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# Judges Face FBI Agent's Misconduct

Prosecutors drop cases amid criminal inquiry.

Zoe Tillman, The National Law Journal

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Federal judges in Washington are grappling with one of the biggest scandals to hit the U.S. attorney's office in years: revelations that an FBI agent allegedly tampered with drugs and firearms collected as evidence.

Prosecutors have already dismissed criminal cases against more than two dozen defendants that involved the agent, Matthew Lowry, and the government has publicly said it expects to abandon more cases in the coming weeks.

The fallout has frustrated judges and defense lawyers as they assess the scope of the alleged misconduct and how best to manage the issues raised by the government's criminal investigation of the FBI agent.

U.S. District Judge Emmet Sullivan this month in court angrily confronted the U.S. attorney's office as he urged prosecutors to keep open and without delay the flow of information to defense lawyers. Next month, Sullivan will referee a fight over how much of that information should be kept under seal.

In another courtroom, U.S. District Judge Richard Leon refused to release the defendants in a case prosecutors have moved to dismiss. Leon wanted more information from the government about its decision to seek dismissal without prejudice, a move that would allow prosecutors to bring charges again. The U.S. Court of Appeals for the D.C. Circuit on Nov. 20 ordered Leon to rule on the release issue "without regard" to how the case would be dismissed.

The government hasn't said much publicly about Lowry's alleged misconduct. In court papers, prosecutors said Lowry may have tampered with guns, drugs and other evidence seized during criminal investigations.

The head of the criminal division of the U.S. attorney's office in Washington, Jonathan Malis, told Sullivan at a hearing this month that the government had filed notices in cases concerning more than 150 defendants that Lowry may have had a role in investigating. The government doesn't expect to seek dismissal in all of those cases, however. That will depend on the extent of Lowry's involvement and whether prosecutors believe they can still stand behind the evidence.

Defense lawyers have complained about the amount of information they've received so far. A. Eduardo Balarezo of Balarezo Law told Sullivan at a recent hearing that most of what he'd learned so far came from The Washington Post, which reported that Lowry used drugs that were being stored as evidence.

Defense lawyer Jonathan Zucker told Sullivan that there was "a complete shutdown on *Brady* disclosures," referring to the government's obligation to turn over favorable information to the defense under the U.S. Supreme Court's 1963 decision in *Brady v. Maryland*.

When Sullivan asked what Zucker wanted him to do, Zucker said it was difficult to say because defense lawyers were "shooting in the dark" without more information from the government.

Balarezo and Zucker said in interviews that they wanted more information about the circumstances surrounding Lowry's alleged misconduct.

"I would like to see and find out what policies and procedures the FBI had in place that allowed this to happen," Balarezo said.

On Nov. 18, Sullivan entered an order allowing prosecutors to turn over additional information to the defense under seal. Defense lawyers argued in filings that the government's request to keep the information out of the public domain "smacks of a coverup of facts and information that may be embarrassing to the government." Sullivan scheduled a hearing on the issue for Dec. 1.

Federal prosecutors in Philadelphia are leading the investigation of Lowry. The Philadelphia office — assigned to lead the probe because of the D.C. office's ties to Lowry — is working in coordination with the U.S. Department of Justice's Office of the Inspector General.

During hearings on Nov. 14 and Nov. 17, Sullivan demanded transparency about how information was flowing from prosecutors in Philadelphia to their counterparts in Washington, and how prosecutors in Washington were complying with their ethical obligations.

Sullivan has long pushed to hold prosecutors accountable for their *Brady* obligations. The judge in 2008 presided over the prosecution of the late Sen. Ted Stevens; the case collapsed amid revelations the government withheld information from Stevens' lawyers at Williams & Connolly.

The legacy of the Stevens case has loomed large over the proceedings in Sullivan's court that involve Lowry.

Sullivan chastised Malis during hearings this month for failing to provide the Philadelphia office with a copy of a new court order addressing the disclosure of information to defense lawyers. Under the order, the judge would review information that prosecutors didn't believe was material before deciding whether to turn over documents to the defense.

Over Malis' protests that he explicitly discussed the *Brady* requirements with the Philadelphia U.S. attorney's office, Sullivan said during a Nov. 17 hearing that the failure to send a copy of the new *Brady* order was "almost inexcusable" and "defies understanding."

Malis' "knee-jerk reaction" should have been to send a copy of the order to Philadelphia, Sullivan said, especially since prosecutors knew that Sullivan "is not playing around with *Brady*, as we know, right?" Malis referenced the Stevens case as he explained to the judge that prosecutors were sensitive to the ethical issues at play stemming from the Lowry matter.

During the hearing last week, Malis' counterpart in the Philadelphia office, Peter Schenck, told Sullivan that although his office was in charge of investigating Lowry, it was sharing all information with prosecutors in Washington. The D.C. office was then responsible for deciding what information to share with defense lawyers.

Schenck said his office was moving as swiftly as possible on its investigation into Lowry and didn't believe it would take months to conclude.

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