeing his police work vindicated by a conviction" established a likelihood of bias which resulted in the witness not being equally available to both parties. 537 F.2d at 927. The court therefore held that the trial court's preclusion of a missing witness argument was error. *Id.*

There, as here, while Bistrong or others may be physically available to both sides, they are not equally available to both parties under the circumstances. The defendants should therefore be permitted to comment at trial upon their absence.

Conclusion

For the foregoing reasons, the government's Motions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2011, the foregoing was served electronically via the District Court's electronic filing system on:

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