

BILLY BARR'S DOJ THROWS THE BOOK AT SOMEONE NOT NAMED MIKE FLYNN FOR RENEGING ON A PLEA AGREEMENT

Last week, the government moved to vacate the guilty plea of Minh Quang Pham because, in violation of his plea agreement, Pham tried to get one of the counts against him thrown out based on an intervening Supreme Court precedent. On top of a new development in a controversial counterterrorism case (one that, because Pham's admitted actions for AQAP were primarily contributing his graphic design skills, could have interesting implications for Julian Assange's extradition), the development is an example of what Bill Barr's DOJ does when defendants not named Mike Flynn renege on the terms of their plea agreement.

Pham is a Vietnamese-Brit who, for a brief period, helped Samir Khan produce Inspire Magazine. Theresa May, while Home Secretary, tried to strip him of his British citizenship, presumably so he could be expelled and drone killed like some other immigrants to the UK with ties to terrorism. When it became clear that effort might fail, the US indicted Pham on Material Support, obtaining military training from a terrorist organization, and possessing a weapon.

There have always been some unexplained aspects of Pham's story. He claims that he willingly left AQAP, returned to the UK with help from the government, where he lived peaceably until he was arrested. Nevertheless, in four FBI interviews he had while in custody but not recorded (the FBI claimed that because he was still in transit, he was not covered by an FBI

rule requiring custodial interviews be recorded), he admitted to getting a bomb-making lesson from Anwar al-Awlaki. He later contested those interviews, but the government used testimony from Ahmed Warsame (another AQAP affiliate was also interrogated in custody while “in transit”) against him. In 2016, Pham pled guilty to three of the charges against him: conspiring to provide material support, conspiring to receive military training, and possessing a weapon. He was sentenced to forty years in prison, of which 30 were tied to the weapons charge, and sent to Florence SuperMax.

Last year in *US v Davis*, the Supreme Court held that the law used to impose the possessing a weapons charge and with it the long prison sentence against Pham was constitutionally vague.

Over the course of months, Pham worked to get representation to have his case reconsidered under *US v Davis*, an effort that was badly delayed both by his incarceration in SuperMax and COVID.

Which, after some negotiations between Pham and the government, led to last week’s action. Because *US v Davis* means Pham’s conviction for the weapons charge must be dismissed, the government argues they are entitled to throw out Pham’s plea deal, and move towards a trial, including new charges.

As set forth in more detail below, the Government respectfully submits that the Court should reinstate the charges contained in the Indictment. The Government dismissed those charges at sentencing pursuant to the Plea Agreement, and only as consideration for the defendant’s guilty plea to the subset of offenses set forth in the Plea Agreement. Neither the terms of the Plea Agreement nor controlling law in this Circuit prevent the Government from reinstating the previous charges against Pham under these circumstances. To the

contrary, the defendant's Plea Agreement expressly preserved the Government's right to do so should the defendant's "convictions" be "vacated for any reason." (Ex. A. at 8). Accordingly, the Government seeks to vacate Pham's convictions, reinstate the charges in the Indictment, and proceed to trial.

[snip]

Although it is axiomatic that "when a defendant breaches his plea agreement, the Government has the option to . . . treat it as unenforceable," *United States v. Cimino*, 381 F.3d 124, 128 (2d Cir. 2004), the Court need not decide whether Pham's filing of a Section 2255 motion constituted a breach of the plea agreement to grant the Government's motion. "Whether [Pham] breached his contract or acted properly in negating it is largely irrelevant to this issue. Despite the change in law, [Pham] remained free to comply with the plea bargain. By taking advantage of the opportunity to vacate his conviction under [Davis], [Pham] chose to void his agreement with the government. That choice relieved the government from its contractual obligations, and explains why double jeopardy does not apply." *Podde*, 105 F.3d at 821 n.6 (internal citations omitted).

In addition to moving to try Pham on the five existing charges (presumably, on the four that remain after Davis), the government plans to charge Pham with an attempted terrorist attack, in part to make sure they can charge Pham with something if the existing plea deal is upheld.

Separate from the application for reinstatement of charges, the Government respectfully informs the Court and defense counsel that the Government intends to file additional charges

against Pham based on additional evidence secured following his conviction and sentencing.

The evidence at issue includes (1) video recordings showing the defendant constructing and detonating a test explosive device virtually identical to the one Pham told law enforcement was to be used in his planned suicide attack on Americans and Israelis at Heathrow International Airport; (2) video recordings of Pham associating with high-ranking members of AQAP; (3) a video recording of Pham describing his goal of waging jihad and his desire to martyr himself; and (4) a document containing instructions for executing the attack upon Pham's return to London. The Government reviewed this evidence with defense counsel during a meeting on December 5, 2019, and produced a copy of the evidence to the defense on or about March 24, 2020.

Based on this evidence, the Government expects to seek additional charges related to the defendant's attempted attack at Heathrow, including a violation of Section 924(c) predicated on the use and possession of a destructive device in furtherance of one or more additional crimes of violence committed in connection with the plot. This conduct, and the anticipated charges based upon it (which are subject both to approval by other components of the Department of Justice and presentation to the grand jury), are not covered by the provisions of the Plea Agreement defining the conduct for which "the defendant will not be further prosecuted criminally by this Office." (Ex. A at 2). Accordingly, while the Government will not proceed with a superseding Indictment until after the Court rules on the reinstatement of the

original charges of the Indictment, the Government expects to seek those additional charges whether or not it is also able to proceed on the previously dismissed counts.

Now, I'm not suggesting, *at all*, that there's an equivalence in the actions of Pham and Mike Flynn. Even assuming some of Pham's complaints about his interrogation and the disproportionate responsibility the government attributed to him over Warsame are true, he still admits he sought to participate in a terrorist organization.

But where a comparison is apt is the plea agreement. Like Pham, the government included language in Flynn's plea agreement that if his conviction were vacated for any reason, he can be charged for the uncharged conduct tied to his plea agreement – which in Flynn's case are the Foreign Agent charges that carry a possible sentence of 15 years. Flynn is arguing that he has not yet been convicted, though that's currently among the many issues under dispute.

And the comparison is apt because (the government has argued, though Flynn disagrees) Flynn reneged on the cooperation included in his plea agreement.

For other people, Bill Barr's DOJ has thrown the book when a defendant has reneged on his plea deal. In Flynn's case, however, Barr's DOJ is doing back flips to try to blow up the existing conviction.

Pham's case will be quite interesting in any case, if it goes to trial (and the government has effectively already told him they intend to keep him in prison for life anyway, so he has no incentive not to contest this aggressively). But it's also a worthy lesson in what normally happens when a defendant blows up a plea deal like Mike Flynn has.