

LEV PARNAS' FAILED ATTEMPT TO FLIP

With a non-cooperation guilty plea earlier this month from co-conspirator Igor Fruman, a trial scheduled next month for Lev Parnas' laundering of money from a Russian national into the politics of marijuana, another trial scheduled next year for Parnas' Fraud Guarantee with Rudy Giuliani, and an investigation into Rudy's foreign influence peddling in a very active phase, it's a complex time to be prosecuting Parnas. That's reflected in the government's motion *in limine* filing submitted on Tuesday, which argues what and how evidence should be admissible at the October trial.

Since we talk a lot about the hearsay exception under charged conspiracies (as the October trial is), the filing is interesting for the complex ways the government proposes the statements of the participants can be admitted at trial:

- Out of court statements – including narrative descriptions of past events – from Parnas, Fruman, David Kukushkin (the other defendant who will face trial), David Correia (who pled guilty in a non-cooperation plea last year), and Andrey Muraviev, the Russian who funded all this, can be entered against each other
- The out of court statements made by Parnas employee Deanna Van Rensburg can be admitted for their truth against Parnas, but not

against Kukushkin

- The government wants to limit questioning of three FBI witnesses to matters affecting their credibility and not other matters (such as why Agent Jacob Balog, who will testify about some charts showing the government's version of the timeline of events, would be added to the team just recently)
- Both defendants have already advised they won't mount an advice of counsel defense and so the involvement of a lawyer doesn't help them (though none of the lawyers in question are named Rudy Giuliani)
- The defendants' attempts to clean things up in 2019, including after they got charged, should not be treated as evidence about their intent in 2018
- Parnas shouldn't be allowed to attempt to nullify the jury (and has apparently already committed not to argue *to the jury* that this matter arose out of vindictive prosecution based on his cooperation in Trump's 2019 impeachment)
- Parnas should not be allowed

to argue that Adam Laxalt must be batshit crazy given his more recent public statements in support of Trump's attempt to steal the 2020 election (or about a matter that the government redacts in their filing)

- The government should be allowed to introduce evidence of how Parnas spent Muraviev's money on lavish spending benefitting himself, but Kukushkin should not be able to argue that Parnas' skimming is proof the two of them did not conspire
- The court should decide ahead of time what damning details it will let Parnas and Kukushkin introduce to incriminate each other
- Parnas should be held to the claims he made in a March 5, 2020 proffer to the government

It's the last of these that I find particularly interesting.

Lev Parnas spent much of January 2020 claiming to want to cooperate with the impeachment inquiry – though those claims were often suspect. At the same time, SDNY seemed to want to stall those efforts. The Senate acquitted Trump in February.

Only after that, on March 5, 2020 (and apparently just March 5), did Parnas proffer

testimony in what he had been publicly claiming for some time was an interest in cooperating. But apparently after making statements that support the government case against him at trial next month, nothing came of the proffer.

On March 5, 2020, Parnas and his counsel met with members of this Office and the FBI, to proffer Parnas's potential testimony about the charges at issue here and other matters. In advance of the proffer, the Government provided a written proffer agreement to Parnas's counsel, setting forth the terms under which statements Parnas made during the proffer could and could not be used against him.

[snip]

During a lengthy proffer, Parnas made several statements that tend to prove the charges at issue here, or facts underlying those charges. An FBI agent took detailed notes of the proffer, and later produced a formal report memorializing it (the "302"). Those notes, and the 302, have been provided to Kukushkin and Parnas.

[snip]

Under the terms of the Proffer Agreement, therefore, defense counsel is free to present a defense and to argue, for example, that the Government has failed to prove its case beyond a reasonable doubt (or failed to present "credible" evidence).

[snip]

Counsel cannot do so, however, in a matter that directly or indirectly contradicts facts elicited during the proffer without triggering the waiver provision of the agreement.

As the Proffer Agreement and the above

law make clear, Parnas may not present evidence or make arguments that are contrary to his own statements in the proffer session without permitting the jury to assess those assertions in light of his contradictory proffer statements. Among the statements that appear most likely to be relevant with respect to the Foreign Donor Scheme, Parnas admitted that the purpose of the money Parnas, Fruman, and Correia obtained from Muraviev was to make campaign contributions to U.S. political candidates. With respect to the Straw Donor Scheme, Parnas admitted that Fruman, rather than Parnas, paid for the donations made to the campaign of Congressman Pete Sessions in Parnas's name, and that Parnas did not reimburse Fruman for those payments. Allowing Parnas to suggest otherwise, when he had in fact admitted those facts as true, would deceive the jury and subvert the truth-seeking purpose of trial. See *Gomez*, 210 F. Supp. 2d at 472.

Basically, this means that Parnas can now be held to what he told the government during his proffer. If he tries to deviate from that, they can then use his proffered testimony to disprove his claims. The government explains that they can avoid using this against Kukushkin by having the agent who would testify about the proffered testimony simply not mention Parnas' inculpatory statements against Kukushkin.

Offering Parnas's proffer statements to rebut specific claims he may make at trial will not infringe Kukushkin's rights. Parnas discussed Kukushkin during his proffer, and if read in its entirety the report of Parnas's proffer plainly inculcates Kukushkin. But the individual admissions that might be relevant to rebutting improper argument by Parnas—such as that Muraviev's money

was sought and used for donations—did not mention Kukushkin. Moreover, because the Government would offer Parnas's statements through a testifying agent (rather than, for example, a recording), the relevant admission can easily be elicited without mentioning Parnas's statements about Kukushkin.

All that's the technicalities and hazards of what happens when someone contemplates a cooperation agreement but then – for whatever reason – doesn't go through with it.

What I find interesting is the timing and circumstances of this proffer. Parnas had been claiming to want to cooperate far earlier than March 2020. In the interim, however, the government learned certain things (such as what files he had deleted from his iCloud and when) that would have made it easier to identify any lies Parnas told in his bid to convince prosecutors he wanted to cooperate. Plus, as we saw with Michael Cohen, SDNY requires cooperators to cooperate on everything they know, not just the crimes they've already been charged with.

Also in the interim, of course, Jeffrey Rosen sharply limited SDNY's ability to investigate any new leads that Parnas may have given, without first getting approval from EDNY.

And then after Parnas went on the record describing (in part) the crimes for which he'll go on trial next month, something happened to – quickly, given the single proffer session – make it clear a plea deal was not going to happen. In the 18 months since then, and especially in the five months since Lisa Monaco seems to have authorized SDNY to resume this investigation, DOJ would have been permitted to use Parnas' proffer to develop new leads in SDNY's investigation: This investigation, but also the investigation into Parnas' influence peddling with Rudy.