

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 UNITED STATES OF AMERICA,

4 v.

15 CR. 0093 (VEC)

5 SHELDON SILVER,

6 Defendant.

7 -----x

New York, N.Y.
October 16, 2015
5:05 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

14 APPEARANCES

15 PREET BHARARA
United States Attorney for the
16 Southern District of New York

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22 BY: JUSTIN VAUN SHUR
STEVEN FRANCIS MOLO
23 ROBERT KELSEY KRY

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1 THE COURT: In view of Mr. Silver's desire to get out
2 of here to make it home for the Sabbath, before we leave, I
3 will complete my findings why we have to be sealed. Let me
4 turn to the government.

5 My gut reaction -- I'm going to give you an
6 opportunity to persuade me that I'm wrong -- is that this is
7 not admissible because of 403 concerns.

8 This is the sort of thing that the probative value is
9 low. I understand your arguments about his use of his position
10 in the assembly to benefit his paramours or alleged paramours,
11 but the marginal impact of that, compared to the prejudicial
12 impact of the fact that he was having an affair with two women,
13 including, including, apparently [REDACTED], seems to me
14 overwhelms it. That is my initial reaction. I'm happy to hear
15 from you.

16 MR. GOLDSTEIN: Your Honor, we understand that. We
17 were sensitive in making the motion. That is why we took pains
18 in making the motion to point out that this is not just about
19 having extra marital relationships, but it's about the use of
20 his official position in the course of those relationships to
21 benefit the people with whom he was having those relationship.

22 THE COURT: I'm reminded of a line that came up in
23 Clinton and Lewinsky. People would say, it's not about the sex
24 and somebody would, say it's always about the sex.

25 MR. GOLDSTEIN: Your Honor, we wanted to raise it with

1 the Court. In part, we do not know to what extent the
2 defendant wants to either through our witnesses or through his
3 own witnesses or through his own testimony to elicit character
4 evidence.

5 We understand the 403 issues. If the defendant is to
6 elicit testimony about being an honorable man, as in the Shyne
7 case, or about having a very clean distinction between his
8 personal life and his business life and he would not mix the
9 two, then that would be a misleading impression for the jury to
10 have.

11 So there are 403 issues in terms of prejudice, but
12 there are also 403 issues in terms of the jury having a
13 misleading impression if the defendant is going to put on the
14 sort of character evidence that would be directly impeached by
15 this conduct.

16 THE COURT: Okay. Mr. Molo.

17 MR. MOLO: Judge, I will be brief. The case law is
18 extensive for the very reasons you state is inadmissible.
19 There is no character trait that it is relevant to in terms of
20 the charges here.

21 THE COURT: There are lots of character traits that
22 it's relevant to.

23 MR. MOLO: Not to the charges in the case. The
24 government argues that it establishes that Mr. Silver conceals
25 his personal affairs, no pun intended.

1 THE COURT: Address specifically the government's
2 argument. Are you going to attempt, via cross-examination or a
3 direct case, to make the argument that Mr. Silver is very
4 careful about keeping separate his official life from his
5 personal life; that there is not an intermingling of his
6 official duties and his personal life?

7 MR. MOLO: I don't know what their evidence is.
8 That's not a way of not answering the question. I don't know
9 yet what they're going to say.

10 Certainly, even if I did do that, I don't understand
11 why they then get to put in these salacious allegations --
12 they're not proven. They're allegations at this point in time.
13 There's no allegation that he did something for these, people
14 by the way --

15 THE COURT: Yes, there is.

16 MR. MOLO: -- in exchange for -- there's no quid pro
17 quo allegation here.

18 THE COURT: It wasn't a bribe relationship. It was a
19 sexual relationship.

20 MR. MOLO: There's no allegation that the sex is in
21 exchange for doing some official act.

22 THE COURT: It wasn't a prostitution relationship.
23 The allegation is that he was helping his girlfriend. He got
24 her a job. He got one of them a job. He benefited the other
25 one from a lobbying perspective.

1 Let me do this. You've heard my general view. My
2 general view is that this is not admissible. By the same
3 token, you need to be careful about the defense you're going
4 down relative to good family man, separates business and
5 pleasure, official acts from personal acts, because that's
6 going to be door-opening type of actions.

7 I don't think that's your defense. So I don't think
8 we're going to get there. My general inclination is the
9 prejudicial impact outweighs the probative value, but that sort
10 of is subject to how the trial starts to spin out.

11 Am I correct that you are not questioning that the
12 government would have a good-faith basis to ask the questions
13 if I allow them?

14 MR. MOLO: At this point, nothing that they've shown
15 me. I would question that. I don't think we need to go there.
16 All I've seen right now is something that was filed -- I will
17 say, while I strenuously oppose the fact that they even filed
18 it, I do appreciate the fact that they filed it under seal, and
19 I give the government credit for that.

20 All I see is what is in the papers that I got on
21 Wednesday. What I've looked at -- I know what the law is on
22 this. Our brief states the law quite accurately, that people
23 try to use this all the time and say, aha. Someone is charged
24 with fraud. They lied to their wife about whether or not they
25 were faithful in their marriage. Therefore, it's a 608(b) act.

1 The essence of it -- that's what this is.

2 THE COURT: I don't think so.

3 MR. MOLO: They've said as much.

4 THE COURT: Not quite. It's different from that. I'm
5 not sure that it's enough different from that to get over the
6 403 problem, but it's more the similarity of using his official
7 role to benefit people for his personal benefit.

8 So he gets his girlfriend a job at [REDACTED]
9 [REDACTED] because she's his girlfriend. It's using his
10 official role to benefit him personally.

11 That's similar to getting a grant for the doctor.
12 It's similar to whatever he was doing for the real estate
13 developer. That's their theory. It's not that he is stepping
14 out on his wife.

15 MR. MOLO: I think what they're offering it for is
16 404(b) evidence.

17 THE COURT: No.

18 MR. MOLO: So they're offering it as character
19 evidence.

20 THE COURT: Right.

21 MR. MOLO: Unless we put Mr. Silver's character
22 directly at issue, I don't see how -- again, even assuming that
23 it was admissible -- I'm not saying that it is -- we have to
24 put his character in issue for that to happen.

25 THE COURT: Correct. I think we're all in agreement.

1 If I start to hear doors opening, I'll let you know.

2 MR. GOLDSTEIN: If I could just ask your Honor. I
3 think you made a reference to putting your good-faith basis in
4 terms of sealing on the record.

5 THE COURT: I'm about to do that. Before I do that,
6 the motion is under seal. The response is under seal. The
7 question is whether it can be redacted, not pretrial, because
8 there's no way to redact it pretrial that wouldn't, I don't
9 think, affect fair trial rights.

10 The question is does it have to remain under seal or
11 can it be redacted so that it can go in the open record.
12 That's really a defense issue.

13 MR. COHEN: You're asking factually, your Honor?

14 THE COURT: Factually. I'm saying it seems to me that
15 right now, the way the government's motion is written, my
16 biggest concern is as to the third parties, to the two women
17 who are identifiable from the brief. I think it could be
18 redacted so that they are no longer identifiable.

19 MR. COHEN: I looked at it with that in mind,
20 your Honor. Looking at the way it's factually laid out
21 throughout the government's brief and, frankly, in ours. I
22 don't see how it could be redacted to accomplish what you might
23 desire to do by releasing part of it.

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THE COURT: Would figure out that what we're talking about is Mr. Silver --

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MR. COHEN: Figure out who they are.

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THE COURT: You think it would identify the individuals?

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MR. COHEN: Yes.

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THE COURT: Does the government have a view on that?

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MR. GOLDSTEIN: I think, your Honor, a few things.

10

One I think your Honor has pointed out the correct issue, which is the potential privacy interest of these third parties.

12

We, after your Honor put the order on the docket, notified the attorneys of those individuals that there was a potential motion that potentially involved them that you were going to be addressing.

16

I don't know if either of them articulated to your Honor in any more detail what their privacy interests are. Under the Lugosch case, the Court has to make a compelling finding on the record that these countervailing interests outweigh the interests of public disclosure.

21

We think that the brief could be redacted to not reference the types of benefits that we allege occurred, but the public could still have access to generally what the issue is, simply that the government has a good-faith basis for asking questions about a potential extramarital relationships

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1 that the defendant used to invoke his official position.

2 Certainly the law and much of the discussion in both
3 of the briefs could survive redaction and could provide the
4 public with the information that it would be entitled to under
5 the 1st Amendment without prejudicing third party rights.

6 MR. COHEN: I think, your Honor, the principal flaw --
7 I think it was the magistrate's handling of the case in the
8 district court -- was that he or she simply took the motion and
9 said, oh, that's an interesting motion, and put it in the
10 drawer.

11 Your Honor has done exactly what you should do.
12 You've addressed the thing and asked us to respond the next
13 day. We gave a response, you've heard the argument on it, and
14 you have made a preliminary determination about the outweighing
15 the prejudicial value.

16 I think you're in total compliance with that to seal
17 it completely at this point. Given the fact that Mr. Goldstein
18 and I obviously disagree on it, I think it can't be redacted
19 successfully.

20 THE COURT: Here is my view: You have all got a lot
21 to do, and I've got a lot to do. Because of concerns about
22 fair trial rights, no matter what, I'm not going to unseal it
23 before the trial is over.

24 So what I'm going to do is put this on hold. I'll
25 give you both ample opportunity to argue about it after trial

1 when everybody's got a lot more time to think about it. You
2 can propose a redaction. Let's put that down the road when
3 everybody has more time to think about it.

4 To further elucidate my findings on sealing the
5 courtroom, given the proximity between today and the beginning
6 of trial, I am concerned that the disclosure of the defendant's
7 alleged extramarital affairs would increase the difficulty of
8 picking a jury in this case.

9 Because the allegations are not simply that he had two
10 affairs but that he used his official position to gain favors
11 for at least one of the women, the press is likely to make much
12 out of the allegation.

13 While jurors will be asked if they can set aside
14 everything they've heard outside the courtroom, that sort of
15 allegation may be particularly difficult for some to set aside,
16 even if the evidence is never actually admitted in court.

17 Moreover, although we could anonymize the limit to
18 some extent, it seems likely that many people would be able to
19 identify them based on at least the current briefs. They have
20 a privacy interest of not being exposed in this matter at this
21 stage of the proceeding.

22 For all of those reasons, I believed it was
23 appropriate to seal the argument and the motion itself at this
24 stage. That is not to say that the motion should stay sealed
25 or that it could not be redacted and disclosed subsequently.

1 I'm going to hand out to you a proposed jury
2 questionnaire and what the proposed oral voir dire will be. I
3 think I have captured generally the subject matters that
4 everyone wanted covered with some exceptions.

5 I will not ask people what television shows they watch
6 and where they get their news. I think that's irrelevant to
7 picking a jury.

8 My jury questionnaire is somewhere in between the very
9 skinny questionnaire the government proposed and the
10 considerably fatter questionnaire that the defense proposed.

11 What I am trying to do is to get you enough
12 information in the written questionnaire to do strikes for
13 cause but also to cover some of the information so that -- for
14 instance, a list of witnesses.

15 The reason I want to do that is I'm going to do
16 individual voir dire, and I don't want to have to read a list
17 of 60 names to every individual juror.

18 So that's plumping up the jury questionnaire a little
19 bit, but I think it will ultimately expedite the oral voir
20 dire. So that's my thought process.

21 I'm happy to hear if I have dropped off some favorite
22 question that you feel you just can't possibly give peremptory
23 strikes without knowing the information other than television
24 shows.

25 Anything further from the government?

1 MS. COHEN: No, your Honor, just to ask: Will the
2 jury questionnaire be handed out on the first day of voir dire?

3 THE COURT: The jury is going to come in the Wednesday
4 before November 2. So we'll give them to the government to
5 copy. Since I promised the press we wouldn't do anything,
6 we'll talk about it on Wednesday.

7 In essence, they're coming in on Wednesday, and then
8 on Monday morning, November 2, we'll start with oral voir dire.

9 MS. COHEN: We'll address it on Wednesday morning.

10 MR. COHEN: Thank you, your Honor, particularly for
11 your sensitivity.

12 MS. COHEN: Thank you, your Honor.

13 (Adjourned)

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