UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. 05 CR 727-01
	)	Hon. Amy J. S Eve
CONRAD M. BLACK.	)	

CONRAD BLACK'S MOTION TO STRIKE THE GOVERNMENT'S UNTIMELY DECLARATIONS, OR ALTERNATIVELY TO REQUIRE PRODUCTION OF RELATED DOCUMENTS AND AN OPPORTUNITY TO CONFRONT THE GOVERNMENT'S WITNESSES

MIGUEL A. ESTRADA
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

CAROLYN GURLAND
2 North LaSalle Street
17th Floor
Chicago, IL 60602

Attorneys for Defendant Conrad M. Black

Conrad Black moves this Court to strike from the sentencing record the two declarations that the government belatedly filed on June 2, 2011. Since Mr. Black's initial response to that filing, his counsel have recently learned additional information raising even more serious concerns about the accuracy of the declarations as well as casting grave doubt on whether they could have been prepared in good faith. Because the government waited until after the close of briefing to submit the two statements from fellow employees of the Department of Justice, it would be fundamentally unfair for the Court to consider the statements unless Mr. Black is given a proper opportunity to confront them. Thus, the Court should refuse to consider the untimely declarations or, in the alternative: (1) grant Mr. Black access to all documents in the possession of the Bureau of Prisons that relate to the statements in the declarations as well as any information that relate to the effort by the government to procure them, and (2) provide his attorneys an opportunity to cross examine these declarants before sentence is imposed.

Five months ago, the Court scheduled the resentencing in this matter for June 24, 2011; it required both parties to file their initial sentencing submissions (including any objections to the updated presentence report) no later than May 13, 2011; and it ordered responses filed by May 27, 2011. Mr. Black abided by these deadlines. So did the government, at least initially. In its authorized submissions on May 13 and May 27 the government took issue with *none* of the facts about Mr. Black's conduct at FCI Coleman, including his significant achievements as a tutor and his other contributions as a model inmate. On June 2, 2011, however—after the final deadline passed—the government filed its only pre-sentencing declarations. It called them "Supplemental Exhibits To Government's Sentencing Memoranda." But these declarations were not offered to "supplement" the record as to *any* argument that the government included in either of its authorized submissions. Instead, the declarations advance for the very first time the

government's position that information it has had since March 2011 is supposedly inaccurate. Far from having challenged these same facts on May 13 or May 27—when it had full opportunity and incentive to do so—the government conceded that Mr. Black's conduct at FCI Coleman was "laudable." DE 1199 at 27.

As noted in our June 8, 2011 Response to the government's untimely submission, the declarations contain inaccurate information contradicted by statements the government has had since it received the updated presentence report. In fact, the accuracy of the declaration by Carrie DeLaGarza is undermined on multiple levels: (1) by the irreconcilable inconsistencies between Ms. DeLaGarza's June 2, 2011 Declaration and the information that she provided to United States Probation Officer Sheila Lally when interviewed by telephone on March 15, 2011 (PSR at p. 35 lines 1134-1138); (2) by the inexplicable contradictions between the same Declaration and an April 20, 2009 Official BOP Memorandum entitled "Memo To Central File" that was appended to Mr. Black's July 20, 2010 BOP Progress Report (PSR at p. 35 lines 1119-1133); and (3) by the inconsistencies between, on one hand, the characterizations of Ms. DeLaGarza in the Declaration (as well those in a second Declaration by BOP employee Tammy Padgett) and, on the other hand, the recollections consistently expressed in 18 letters sent to the Court by inmates at Coleman including Mr. Black's fellow tutors, a number of his students, and those who had direct observations of Mr. Black's tutoring efforts.[1]

After receiving the June 2 Declarations, Mr. Black's counsel promptly began investigating their veracity by, among other things, seeking information from others with knowledge of Mr. Black at FCI Coleman. The process was slowed by the fact that the location

[1] Ms. Padgett is another BOP employee whose declaration contains incorrect information, based largely on subjective impressions and hearsay reports of conversation. Those inaccuracies are also addressed below.

of these other witnesses makes access to them cumbersome. Since our June 8 submission, the inconsistencies not only have become more pronounced, the inaccuracies have become less and less susceptible to the excuse that they are "honest mistakes." In particular, there is now strong reason to believe that Ms. DeLaGarza's false Declaration was not made in good faith.

We note a few examples of the problems with the declarations. We learned this week that one of the tutors who worked with Mr. Black had been asked, before June 2, by a BOP supervisor at the facility to tabulate the number of students who were tutored *solely* by Mr. Black. That number is close to meaningless. The large majority of GED candidates at the facility who needed help on the writing and reading comprehension section of the GED exam, which was Mr. Black's area, *also* needed help on one or more other sections. This help would necessarily have come from one of the other tutors in the Vocational Training Department. Nevertheless, Ms. DeLaGarza's Declaration appears to be based on this spurious distinction, stating: "[Mr. Black] worked with students on grammar and writing skills only. During this time frame, 117 students from these four classes obtained their GED. To the best of my memory and records, from these 117 GED completions, 18 students were tutored by Black." (DeLaGarza June 2, 2011 Declaration ¶4).

Mr. Black tutored many more than 18 inmates. That has been confirmed by a fellow tutor at the facility and other Coleman inmates. If Ms. DeLaGarza came up with her total of 18 by asking another Coleman tutor to report a meaningless tally of students who worked with *no tutor other than* Mr. Black, then her sworn statement is the product of a drafting process that was conducted in bad faith. The open question is whether this artificial limitation on the information-gathering process, which is at best misleading, and at worst intentionally false, was Ms. DeLaGarza's idea or generated by someone else.

Ms. DeLaGarza also states that Mr. Black "projected the attitude that he was better than others in the class, both faculty and students" (DeLaGarza June 2, 2011 Declaration ¶7). Ms. Padgett's offering on the same topic was that Mr. Black "gathered a following of inmates who performed services for him, acting like servants. These inmates cooked for Mr. Black, mopped his floor, ironed his clothes, and other similar tasks." (Padgett June 2, 2011 Declaration ¶3).

Since the filing of these June 2 declarations, and even more so since the filing of our June 8 Response, we have received information from other inmates at FCI Coleman who resided in the same residential unit as Mr. Black. Some letters and emails resulted from our request for clarification of specific points raised in the DeLaGarza and Padgett declarations. Others arrived unsolicited, from inmates who independently heard of the government's allegations, including those who saw media coverage of the government's filing. Their communications in response to the declarations expressed bewilderment, anger and indignation that such utterly false allegations could be leveled against Mr. Black.

The consistent information we have recently received from those with direct knowledge is that Mr. Black performed all required duties such as bed making and keeping his area clean, that he often took meals in the dining hall with the other inmates, and that he did not ask anyone else to iron for him. We also have learned that to the extent others provided any assistance to Mr. Black, it was done at their behest and in the spirit of camaraderie and collegiality.

One letter from an inmate in Mr. Black's residential unit describes, for example, the experience of having lost two family members in close succession. During that difficult period, Mr. Black came to this inmate, offered to make him a meal, and shared stories about Mr. Black's experience of losing his own mother and father—also in close succession. Indeed, numerous inmates, including those who provided the type of assistance to Mr. Black that the BOP

declarations so grossly mischaracterize, have debunked as false, offensive, and unworthy of being dignified by comment the notion that Mr. Black had inmates act like servants for him. The inmates from whom we have heard since the government's June 2 filing have drawn attention to Mr. Black's ample reciprocation for any help provided to him, such as assisting with resumes and business plans, providing personal counseling, and otherwise drawing on his experience and education to help his fellow inmates.

None of the favorable information we have received from numerous separate sources at the facility managed to make its way into the *government's* declarations. And some of this new information flatly contradicts the statements that Ms. DeLaGarza and Ms. Padgett *did* make. Finally, as noted above, there are strong indications that at least the former statement was not prepared in good faith.

The government has placed Mr. Black and the Court in an untenable position by waiting until after the close of briefing to unveil a factual dispute that it had more than ample time to raise, and that it affirmatively elected *not* to raise. The briefing schedule has been known for months. At each status conference the Court has taken care to inquire about the need for an evidentiary hearing, and the parties have told the Court that none is needed. This includes the May 9, 2011 conference, held more than a month after the government received Mr. Black's memorandum to the Probation Department setting forth the relevant facts (and the supporting documentation) about Mr. Black's conduct while incarcerated. The Court has made quite clear that the date for resentencing will be June 24. Mr. Black has made equally clear that he opposes any attempt by the government to postpone the date. In fact, when the government proposed to the Supreme Court in April that such a postponement should be arranged, if necessary, to accommodate the government's *second* request for an extension of time to respond to Mr.

Black's petition for writ of certiorari (which Mr. Black filed a full month early in order to keep the resentencing on schedule), Mr. Black strongly objected to any further delay. The Supreme Court limited the government's second extension to one week as a result.

After being put on clear notice of the deadlines, the government nonetheless made its untimely filing. It had the account of Ms. DeLaGarza's statements to the Probation Officer in the updated presentence report that the government received in April, more than two weeks before the deadline to take issue with those representations. It did not take issue. In his May 13, 2011 sentencing memorandum, Mr. Black elaborated in detail on the facts and circumstances of his confinement, quoting a number of inmate letters about Mr. Black's tutoring and other aspects of prison life. The time to respond to Mr. Black was May 27, yet the government again did not take issue. Ms. DeLaGarza and Ms. Padgett are hardly strangers to the United States Attorney's Office. They work for the same Department of Justice. If the government had reason to doubt that the Probation Department had accurately described Mr. Black's behavior at FCI Coleman (or that Mr. Black's own filing had been accurate), it knew how to investigate (and, in Ms. DeLaGarza's case, it knew where to start the investigation).

The government's decision to wait until after briefing closed before trying to generate a new factual dispute leaves the Court with three options: (1) accept the government's contradictory declarations without any opportunity for the defense to explore the contradictions in a meaningful way; (2) give Mr. Black the opportunity to review all relevant documents in the custody or control of the BOP and its employees as well as the chance to cross-examine the declarants and present testimony of his own; or (3) reject the late-filed declarations. The first option—effectively rewarding the government's tactics—would be fundamentally unfair to Mr. Black. The second choice is a minimum requirement in the event the declarations are to be

considered, but the Court must grant access to all materials quickly, and the government would need to fully cooperate rather than oppose access.[2] The final option is the one the government has invited through its conduct. The Court should not hesitate to use it.

The government's statement when it filed these declarations—that they are "not to discount the work that defendant or other inmate tutors have performed in prisons like Coleman" (DE 1204)—is no more convincing than the accompanying pretense that the government still believes "such work is laudable" (*id.*). This is not the first time the government will have represented one thing when it knows it cannot win unless the Court effectively credits the contrary proposition. *See, e.g.*, DE 1199 (Government Submission Regarding Sentencing) at 14 n.3 (claiming no desire to relitigate the Court's earlier relevant conduct rulings, and then asking the Court to hold Mr. Black accountable for conduct where the Court could only do so by

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[2] The government would need to produce the following documents no later than June 21:

A. All Bureau of Prisons documents referring or relating to Conrad Black's participation and service as a tutor in Coleman's Vocational Training Department;
B. All Bureau of Prisons documents referring or relating to Conrad Black's tutoring of any inmates;
C. All documents, including notes, emails, or other correspondence that refer or in any way relate to Conrad Black that were signed, authored, or prepared in any part by Education Specialist Carrie DeLaGarza;
D. All documents, including notes, emails, or memoranda that refer, or in any way relate, to the conversation between Ms. DeLaGarza and United States Probation Officer Sheila Lally in connection with Ms. Lally's preparation of the April 21, 2011 Updated Presentence Investigation report prepared in connection with Mr. Black's resentencing;
E. All correspondence, including records of any written, telephonic or email correspondence between Ms. DeLaGarza and/or Ms. Tammy Padgett and any representative of the United States Attorney's Office, including, without limitation, any FBI or IRS agents assisting the United States Attorney's Office in this case, on the topic of Conrad Black;
F. Any and all drafts of Ms. Padgett's and Ms. DeLaGarza's June 2, 2011 declarations;
G. Any documents relating in any way to Ms. Padgett's and Ms. DeLaGarza's June 2, 2011 declarations, including materials evidencing; (1) the drafter of the declaration, (2) the involvement of the United States Attorney's Office or any representative in preparing the declaration; or (3) how the government came to possess the affidavit; and
H. All of the attestations of Vocational Training supervision that Ms. Padgett completed or signed during the time period that Mr. Black served as a tutor at Coleman.

contravening those rulings). Those representations in Mr. Black's sentencing submission that the government seeks to smear, both in this Court and in the court of public opinion, are a critical part of the Section 3553(a) analysis in this case. These facts are relevant to Mr. Black's history and characteristics (§3553(a)(1)), to the imposition of just punishment and the promotion of respect for the law (§3553(a)(2)(A)), to specific and general deterrence (§3553(a)(2)(B) & (C)), and even to the avoidance of unwarranted sentencing disparities (§3553(a)(6)). The government cannot credibly pretend that the first time the importance of these facts dawned on it was weeks after the May 13 deadline. The Court notified the parties at the May 9, 2011 status conference that Mr. Black's conduct in the three-and-a-half years since the original sentencing would be a very important factor at the resentencing, which is why the Court asked for it to be the primary focus of his resentencing filings.

The Court should turn back the government's effort to gain an unfair advantage by flouting a schedule that the Court set five months ago.

Respectfully submitted,

s/ David Debold
David Debold

CAROLYN PELLING GURLAND
2 North LaSalle Street
17th Floor
Chicago, Il 60602

MIGUEL A. ESTRADA
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

June 16, 2011

Attorneys for Defendant Conrad M. Black

CERTIFICATE OF SERVICE

I, Carolyn Gurland, an attorney for Defendant Conrad M. Black, hereby certify that on this, the 16th day of June, 2011, I caused the above-described document to be filed on the CM/ECF system of the United States District Court for the Northern District of Illinois, which constitutes service of the same.

/s/ Carolyn Gurland

CAROLYN GURLAND
2 North LaSalle Street
17th Floor
Chicago, Il 60614