

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 18-20530-CR-UNGARO/O'SULLIVAN

UNITED STATES OF AMERICA

Plaintiff,

Vs.

JAVIER ESTEPA, *ET AL.*

Defendant.

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**DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER GRANTING
GOVERNMENT'S MOTION TO EXCLUDE EXPERT TESTIMONY AND
INCORPORATED MEMORANDUM OF LAW**

The Defendants respectfully submit that the Court, perhaps owing to undersigned counsel's failure to respond to the Government's earlier Motion in *Limine*, has misperceived the Defendants' defense and the absolutely essential role the proposed expert's testimony would play in advancing that defense.

The Government, throughout this case, has consistently misinterpreted Defendants' compliance position as an "everybody does it" defense. The Government is mistaken. There was no need for the Defendants to file a response to the Government's Motion in *Limine* because the Defense never intended to advance the proposition that the Defendants' conduct was "common industry practice." Moreover, the Defense has never suggested and/or maintained that submitting false information was or is an acceptable practice.

When undersigned counsel, in Defendant's Expert Disclosure Summary, *proffered* that Mr. Navarrete would opine that the forms submitted by Aaron a)

“...complied with all the rules and regulations governing public housing projects for Miami-Dade County” and b) “[u]sing the subcontractor’s employees as temporary employees of Aaron Construction was an acceptable practice”, undersigned counsel meant **there was no false information** willfully contained in the forms and that is why Mr. Navarrete would opine that the forms, as filed, complied with the County’s rules and regulations.

In fact, when the Court, in denying part of the Government’s Motion in *Limine*, specifically ruled that, “Defendants may introduce intrinsic evidence of their subjective belief that their conduct was ‘acceptable’ to the County...”, the Defendants were satisfied that, because of Mr. Navarrete’s testimony, their defense would be clearly established for the jury.

Thus, if the Court reconsiders the Defendants’ position, that the information contained in the forms was true, the Reliability Prong of Mr. Navarrete’s *proffer* is enhanced and better appreciated. The forms complied because the information was accurate and while hiring the subcontractor’s employees was a novel practice, there was no authority to preclude it. Quite the contrary, as *proffered*, it was advantageous to Aaron Construction because it helped ensure that (1) the workers were protected by workers’ compensation, (2) Davis Bacon wage requirements were met, and (3) illegal workers would not participate. Accordingly, Mr. Navarrete would refute the precise allegations the Government alleges was the motivation for the fraud.

Once the Government’s misperception of the defense is eliminated, Mr. Navarrete’s experience reviewing similar forms and procedures allows him to

conclude that when the information provided is true and accurate, the forms are in compliance with County policy. Further, the information contained in the forms eliminated Aaron's necessity to declare the use of subcontractors because the workers were temporary employees of Aaron and, predicated upon his experience, there is no rule, regulation and/or law to preclude such a procedure; Aaron provided worker's compensation coverage to the temporary employees (a County requirement), paid required Davis Bacon wages (another County requirement), and screened the temporary employees for illegal workers.

In sum, it would clearly be both helpful to the trier of fact – and objectively compelling – to learn that Aaron's conduct met the standards imposed by the County in the administration and supervision of the rehabilitation of low-income housing projects, all as Mr. Navarrete would testify to.

MEMORANDUM OF LAW

“The Supreme Court and [the Eleventh Circuit] have permitted motions for reconsideration in criminal cases notwithstanding the fact that the Federal Rules of Criminal Procedure do not expressly provide for them.” *United States v. Phillips*, 597 F. 3d 1190,1199 (11th Cir. 2010). “Appropriate circumstances for reconsideration include situations in which the Court has obviously misapprehended a party's position, the facts, or mistakenly has decided an issue not presented for determination.” *Parekh v. CBS Corp.*, No: 6:18-cv-466-Orl-40TBS, 2018 U.S. Dist. LEXIS 204890, 2018 WL 6325284 (M.D. Fla. 2018); *U.S. v. Halifax Hosp. Medical Center*, No. 6:09-cv-1002-Orl-31TBS, 2013 U.S. Dist. LEXIS 170972, 2013 WL 6284765, at *1 (M.D. Fla. Dec. 4, 2013). Ultimately, the

“decision whether to grant or deny a motion to reconsider is committed to the sound discretion” of the Court. *United States v. Bailey*, 288 F. Supp. 2d 1261, 1267 (M.D. Fla. 2003).

Here, the Defendants have an expert whose qualifications, as the Court acknowledged, meet the test under **Rule 702** of the **Federal Rules of Evidence**. It would impose an unjust burden upon the Defendants to deprive them of testimony that the representations included in their forms were not only accurate but in full compliance with the obligations imposed upon Aaron Construction. Moreover, the Defendants respectfully submit that the Government’s objections to Mr. Navarrete’s proposed testimony are best addressed through cross-examination of Mr. Navarrete either at trial or through a Defense *proffering* at trial of Mr. Navarrete’s expected testimony – rather than by premature exclusion of such testimony – exclusion of which denies to the Defendants their right to a fair trial.

CONCLUSION

In light of the critical misperceptions of the Defendants’ defense as explained above and as sought to be clarified, the Defendants respectfully ask the Court to reconsider its Order granting the Government’s Motion to Exclude Expert Testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true copy of the foregoing was electronically filed,
by CM/ECF, this 30th day of January, 2019.

By: /s/ Neil G. Taylor
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