IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 4:20-CR-358-2
	§	JUDGE MAZZANT
JOHN RODGERS (2)	§	
	§	
	§	

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO QUASH DEFENDANT RODGERS'S SUBPOENAS FOR TESTIMONY BY CURRENT AND FORMER U.S. DEPARTMENT OF JUSTICE ATTORNEYS

The United States respectfully submits this reply to Defendant John Rodgers's Response in Opposition (Dkt. #98) to the United States' Motion to Quash Defendant Rodgers's Subpoenas for Testimony by Current and Former U.S. Department of Justice Attorneys (Dkt. #82).

Defendant Rodgers's purported justification for these subpoenas continues to shift. Defendant's initial request under 28 C.F.R. § 16.23 (Dkt. #89, Ex. 4) suggested that he seeks the testimony of Principal Deputy Assistant Attorney General Doha G. Mekki, Assistant Chief Megan S. Lewis, former Antitrust Division Trial Attorney Katherine Stella, and FBI Special Agent Jeffrey Pollack to prove the existence of a non-prosecution agreement (Dkt. #89, at 2 n.2)—notwithstanding the Court's ruling that "no agreement was reached as a matter of law" (Dkt. #56, at 36). One week later, Defendant disclaimed that he seeks their testimony for this purpose (Dkt. #87, at 5). Defendant further represented that he does not oppose the United States' motion *in limine* to exclude evidence about any alleged non-prosecution agreement (Dkt. #87, at 5). Instead, according to Defendant's witness list (Dkt. #68) and his response in opposition to the United States' motions in *limine* (Dkt. #87, at 5–10), these four individuals were character

witnesses. They were being called to testify about their "opinion of John Rodgers's truthfulness" (Dkt. #68, at 1; *see also* Dkt. #87, at 6–7) or about "Rodgers' reputation in the community" (Dkt. #87, at 7).

Now Defendant Rodgers has returned to seeking "evidence that the prior prosecution team believed Rodgers was telling the truth and intended to sponsor him as a witness in the case, rather than accusing him of being a liar and charging him with obstruction" (Dkt. #98, at 6; *see also id.* at 8 (seeking testimony "that Rodgers was telling the truth about his version of the events")). Defendant insists that this testimony is relevant because it "goes to his truthfulness *about the charges at issue*" (Dkt. #98, at 11 (emphasis in original); *see also id.* at 9 ("Rodgers seeks to elicit testimony of the Government witnesses not as to his veracity in general, but his truthfulness *about the charges at issue*." (emphasis in original))). But this framing of the testimony is fatal to his arguments. To permit a government witness to testify to her "opinion" (Dkt. #68, at 1) or "belief" (Dkt. #89, Ex. 4) about whether, for example, the defendant made a false or misleading statement under oath in proceedings before the Federal Trade Commission would invade the province of the jury.[1]

In any event, such opinions and beliefs are protected by the deliberative process privilege and the attorney work product doctrine. *See United States v. Morgan*, 313 U.S. 409, 422 (1941) (deliberative process privilege protects an executive officer's "mental processes"); *Adams v. Memorial Hermann*, 973 F.3d 343, 349 (5th Cir. 2020) (attorney work product doctrine protects an attorney's or her agents' "mental impressions" (quoting *Dunn v. State Farm Fire & Cas. Co.*,

[1] The United States would add that if a government witness, including Special Agent Pollack, is asked by defense counsel about these matters, that would open the door to statements covered under Defendant's No-Direct-Use agreements ("NDU"s) under the terms of those agreements.

927 F.2d 869, 875 (5th Cir. 1991))). Defendant cites a case forty years old for the proposition that the work product doctrine applies only to tangible "*materials*" and not to oral testimony (Dkt. #98, at 7 (quoting *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979))). But as the Fifth Circuit has more recently explained, the work product doctrine "protects both 'tangible and intangible' work product," including oral testimony as to mental impressions. *Adams*, 973 F.3d at 349–50 (quoting *United States v. Nobles*, 422 U.S. 225, 237 (1975)) (affirming limitation on oral testimony under the work product doctrine).

If instead Defendant Rodgers seeks to introduce this testimony to prove his truthful character by specific instances of truthful conduct (Dkt. #98, at 8–9 (explaining that Defendant "seeks to elicit testimony of the Government witnesses not as to his veracity in general," but as to specific instances of his veracity)), he cannot do so under the Federal Rules. Federal Rule of Evidence 405 allows proving character by specific instances of conduct only when "a person's character or character trait is an essential element of a charge, claim, or defense." Fed. R. Evid. 405(b). Those circumstances are rare—particularly in the Fifth Circuit, which interprets "essential element" in the "strict sense," *United States v. Gulley*, 526 F.3d 809, 819 (5th Cir. 2008))—and they are not present here. *See, e.g.*, *United States v. Crinel*, Crim. No. 15-61, 2016 WL 5363091, at *2 (E.D. La. Sept. 26, 2016) (quoting *Gulley*, 526 F.3d at 819) (holding that obstruction of a federal audit is not a crime in which the defendant's character is an element).[2]

[2] Defendant Rodgers asserts that his truthful character is an "essential element" of the conspiracy and obstruction charges against him but cites three cases that stand for the proposition that truthful character is merely "relevant" to those charges (Dkt. #98, at 8–9). The United States does not dispute that Defendant's truthfulness is a "pertinent trait" and, therefore, character evidence of that trait is admissible under Rule 404(a)(2)(A). But the method of proving character must still comply with Rule 405. Under Defendant's Rodgers's interpretation, whenever Rule 404(a)(2)(A) is satisfied, specific-instances evidence must be allowed under Rule 405(b). That interpretation ignores the structure of Rule 405 and the distinct meanings of "pertinent" and "essential."

For these reasons, the United States seeks to quash the subpoenas. In addition, the U.S. Department of Justice determined, pursuant to 28 C.F.R. § 16.26(a),[3] that Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, and former Trial Attorney Stella were not authorized to testify in this matter.[4] A federal employee cannot be compelled to comply with a subpoena for testimony when the employee's agency has not authorized the testimony. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467–68 (1951). The United States therefore respectfully requests that the Court quash the subpoenas or exclude the evidence at issue.

[3] The United States does not seek to quash the subpoenas for failure to comply with 28 C.F.R. § 16.23 (Dkt. #98, at 2–3).

[4] The Department's decision is reviewable under the arbitrary and capricious standard of the Administrative Procedure Act. *Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1197–98 (11th Cir. 1991).

Dated: April 2, 2022

Respectfully submitted,

/s/ Spencer D. Smith

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2022, I electronically served a true and correct copy of this document on Defendants' counsel of record by means of the Court's CM-ECF system.

/s/ Spencer D. Smith
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