13 ROUTINE ASPECTS OF FBI INVESTIGATIONS SIDNEY POWELL SAYS SHOULD NOT BE USED WITH MIKE FLYNN

Last night Sidney Powell submitted what procedurally is called her "reply" brief in a bid to compel Brady production. Even if her object were to obtain Brady, this is best thought as her opening bid, as it for the first time she presents this argument. But on page 2, she admits she's not actually seeking Brady (which makes me wonder whether this entire brief is sanctionable), but instead is seeking to have her client's multiple guilty pleas dismissed.

> The government works hard to persuade this Court that the scope of its discovery obligation is limited to facts relating to punishment for the crime to which Mr. Flynn pleaded guilty. However, the evidence already produced or in the public record reveals far larger issues are at play: namely, the integrity of our criminal justice system and public confidence in what used to be our premier law enforcement institution.

To make her case that her client — who, she herself emphasizes, served for 30 years as an intelligence officer and so was no spring chicken about the ways of the world — nevertheless got duped by evil FBI officers attempting to entrap him by his own actions, Powell attacks the following utterly routine parts of FBI investigations:

1. People who know things relevant to an investigation are interviewed by FBI Agents, working in twos, who

then write up a 302
2. The FBI doesn't tape non-custodial interviews, though probably should record more than they do, as 302s can be dodgy
3. FBI Agents often don't take notes while they're interviewing someone, because that distracts from the interview
4. The FBI would prefer to talk to witnesses – all witnesses! – without lawyers present
5. FBI will prepare for interviews to ensure they are as useful as possible
6. FBI often watches how suspects respond to learning about potential criminal evidence against them
7. Prosecutors try to get suspects to plead guilty by showing them some, but not the most sensitive, damning information they have about them
8. The FBI usually doesn't tell people it is investigating that it is investigating them
9. The FBI is allowed to open investigations when they obtain evidence that might indicate a crime – they don't have to wait until

they have evidence that proves beyond reasonable doubt someone is guilty before they try to collect evidence to try to figure out whether a crime has been committed and if so by whom

10. People considering pleading guilty meet with prosecutors before doing so to lay out what evidence they'll be willing to share for a lenient plea deal
11. Even for cases that may one day end up in Emmet Sullivan's court, suspects don't get to review all the evidence the government has against them before they're charged and even in Sullivan's court, defendants only get to review the evidence that would be helpful to their defense (or sentencing) pertaining to the crimes in question, not other bad deeds
12. When the FBI thinks a hostile foreign country is trying to interfere with the United States, it investigates
13. People who work at DOJ work with other people who work at DOJ

Effectively, Powell's argument is that none of

these very routine things that happen with every single FBI investigation should have happened with an investigation of her client. She has a point that some of them — especially the way FBI writes up 302s — should be fixed. But that doesn't mean her client is anymore innocent than any of the thousands of other defendants treated similarly.

There's a ton more that I'll do in a follow-up post, virtually all of which is misleading but which, because she waited to submit this until her reply brief, the government will need to ask for permission to lay out as false.

She makes just two interesting arguments of merit. First, she argues that Rob Kelner was conflicted when he advised Flynn to plead guilty in 2017.

> The government fails to acknowledge, however, that Covington & Burling was the very firm that Mr. Flynn paid more than $1 million to investigate, prepare, and then defend the FARA registration in response to NSD/FARA section's and David Laufman's demands. See n.9 supra. By August 2017, when the government threatened Mr. Flynn with criminal charges related to the same FARA registration, former counsel were immediately caught in the vice of an intractable conflict of interest that they never escaped until Flynn engaged new counsel. By no later than August 2017, the conflict between Mr. Flynn and his former lawyers was non-consentable and not subject to waiver. Even if Mr. Flynn had been fully informed in writing of the conflict at that time, the lawyers were obligated to withdraw from the representation without regard to his wishes.
>
> Some conflicts of interest are so likely to interfere with the effectiveness of counsel, and so destructive of the fairness of the proceeding, that courts

> must prophylactically *override* a defendant's proffered waiver of the right to conflict-free counsel.

This is a point I raised the day after Flynn's original sentencing hearing, which is proof that Emmet Sullivan had an opportunity to raise the conflict issue when he accepted Flynn's second guilty plea. He did not, even while making damn sure that Kelner's advice had been adequate.

Since that time, the government has alleged that Flynn lied to Kelner, which would eliminate any possible conflict, because Kelner advised Flynn based off what he told him.

Moreover, the issue of whether Flynn's counsel was conflicted is utterly irrelevant to any questions about Brady, and so irrelevant to the stated purpose of this motion.

She also argues that precedent holds that Giglio is included in Brady.

> The government dismisses its duty to produce impeachment evidence in a single sentence, claiming the Supreme Court has held its Brady obligation "does not extend to impeachment evidence." United States v. Ruiz, 536 U.S. 622 (2002); Gov. Reply Brief, 7, Oct. 1, 2019. But Ruiz did not overrule Giglio v. United States, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general rule [of Brady.]"), and Bagley, 473 U.S. at 676-77 (stating emphatically "[t]his Court has rejected any such distinction between impeachment evidence and exculpatory evidence"). Both hold that impeachment evidence is encompassed within Brady, and no court has held that Ruiz radically altered the Brady/Giglio landscape. Rather, Ruiz focused on the voluntariness of the plea, and there was

> not even an allegation that any information was withheld.
>
> This Circuit applies the Giglio and Bagley standard that "'impeachment evidence . . . as well as exculpatory evidence falls within the Brady rule.'" In re Sealed Case No. 99-3096 (Brady Obligations), 185 F.3d 887, 892 (D.C. Cir. 1999) (quoting Bagley, 473 U.S. at 676). This is because "evidence that impeaches the [government's witnesses] is almost invariably 'favorable' to the accused, because by making the government's case less credible it enhances the defendant's" case. 185 F.3d at 893. When impeachment evidence is exculpatory, as noted in Giglio and Bagley, it is Brady like any other. McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003). The government cannot be the "architect of a proceeding that does not comport with standards of justice." Brady, 373 U.S. at 88.

Even if she's reading these precedents correctly, they're irrelevant to the issue at hand: how Sullivan interprets his own Brady order to incorporate Giglio or not, since Flynn had waived rights to discovery by the time he pled guilty. And since that's not entirely clear, there is little chance she'll get Sullivan to sanction the prosecutors, which is one thing Powell wants. Plus, much of what Powell presents — including that Strzok believed Flynn showed no indices of lying — actually undermines her arguments that this stuff impeaches Peter Strzok or others. Still, I expect a rigorous discussion on how these precedents apply when Sullivan reviews this stuff on November 7.

There are two other details about this filing of acute interest. First, Powell notes that DOJ is still refusing to disclose a January 30 memo saying that they did not believe Flynn was an Agent of Russia. Mueller said Flynn's ties were

still being very actively investigated this summer. The line in the Mueller Report that addresses his ties to Russia is redacted. There may be a reason why DOJ is withholding that, one that Powell should give some consideration to.

Also, in a recent filing, the government revealed that there were interviews with Flynn that took place after January 24, at which (they claim) he continued to lie.

> Based on filings and assertions made by the defendant's new counsel, the government anticipates that the defendant's cooperation and candor with the government will be contested issues for the Court to consider at sentencing. Accordingly, the government will provide the defendant with the reports of his post-January 24, 2017 interviews. The government notes that the defendant had counsel present at all such interviews.

If he did, in fact, lie in these, any one of them could be turned into a False Statements charge quite easily. And they would demonstrate that all her complaints about the January 24 302 are misplaced.

Curiously, Powell doesn't mention the existence of these 302s in her rant.

Ultimately, though, her main argument is that Mike Flynn should not have been investigated the way the FBI investigates people. I'm not sure that's going to get her what she wants.