U.S. Department of Justice

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October 31, 2017

BY ECF

Honorable Andrew L. Carter, Jr.
United States District Judge
Southern District of New York
500 Pearl Street, Suite 1320
New York, New York 10007

Re: ***United States* v. *Norman Seabrook and Murray Huberfeld,***
16 Cr. 467 (ALC)

Dear Judge Carter,

The Government writes today in support of an oral application made earlier today to preclude the defendants' use of certain items pertaining to a witness called by the Government, Jona Rechnitz, who remains under cross-examination. The items include (1) a purported photograph of a costumed Rechnitz wearing dark makeup in the fashion commonly known as "blackface" (the "Photograph"), (2) an e-mail in which Rechnitz appears to refer to former President Barack Obama as a "shvartze," (the "E-mail") and (3) an audio recording of a partial conversation in which Rechnitz refers to an unidentified person as, "a schmuck, a shvartze" (the "Recording") (collectively, the "Items"). The Court should preclude the admission, reference, and any other use of the Items under Federal Rule of Evidence 403. The Items are not relevant to any issue properly before the jury. To the extent that defendants argue that the Items demonstrate bias, the Items are detached from any party to the case, at odds with the rest of the record in evidence, and are of no probative value. Finally, and most importantly, even assuming *arguendo* that the Items offered some probative value to the issues before the jury, any such value is vastly outweighed by their clearly prejudicial and inflammatory nature.

It goes without saying that blackface, as it has appeared over the decades since coming into fashion in 18th century American theater, is vile. Racial epithets and derogatory racial terminology are abhorrent. The practice of blackface and the use of such terms are widely and correctly derided, and are seen as markers of either a lamentable ignorance of their history, at best, or an inexcusable racial animus, at worst. But it is that very societal consensus that should prompt particular caution with respect to the defendants' desire to parade such markers before the jury in association with a witness crucial to the case at bar. The question is an evidentiary one, and the loaded nature of the image and terms themselves, combined with connections to the witness that are low in number and attenuated to any issue of consequence, counsel overwhelmingly against their admission or reference.

A. Overview

Last evening, counsel for Mr. Seabrook notified the Government of its plan to make use of the Items by including them with other marked exhibits intended for Rechnitz's cross-examination.

The Photograph was a full-color image of a costumed individual, purportedly Rechnitz, wearing, among other things, black facial makeup, oversized sunglasses and an Afro wig. We are informed by defense counsel, though have not corroborated this information ourselves, that the image was posted on social media, although not by the witness, and that the costume may have been worn on the Jewish holiday of Purim, which celebrates the saving of the Jewish people from the Persian vizier Haman, and contemporarily involves masquerading in costume. *See generally*, "Purim," Wikipedia, https://en.wikipedia.org/wiki/Purim, last accessed October 31, 2017. *See also* "Assemblyman Dov Hikind Defends Wearing Blackface to a Party," THE NEW YORK TIMES, Feb. 25, 2013, http://www.nytimes.com/2013/02/26/nyregion/hikind-defends-wearing-blackface-to-purim-party.html, last accessed October 31, 2017 (concerning a Brooklyn state assemblyman photographed wearing blackface at a Purim party he hosted at his home).

The E-mail is a private exchange between the witness and his wife. The witness's wife complains that the show "Access Hollywood" has been pre-empted by the State of the Union address. The witness responds with something either in Yiddish or with typos or both, which prompts a question mark from her. He responds again, "Inwrote schvartze," Presumably meaning "I wrote schvartze." The conversation then switches to another topic. After that, the topic of conversation changes.

The Recording is taken from an audio conversation intercepted by a judicially authorized wiretap of the witness's phone that was disclosed to the defendants in discovery. The conversation is a lengthy one, but the reference is fleeting and its meaning unclear:

> THE WITNESS: Hello?
> MALE 1: I forgot to tell you that Mark said you were really very helpful today.
> THE WITNESS: Mark? You know what? He's getting so screwed. It just bothers me.
> MALE 1: Yeah, 27 percent crazy.
> THE WITNESS: He's a schmuck. What is he, a schvartza?

There is no additional context provided on the call. There is no indication of who Mark is, or what "getting so screwed" means here. The call provides no context as to why Mark might be a "schmuck," whether he might be a "schvartza," and whether the two are even linked.

Dictionary.com notes that the term "schvartze" is derived from a Yiddish noun from a descriptive adjective meaning "black," and is used by some Jewish people to refer to a black person. The term inspires a varied number of reactions on the Internet, with some defending it as "not clear cut;" "[t]here are those. . . who believe that 'schwartza' is just Yiddish for the word 'black' and its use is part of the Jewish culture." "Bernard Goldberg: Dictionaries Have a 'Liberal' Bias," The Huffington Post, April 19, 2009,

https://www.huffingtonpost.com/2009/03/19/bernard-goldberg-dictiona_n_177123.html, last accessed October 31, 2017. However, Dictionary.com further notes the term is "often disparaging," which appears to be in alignment with much of the analysis available online. (Dictionary.com.)

None of the Items reference defendant Norman Seabrook, or any other person mentioned in the trial, in any way. This includes Chief Philip Banks, another African-American associate of Rechnitz's, according to testimony elicited at trial. Moreover, the Photograph, the E-Mail and the Recording appear to be the only instances of in which Rechnitz dons or uses racially insensitive material in the hundreds of thousands of pages of documents and the thousands of recorded telephone calls produced in discovery in this case. Notably, the Government has now undertaken a review of Rechnitz's e-mails from the jsrcap.com e-mail account, from which the E-mail emerged and which the defendants received in discovery. The e-mail account contains 98,616 of Rechnitz's e-mails over the course of several years. We searched all spellings of "shvartze" that we could find. The E-mail was the only instance of the witness's using the term that we could find, which likely explains why it is the only one the defense intends to offer. The only other appearance of the term was in an e-mail Rechnitz received from an older family member in which the family member mentions a local African-American politician, writing, "It is a honor to host a Schvartze in Washington who is pro Israel."

In any event, the trial concerns none of this. Rather, the trial concerns allegations that defendant Norman Seabrook agreed to receive a kickback from defendant Murray Huberfeld, and that Huberfeld actually gave Seabrook the agreed-upon kickback. Rechnitz has testified that he facilitated the kickback between the two, and that he actually delivered the kickback in cash to Seabrook, whom Rechnitz had befriended, and received reimbursement for that kickback from Huberfeld. Seabrook is African-American. Huberfeld and Rechnitz are Orthodox Jewish.

B. Applicable Law

Under Rule 403 of the Federal Rules of Evidence, the Court may exclude even relevant evidence when "its probative value is substantially outweighed by a danger of unfair prejudice." "'Unfair prejudice' within [this] context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief* v. *United States*, 519 U.S. 172, 180, (1997) (citing the Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C. App., p. 860). In making a Rule 403 determination, courts should ask whether the evidence's proper value "is more than matched by [the possibility] . . . that it will divert the jury from the facts which should control their verdict." *Benson* v. *Am. Ultramar Ltd.*, No. 92 CIV. 4420 (KMW) (NRB), 1996 WL 514963 (S.D.N.Y. Sept. 10, 1996) (citing *United States* v. *Krulewitch*, 145 F.2d 76, 80 (2d Cir.1944) (Hand, J.)).

Even if evidence purporting to show that a witness is biased against the defendant is relevant, it can still be excluded if the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or undue delay. (*See United States* v. *Flaharty*, 295 F.3d 182, 191 (2d Cir. 2002) (citing Fed. R. Evid. 403)). This exclusion of evidence can pertain to material suggesting the witness is racially biased, especially

if the alleged racist conduct is not overwhelming. (*See United States v. Stevenson*, 660 F. App'x 4, 6 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1212 (2017).

There does not appear to be law in this Circuit addressing this precise set of circumstances. This morning, Seabrook's counsel referenced *United States* v. *Figueroa*, 548 F.3d 222, 230 (2d Cir. 2008). In that case, the Second Circuit ruled that although the error was harmless, a district court abused its discretion by ruling that a defendant could not examine a witness against him about his tattoos, which included swastikas. However, as Seabrook's counsel acknowledged, the Circuit explicitly disclaimed any analysis of Rule 403, which the district court had not undertaken. The district court had instead made its finding by reference to Rule 608, and because it had not explored the question of prejudice under Rule 403, the Circuit expressed no opinion on it.[1] *Figueroa* does not reach the issue raised here by the Government.

Other law is more helpful with respect to the Rule 403 calculus at issue. The Second Circuit's decision in *Stevenson*, by way of example, upheld a district court's decision to prevent the defense from cross-examining a witness regarding his use of a racial epithet in a recorded conversation because the district court had determined that "the epithet was not used in an obviously derogatory manner and, thus . . . the recordings were more confusing than probative." (660 F. App'x at 6; *see also United States* v. *Rahman*, 189 F.3d 88, 132 (2d Cir. 1999) (finding that a very weak foundation for an allegation of racial bias could weigh in favor of excluding such evidence). *Cf. Brinson* v. *Walker*, 547 F.3d 387, 394 (2d Cir. 2008) (distinguishing between lesser indications of racial bias and racist statements of such intensity as to create an inference that the witness would fabricate testimony against a member of a particular racial group)).

[1] The Circuit instead ruled that because the presence of the swastikas went to bias, which can be proven extrinsically, there was no valid Rule 608 basis to preclude the matter.

C. Discussion

a. *The Photograph*

Under virtually any Rule 403 analysis, the Photograph must be excluded. That the Photograph is prejudicial lies beyond cavil. Blackface is, simply put, taboo in modern American society, and rightly so. The practice of blackface, and the more extended racial history attached to it, is sufficiently weighty and fraught as to compel a visceral, emotional response. It is, in a word, ugly. And it is, without question, the sort of association that one can reasonably expect to get a reasonable juror to shut down in his or her thoughtful consideration of a witness's testimony.

The Photograph's probative value, by contrast, scarcely rises above the theoretical. The circumstances of the Photograph itself obviously bare no connection to the matter at trial. Nothing about Rechnitz's costume tends to make the allegations in the Indictment more or less true. The defense puts forth only the thinnest of rationales by pointing to the possibility that the Photograph demonstrates bias against African-Americans generally, and thus, inferentially, against defendant Seabrook in particular. Specifically, the defense has offered the assertion that, "When you hold someone in low regard, picking him as the target that you're going to frame is easier." (Tr. 975).

Setting aside the obvious point that holding a party in "low regard" is not a basis of evidentiary admissibility, the claim appears wholly speculative based on the record at trial and the evidence available to the parties. To go from the use of racially insensitive language in a few private communications to a willingness to frame another human being as racist requires a certain leap. Such a leap is without support in this case. The Government has observed no evidence, even after two days of rigorous cross-examination, that Rechnitz framed Norman Seabrook, and perceives no explanation for why such a purportedly racially-motivated venture would have necessitated taking down Seabrook's co-defendant, a fellow Orthodox Jew and family friend. This appears to be an act of pure reaching by defense counsel based on the bare fact that Seabrook is African-American and Rechnitz is not. There is no suggestion, within the picture or within any of the Items, of Rechnitz framing Seabrook, or for that matter, any racially motivated animus toward Seabrook at all. On the contrary, the evidence has established a close and lengthy relationship between Rechnitz, Seabrook, and Banks; communications between them evidencing the same; and a Rechnitz personal and business e-mail account containing nearly 100,000 communications and five months of wiretapped conversations with close confidantes otherwise barren of the whiff of the racial animus Seabrook attempts to play up.

There is more. It is unclear what circumstances led Rechnitz to don this. But there are explanations well short of full-blown racial animus, and certainly well short of the sort of racial animus that motivates a witness to run around framing his African-American friends for federal crimes. There are gradations of possible explanation, but only the blunt force impact of the image on the jury. The Ninth Circuit Court of Appeals thoughtfully addresses this duality in *Bryant* v. *McDonald*, 586 Fed. Appx. 290, 291 (9th Cir. 2014), in which it held that a district court did not err when it denied habeas corpus relief on the defendant's claim that his Constitutional rights were denied when California state courts excluded evidence that a witness had used a "vile racial epithet" when interviewed by the police. As the *Bryant* court put it:

> Bryant was not precluded from exploring any other indications of bias, racial or otherwise. Taking the witness' testimony as a whole, the state courts could find it unlikely that her credibility or reliability would reasonably have been questioned by a juror on the basis of that one use of the epithet. Moreover, they could reasonably determine that use of the epithet in a moment of anger was of minimal relevance to her identification of Bryant as a person who had been at her house at an earlier time. Yet the epithet is so rightly frowned upon by our society that the state courts could reasonably determine that evidence of its use would be so highly " 'offensive and inflammatory'" that it would cause undue prejudice to the state's case.

Id. at 291. Similarly, although the Photograph could have many explanations – none of them dealing with the case – its impact could only be prejudicial in the extreme. It should, without question, be excluded.

b. *The Recording and the E-mail*

The Rule 403 calculus for the remaining Items is quite similar. Neither the Recording nor the E-mail speak to any contact with Seabrook at all. Defendant Seabrook's rationale is the same utterly speculative rationale as with the Photograph. Further, the instances are isolated, and do not reflect the sort of "racial bias, *at least when held in extreme form*, that can lead people to lie or distort their testimony." *Brinson*, 547 F.3d at 394 (emphasis added).

And yet here, too, the danger of prejudice is all too real, and the effect on the jurors likely blunt and overwhelming. Two isolated uses of a racial slur – and in a language not spoken by any of the jurors as far as the Government is aware, who therefore cannot parse any of the term's nuance – is exactly the sort of thing that could reasonably prompt an emotional reaction from any reasonable and decent juror. The potential prejudice is extreme, and measured against a void of probative value, the Court should clearly exclude both the Recording and the E-mail.

CONCLUSION

For the reasons above, we respectfully renew our request that the prejudicial Photograph, E-mail, and Recording be excluded. We further request that they not be referenced in questions posed to the witness without being admitted into evidence, as the prejudicial impact would be the same in any event.

Very truly yours,

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