

MAINE STATE LEGISLATURE

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Report of
Special Investigatory Counsel
to the
Attorney General of Maine

April 30, 1992
Professor David P. Cluchey
Professor Melvyn Zarr

SUMMARY

On January 23, 1992, the Attorney General of Maine charged us with the responsibility as Special Investigatory Counsel to answer six questions concerning the investigation by the Bureau of Intergovernmental Drug Enforcement (BIDE) of District Attorney Janet Mills.

The six questions and a summary of our responses to them follow.

Q.1 Whether there was sufficient basis to initiate a referral by the state to the U.S. Attorney's Office of an investigation of District Attorney Janet Mills?

Response: Yes. Information had come to state and federal law enforcement officials from a number of persons involved in the drug culture that District Attorney Janet Mills had purchased or used cocaine. The credibility of these persons was uncertain, but the number of the statements justified a referral of this matter for investigation. An extensive investigation failed to reveal a prosecutable case, resulting in the United States Attorney's sound decision to terminate the investigation.

Q.2 Whether state BIDE agents leaked the existence of a federal grand jury investigation concerning Janet Mills to the press?

Response: We found no evidence that state BIDE agents leaked the existence of the federal grand jury investigation to the press. The grand jury investigation was revealed publicly on a television newscast on December 14, 1990. By that time, a large number of persons knew of the existence of the grand jury investigation. These persons included state and local police officers, deputy sheriffs and prison guards, as well as BIDE agents. All of the BIDE personnel who were directly involved in this investigation denied to us under oath that they leaked the information or knew who had done so. The leak could have come from any number of state law enforcement officers, including BIDE agents not involved in the investigation. The universe of such persons probably included persons who harbored a grudge against District Attorney Mills. The possible motive of the leakers may have been to use the media to act out their malice against District Attorney Mills. Whatever the motive, the leak was highly damaging to District Attorney Mills and deprived her of her right to grand jury secrecy. Neither the television station that broadcast the story nor the reporter who reported it would cooperate with our investigation.

Q.3 Whether state BIDE agents operated outside their statutory authority in the Janet Mills investigation?

Response: No. The Intergovernmental Drug Enforcement Act of 1987, codified as Title 25, Chapter 353, of the Maine statutes, provided ample statutory authority for the investigation. The information we reviewed in no way suggested that BIDE agents acted outside the scope of this broad authority in the conduct of the investigation.

Q.4 Whether state BIDE agents who participated in the Janet Mills investigation engaged in improper investigatory procedures and actions, including Mills' allegations that BIDE agents solicited disparaging, untruthful and perjurious statements from individuals?

Response: No. BIDE agents followed investigative leads aggressively, but they did not try to solicit untruthful allegations from the individuals they contacted. On the contrary, they carefully screened accusations of wrongdoing against District Attorney Mills and discarded those they believed to be untruthful. Inevitably in the investigation of some criminal cases, law enforcement officers may have to deal with liars and cheats as well as responsible citizens. In the course of this case, it appears that the officers investigating the case were lied to in a number of instances; this was dealt with by

examining many of the witnesses by polygraph to attempt to determine who was lying and who was not. A number of individuals who had been contacted alleged that they had been subjected to improper investigatory tactics. We found a number of these allegations to be exaggerated and, in several instances, simply untrue. The most serious of these allegations turned out, upon our investigation, to be directed to the conduct of federal officers -- a subject beyond the scope of our investigation. As to the allegations against BIDE agents, we believe that they did not cross the line from the aggressive into the improper.

Q.5 Whether state BIDE agents improperly acted in a manner that "dragged out" the Janet Mills investigation?

Response: No. We found no evidence that state BIDE agents acted in a manner that prolonged this investigation. In our experience, once a matter is being presented to a grand jury it is no longer the law enforcement officer/investigator who is directing the investigation. At that point the authority over the investigation and its direction is in the hands of the prosecuting attorney. It is the prosecuting attorney who makes the decisions concerning the scope and the timing of the investigation. In this case the Office of the United States Attorney was at all relevant times responsible for the timing of this investigation. State officials, including BIDE agents, pressed the United States Attorney's Office to expedite the

decision to clear or to charge District Attorney Janet Mills. State officials were so concerned about the slow pace of the investigation that BIDE participation in the investigation was limited in the summer of 1991 and then essentially terminated in the fall. Instead of "dragging out" the investigation, state officials strenuously tried to do just the opposite.

Q.6 If any of the above five inquiries leads to concerns about BIDE agents' activities, whether there was appropriate supervision of these activities and whether their cooperation with the U.S. Attorney's Office impacted their supervision?

Response: Since none of the five inquiries leads to concerns about BIDE agents' activities, it is unnecessary to respond to this question. As a general observation we note that cooperation between state and federal law enforcement agencies is useful and important. Such cooperation is not without its difficulties, however. When a state investigatory agency is cooperating with a federal prosecutorial agency and a criminal investigation is underway that involves a grand jury, state officials supervising the state investigatory agency are handicapped in evaluating the appropriateness of the investigation and the decisions made in the course of the investigation without access to all aspects of the investigation, including evidence presented to the grand jury. For the future, state officials would be well-advised, in

instances of state and federal cooperation, to take steps to ensure that they have full access to all aspects of the investigation.

INTRODUCTION

The investigation by the Bureau of Intergovernmental Drug Enforcement (BIDE) generated misunderstandings that are difficult to dispel. The difficulties revolve around the facts that the target of the investigation was a public official, that the investigation did not result in the filing of formal charges and that such investigations are not normally open to review or even to public disclosure, let alone the intense public discussion that has been generated about BIDE's investigation.

Grand jury secrecy is a long-established and carefully guarded right of a citizen who has not been charged with a crime. Prosecuting attorneys, law enforcement officers, and the grand jurors themselves are required under penalty of law to remain silent about the disclosures that occur before the grand jury. The duty of the grand jurors is to hear the evidence and to determine if there is probable cause to believe that a violation of the criminal law has occurred and that a particular person committed that violation. If the grand jury determines that there is no probable cause to believe that a violation occurred or if the prosecuting attorney chooses not to go forward with the presentation of an indictment for a vote by the grand jurors, the matter ends there, in secrecy. And so it should. No citizen should be exposed to public suspicion of wrongdoing when there is no probable cause to support that suspicion or the prosecutor is not prepared to request the issuance of a formal charging

document.

The public disclosure of a grand jury investigation becomes even more serious when the investigation involves a public official charged with prosecuting violations of the law herself. That this case became public instead of quietly disappearing when it became clear that initial allegations could not be proved is unfortunate in the extreme. Although we were unable to identify the person or persons who revealed the existence of this investigation to the news media, this was an unfair act that unnecessarily damaged the reputation of a dedicated, hard working public official. The public disclosure of this investigation deserves the strongest possible condemnation.

Of necessity, most of the information we reviewed or became privy to in the course of our investigation should and will remain confidential. All the information supporting this report, whether reviewed or generated by us, is being deposited with the Attorney General.

In the summary, we have answered the six questions posed to us by the Attorney General. In addition, we believe it is appropriate to provide a chronological overview of BIDE's investigation and to outline in some detail our methodology in conducting our own investigation. These topics constitute parts one and two, respectively, of our report. We conclude with some brief observations.

PART I

A CHRONOLOGY OF BIDE'S INVESTIGATION

A. THE INVESTIGATION BEGINS: AUGUST - DECEMBER, 1990

Prior to August, 1990, Attorney General James Tierney had received reports from law enforcement officers that there was "street talk" concerning the purchase or use of cocaine by District Attorney Janet Mills. The sources of this information were persons involved in the drug culture; their credibility was uncertain, but the number of the statements continued to grow.

By August, 1990, Attorney General Tierney had decided that a formal investigation should be initiated. On August 23, 1990, Attorney General Tierney met with United States Attorney Richard Cohen, and they agreed that the matter should be referred to the United States Attorney's Office for investigation. Tierney, Cohen and Commissioner of Public Safety John Atwood agreed that BIDE would supply investigatory resources.

BIDE geared itself up for the investigation by establishing a special unit consisting of two agents and one supervisor. The unit was formed with awareness of the extraordinary sensitivity of the investigation and out of a concern that the investigation itself not compromise the conduct of office of the District Attorney. It was imperative to keep the investigation in confidence so as not to generate a cloud over the conduct of the District Attorney's office; hence, the unit was named the "confidential unit".

Notwithstanding the best efforts of BIDE to keep the investigation confidential, it was inevitable that a large number of persons would find out about it. The sources of information had to be interviewed, and these interviews turned up further leads. Persons in the drug culture or in custody talk to one another and to law enforcement officers. By December, 1990, a large number of persons knew of the existence of the investigation, including state and local police officers, deputy sheriffs and prison guards, as well as BIDE agents. These persons also knew that the federal grand jury had begun hearing testimony in early December, 1990.

On December 14, 1990 reporter John Impemba aired a report on WCSH-TV that five law enforcement officers had told him that District Attorney Mills was being investigated by the federal grand jury for illegal drug use.

The impact on District Attorney Mills was immediate and severe. It put her conduct of office under a cloud and precipitated the very crisis of confidence which the formation of the "confidential unit" had been designed to avoid. It deprived her of her right to grand jury secrecy.

All of the BIDE personnel who were directly involved in this investigation denied to us under oath that they leaked the information or knew who had done so. Whoever did the leaking probably harbored a grudge against District Attorney Mills and used the media to act out their malice against her. Whatever the motive, the leak was highly damaging to District Attorney Mills'

conduct of office. It should have intensified the urgency with which the investigation was conducted.

B. THE INVESTIGATION PROCEEDS: JANUARY - JUNE, 1991

BIDE agents continued their work of developing leads for presentation to the federal grand jury. There were many witnesses to interview. Many persons claimed to have personal knowledge or to know of others with personal knowledge or to know of the existence of photographs or of a mysterious and, it turned out, mythic videotape. All these persons had to be interviewed by the agents.

The agents well understood that the statements they were receiving might not be true and they went to considerable lengths to test the veracity of the persons making the statements. Many of the persons were polygraphed. Substantial effort was put into verifying the details of statements. Some persons were not presented to the grand jury because the agents and the United States Attorney's office believed that they were lying.

Given the large number of persons whom the agents contacted, it is not surprising that some persons believed and alleged that they had been subjected to improper investigatory tactics. As many of those contacted by the investigators were themselves suspected of using or selling drugs, they did not all voluntarily cooperate with the investigators, and the investigators were, at times, aggressive in dealing with these people. The most serious

allegations of impropriety turned out, upon our investigation, to be directed to the conduct of federal officers -- a subject beyond the scope of our investigation. For example, BIDE agents did not attempt to probe into District Attorney Mills' sex life -- an allegation which was widely reported in the press.

BIDE agents followed investigative leads aggressively, but they did not try to solicit untruthful allegations from the individuals they contacted or otherwise engage in improper tactics.

C. THE INVESTIGATION LANGUISHES: JULY - DECEMBER, 1991

During July, 1991, BIDE officials had become so concerned about the slow pace of the investigation that they complained to Commissioner Atwood, who, in turn, pressed the United States Attorney for a prompt decision to clear or to charge District Attorney Mills. When a prompt decision was not forthcoming, Commissioner Atwood, in late July or August, ordered BIDE Director Frank Amoroso to scale back BIDE's participation in the investigation. In September, Commissioner Atwood ordered Director Amoroso to essentially terminate BIDE's participation, and this occurred around the first of October.

Commissioner Atwood and BIDE officials were not the only ones frustrated by the lack of a decision by the United States Attorney's office. By September, District Attorney Mills had lost patience with the cloud hanging over her conduct of office.

In mid-September, District Attorney Mills, in her words, "went public". She announced to the press that she had been the victim of a smear campaign by BIDE and that she intended to sue Commissioner Atwood and BIDE officials. Her charges were widely reported. Commissioner Atwood and BIDE officials could not effectively respond because the United States Attorney's investigation was still continuing.

Finally, on December 19, 1991, United States Attorney Cohen sent a letter to District Attorney Mills' attorney stating that the investigation had been terminated. The investigation was over, but the misunderstandings of the roles played by the major participants was to continue for many months. This report was commissioned by Attorney General Carpenter to dispel the misunderstandings.

PART II

OUR METHODOLOGY

Upon being requested to make an inquiry into the BIDE investigation of District Attorney Janet Mills it was immediately apparent that we would need a small staff to assist us. Attorney General Carpenter was properly reluctant to involve the staff of the Department of the Attorney General because of his concern that it be absolutely clear that he and his department had in no way attempted to influence our investigation. We initially identified a research assistant and a clerical assistant and began the search for a private investigator. This last was a delicate task because of the law enforcement backgrounds and connections of so many private investigators. We were, however, able to secure the services of a very competent investigator within a short time.

We structured our investigation around the six questions to which Attorney General Carpenter had asked us to respond. Our description of our methodology is likewise structured around the six questions. We repeat each question and describe how we went about answering it.

Q.1 Whether there was sufficient basis to initiate a referral by the state to the U.S. Attorney's Office of an investigation of District Attorney Janet Mills?

In determining whether there was a sufficient basis to refer

the investigation of District Attorney Janet Mills to the United States Attorney's Office, we reviewed the allegations that had come to the attention of BIDE investigators as of August 23, 1990, when the matter was referred by Attorney General James Tierney. We also interviewed former Attorney General Tierney. The allegations were contained in reports prepared by BIDE investigators during 1990. There were a large number of these reports. They were made available to us by BIDE and read by us. In some instances we have questioned under oath the BIDE investigators who prepared the reports. We believe that our review of these confidential reports gave us sufficient information to answer this question in the affirmative.

Q.2 Whether state BIDE agents leaked the existence of a federal grand jury investigation concerning Janet Mills to the press?

Question two presented a difficulty in that we understood early on that John Impemba and WCSH-TV had not been willing to discuss the sources of Mr. Impemba's news report on the grand jury investigation with others seeking information on the leak. Nevertheless we wrote to Mr. Impemba and requested his assistance in at least eliminating BIDE agents as the sources of the leak. This letter is attached as Attachment A. Our letter was answered by an attorney for Mr. Impemba and WCSH-TV, declining to cooperate with our investigation. This letter is attached as

Attachment B. Later in the course of our investigation, Mr. Impemba left his employment at WCSH-TV. After we determined that Mr. Impemba was no longer represented by counsel, we had our investigator contact him directly. Although Mr. Impemba spoke with our investigator, he continued to refuse to provide us with any assistance in our investigation.

In addition to seeking Mr. Impemba's assistance, we interviewed under oath the BIDE agents directly involved in this investigation and their supervisors in BIDE and asked each one if they had leaked the existence of the investigation or had any knowledge about the leak. Each person categorically denied leaking the information or having knowledge concerning the leak.

From the volume of BIDE investigative reports we infer that a wide variety of individuals, including a number of state and local law enforcement agents, had knowledge of this investigation. Under the circumstances we think it unlikely that the sources of the leak of the grand jury investigation can be determined unless the leakers come forward -- an honorable act which we doubt will occur.

Q.3 Whether state BIDE agents operated outside their statutory authority in the Janet Mills investigation?

Maine statutes give broad authority to BIDE agents to function as law enforcement officers. See 25 M.R.S.A. § 2955. We derived the answer to this question from a detailed review of

all BIDE reports on this investigation, taped interviews under oath with BIDE agents directly involved in the investigation, and selected interviews under oath with persons who had been interviewed by BIDE agents in the course of this investigation. We did not find any evidence that BIDE agents had acted outside the scope of their statutory authority.

Q.4 Whether state BIDE agents who participated in the Janet Mills investigation engaged in improper investigatory procedures and actions, including Mills' allegations that BIDE agents solicited disparaging, untruthful and perjurious statements from individuals?

We began this aspect of our investigation by doing a "media search" in an effort to identify as many reports of instances of improper investigatory procedures as possible. In addition we obtained copies of District Attorney Mills' testimony before the Legislative Audit and Program Review Committee and copies of reports prepared for the Legislative Judiciary Committee by Kenneth Allen. District Attorney Mills supplied us with other allegations of improper investigative activity and other individuals contacted us and provided us with additional allegations. In each instance where we identified an allegation of improper investigatory procedures we attempted to contact directly the person who had made the allegation. We were successful in making contact in most cases, but we were

unsuccessful in a few. In a few cases where we did make contact the person involved refused to speak with us. In most cases our investigator would make initial contact with the person making the allegation and prepare a summary of interview for us to review. In those cases where it appeared to us appropriate to examine the allegation more closely, we interviewed the person under oath.

Once an allegation had crystallized that we thought might have substance, we interviewed the BIDE agent/agents involved under oath. This interview process constituted the most time-consuming aspect of our investigation. We discovered several things in the process of this investigation. First, a number of allegations of improper conduct that had appeared in the press had been exaggerated and blown out of proportion. Some were simply untrue. Second, a number of the allegations in fact related to conduct of the federal prosecutors handling the case and not to BIDE agents. To the extent we were permitted by the ground rules under which we were given information to reveal it to the United States Attorney, these allegations were vehemently denied. We made no separate investigation of these allegations as this was outside the scope of our charge. Third, while it was clear that this investigation was handled aggressively, we found no evidence that the BIDE investigators crossed the line from aggressive investigatory procedures to improper investigatory procedures.

Q.5 Whether state BIDE agents improperly acted in a manner that "dragged out" the Janet Mills investigation?

Question five required an overview of the entire investigation as well as detailed inquiry into how the investigation was conducted. We had access to all reports on this investigation prepared by BIDE agents as well as the cooperation of those agents in responding to questions about those reports and other matters. We were slightly handicapped in responding to this question by lack of access to reports prepared by federal Drug Enforcement Administration agents. The letter refusing access to these reports is attached as Attachment C. We were also handicapped by lack of access to the evidence presented to the grand jury and to the federal prosecutor presenting that evidence. Copies of our correspondence with the United States Attorney and the Attorney General with regard to access to this information are attached as Attachments D, E, F and G.

We undertook to fill these gaps in access in the following ways. In regard to the DEA reports, we were provided with the names of all persons interviewed for this investigation whose interviews were written up by DEA agents. A BIDE agent very familiar with those reports then provided us with oral summaries of the information contained in those reports in a taped interview conducted under oath. In regard to access to the federal prosecutor presenting evidence to the grand jury, we had a lengthy meeting with the United States Attorney and several

members of his staff where we reviewed together the progress of this investigation. We were aware from the beginning of our investigation that access to the grand jury transcripts was probably barred by federal law. We researched that issue carefully and concluded that access was not available to us. After an ambiguous suggestion by the United States Attorney in his letter of February 28 (Attachment E), the Department of the Attorney General also researched the matter and reached a similar conclusion. (Attachment G). Ultimately, the information we had available to us was sufficient to allow us to conclude that BIDE agents and their supervisors had not acted to delay or drag out the investigation of District Attorney Mills. To the contrary, Attorney General Carpenter and Commissioner Atwood stated to us that they had urged that the investigation be concluded as quickly as possible and that they had expressed concern about the length of the investigation on several occasions.

Q.6 If any of the above five inquiries leads to concerns about BIDE agents' activities, whether there was appropriate supervision of these activities and whether their cooperation with the U.S. Attorney's Office impacted their supervision?

Question six is conditioned on a finding that there is a concern about the conduct of BIDE agents with regard to any of the preceding five questions. As no concern materialized in

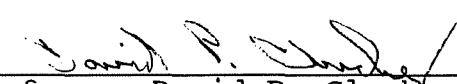
regard to the conduct of the BIDE agents, it is unnecessary to respond to this question. We have noted in our response to question six our concern that for the future state officials stay closely involved with investigations conducted by state law enforcement authorities that are being presented to a federal grand jury. As a practical matter, the only way state officials can exercise informed control over state law enforcement agents involved in such an investigation is with complete knowledge about the investigation, including the evidence presented to the federal grand jury.

CONCLUDING OBSERVATIONS

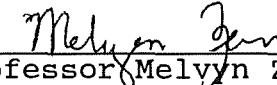
The allegations concerning the conduct of District Attorney Mills required an investigation. These allegations were, in fact, undermining her authority and needed to be dealt with. The exposure of the existence of the grand jury investigation did substantial, unjustified harm to District Attorney Mills' reputation. Once the existence of the investigation was public, it would have been prudent to proceed as quickly as could have been done responsibly to charge or to clear. This investigation continued for precisely a year and five days after its public exposure. During that period of time there were a series of exaggerated and some untrue allegations of investigatory improprieties published in the media. Ultimately, the appropriate decision was made not to request an indictment.

However, the protraction of the investigation, coupled with the unwarranted leak, was extremely unfortunate.

Respectfully submitted,



Professor David P. Cluchey



Professor Melvyn Zarr

Acknowledgments

We wish to acknowledge with deep appreciation the valuable contributions made to our investigation by the following persons:

-Ms. Nancy Knight, who managed the project, organized the files, did the typing and kept things straight.

-Mr. Jonathan Block, University of Maine Law School class of 1992, who researched major and minor points of law and fact.

-Mr. John Rzasa, private investigator, who tracked down and interviewed many persons both tactfully and effectively.

-Deputy Attorney General Vendean Vafiades, who enticed us into this venture and provided us with the support necessary to complete it.

-Finally, Attorney General Michael Carpenter who promised us complete independence and his full cooperation and delivered on his promises.

INVESTIGATORY COUNSEL OF THE STATE OF MAINE

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(207) 780-4363

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Dept. of the Attorney General
59 Preble Street
Portland, Maine 04101-3014

February 11, 1992

Mr. John Impemba
WCSH TV 6 ALIVE
1 Congress Square
Portland, Maine 04101

Dear Mr. Impemba:

We have been appointed as Investigatory Counsel by Attorney General Michael Carpenter to respond to a number of questions concerning a recent investigation of Janet Mills conducted by the Bureau of Intergovernmental Drug Enforcement and the Office of the United States Attorney in Maine. One question posed by Attorney General Carpenter is "Whether state BIDE agents leaked the existence of a federal grand jury investigation concerning Janet Mills to the press." The leak refers to the story you broke on December 14, 1990.

We ask your limited cooperation in answering the question posed by Attorney General Carpenter. You have been quoted by District Attorney David Crook as saying that your source for this report was five state and county law enforcement officers. You have also apparently assured an official of BIDE that BIDE agents were not the source of your news report. We are not asking you to reveal the identities of your sources. We are simply asking you to confirm or deny that BIDE agents were involved in the leak.

Your cooperation is in the public interest. When it is suggested that such a leak was politically motivated, there is a real danger that the credibility of the entire law enforcement community in Maine will be undermined. Moreover, the credibility of the media is at stake, since media personnel may have been unwittingly exploited in a possible political ploy.

Since the timetable for our investigation is very short, we would appreciate a prompt response to our request. Thank you for any help you can provide to us.

sincerely,


David P. Cluchey


Melvyn Zarr

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February 28, 1992

David P. Cluchey, Esq.
Melvyn Zarr, Esq.
Investigatory Counsel of the State of Maine
Department of the Attorney General
59 Preble Street
Portland, ME 04101-3014

Dear David and Mel:

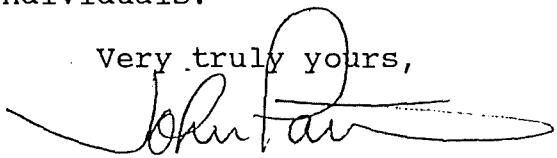
A copy of your letter to John Impemba of February 11, 1992 has been forwarded to me as counsel for WCSH-TV. I have reviewed your request with the station and John Impemba and must advise you that Mr. Impemba respectfully declines to answer the question posed by you.

The news stories run by Channel 6 and John Impemba beginning on December 14, 1990 regarding Janet Mills was based, in significant part, on confidential information provided to John Impemba. As I am sure you are aware, courts have in a wide variety of circumstances recognized a constitutional privilege for reporters to protect confidential informants. Mr. Impemba is unwilling to do anything to compromise the identity of his confidential informants or to risk waiver of his constitutional privilege. We also understand the purpose of your inquiry and that your question does not ask Mr. Impemba to identify the source, but rather to rule out a potential category of sources. However, we remain concerned that answering the question as posed might constitute a voluntary waiver of Mr. Impemba's privilege and Mr. Impemba, therefore, respectfully declines to answer.

February 28, 1992
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With respect to the statements in your letter which are attributed to Mr. Impemba by District Attorney David Crook and an unnamed "offical of BIDE," Mr. Impemba does not recall having made the statements to those individuals.

Very truly yours,



John M.R. Paterson

cc: John Impemba
Pat Casey

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U.S. Department of Justice

RECEIVED
ATTORNEY GENERAL

Drug Enforcement Administration

FEB 19 1992

Washington, D.C. 20537

FEB 13 1992

Vendean V. Vafiades
Chief Deputy Attorney General
State of Maine
Department of the Attorney General
State House Station 6
Augusta, Maine 04333

Dear Ms. Vafiades:

This is in response to your letter of February 4, 1992, regarding the release of Drug Enforcement Administration (DEA) records involving the District Attorney Mills investigation. As Resident Agent in Charge Steve Georges has indicated to you, it is the position of DEA that any such reports which you seek were prepared during the course of a law enforcement investigation. It is DEA's policy that such reports are not to be released for nonprosecutorial purposes.

Your letter of February 4, 1992, does not indicate why you have requested the aforementioned reports. DEA will not authorize the release any such reports absent a demonstration that the release of the information sought falls within the confines of DEA's policy.

Sincerely,

Dennis F. Hoffman
Chief Counsel

cc: RAC Steve Georges

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Dept. of the Attorney General
59 Preble Street
Portland, Maine 04101-3014

February 10, 1992

United States Attorney Richard Cohen
156 Federal Street
Portland, Maine 04101

Dear Mr. Cohen:

We are engaged in an investigation of allegations concerning an investigation conducted by the Bureau of Intergovernmental Drug Enforcement and your office into the activities of District Attorney Janet Mills. Attorney General Michael Carpenter has appointed us as Investigatory Counsel and, for purposes of this investigation, we are employees of the Department of the Attorney General.

Attorney General Carpenter has asked us to respond to the six questions set out below:

1. Whether there was sufficient basis to initiate a referral by the state to the U.S. Attorney's Office of an investigation of District Attorney Janet Mills;
2. Whether state BIDE agents leaked the existence of a federal grand jury investigation concerning Janet Mills to the press;
3. Whether state BIDE agents operated outside their statutory authority in the Janet Mills investigation;
4. Whether state BIDE agents who participated in the Janet Mills investigation engaged in improper investigatory procedures and actions, including Mills' allegations that BIDE agents solicited disparaging, untruthful and perjurious statements from individuals; and
5. Whether state BIDE agents improperly acted in a manner that "dragged out" the Janet Mills investigation.
6. If any of the above five inquiries lead to concerns about BIDE agents' activities, whether there was appropriate supervision of these activities and whether their cooperation with the U.S. Attorney's Office impacted their supervision.

United States Attorney Richard Cohen
February 10, 1992
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Attorney General Carpenter has advised us that you are willing to cooperate with our investigation to the extent you are able. We fully appreciate that you cannot "disclose matters occurring before the grand jury." F.R.Crim.P. 6(e)(2). We seek your cooperation as to matters occurring outside the grand jury.

Specifically, we ask to review documents falling into the following categories.

First, we have been asked to investigate the leak of notice of the pending grand jury proceeding to the media. In order to investigate thoroughly this matter, we request access to all documents relating to the leak, including documents relating to any internal investigation or inquiry regarding the source of the leak.

Second, we have been asked to investigate the allegations that improper investigative techniques were used during the course of this investigation. We request access to all documents relating to the investigative techniques used in this investigation, including any documents relating to any inquiry into the propriety of the investigative methods used in this investigation.

Third, we have been asked to investigate whether the investigation in this matter was unduly protracted. We request access to all documents relating to the following matters:

1. The 1990 referral of this matter to your office by then Attorney General James Tierney.
2. All written status reports or notes for oral reports on the status of this investigation. We would be particularly interested in any such documents relating to the periodic briefings given to state law enforcement officers concerning the progress of this investigation.
3. All written communications between your office and Janet Mills and her attorney.

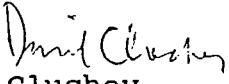
Finally, we request access to any other documents which, in your judgment, are relevant to the questions we have been asked to address.

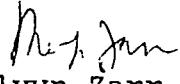
In addition to our review of documents in this matter, we are interested in interviewing a number of individuals who appear to have knowledge of matters which relate to the questions to which we have been asked to respond. These individuals include yourself, William H. Browder, Jr., Nicholas Gess, and Jonathan Toof.

United States Attorney Richard Cohen
February 10, 1992
Page three

Since the timetable for our investigation is very short, we would appreciate your prompt cooperation.

Sincerely,


David P. Cluchey


Melvyn Zarr



United States Attorney

District of Maine

East Tower
One Hundred Middle Street Plaza
Portland, Maine 04101

207/ 780-3257
FTS/ 833-3257

February 28, 1992

HAND DELIVERY

David P. Cluchey, Esquire
Melvyn Zarr, Esquire
Investigatory Counsel of the
State of Maine
Department of Attorney General
59 Preble Street
Portland, Maine 04101-3014

PERSONAL AND CONFIDENTIAL
TO BE OPENED BY ADDRESSEES ONLY

Gentlemen:

After consultation with the Criminal Division of the Department of Justice regarding your letter of February 10, 1992, I am pleased to advise you as follows:

FIRST

I am enclosing herewith a summary of non-grand jury investigative activity. This memorandum has been prepared from non-grand jury sources by the attorney assigned to this matter, subsequent to the termination of the investigation and my decision to decline prosecution. I am providing it to you as an aid in conducting your investigation into the activities of the Bureau of Intergovernmental Drug Enforcement. I am providing it, however, subject to the requirement that it not be used directly in formulating any findings you may reach, ie: that the summary itself, as opposed to the source documents from which it has been compiled and which I understand are in your possession, not be quoted from or made a part of any public report.

SECOND

To the extent that your letter requests materials subject to the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, the Department of Justice is without authority to grant access to such material absent an Order from the United States District Court authorizing such disclosure. In terms of the scope of Rule 6(e) and its restrictions on what material may be provided to you, case law suggests a somewhat more expansive reading of the Rule's provisions than the language quoted at the top of page 2 of your February 10 letter.

I have in the past informed Attorney General Carpenter of the manner by which he might obtain access to such material preliminarily to or in connection with a judicial proceeding with respect to the person who was the subject of the federal investigation. In the event that you seek access to such material through this procedure, I would ask that you provide me with a copy of your Motion in order that it may be reviewed by myself and appropriate Department of Justice Criminal Division officials in order to determine whether it satisfies the legal requirements set forth in the Rule.

THIRD

With respect to that portion of your letter which requests information about a purported grand jury "leak", this Office has received no evidence that there was any disclosure of matters occurring before the grand jury. A review of the context of the initial media report does not itself provide evidentiary support for believing material covered by Rule 6 of the Federal Rules of Criminal Procedure was improperly disclosed.

Early on this Office communicated with the principal attorney for the subject of the investigation asking to be provided with any credible evidence that any violation of law had in fact occurred. No response or other information has ever been provided to us. In addition, it is my understanding that a similar request was made by Maine's Commissioner of Public Safety to this same attorney, again with a similar lack of any response.

To the extent that there would be any violation of federal law arising from an unauthorized disclosure of matters occurring before the grand jury, that is a matter for federal investigation and, if appropriate, prosecution. Should you, incident to your investigation, uncover any evidence that such a violation of law has occurred, I would ask that you promptly bring it to my attention in order that it can be vigorously pursued by appropriate Department of Justice investigators and prosecutors.

FOURTH

With respect to your request for documents relating to what you have termed "investigative techniques", we are unaware of any documentary material prepared in the course of this investigation which in any way would be evidence of improper or illegal investigative techniques. To the extent that in the course of your examination of the actions of State authorities you become aware of any evidence indicating questionable action by any federal official, I would ask that it be promptly forwarded to me for further dissemination to appropriate Department of Justice officials. Beyond the summary of the investigation that I have provided to you, however, I would suggest that you must interview the individual Bureau of Intergovernmental Drug Enforcement investigators in pursuing this aspect of your investigation.

FIFTH

With respect to that portion of your investigation which you state is focused on determining whether the investigation was "unduly protracted" you should be aware that in carrying out this investigation and reaching my prosecutive determination, we have communicated and coordinated throughout with appropriate Department of Justice officials. Those officials participated and concurred in all significant investigative decisions as well as in the final prosecutive determination which I reached.

This Office and the Department of Justice have concomitant responsibilities not only to those individuals who may be the subjects of investigations, but also to the citizens of the District of Maine as a whole. Those responsibilities are to ensure that investigations are conducted not only expeditiously but also in a manner that is thorough, fair and complete. While I can assure you that given these interests the investigation and prosecutive determination in this case were handled in an appropriately expeditious manner, you should also be aware that the manner in which this Office and the Department of Justice arrives at its prosecutive decisions is a matter of federal concern absent, of course, some intentional effort on the part of State personnel to delay or obstruct federal investigative efforts. We are aware of no such obstructive activity by State personnel in this case. However, to the extent that, incident to your investigation, you would uncover any such evidence, I would again ask that we promptly be made aware of it.

SIXTH

With respect to your request for documents relating to the referral of this matter to my office by then Attorney General James Tierney as well as notes of periodic briefings given to Mr. Tierney, Mr. Carpenter, and members of their staffs, we believe that it would be more appropriate for you in conducting your investigation of State personnel to speak with Mr. Tierney, Mr. Carpenter, and members of their staffs and obtain such information directly from them. I will of course also make myself available to you. To the extent that you cannot obtain appropriate information from State officials, I am willing to reconsider as necessary any request for informal notes made during the course of such meetings. My concern with such informal notes, however, is that they were by no means intended to be verbatim summaries of those meetings.

SEVENTH

With respect to your request for copies of written communications between my Office and/or the Department of Justice and the subject of this investigation or her principal attorney, we have absolutely no objection to your obtaining all our correspondence from the persons to whom it was directed. In making such a request of them you may inform them of my acquiescence in your obtaining such materials. Alternatively, I will myself provide copies of this correspondence upon receipt of authorization from its recipients waiving all rights under applicable federal confidentiality provisions. If the recipients should decline to provide such a waiver to you, I would be willing to reconsider my decision that such a waiver would be a prerequisite to my disclosure to you of such correspondence. I would further request, however, that you provide me with an index of the materials turned over to you as well as copies of the documents. In this way, I will be able to determine that you have in fact been provided all documents in their entirety. You may further inform the recipients of my correspondence that should they choose to provide only some documents or excerpted copies of those documents, I will then feel free to make all documents available to you in their entirety.

EIGHTH

With respect to your request to speak with myself and certain members of my Office, I will make myself available to you and will be happy to provide information that may be of assistance to you in carrying out your investigation. After consultation with appropriate Department of Justice officials, however, I have determined that I cannot make members of my staff available, absent some narrowing of particular matters of inquiry beyond information which I myself may appropriately provide to you. The reason for this decision is that under appropriate law and regulation,

responsibility for federal prosecutive decisions in this District rests with me as United States Attorney. If after speaking with me and conducting further investigation there are factual occurrences about which you need information that I myself cannot provide to you, I will be happy to reconsider your request at that time.

I am hopeful that the summary we are providing to you will give you some idea of the complexity and difficulty inherent in the investigation and prosecutive determination that was undertaken. As I informed Attorney General Carpenter, I have every desire to cooperate in all appropriate ways in any investigation of the activities of any State official, subject, of course, to whatever legal restraints may be imposed by Rule 6, the Federal Privacy Act, and considerations of appropriate federal/state comity.

Very truly yours,



Richard S. Cohen
United States Attorney

RSC:cmp

INVESTIGATORY COUNSEL OF THE STATE OF MAINE

David P. Cluchey, Esq.

(207) 780-4363

Elvyn Zarr, Esq.

(207) 780-4359

Dept. of the Attorney General
59 Preble Street
Portland, Maine 04101-3014

March 3, 1992

Michael E. Carpenter, Esq.
Attorney General
Department of the Attorney General
State House Station 6
Augusta, Maine 04333

Dear Attorney General Carpenter:

On February 10, 1992 we wrote to United States Attorney Cohen seeking his cooperation in answering the questions which you have assigned to us.

We wrote in part:

Attorney General Carpenter has advised us that you are willing to cooperate with our investigation to the extent you are able. We fully appreciate that you cannot "disclose matters occurring before the grand jury." F.R.Crim.P. 6(e)(2). We seek your cooperation as to matters occurring outside the grand jury.

On February 28, 1992 Mr. Cohen responded to our letter. In part he wrote:

To the extent that your letter requests materials subject to the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, the Department of Justice is without authority to grant access to such materials absent an Order from the United States District Court authorizing such disclosure. In terms of the scope of Rule 6(e) and its restrictions on what materials may be provided to you, case law suggests a somewhat more expansive reading of the Rule's provisions than the language quoted [in] your February 10 letter.

I have in the past informed Attorney General Carpenter of the manner by which he might obtain access to such material preliminarily to or in connection with a judicial proceeding with respect to the person who was the subject of the federal investigation. In the event that you seek access to such material through

Michael E. Carpenter, Esq.
March 3, 1992
Page two

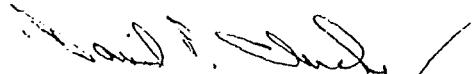
this procedure, I would ask that you provide me with a copy of your Motion in order that it may be reviewed by myself and appropriate Department of Justice Criminal Division officials in order to determine whether it satisfies the legal requirements set forth in the Rule.

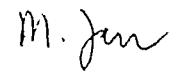
If you believe that the procedures suggested by Mr. Cohen are appropriate, we ask you to take those steps suggested by him which might produce for us whatever material he is referring to. In order to put this in more context we are attaching the exchange of letters.

We would appreciate whatever assistance you can give to us.

Thank you.

Sincerely,


David P. Cluchey, Esq.


M. Zarr

Melvyn Zarr, Esq.

Enclosures



MICHAEL E. CARPENTER
ATTORNEY GENERAL

VENDEAN V. VAFIADES
CHIEF DEPUTY

Telephone: (207) 626-8800
FAX: (207) 289-3145

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

PLEASE REPLY TO:

96 HARLOW ST., SUITE A
BANGOR, MAINE 04401
TEL: (207) 941-3070

59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 879-4260

March 13, 1992

David P. Cluchey, Esq
Melvyn Zarr, Esq.
Investigatory Counsel
Department of the Attorney General
59 Preble Street
Portland, ME 04101-3014

Dear David and Mel:

This is in response to your letter of March 3 with respect to the U.S. Attorney's suggestion that this office might be able to obtain grand jury material "preliminarily to or in connection with" a judicial proceeding under Fed. R. Crim. P. 6(e)(3)(C)(i).

That rule contemplates that the party seeking disclosure of grand jury material demonstrate that the primary purpose of disclosure is to assist in the preparation or conduct of a specific litigation, either pending or anticipated. See United States v. Baqqot, 463 U.S. 476, 480 (1983). The case law demonstrates that the possibility that unspecified litigation may arise in the future is not sufficient to justify an application under Rule 6(e)(3)(C)(i) because the party seeking disclosure under that rule must demonstrate a particularized need to use the material in question in a specific and identifiable judicial proceeding. Id. In this instance, there is no pending judicial proceeding for which disclosure would be sought, and I am not in a position at this time to state that I wish to use grand jury material in connection with any anticipated judicial proceeding.

As a result, while it is possible that your report or some other information that may come to light could lead to litigation in the future, I do not have a basis to file an application under Rule 6(e)(3)(C)(i) at this time.

Very truly yours,



MICHAEL E. CARPENTER
Attorney General

MEC:jwp