

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA

Plaintiff,

Case No: 2:16-CR-00160-JVB-JEM

v.

JOHN CORTINA, and
JAMES E. SNYDER,

Defendants

DEFENDANT JAMES E. SNYDER'S
SANTIAGO RESPONSE

For his response in opposition to the government's *Santiago* proffer [Dkt. 180], Mr. Snyder respectfully submits the following.

Introduction

Scenario #1. A person makes a political contribution to a mayor.¹ Months later the mayor recommends that a business connected to that person be put on a City's towing list – not because of the contribution, but because after due diligence and consulting with the necessary public officials they decide the business has the objective qualifications to do the job. *Result*—no crime has occurred. A contrary finding would send shockwaves across the country, criminalizing wholly lawful conduct and exposing untold hundreds if not thousands of mayors and other elected politicians throughout the country to imminent indictment.

¹ Mr. Snyder is not conceding any of the alleged facts contained in the *Santiago* proffer. But even if the Court assumes each of those allegations are true for purposes of this motion and response, the government has failed to meet its required burden under *Santiago* and its progeny.

Scenario #2. Same facts, but at the same time – with no direction, input, influence, advice, or hint even of knowledge on the part of the mayor – the contributor privately boasts and “puffs” that he has an inside track to being place on the towing list because of his financial donation. *Result for the mayor* – still no crime has occurred. The mayor in scenario #2 is no different from the mayor in scenario #1, because the mayor has no control over or responsibility for outrageous assertions that he did nothing to induce, and of which he knows nothing.

Mr. Snyder asks the Court to consider what is *absent* from the government’s *Santiago* proffer (§ 1 below), and what is *present* (§ 2 below). Absent from the proffer is any evidence that Mr. Snyder had any idea what Mr. Cortina and CHS1 were telling themselves in the privacy of their intimate chats. The government collected and reviewed, by its own-description, “thousands of pages of discovery, including dozens of hours of undercover recordings” [dkt. 183, p. 6], over the course of its five-year investigation. The 83-page proffer suggests the government was hardly being circumspect in its choice of evidence. Its length indicates this is the strongest evidence the government has.

And yet more than two years after indictment the government cannot produce evidence showing Mr. Snyder made any *quid pro quo* arrangement with Mr. Cortina. Absent from the proffer is any evidence that Mr. Snyder knew anything about Mr. Cortina’s private puffery, all of which occurred outside Mr. Snyder’s presence. Even if Mr. Cortina and CHS1 actually had a scheme between them, absent is any evidence that Mr. Snyder induced, knew of, or had any connection to that scheme, so he cannot be a party to a conspiracy. The government speculates as to why it still has no good evidence implicating Mr. Snyder. But just as Freud said that “sometimes a cigar is just a cigar,” sometimes there is no evidence just because *there is no evidence*.

Also absent from the government's proffer is a great deal of contextual information deliberately excised to increase dramatic effect. Mr. Snyder will provide some of that context here.

But aside from the absence of any evidence that Mr. Snyder conspired with Mr. Cortina, what is present in the proffer is just as noteworthy. Included in its proffer is affirmative evidence *disproving* the government's own conspiracy theory. As Mr. Cortina told CHS1, eight months after the government alleges a crime commenced, "He-he (Snyder) called it fxxkin' loans. He calls it loans." [Dkt. 180, p. 73.] That statement occurred before either Mr. Snyder or Mr. Cortina knew there was an investigation or a pending indictment, so Mr. Cortina had no incentive to lie to CHS1. In those circumstances, according to the proffer, Mr. Cortina relayed to his business partner (and secret informant) that Mr. Snyder did *not* understand the alleged payment to be a bribe. Instead Mr. Snyder understood it then as he understood it when he received it, as a loan to his campaign fund, which he insisted be properly documented via check delivered to his official campaign headquarters. Every other bit of evidence cited in the government's *Santiago* proffer is entirely consistent with Mr. Snyder's lawful intent he held while receiving the contribution. So even if Mr. Cortina, at CHS1's urging, privately play acted the role of a 79-year-old gangster, yukking it up about "juice money," the government's own proffer proves Mr. Snyder had no idea what they were talking about.

Because there is due process in this Country, an individual cannot be convicted and sent to prison based on conversations he did not induce, participate in, or even know about. The government has no evidence that Mr. Snyder induced, participated in, or knew about the hearsay statements documented in the proffer. Because the government

failed to make its requisite *Santiago* showing, those statements are inadmissible at a trial involving Mr. Snyder.

Legal Standard

Federal Rule of Evidence 801(d)(2)(E) provides that a "statement offered against a party" is not hearsay if it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *United States v. Bainbridge Mgmt. L.P.*, 2002 WL 31006135, at *2 (N.D. Ill., Sept. 5, 2002); accord *United States v. Walker*, 2008 WL 4534029, at *1 (N.D. Ill., Oct. 3, 2008). For a Court to admit co-conspirator statements into evidence pursuant to this rule, "the government must show, by a preponderance of the evidence, [1] that a conspiracy existed, [2] that the defendant and the declarant were members of that conspiracy, and [3] that the statements sought to be admitted were made during and in furtherance of that conspiracy." *United States v. Yoon*, 128 F.3d 515, 526 (7th Cir. 1997) (citing *United States v. Santiago*, 582 F.2d 1128, 1134 (7th Cir. 1978)). The government must demonstrate to the Court that it can satisfy these requirements *before* the statement is admitted into evidence. *United States v. Stephenson*, 53 F.3d 836, 842 (7th Cir. 1995).

Even if the government shows there exists *some* conspiracy, its showing is not complete. Mere conversations between coconspirators are not admissible under Rule 801(d)(2)(E). *United States v. Shoffner*, 826 F.2d 619, 627 (7th Cir. 1987). Proffered conspirator statements must further the objectives of the conspiracy, such as statements: (1) to recruit potential co-conspirators, *see Shoffner*, 826 F.2d at 628; (2) to control damage to an ongoing conspiracy, *see United States v. Van Daal Wyk*, 840 F.2d 494, 499 (7th Cir. 1988); (3) to keep co-conspirators advised of the progress of the conspiracy, *see United States v. Potts*, 840 F.2d 368, 371 (7th Cir. 1987); (4) to conceal the conspiracy, *see United States v. Kaden*, 819 F.2d 813, 820 (7th Cir. 1987); or (5) to execute the conspiracy, *see United States v. Cox*,

923 F.2d 519, 527 (7th Cir. 1991). If the statement does not fall into one of these categories, it remains inadmissible hearsay.

A *Santiago* proffer does not become more persuasive because of its length. See *Bainbridge*, 2002 WL 31006135, at *3 (government did not satisfy its pretrial burden despite “voluminous” proffer of 74 pages and supplement of 44 pages).

Argument

- 1. Absent from the proffer is any evidence that Mr. Snyder engaged in wrongful conduct. There is no evidence he induced, participated in, or knew of the conversations. Also absent is significant exculpatory evidence, which provides context and affirmatively proves Mr. Snyder is innocent and was not involved in any conspiracy.**

As far as Mr. Snyder ever knew, he acted just like the mayor in *scenario #1* above. There is no crime. The government has proffered extensive evidence indicating that Mr. Snyder may have been like the mayor in *scenario #2* above. In that scenario, there is also no crime. With no evidence of wrongdoing, or instruction to others to participate in wrongdoing, Mr. Snyder cannot be a coconspirator.

- 1.1. The government sent in CHS1 to see if Mr. Snyder would try to seek bribes. In response, Mr. Snyder asked whether CHS1 was the kind of tow operator who would help old ladies out of a ditch for free.**

The government sent CHS1 – someone Mr. Snyder did not know, but who had been recommended to him by a former sheriff – to Mr. Snyder’s office in May of 2014,² attempt-

² This is the recording and transcript produced in violation of Rule of Criminal Procedure 16, which the government should not be permitted to introduce or rely on. [See Dkt. 178.] The government has responded, saying that after exercising due diligence it could not have known that its main witness in this case engaged in a one-on-one recorded interview with the main defendant until four years after the fact and two years after indictment. [Dkt. 183 p. 3.]

ing to “uncover corruption regarding the awarding of towing contracts in Northwest Indiana.” [Dkt. 180, p. 11.] The CHS repeatedly prods Mr. Snyder, employing several variations on the phrase, “I’ll do anything you want.” [Dkt. 180, p. 15.]

What was Mr. Snyder’s reaction? As far as the government’s recording reveals, there is no evidence that Mr. Snyder understood CHS1’s language to refer to bribes. Instead, Mr. Snyder noted that other public officials and sheriffs spoke highly of CHS1. [*Id.*] And in the very next line, right after CHS1 begins talking with knowing winks and nods about being “the kind of guy that you can go to,” Mr. Snyder’s response was: “So, the two guys that I know ... [Towing Company], I can call them when I have a break down, you know on the side of the road, and I’m helping some old lady and they come get it and fix the car and give it back to them.” The government conspicuously omitted that line from its proffer. [Dkt. 180, pp. 14–15.]³

The next elision from the proffer also cuts out Mr. Snyder’s clearly expressed motivation. Right after the government’s excerpt 2 ends, Mr. Snyder responds to CHS1’s towing experience and says: “Well, that’s what the officers want, and that’s, you know, anything I can do to help them and make their job easier, you know, I spend a lot of time trying to make their situations...” The government omits that but begins Excerpt 3 on the very next line, in which CHS1 (not Mr. Snyder) interrupts and abruptly begins talking about “do[ing] anything for a policeman and a policeman’s wife, the mayor’s wife ...” [Dkt. 180, p. 16.]

Mr. Snyder is innocent and naïve to a fault. Mr. Snyder heard CHS1’s statement about “do[ing] anything you want” and “being the kind of guy you can go to.” But in portions

³ Mr. Snyder can provide the full transcripts and recordings for the Court’s review, if the Court requests.

of the transcript conspicuously omitted by the government's proffer, Mr. Snyder immediately began talking about wanting a towing company that would be willing to pull the cars of proverbial "little old ladies" out of ditches free of charge, as part of his goal of doing everything he could to make police officers' jobs easier.

The government intentionally excised those portions (and only those portions) from what it submitted to the Court. Mr. Snyder's reaction perhaps explains why CHS1's investigation into Mr. Snyder appears to have been suspended in 2014 for eighteen months; nothing else in the proffer explains that eighteen month gap. For unexplained reasons, the government misplaced this recording until October of this year, when in the exercise of "due diligence" it remembered it existed. [See Dkt. 178; dkt. 183.]

1.2. The government has no evidence Mr. Snyder had any connection to Mr. Cortina's and CHS1's private banter.

The government's proffered submissions span 70 pages. [Dkt. 180, pp. 13-81.] Following the May 2014 recorded conversation, discussed above, Mr. Snyder appears in under 3% of the remaining lines. None of those statements indicate any knowledge of Mr. Cortina's and CHS1's banter. In fact in those instances in which Mr. Snyder speaks to Mr. Cortina there is nothing scandalous, outrageous or otherwise indicative of the government's conspiracy theory.

1.3. The government omitted significant exculpatory information

As shown by the selective edits made to transcript of the May 2014 meeting, accurate context was not the main goal of the government's proffer. The remaining portions of the proffer omit significant, largely undisputed details that show there was no criminal behavior on the part of Mr. Snyder.

1.3.1. Cortina did not begin campaign contributions in January 2016.

The government's theory appears to be that a conspiracy commenced when CHS1 contacted Mr. Snyder in May of 2014; at that time, Mr. Snyder told him to get in touch with Mr. Cortina; then for the next eighteen months nothing happened. Then in January 2016, Mr. Cortina paid Mr. Snyder a bribe to begin towing. That eighteen month gap renders the theory implausible on its face, since it omits all context that would render the theory coherent.

First, as the government is fully aware but omits from its proffer, Mr. Cortina was a regular lawful political contributor to Mr. Snyder's campaigns going back a decade. Mr. Cortina lawfully made political contributions to Mr. Snyder's failed Mayoral bid in 2007. Mr. Cortina either personally or via his business made political contributions to Mr. Snyder's campaign in every year from 2011 through 2015. The lawfulness of those payments has not been challenged in this case.

A portion of the contribution made in January 2016 was the annual fee to be a participant in Mr. Snyder's "Business Roundtable." The government's proffer makes much of this and contains extensive discussion of the roundtable between CHS1 and Mr. Cortina. But that organization was and is a standard and proper fundraising mechanism used by politicians across the country. Mr. Cortina contributed that \$2000 amount in January 2015; March 2014; January 2013; and March 2012—that is, every year the Business Roundtable has existed. The government omitted these undisputed facts, but these undisputed facts make it much less plausible that the January 2016 contribution should suddenly be seen as a bribe unlike the several identical contributions made by Mr. Cortina in prior years.

The only difference between the lawful contributions in March 2012, January 2013, March 2014, and January 2015; and what the government now claims was an unlawful contribution in January 2016, are the private conversations between Mr. Cortina and CHS1 to which Mr. Snyder was not privy. But again, that is like the difference between *scenario #1* and *scenario #2* above and in no way inculcates Mr. Snyder.

1.3.2. Mr. Cortina and his previous partners were on the tow list based on merit. Later, they were also *terminated* based on merit, despite the fact that Mr. Cortina was a regular political contributor to Mr. Snyder. There was no connection between money and towing.

Mr. Cortina's connection to Portage towing did not begin in 2016. It began back in 2012. The government will not be able to seriously dispute at trial that one of Mr. Snyder's (and public officials in his administration like PO1 and PO2) central concerns with towing companies was that they maintain impound lots within or near Portage so that residents would not need to travel far to retrieve their towed vehicles. As part of his Kustom Auto Body business, Mr. Cortina owned a secure fenced in lot within Portage. That was the major reason towing companies sought to partner with him: they provided the towing equipment while Mr. Cortina provided a secure impound facility.

From 2012 to 2015, Mr. Cortina partnered with Ambassador towing. [Dkt. 180, p. 14.] The government has not alleged any impropriety with that arrangement, even though Mr. Cortina made political contributions in each of these years. As the proffer indicates, Mr. Cortina (and by extension, Ambassador) built substantial goodwill for the City by painting City vehicles and equipment free of charge. [*Id.*] As Mr. Snyder told CHS1, "He [Cortina] *paints* all our [the City's] stuff. They're, you know, underperforming as a towing company, but they're making up for it in what they do." [Dkt. 180, p. 14.] The government says the word *paints* is unintelligible, except Mr. Snyder repeats it a few sentences later:

“But the problem is, is they do all that work for [the City of Portage]. Um, they painted all of our leaf trucks.” [*Id.*] To be clear, this was not bestowing a benefit on any individual, but was lawful civic service.

Over time, however, Ambassador Towing accumulated a number of complaints regarding the quality of its towing services. Three months before Election Day for Mr. Snyder’s 2015 reelection campaign, PO1 – with Mr. Snyder’s knowledge, agreement, and blessing – terminated Ambassador and Mr. Cortina from the City’s authorized tow list. This was in spite of Mr. Cortina’s regular political contributions and substantial goodwill that came from his providing the City with free services. Mr. Snyder and PO2 told Mr. Cortina that he retained that goodwill with the City, but that the termination stemmed from the underperformance of his then-partner, Ambassador. Thus, they informed him that if he found a new partner he would be eligible to be placed back on the City’s list of approved towing operators. That was how CHS1 and Mr. Cortina became connected in January 2016. It will be difficult to dispute at trial that Mr. Cortina was well-placed to partner with a towing operator and tow for the City of Portage *long* before January 2016, and for reasons that are completely independent of political contributions.

1.3.3. Previous towing companies were taken off the list because of merit, and those companies also made political contributions. This further shows there was no connection between money and towing.

Waffco was terminated from the City’s towing list. That termination was merits based and had nothing to do with personal considerations. Omitted from the government’s proffer is significant evidence showing the City of Portage, PO1, PO2, and Mr. Snyder would have been derelict *not* to terminate Waffco.

As the government is aware, Waffco made regular and lawful contributions to Mr. Snyder’s political campaign throughout the relevant time period. The idea that Mr.

Snyder terminated Waffco based on a bribe disguised as political contributions, even though Waffco had also made political contributions, makes no sense.

Waffco previously represented to Mr. Snyder and PO1 that they had a physical impound lot located in Portage. They did not. Mr. Snyder himself experienced the inconvenience resulting from that misrepresentation when in early 2016 he (along with PO2) went to pick up a City vehicle that had been towed by Waffco. To the Mayor's great irritation, in light of assurances Waffco had given him over several years that they were impounding cars within Portage, he discovered that Waffco had no impound lot in Portage, as it had claimed, and that instead the vehicle had been towed to Lake Station and stored there.

In another exchange omitted by the government, PO1 confirmed this to CHS1 as CHS1 secretly recorded him:

PO1: Um, yea, I mean, like I said, the other, we got rid of Waffco. I don't necessarily have anything personal against them. Um, we didn't, as far as I can tell they did good work. Biggest thing is they didn't have, they had a store front. But they didn't keep any of their cars here. They took, they still took them to Lake Station, so that's a problem. So it made it a little bit easier for me but, you know some guys, that over the course of the years, you know, develop, you know, friendships, so. It is what it is. Um. All our uh, take a look at that. That's kinda [...], the tow policy dictates...

Moreover, on the company's social media accounts, Waffco frequently mocked the people who got into accidents and therefore needed their vehicles towed. On one post, the company's account says, "Driver: That Snow was deeper than I thought? Me: Thanks For the money Jackwagon..." On another post showing a wrecked semi-truck, the account posted, "F*kin garbage scow." The account mocked a different accident, "Kinda early to be asleep while driving... Up And out you come." On another social media post,

Waffco informed its potential customers, “I don’t care about anyone liking me. Most of you mother*ckers don’t even like yourselves.” The caption informed local residents that following an accident the “first thing out of his sh*t hole mouth is ‘Are you going to sue?’ ... Prick don’t even ask [tow truck driver] Is He OK...” Making fun of a semi that hit a bridge, the company said, “Bridge trolls strike again.” Then, presumably in a commentary on the driver’s ethnicity, Waffco said “Don’t pay no attention to the height sign, It’s in a FOREIGN LANGUAGE,” followed by a US Flag emoji.

Indeed, just two months before the conversations proffered by the government—showing Mr. Snyder and other public officials considering Waffco’s termination—the owner of Waffco posted to his public account: “Breaking News... [Bruce] Jenner to donate balls to [then-President] Obama,” along with photographs of the two.

The government’s theorizes that the City of Portage should have continued on with this company, and *would* have absent Mr. Cortina’s January 2016 contribution. The government argues that the January 2016 contribution made the difference, even though Mr. Cortina made political contributions every prior year to Mr. Snyder’s mayoral campaign, and even though Waffco also made political contributions every prior year to Mr. Snyder’s mayoral campaign. Mr. Snyder disagrees with the government’s taste in towing companies—he, PO1, PO2, and all other officials in the City had every justification to terminate Waffco. That decision was made in the interests of the City of Portage.

1.3.4. The remaining transcripts show that Cortina and CHS frequently engaged in “locker room talk” about bribing officials, and yet never carried it through.

If the Cortina tapes are credible, Mr. Cortina has, without exaggeration, every politician in Northwest Indiana in his pay. On the tapes, he discussed with CHS1 bribing at least eight other politicians in the area. Yet the government knows that those schemes

were completely fictionalized puffery. They have objective evidence that none of those schemes were real, but they lowered their standard of proof to believe that what Mr. Cortina said about Mr. Snyder.

Indeed, if the tapes are to be believed, Mr. Cortina *even has CHS2 in his pay*. According to one tape:

JC: Sh*t. And I got [CHS2] in my-in my back pocket.

CHS: What's [CHS2] do?

JC: [official position]. Porter County.

CHS: Oh really

JC: The whole [position] of Porter County.

CHS: Does he take money? Does he need it? You hel-does he help you? Does he do anything for you?

JC: Who [CHS2]? Uh... whatever I need.

CHS: Really?

JC: Whatever I need.

CHS: So you can help a friend?

JC: Yea, you know. If you are paying too much taxes on your property, he finds a loophole. Not for everybody, for me.

CHS: So did you help him get into office?

JC: Eh I-I helped him get a um Mustang Rousch.

Mr. Snyder does not find these ridiculous assertions credible; and neither does the government, since they are obvious fiction. But the government's *Santiago* proffer lowers the standard of proof when it comes to Mr. Cortina's ridiculous assertions about Mr. Snyder.

1.3.5. The final quoted conversation from November 10, 2016, is taken obscenely out of context.

The government's proffered excerpts from November 10, 2016, are taken obscenely out of context. Mr. Snyder expressed absolutely no belief that he or Mr. Cortina had anything to fear stemming from January 2016 or Portage towing. Rather, he expresses concern that *CHS1* might be in trouble, and discusses *CHS1* retaining counsel for protection.

The parties were worried that *CHS1*'s towing in Lake County might tie *CHS1* to Sheriff Buncich. That is also why Mr. Cortina's and *CHS1*'s towing firm was suspended – PO1 and Mr. Snyder thought that firm may have been compromised, but because of contacts *with Sheriff Buncich*. Not because of any connection between Mr. Cortina and Mr. Snyder. Indeed, no one at that meeting expressed any idea or concern that Mr. Cortina and Mr. Snyder had anything to fear based on anything other than Mr. Cortina's third-hand connection to Sheriff Buncich, through concerns that *CHS1* may have been engaged in bribery in Lake County.

Indeed, Mr. Snyder advised Mr. Cortina to retain an attorney immediately, so that the attorney could go to the government and explain that they "got the wrong place."

Mr. Snyder and Mr. Cortina also discuss the fact that towing companies, like all companies, make political donations to all political parties. But in the tape, they discuss how the line is crossed when a politician "does favors" based on those contributions. Once again, the government declined to portray its recordings in an accurate way to the Court.

2. Present in the government's offer is affirmative disproof of its conspiracy theory.

The government's proffer shows Mr. Snyder had no idea what Mr. Cortina and *CHS1* were talking about in their private chats.

2.1. Mr. Snyder has always considered the money a campaign contribution, as the government's own proffer shows

One of the ultimate questions in this case is whether Mr. Snyder understood the check given in January 2016 by Mr. Cortina to be a lawful political contribution—just like the money Mr. Cortina had given every year prior to that—or whether Mr. Snyder accepted the check with the intent of being influenced to take different official acts than he otherwise would have. The government's own proffer shows Mr. Snyder understood it to be a lawful loan.⁴

As Mr. Cortina relayed to CHS1 in September 2016, Mr. Snyder has been consistent from the very day he received it: "He-he [Snyder] called it fxxkin' loans. He calls it loans." [Dkt. 180, p. 73.] It was then the *CHS*, not Mr. Cortina, who began talking about and using the provocative term "juice money." [*Id.* p. 74.]

Mr. Cortina then allegedly says, "I have to get the mayor in my back pocket and say hey Jimmy ..." [*Id.*] That also disproves the government's own case: the only reason to say you "have to get" someone in your back pocket is if they weren't already in your back pocket.

The fact that Mr. Snyder has consistently and exclusively considered the January 2016 check to be a lawful loan and a lawful political contribution presented a serious problem for the government's case. Accordingly, they threatened his brother [*id.* p. 77] with prosecution to pressure him to agree to act as an informant. Yet even when CHS2 discussed the issue with Mr. Snyder, Mr. Snyder continued to referred to it as a loan: "He's [Snyder]

⁴ As the government will not dispute, Mr. Snyder demanded that the contribution come in the form of a well-documented check to his campaign. Tellingly, this puzzled CHS1 who told Mr. Cortina that everything was done in cash in Lake County. [Dkt. 180, p. 18.]

like uh, well you know, Jon, I, I got a loan ... from John [Cortina]. And I'm gonna pay him back when I get the check." [*Id.* p. 76.]

The brother (CHS2) then went to Mr. Cortina, hoping for evidence that might contradict Mr. Snyder's expressed belief, evidence that he and Mr. Cortina planned to call it a loan simply to cover their tracks. As CHS2 prodded, "I wonder why then uh, I wonder why, I wonder what my brother's doing trying to call it a loan. Like I'm wondering like does that make it legal? I don't know. I'm not sure what his uh strategy is there." [*Id.* p. 77.] That would have been a real smoking gun, if Mr. Cortina responded by saying that they planned to call it a loan to cover their tracks, but he said nothing of the sort. Instead he responded with an unintelligible non-sequitur. [*Id.*]

In short, the government failed to identify evidence that Mr. Snyder committed a wrong related to Counts 1 and 2. There is there no evidence that Mr. Snyder induced, participated in, or knew about any of the scandalous conversations quoted in the proffer. But even further, the government has affirmatively proven that Mr. Snyder did *not* have a corrupt intent in January 2016, and has shown that Mr. Snyder contemporaneously disagreed with any notion of conspiring to accept a bribe. The government has failed to meet its *Santiago* burden.

3. Assuming for argument's sake that there was a conspiracy, significant portions of the proffer clearly have no connection with the alleged conspiracy. Those statements remain inadmissible hearsay.

There was no conspiracy. Assuming there was, Mr. Snyder did not induce it, participate in it, or know about it.

Assuming for argument's sake a contrary finding, the government's *Santiago* proffer contains serious deficiencies. The government bears the burden of showing that each and

every hearsay statement it seeks to admit was made in furtherance of the alleged conspiracy. *United States v. Shoffner*, 826 F.2d 619, 628 (7th Cir. 1987). A great portion of the hearsay statements, however, are irrelevant (and false) hearsay allegations bearing no relationship to Counts 1 and 2 or to the government's conspiracy theory.

All of the following are false hearsay allegations. But the Court need not sort through their veracity. On their face they clearly have no relationship to the alleged conspiracy, so they should be excluded even if the government made its *Santiago* showing:

- Cash: fiction and irrelevant hearsay.
- Tickets to Florida and Las Vegas: fiction and irrelevant hearsay.
- Christmas presents: fiction and irrelevant hearsay.
- Fireworks: fiction and irrelevant hearsay.
- Blackhawks tickets: fiction and irrelevant hearsay.
- Food: fiction and irrelevant hearsay.

4. Many statements obtained from Mr. Snyder were in part the result of ethically dubious investigative techniques.

Under the McDade Act, "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a). Indiana like many states follows a "no-contact" rule, whereby it is unethical for an attorney to contact an opposing party, including through agents, if the attorney knows the opposing party has retained counsel in relation to that matter. Ind. R. Prof. Cond. 4.2.

The May 2014 contact did not violate this ethical rule, as Mr. Snyder was not represented by counsel. In July 2014, however, the government sent FBI agents to interview Mr. Snyder. Mr. Snyder immediately retained Mr. Kirsch as his attorney. [Dkt. 102, p. 4.]

Any contacts initiated with Mr. Snyder thereafter would be skirting if not overstepping ethical boundaries. The case law in the Seventh Circuit is not extensively developed on this issue, and likely would not require dismissal or suppression of evidence. 28 C.F.R. § 77.5; *United States v. Ward*, 895 F. Supp. 1000, 1007 (N.D. Ill. 1995) (discussing issue, but before McDade Act passed and in the context of Illinois's professional rules). Indiana's Rule 4.2 does not appear to have been extensively tested on this issue. *But see United States v. Thomas*, 39 F. Supp. 3d 1015, 1024 (N.D. Ill. 2014) (Illinois's "Rule 4.2 applies to prosecutors prior to the filing of formal charges.").

Comment 5 to the Rule says communications authorized by law "may ... include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." The inclusion of the word "may," rather than just saying "include," suggests such a tactic might be inappropriate even pre-indictment, but the topic has not been extensively litigated. The post-indictment contact with Mr. Snyder, already raised for this Court's attention, would certainly violate this ethical rule. [See dkt. 131.]

In ruling on this *Santiago* proffer, however, the Court should consider whether each statement elicited from Mr. Snyder after July 2014 at CHS1's or CHS2's insistence were the result of investigative techniques that skirted or stepped over the government's ethical duties. *See Coburn v. DaimlerChrysler Servs. N. Am., L.L.C.*, 289 F. Supp. 2d 960, 967 (N.D. Ill. 2003) ("The 'chalk lines' drawn by the ethical rules are meant to be avoided at all costs. The goals should not be to come so close to the 'chalk lines' that one is covered

in white dust. The goal must be to operate at all times well within the ethical ‘chalk lines’ drawn by our ethical rules.”)

5. Finally, all of the above is irrelevant. The Santiago proffer should not be considered because it violates at least four different time requirements.

The government’s *Santiago* proffer violates at least four timing requirements the government was required to make pursuant to Court Order or the Rules of Criminal Procedure. Because it is untimely, the Court should decline to review it at all and should rule in limine that all of Mr. Cortina’s hearsay statements are inadmissible in a trial involving Mr. Snyder.

First, the government’s proffer relies on a conversation from May 2014. That evidence was wrongfully withheld until 200 days after the Court ordered the government to complete its discovery, 32 days after AUSAs Benson and Koster told the Court in person that discovery production had been complete, and 9 days after what would have been the first day of trial had the government not asked the Court to continue the trial date. That is a violation of Rule of Criminal Procedure 16.

Second, for the same reasons that production violated the Court’s Order to complete discovery long before.

Third, the entire Santiago proffer violates the Court’s Order to file it by November 16, 2018.

Fourth, in addition to all the above, in this Court’s Order on the parties’ motions in limine, the Court ordered, “The government has agreed to provide Mr. Snyder with excerpts of recordings it intends to use at trial, some of which contain vulgar language, so that he could object to them specifically, if he so wishes. The Court agrees to this arrangement. The government *must provide the recordings it intends to use at trial by November*

30.” [Dkt. 167, pp. 1–2 (emphasis added).] November 30 came and went. Even though the Court ordered that the government “must” provide its redacted recordings by then, the government ignored that Court Order as well. Even as it was submitting briefing to the Court explaining its previous lapses, the government missed another Court-ordered deadline.

Conclusion

In ruling on the government’s *Santiago* proffer, the Court is not an idle spectator, who can sit back and allow the jury to decide. To rule in the government’s favor, the Court must find that the government has proven at least a 51% likelihood that Mr. Snyder was a coconspirator. There is no evidence he was a coconspirator. There is no evidence he induced, participated in, or even knew of the hearsay conversations the government seeks to admit through its *Santiago* proffer. The government did not make its requisite showing.

Mr. Snyder would be happy to discuss the government’s proffer and this response at the upcoming December 5, 2018, hearing.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 3, 2018, the foregoing was filed utilizing the Court's CM/ECF e-filing system, which will provide notice to all registered counsel of record.

/s/ Jackie M. Bennett, Jr. _____