

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

IN THE MATTER OF APPLICATION
FOR A SEARCH WARRANT –
MOTION TO QUASH SUBPOENA
RELATED TO MISC. 06-30 (JAF)

MISC. NO.: 06-49 (JAF)

NOTICE TO CLARIFY THE RECORD

TO THE HONORABLE COURT:

COMES NOW the Commonwealth of Puerto Rico (“Commonwealth”), without conceding or consenting at this time to the Court’s jurisdiction, through the undersigned attorneys, and very respectfully clarifies the following for the record:¹

I. Introduction

On March 2, 2006, this Honorable Court issued a “Memorandum Order” in which it stated that it would “withhold action on the [United States’] pending motion to quash [the subpoenas issued by the Commonwealth]”. See Docket No. 4. Although the Commonwealth is pleased with the practical effect of this determination (i.e., the subpoenas were not quashed), and is thus not seeking reconsideration, it must clarify the record with respect to several inaccurate statements and unusual expressions made by the Court that were not relevant to the issue before the Court; namely:

¹ Leave is hereby requested to file the present notice in excess of pages.

- (i) Misstatements about the Commonwealth's representations during the March 2, 2006 hearing;
- (ii) Legal conclusions regarding the merits of the Commonwealth's request for information;
- (iii) Speculations about the Commonwealth's motives in issuing the subpoenas to request information from the United States; and
- (iv) Specific statements regarding the facts surrounding the execution of one of the warrants issued in the case In the Matter of Application for Search Warrant, Misc. No. 06-30 (JAF).

Thus, through the present motion we ask this Honorable Court to take notice of the following:

II. Discussion

- A. The Court did not accurately summarize the Commonwealth's statements.
 - a. The Commonwealth has not discarded the possibility of, at the opportune time, seeking judicial enforcement of the subpoenas.

The statement attributed to the Commonwealth by the Court, to the effect that the Commonwealth had "agreed that no enforcement action would take place without giving the federal officials and this court ample notice," and that it "does not have any plans to enforce the subpoenas," does not accurately characterize the statements made at the March 2 hearing. See Docket No. 4, at 4.

What the Commonwealth stated was the following: "[w]hat [we are] willing to do is give advance notice to the U.S. Attorney's Office if we decide to enforce it [the subpoena] judicially in state court. I cannot

today commit ourselves to deciding ahead of time that we don't have that avenue open." Docket No. 7, at 25 (transcript of statements made by Mr. Antonetti, Solicitor General of Puerto Rico, on behalf of the Commonwealth) (emphasis added). This differs from the Court's summary in three important respects.

First, contrary to the Court's statements, the Commonwealth has not discarded the possibility of, at the opportune time, seeking judicial enforcement of the subpoenas. The only matters that the Commonwealth has not yet decided are the timing and venue of any future enforcement proceedings it may initiate. Of course, as we have previously argued,² unless and until the Puerto Rico Department of Justice ("PRDOJ") affirmatively initiates an enforcement action, this Court will lack jurisdiction, even under the federal officers' removal statute, 28 U.S.C. § 1442(a), because there would be nothing to remove.

Second, the Commonwealth's commitment to give the U.S. Attorneys' Office prior notice of the filing of an enforcement proceeding applies only to enforcement proceedings in the courts of the Commonwealth.

Third, the Commonwealth did not commit itself to give this Court prior notice of enforcement proceedings. After all, the whole purpose

² See Docket No. 3, throughout. Although this case's docket report does not indicate that the case is closed, please note that there is nothing further to provide in this case; a case cannot remain open simply based on the possibility that something could occur in the future that might give this court jurisdiction. In sum, the fact that the matter has not been formally closed is nothing more than an internal housekeeping detail, which cannot supply jurisdiction where it is lacking.

behind the Commonwealth's decision to volunteer to give the U.S. Attorney's Office advance notice of any initiation of enforcement proceedings in a Commonwealth court was, in fact, to allow the U.S. Attorney's Office to adequately prepare whatever notices, motions or other papers that it might deem necessary (including, for example, a notice of removal).

- b. The Commonwealth did not state "that it was evaluating other avenues through which to get the information about the federal agents."

The Court appears to believe that the Commonwealth conceded that it should have "explore[d] more conventional avenues of obtaining information about the federal agents before bothering to enforce the drastic and controversial subpoenas at issue." Docket No. 4 at 6. That is incorrect. We reiterate the point made during the hearing:

I respectfully disagree with [the] Court's view that we may have jumped the gun with the subpoena. . . . [W]e thought that was the proper way to do it. We are currently going to be evaluating which is the next step in order to continue the investigation; if the step is administrative, if it is federal judicial or if it state judicial.

Docket No. 7 at 18 (Statements of Mr. Antonetti). In other words, in the Commonwealth's view, the issuance of subpoenas was an appropriate means of formally initiating a demand under the USDOJ's Touhy regulations.

The Commonwealth did state that it was pursuing conversations with the USDOJ in the hope that it would not be necessary to initiate judicial proceedings. But this statement must be placed in the context of

the question at issue on the day of the hearing: whether removal jurisdiction would arise immediately upon the issuance and service of the subpoenas, or whether further steps were needed.

The Commonwealth contended (and still contends) that, in order for a district court to acquire jurisdiction under the Federal Officers' Removal Act, there must be a preexisting state judicial proceeding. The only two questions as to which the Commonwealth acknowledged there was still some question were: (a) whether it would actually be necessary to initiate a proceeding (in view of the Commonwealth's hope that its negotiations with the USDOJ would bear fruit); and (b) if such proceedings became necessary, whether they should be initiated in state or federal court, or even in a federal administrative agency.

It must be emphasized that the conversations between the PRDOJ and the USDOJ were not intended to substitute a formal demand for information. To the contrary, it was precisely the service of formal demands for information, through subpoenas, that opened the door to conversations between the two agencies. In sum, the decision to negotiate does not mean that the subpoenas were not a proper instrument for initiating a request for information.

B. This Court's legal conclusions regarding the merits of the Commonwealth's requests for information were made without jurisdiction, which therefore could, at best, be characterized as obiter dicta.

This Court reached a series of legal conclusions regarding the merits of the Commonwealth's request for information that were issued

prematurely and without jurisdiction.³ For example, the Court stated that USDOJ regulations forbid the subpoenaed USDOJ employees “from releasing the subpoenaed information, which is considered agency property;” that “USDOJ regulations, 28 C.F.R. §§ 16.21 et seq., detail a specific procedure that PRDOJ must follow to obtain agency information;” that the United States is “[f]orbidden from releasing the information by federal law;” and that production of “the subpoenaed information could compromise the personal security of the federal agents involved.” Docket No. 4 at 3.

Given that the Court decided that the “jurisdictional question” in the instant case was “mooted,” Docket No. 4 at 4, the Court had no cause or even jurisdiction to address anything else. In fact, the course of action taken by this Court, not “formally endorsing the United States’ jurisdictional argument in this case,” *id.*, and not granting the United States request to quash the subpoenas, is consistent with this Court’s lack of jurisdiction.

C. Contrary to this Court’s assertions, the issuance of the subpoenas was motivated by the proper exercise of legal authority.

As the Court admitted, in its Memorandum Order, its views regarding the motives and wisdom of the PRDOJ’s actions were not based on anything other than pure speculation. The PRDOJ hereby asserts

³ The Commonwealth disagrees entirely with the merits of the Court’s premature conclusions of law. Since that matter has not been and is not currently before this Court, however, we will not discuss it at this point. If and when the matter arises again and is properly before a court with jurisdiction over it, then we will discuss the merits.

that, contrary to the Court's speculations, its actions directed at properly exercising its authority to investigate a complaint filed by a number of citizens who allege that they were the victims of criminal behavior.

The subpoenas were issued pursuant to the PRDOJ's authority to conduct criminal investigations. As head of the Department of Justice of the Commonwealth of Puerto Rico, the Secretary of Justice is endowed, pursuant to Article IV, Section 5 and 6 of the Constitution of Puerto Rico and the Organic Act of the Puerto Rico Department of Justice, 3 P.R. Laws Ann. §§ 291 et seq., with a mandate to ensure full compliance with the Laws of the Commonwealth of Puerto Rico. The Secretary and any officer in whom the Secretary delegates may conduct any necessary investigation in order to carry out any of the Secretary's responsibilities pursuant to 3 P.R. Laws Ann. §§ 291-295u.

Among the powers of the PRDOJ to carry out its responsibilities are the power to interview witnesses, obtain statements, and issue subpoenas for documents and objects that it may consider essential for its investigations. 3 P.R. Laws Ann. §292(h). The existence of a parallel federal system of criminal justice in no way constitutes a preemption or abrogation of the states' power to enforce their criminal laws. *Knapp v. Schweitzer*, 357 U.S. 371, 374-375 (1958).

As the Commonwealth expressed at the March 2 hearing,⁴ “demands” requesting information from the United States Department of Justice “ordinarily take the form of a subpoena,” *Fai Mak v. FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001), since the federal regulations cited by the United States itself, both literally and textually, define a “demand” as a “subpoena, order, or other demand [...] of a court or other authority.” 28 C.F.R. § 16.21(a)(2). See also *Ferreira v. U.S.*, 350 F. Supp. 2d 550, 558 (S.D.N.Y. 2004).

Therefore, contrary to this Court’s assertions, even pursuant to the regulations cited by the United States itself (and without conceding said regulations’ applicability to the present situation),⁵ the issuance of the subpoenas was motivated by the proper exercise of legal authority. It follows that the subpoenas can hardly be described as “drastic and controversial” when the regulation cited by the United States itself specifically contemplates their use when requesting information pursuant to its terms.

It also follows that the Court’s description of the PRDOJ’s choice to serve these subpoenas on United States Attorney Humberto García and

⁴ See Docket No. 7, Transcript, page 19 (“under the Touhy regulations [...] a subpoena is defined as a demand.”) (statements made by Mr. Martínez on behalf of the Commonwealth).

⁵ In fact, such regulations do not even apply to a law enforcement request by the Commonwealth or a State, such as the one here in question. See 28 C.F.R. § 16.21(c) (“Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prospective, or regulatory agencies.”). Nevertheless, out of an abundance of caution, since the Commonwealth’s goal is simply to obtain the evidence it requested, it decided to serve a formal request for information.

Special Agent Luis Fraticelli as “a poorly thought-out strategy now wisely abandoned” lacks a basis in both fact and law. Although said regulations do not mandate that a request for information be directed to the United States Attorney, they do establish that the United States Attorney should review the request, once received by the holder of the information requested. See 28 C.F.R. § 16.22(b). In this sense, this Honorable Court’s statement that “by no stretch of the imagination does [the regulatory procedure for obtaining the requested information] involve directly asking USA García and SAC Fraticelli” is incorrect. In fact, it was precisely the United States Attorney’s Office and the Federal Bureau of Investigations who requested that the subpoenas be addressed to the United States Attorney. The Commonwealth chose to accommodate the United States’ specific requests regarding the procedure for soliciting the information. See *supra* n.5. The U.S. Attorney’s Office is now estopped from arguing the contrary.

Similarly, there is no evidence to support the Court’s incorrect and unwarranted conjecture that the PRDOJ is using this investigation as “an opportunity to issue publicity-stunt subpoenas” or to “embarrass federal institutions,” Docket No. 4 at 6. The issuance of the subpoenas was a regular, ordinary, and legitimate exercise of the PRDOJ’s investigative authority, motivated exclusively by the Department’s intent to fulfill its duty to responsibly investigate a complaint that falls squarely under its jurisdiction.

D. The factual statements made by the Court, regarding the events that occurred on February 10, 2006, were: (i) unsupported by any evidence of which the Commonwealth is aware; (ii) irrelevant to the issues before the Court; and (iii) made without jurisdiction.

It must be made clear that absolutely no evidence was presented by either of the parties at the March 2, 2006 hearing. The Court, nevertheless, without a basis on the record, made the following series of factual assertions:

On February 10, 2006, the FBI executed a search warrant, one of six issued by this court on February 9, 2006, at 444 De Diego Street, Río Piedras, Puerto Rico, pursuant to the investigation of a criminal enterprise. Following standard practice and investigative protocol, the USDOJ cannot publicly release details surrounding the criminal enterprise that motivated the search warrant. However, the court, as the issuing judicial authority, has obtained knowledge through the sealed, supporting documents and the warrants' return that the criminal plans were very specific, and if successful, could have compromised the lives of state and federal officials, public and private property, as well as the general public.

During the warrant's execution, a handful of journalists eager to obtain the news of the day slipped into a large group of protesters and curious members of the general public who tried to take advantage of an opportunity to cross a police line at 444 De Diego Street, a residential condominium. The federal agents guarding the site's perimeter, their vehicles, and the fruit of the search - in other words, executing their official duties - eventually pepper sprayed those who barged through the line against federal law in an effort to insulate themselves from such interference.

Journalist Normando Valentín Quintana was one of the individuals who suffered the effects of pepper spray on February 10, 2006. He subsequently requested that the PRDOJ file criminal charges against the federal agents responsible for what the PRDOJ believes to be an assault and battery. To that end, PRDOJ issued subpoenas against United States Attorney Humberto García ("USA García") and

against Luis Fraticelli, Special Agent in Charge of the San Juan Field Office of the Federal Bureau of Investigation (FBI) ("SAC Fraticelli") on February 17, 2006, seeking the already-mentioned information. PRDOJ's issuance of the subpoenas against federal officials has generated a great deal of local news coverage, which, coupled with the vocal protests against the searches themselves, has served to publicly cast federal institutions in a negative light.

Docket No. 4, at 2 (emphasis added). Given that there was no evidence on the record, it is not clear what source of information the Court relied upon in order to reach these conclusions.

- a. The Court's statements improperly prejudge a number of factual issues which may well prove to be crux of potential future civil lawsuits or criminal prosecutions.

The Court's statements improperly purport to prejudge a series of factual issues which may well be the very crux of potential future civil lawsuits or criminal prosecutions. Most of the factual statements made by the Court are precisely the issues currently under investigation by both local and federal authorities.

For example, there is no evidence on the record as to the number of journalists, *vis à vis* how many "protesters and curious members of the general public." There is no evidence on the record as to the number of journalists who entered the premises, the existence of a police line, of any notice given of its existence, or any other evidentiary grounds for this finding. There is no evidence on the record as to whether there were any agents guarding a perimeter, whether there even was a perimeter, whether it was clearly demarcated, or whether there was some other sort

of notice given of its existence. Similarly, even assuming there was a line, there is no evidence on the record as to whether the line was crossed, and if it was, then whether the expression “barged through” was an accurate way to describe the manner in which it was crossed.

There also was no evidence on the record from which one could determine whether, under the circumstances present on that day, the agents’ decision to pepper-spray journalists was a reasonable use of force, or was otherwise was a proper exercise of their official authority.

There is also no evidence on the record that the PRDOJ “believes” that federal agents did, in fact, commit assault and battery. At this time, the PRDOJ is only insisting on its right to investigate thoroughly various complaints that it has received concerning the conduct of FBI agents on February 10, 2006.

- b. The Court’s assertions of fact were unnecessary as a matter of law to its resolution of the jurisdictional question of whether the quash motion was properly filed in United States District Court.

The Court’s assertions of fact were unnecessary to its resolution of the only question that was before it: “the jurisdictional question of whether the quash motion was properly filed in United States District Court.” Docket No. 4 at 1. The only “facts” that mattered, one way or another, for purposes of the jurisdictional inquiry were those relating to the nature and legal effect documents that the PRDOJ served on the USDOJ and FBI; e.g., (1) Did the PRDOJ have authority under Puerto Rico law to issue the subpoenas?; (2) Did the issuance and service of a

subpoena constitute the initiation of a judicial proceeding, for purposes of the Federal Officers' Removal Act?; (3) What consequences does Puerto Rico law prescribe for the failure to comply with subpoenas issued by prosecutors?; and (4) Had the Commonwealth initiated a enforcement proceeding in its courts at the time of the hearing?

Obviously, the first three are pure questions of law that did not depend on any facts at all. Only the last one was at all contingent on facts, and even then, the fact is one of which the Court could take judicial notice: was there, or was there not, a pending proceeding in Commonwealth court to enforce the subpoenas against the U.S. Attorney and the FBI Special Agent in Charge? None of the "facts" listed by the Court have anything to do with this jurisdictional issue.

- c. From the Court's insistence that the federal search warrants were based on information involving potential acts of violence, one could infer that the Court's assertions of fact might have been motivated by the groundless concern that the purpose of the Commonwealth's investigation was to interfere with the federal investigation.

The Court's Memorandum Order strongly suggests that the Court is under the impression that the Commonwealth does not wish to cooperate with the federal government. For example, the Court writes:

In executing the search warrant on February 10, the FBI sought to ensure the safety and welfare of this community, and in that regard federal and local officials at least theoretically share a common goal. If local officials elect not to work towards that common goal with federal officials, then they should at the very least not undermine the delicate balance between the United States' sovereign immunity and legitimate state interests.

Docket No. 4 at 7 (emphasis added). There is no basis on the record for anyone to doubt the Commonwealth's resolve to work towards the common goal of ensuring the safety and welfare of this community.

The problem here is, precisely, that the U.S. Attorney's Office has conflated two entirely different questions: whether the federal search warrants are valid, and whether or not a federal officer, who was standing outside of a building where one of the warrants was being executed, used excessive force against members of the press. The two issues must be distinguished.

Let us be clear: the validity of the search warrants issued by this Court and executed by the FBI is simply not at issue here. The Commonwealth recognizes the federal government's duty to properly investigate possible violations of all federal criminal laws. Insofar as this Court harbored doubts regarding this, let them be put to rest.

That being said, however, the Commonwealth also has the duty to enforce its own criminal laws. Where there is evidence of a potential crime, the least that the Commonwealth can do is investigate the matter. Here, the Commonwealth is trying to investigate a complaint in which it was alleged that, during the execution of one of the warrants, unnecessary force may have been used against a member of the press.

The Commonwealth, in the interest of conducting as thorough and accurate an investigation as possible, has requested certain information from the FBI (for example, the names of the officers who allegedly may

have employed excessive force). Should the FBI stance prevail, the Commonwealth will decide whether local criminal laws were violated without the benefit of the FBI's version, that is, exclusively on the basis of the evidence it is, in fact, able to collect.⁶

In order to break this impasse, the Commonwealth formalized its requests for information. The information sought, it should be emphasized again, has nothing to do with the subject-matter of the federal investigation, as such. The FBI could have been in that location executing a search warrant in a copyright infringement case – the result would be the same. The only issue that concerns the Commonwealth is the potential violation of its criminal laws with respect to the actions taken by two individual FBI officers while dealing with a crowd of civilians.

The Court recognizes that the Commonwealth has a legitimate interest in investigating this matter. It disputes only the Commonwealth's decision to use subpoenas. As noted earlier, we disagree with the Court's interpretation of law. See, again, *Fai Mak v. FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001) (the USDOJ's Touhy regulations "clearly contemplate that subpoenas may issue"). The Court, in turn, has not been persuaded. So be it – but this disagreement cannot furnish the basis for speculations as to the Commonwealth's motives.

⁶ There is no evidence to support the Court's conjecture that the PRDOJ "believes [the pepper spraying] to be an assault and battery", Docket No. 4.

- d. The Court's concern with the reputational harm that federal institutions may have suffered as a result of press coverage related to the February 10 incident is based on information not on the record, which is, in any case, not relevant to the resolution of the dispute that was pending before the Court.

The Court stated in its Memorandum Order that:

PRDOJ's issuance of the subpoenas against federal officials has generated a great deal of local news coverage, which, coupled with the vocal protests against the searches themselves, has served to publicly cast federal institutions in a negative light.

The subject of the sentence is "PRDOJ's issuance of the subpoenas against federal officials," and its verb and predicate are "has generated a great deal of local news coverage." There is no evidence on the record of regarding this item. In fact, if anything, the event that "generated a great deal of local news coverage" would have been the U.S. Attorney's Office's filing of a motion to quash the PRDOJ's subpoenas. Until the USA's Office filed its motion and this Court scheduled a hearing, there was little or no coverage of the subpoenas. As stated before, the PRDOJ's service of subpoenas on the USAO was a normal step in the process of seeking and obtaining information from the USAO and FBI.

Second, the predicate, "news coverage," is modified by a subordinate clause: "which, coupled with the vocal protests against the searches themselves, has served to publicly cast federal institutions in a negative light." Of course, as we all know, the press and the citizenry are entitled to speak their minds as they see fit, and if their opinion is that

government institutions are behaving improperly, they have a federal constitutional right to say so.

III. Conclusion

In view of the above, the Commonwealth wishes to clarify the record.

WHEREFORE, it is very respectfully requested that this Honorable Court take notice of the above.⁷

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the instant document has been filed with the Court's CM/ECF System, which will simultaneously serve notice on all attorneys of record to their respective registered e-mail addresses. Any non-registered attorneys and/or parties will be served via regular mail.

In San Juan, Puerto Rico this 23rd day of March, 2006.

RESPECTFULLY SUBMITTED,

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⁷ Leave is hereby requested to file the present notice in excess of pages.

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