

MEMORANDUM

November 16, 2020

To: The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Copy to: Pat A. Cipollone, Esq.
Counsel to the President of the United States

Mr. Jared Kushner
Senior Advisor to the President of the United States

From: Edwin Meese
Michael B. Mukasey
Larry D. Thompson
Gary Apfel

Re: Clemency Request for / Philip Esformes

Dear Mr. President,

We applaud your thoughtful and compassionate use of your presidential clemency power. Indeed, your exercise of clemency is part of your remarkable and groundbreaking efforts toward criminal justice reform, which have provided a second chance for thousands of deserving people. We congratulate you and your White House Staff for these great humanitarian achievements.

We are writing to you¹ urgently – to ask that you exercise your executive clemency power, to commute the sentence of Philip Esformes. As outlined below, this request is based on compelling legal reasons, as well as pressing humanitarian concerns. Earlier today, we spoke with Attorney General Barr and he supports this request. Specifically, he has authorized us to convey to you that he will not oppose your commuting Mr. Esformes' 20-year sentence to five years with the remainder of his sentence (Mr. Esformes has already been incarcerated for more than 52 months) to be served in home detention. The precise terms of our proposed level of commutation were suggested by the Attorney General.

¹ We are all participating in this matter on a *pro bono* basis.

INTRODUCTION

Philip Esformes' 20-year sentence of imprisonment was imposed following his conviction on health care fraud charges in the United States District Court for the Southern District of Florida. Mr. Esformes' conviction was tainted by prosecutorial misconduct, as detailed in a comprehensive 117-page report from a United States Magistrate Judge outlining the Government's intrusion on the attorney-client privilege between Mr. Esformes and his counsel, as well as the Government's failure to follow its own privilege-related protocols. Following an eight day evidentiary hearing, the Magistrate Judge recommended that all the tainted evidence should be suppressed.

Following an unusual hearing that raised as many questions as it purported to resolve, the trial judge, without an evidentiary hearing, and after expressing concern about the impact an adverse ruling would have on the careers of the prosecutors, determined not to follow the Magistrate Judge's recommendation. Three of the prosecutors even retained private counsel to assert their personal interests, and these attorneys were permitted to appear and be heard at oral argument on the motion. This unprecedented set of circumstances is currently the subject of an appeal to the United States Court of Appeals for the Eleventh Circuit. While we understand the Department of Justice generally prefers to allow the judicial process to play itself out, we believe that that this is one of the rare exceptions. As described above, Attorney General Barr supports our request. Mr. Esformes has already served more than 52 months in prison – most of which was in isolation and in extremely difficult circumstances² - which in our opinion is ample under the circumstances, and which would continue during the pendency of any appeal. We respectfully urge you to step in and exercise the power vested in you by the Constitution and commute his sentence.

We do not make this request lightly. In expressing our deep concern for the injustice that has transpired in this case, Messrs. Meese, Mukasey and Thompson were joined by a remarkable group of other former high-ranking Department of Justice officials – former Attorneys General John Ashcroft and Alberto Gonzales; former Deputy Attorney General David Ogden; former Solicitors General Kenneth Starr and Seth Waxman; and former FBI Director Louis Freeh – in submitting a Brief of *Amici Curiae* to the Eleventh Circuit in support of Mr. Esformes's request to have his conviction overturned and case dismissed on account of the prosecutorial misconduct. (A copy of the *Amicus* Brief is enclosed) We respectfully maintain that the most humane and expedient resolution to remedy this injustice, is a commutation.

BACKGROUND

Prosecutors initially claimed that Mr. Esformes, who ran skilled nursing facilities (SNFs) in Florida, was guilty of a "billion dollar" Medicare fraud. But the 200 patient files they

² Mr. Esformes was denied bail and we understand that he spent approximately 36 months in MDC Miami, where he was confined to a cell most of the time, and did not have access to fresh air or the outside. Shortly after he was sentenced, COVID broke out and he was once again placed in lockdown, during which – for many months – he was confined, for almost 24 hours a day to his cell.

subpoenaed showed no fraudulent billing. The prosecutors then changed theories and argued Mr. Esformes improperly admitted psychiatric patients to his SNFs. This theory, however, was also flawed, as there is no rule or regulation prohibiting SNFs from providing services to psychiatric patients. To the contrary, every psychiatric patient at Esformes' facilities received independent certifications of medical necessity in support of the patient's admission, in accordance with federal regulations. To exclude patients from an SNF based solely on mental health grounds over the recommendation of their treating physicians and other medical professionals would violate federal anti-discrimination laws.

Notwithstanding the weakness of the Government's theory, the trial judge allowed the Government's sole medical expert, Dr. Cifu, to offer his opinion that psychiatric patients should be kept out of SNFs. We found it significant that Dr. Cifu is not a psychiatrist, had no knowledge of SNF practices in the geographic region where Mr. Esformes' facilities were located, never consulted available statistics regarding the prevalence of psychiatric patients at SNFs, and did not even realize there were federal and state regulations requiring third-party certification of medical necessity for every psychiatric patient at Mr. Esformes' facilities. His testimony was little more than speculation elicited by prosecutors' leading questions on subjects well beyond his expertise.

The Government's Medicare fraud case boiled down to Dr. Cifu's unsupported opinions, the testimony of a disgruntled weekend nurse (an unsuccessful *qui tam* complainant) whom the trial judge found unqualified to opine as to medical necessity, and the testimony of three patients having psychiatric diagnoses who expressed their subjective views as to their treatment—which was thoroughly rebutted by their treating physicians. And the only doctor called by the Government as a fact witness testified that there were no kickbacks and no unnecessary services. Indeed, the Government witnesses included persons who testified about facilities that were not even part of Mr. Esformes' business, which caused the district court to dismiss two of the three counts of Medicare fraud.

The prosecutors were, notably, unable to convict Mr. Esformes on their principal claim of Medicare fraud. The convictions instead were limited to kickback and money laundering counts. Even there, however, the Government never proved actual loss and could not identify a single instance of improper billing. Mr. Esformes was sentenced to 20 years' imprisonment and ordered to pay \$5 million in restitution and \$38 million in forfeiture³.

³ The trial judge accepted the government's arbitrary figure that 1% of patients at Mr. Esformes' Skilled Nursing facilities had a primary psychological diagnosis and that therefore 1% of all revenue had to be forfeited—\$38 million—even though that number was not tied to a specific facility nor to any specific patients. Indeed, it overrode the jury's express rejection of a \$38 million forfeiture. The \$5 million restitution order was similarly based on an arbitrary extrapolation that cannot be tied to any proof of actual loss. There was no proof of fraudulent billing and no proof of any loss.

HARMFUL ERROR INFECTED EVERY PHASE OF THIS CASE

As documented in the Magistrate Judge's 117-page report that was issued after hearing eight days of testimony, starting with their investigation, the prosecutors knowingly and repeatedly invaded Mr. Esformes' privileged attorney-client relationships, used his confidential information against him—then tried to cover up their misdeeds with testimony the Magistrate Judge found lacked any credibility.

Specifically, in July, 2016, the Government seized hundreds of privileged documents from the office of Mr. Esformes's in-house lawyer. The prosecutors knew this was Mr. Esformes's lawyer but they told case agents not to treat him as such. And, contrary to DOJ protocol, there was no effective "taint" procedure in place to keep privileged materials separate from documents that were handed over to the prosecution team. There was no supervising taint prosecutor during the raid, and the agents performing the search lacked proper instructions for identifying and handling privileged materials. The lead agent did not even know the name of Mr. Esformes's defense counsel. Only a handful of documents were placed in a single "taint" box containing privileged materials; hundreds of privileged documents were commingled with non-privileged materials in 69 other boxes containing over 179,000 seized documents. The lead prosecutor promptly and personally reviewed privileged materials obtained from the office of Mr. Esformes' lawyer—then used the information to conduct a "reverse proffer" to the lawyer (trying to get him to cooperate with the Government) and "debrief" the lawyer's paralegal, questioning him in detail about an analysis he had done at the request of Mr. Esformes's criminal defense attorney. And the lead prosecutor did so despite being told that the materials were privileged work product.

The lead prosecutor continued her review and use of the protected materials—knowing of the privilege issue—without any notification to Mr. Esformes's defense team or the court. In fact, the Government provided Mr. Esformes's lawyers with electronic copies of the documents that were seized but that production omitted these highly sensitive and protected documents. Mr. Esformes's defense team did not learn that the prosecutors even had these materials until months later, when they asked for a physical inspection of all the document's seized from the office of Mr. Esformes's in-house lawyer.

The Government also had invaded Mr. Esformes's protected confidential communications the year before when it secretly recorded his conversations with alleged business contacts in violation of an effective written joint defense agreement—and did so without seeking any court approval beforehand. And those recordings captured conversations with Mr. Esformes's defense counsel as well as conversations between the parties relating to legal strategies.

The Government then, at an *ex parte* hearing, asked the district court, and received permission, to turn the tapes over to the prosecution team without disclosing that an enforceable joint-defense agreement was in place. The prosecution also received—without court-approval—summaries of privileged conversations between Mr. Esformes and his defense counsel.

The Magistrate Judge found that not only had the lead prosecutor "wholly disregarded all privilege concerns" in taking and using Mr. Esformes's privileged information, but that prosecutors tried to cover that up at the evidentiary hearing by creating a "new narrative" that she found had "zero credibility." In fact, the Magistrate Judge characterized the prosecutors' conduct

as a “deplor[able]” effort to “obfuscate” the evidentiary record. And the Magistrate Judge recommended suppression of the illegally obtained tapes and privileged documents.

The Government objected to the Magistrate Judge’s credibility findings and proposed remedy. At the hearing in the District Court, the lead prosecutor and two others appeared in their personal capacities represented by their personal attorneys and asked the District Court to overturn the Magistrate Judge’s credibility findings because, if left undisturbed, those findings would permanently damage their personal careers and options for other positions (in other words, their livelihood). The judge commented he had “moral burden, okay, to worry about whatever ruling I make here is going to have on the career of a prosecutor.” and asked the prosecutors’ private attorneys: “What is the specific wording that you want me to find or add or delete?” They told him exactly how he should revise the Magistrate Judge’s credibility findings (even though the District Court had not conducted its own evidentiary hearing) to avoid any personal harm to the prosecutors, which he did.

The District Court actually permitted one of the private counsel to present the life history of one of the prosecutors, treating a hearing on whether the United States of America had violated the rights of a criminal defendant as if it were an internal DOJ responsibility review board. The District Court’s consideration of the ancillary impact of its decision on the individual prosecutors is akin to a football referee not penalizing a team for a pass interference penalty because of the impact on the career of the player who committed the penalty.

To be clear, Mr. Esformes did make mistakes. His compulsive personality⁴ caused him to improperly obtain copies of inspection schedules to ensure his facilities were in tip-top shape when inspected. But that is not Medicare fraud, and it caused no harm to anyone. He also made the mistake of doing business with “the Delgado Brothers,” healthcare participants who, after being indicted, secretly recorded Mr. Esformes as part of a plea deal and ensnared him in a fictional plan for one of them to flee the country. As the Magistrate Judge later found, however, those recordings were obtained improperly because the parties had a joint defense agreement and the Government violated Mr. Esformes’ attorney-client privilege.

REMORSE, TRANSFORMATION AND RE-ENTRY

We understand that Mr. Esformes has expressed deep and profound remorse for his actions. He has internalized his punishment on a very deep level and spends literally 18+ hours a day in study and prayer, seeking G-d’s forgiveness for his prior conduct. He has become emaciated (by numerous accounts, he has lost more than 60 pounds) and physically ill by the extent of his self-

⁴ Dr K. Drorit Gaines, Ph.D. a clinical and forensic Neuropsychologist, who spent many hours with, and conducted a battery of tests on, Mr. Esformes in prison, opines that Mr. Esformes “meets diagnostic criteria for obsessive-compulsive Disorder and it is my belief that he has suffered from this condition since early years of life”.

imposed deprivation of food and sleep. Aside from one incident⁵, Mr. Esformes has had a perfect record in his four plus years in prison.

Mr. Esformes suffers from multiple medical conditions, including undiagnosed lumps on his neck. Despite the extreme suffering and physical pain he endures on a regular basis - his veins are inflamed and purple; his receding gums and deteriorating vision make it hard for him to eat, sleep and read - he has spent many hours sharing his spiritual journey with other incarcerated persons.

As conveyed by respected community leaders who have interacted extensively with Mr. Esformes (see, for example, the letter from Rabbi Sholom Lipskar, Chairman of the Aleph Institute enclosed herewith), he has gone through a most remarkable transformation, in which he has spent countless hours of introspection, on a very deep level.

In his letter to you, seeking clemency, Mr. Esformes writes:

One practice, which was hard for me in the past, is developing patience. Sitting in a prison cell for hours at a time has enabled me to take the time to review my actions day and night, to contemplate what I can improve upon, what I can do better, what to cancel out. This I reflect on each and every day.

What matters to me now, has no monetary value. The essence of what I truly value is the simple yet magnificent gifts we are given, simply because we exist. I am so sorry that I lost sight of this. I yearn for a second chance to be better, to be free once again, only this time, I choose to take nothing for granted and to feel only gratitude.

Mr. Esformes has a strong support system, from both his family and the community to help him with his transition back into society. The commutation suggested here would reunite Mr. Esformes with his three children, and, if done before December 31, would afford his daughter Serena, her deepest wish: her father's presence at her wedding.

CONCLUSION

Mr. President, Mr. Esformes has already served more than four years in prison – ample punishment for what he actually did – and is suffering immensely. The Founding Fathers granted the President the awesome power of clemency to take care of unusual situations where such measures are necessary. Given the unique circumstances of the case, we respectfully ask that you remedy the situation by exercising that power and grant clemency to Mr. Esformes.

⁵ Mr. Esformes, who cannot tolerate caffeine, was found to possess HydroxyCut (an over the counter supplement which serves as a substitute to Caffeine) in his cell. He was taking the Hydroxycut, to help him stay awake for his incredibly intense regiment of prayer and study. He has accepted responsibility and expressed deep remorse for his conduct. Dr. Gaines, is of the opinion that the path of self-deprivation he has chosen for himself (he restricts his food intake to such a degree that he lost more than 60 pounds and spends hours on his knees so his body is in a position that he can catch the light in his tiny cell - which has caused his legs to swell and turn purple) is an extension of his untreated OCD diagnosis.