

JUDGE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	NO. CR 12-00016 RAJ
)	
Plaintiff,)	
)	
vs.)	DEFENDANTS' MOTION FOR
)	DISCOVERY
JOHNATHAN CASEY PHAIR, and)	
DEZI-RAY THOMAS ARNEZ LOUIE,)	Noted: June 8, 2012
)	
Defendant.)	

COME NOW the defendants Johnathan Phair and Dezi-Ray Louie, by their respective attorneys, Assistant Federal Public Defenders Michael Filipovic and Lynn Hartfield, and Peter Offenbecher and Jeffrey Grant, and submit the following motion for discovery. The Court is respectfully requested to consider the attached Certificate of Compliance with CrR16 filed with this motion.

MOTION

A number of defense discovery requests have been addressed by the case scheduling order setting specific due dates for various items, and these issues will not be revisited here. *See* Docket No. 93.

1 This motion is addressed to these matters where the government has failed to
2 respond to specific defense requests.

3 **A. Specific Items Requested at the February 15, 2012 Discovery**
4 **Conference and Requested in Follow up Letters Dated February 21,**
5 **2012, and April 9, 2012. See Appendix A to Certificate of Compliance**
6 **with CrR16.**

7 Item one: *“4. Any memorialization of the chain of custody for the items*
8 *identified and packaged by the defense on February 10, 2012, that*
9 *were left at the house and later retrieved by Lummi tribal officers.”*
10 02/21/12 Discovery Letter at p. 2.

11 On February 10, 2012, the government counsel, along with the FBI case agent
12 and a Lummi Nation detective, accompanied defense counsel and their investigators to
13 the Yolanda Wilbur residence, where the defense team inspected the scene and took
14 photographs. A number of items from the house were identified by the defense as
15 material to the defense case. Counsel requested that the FBI case agent take these items
16 into custody so that they could be preserved for forensic analysis by the defense. The
17 government declined to take these items, and the defense was denied permission to
18 remove any items from the house at that time.

19 The identified items were gathered and placed in one area of the home and
20 photographed by the defense. Subsequently, the Lummi Police Department agreed it
21 would retrieve these items from the Wilbur home and hold them for the benefit of the
22 defense. Ultimately, these items were retrieved from the Lummi Police Department by
23 Kay Sweeney, a forensic criminalist retained by counsel for Mr. Louie.

24 This request is for any law enforcement inventory or other report memorializing
25 the date, time, and method of retrieval of these items from the Wilbur residence, the
26 manner in which these items were stored at the Lummi Police Department, and any other
information that would be relevant to chain of custody.

1 The Lummi Police Department has been working closely with the FBI in the
2 investigation of this case.

3 This request for discovery falls squarely within CrR16(a)(1)(E)(i) as a document
4 or item within the government's possession that is material to preparing the defense.

5 The government has not specifically responded to this request.

6 Item 2: "5. *The key identifying the codes used in the CAD report provided*
7 *to the defense, Bates No. 159 to 166.*" 02/21/12 Discovery Letter at
8 p. 2.

9 The government has provided the defense with a CAD report from the Lummi
10 Nation Police Department. This report documents the location of various law
11 enforcement and emergency personnel during the early morning hours of December 17,
12 2011. However, to fully understand the information contained in that report, counsel
13 requires a code to understand the various abbreviations utilized in that report. Again,
14 this request was made orally, repeated in writing, and followed up with another
15 discovery letter. This too falls within CrR16 (a)(1)(E)(i).

16 Item 3: "6. *A copy of the time line referenced by Detective Long in her*
17 *testimony at the preliminary hearing.*" 02/21/12 Discovery Letter
18 at p. 2.

19 Lummi Nation Law Enforcement Detective Kelly Long testified at the
20 preliminary hearing. During her testimony, she referenced a "time line" that she had
21 prepared but had not brought with her to court.

22 We requested that that time line be provided to the defense in the February 21st
23 and subsequent follow-up letter, and have received no response from the government.
24 Detective Long's time line is material to the defense preparation of the case.

25 //

26 //

1 Item 4: “8. All statements made by Mr. Phair or Mr. Louie, whether
2 memorialized in writing or not, and including those made to non-
3 law-enforcement personnel. Any statements the government seeks
4 to introduce against one defendant may be a basis for severance of
5 the defendants, so we need to know this information well before our
6 pretrial motions deadline.” 02/21/12 Discovery Letter at p. 2.

7 The government has provided some statements made by Mr. Phair and Mr. Louie
8 to non-law enforcement personnel, but has not advised the defense which, if any,
9 statements it intends to introduce at trial. While these statements to non-law
10 enforcement personnel are not specifically covered under CrR16, they are necessary for
11 the defense to effectively present a motion for severance based on *Bruton v. United*
12 *States*, 391 U.S. 123 (1968). See Defendant’s Motion for Severance filed on the same
13 date as this discovery motion.

14 The Court is requested to direct the government to state affirmatively whether
15 there are any additional statements that were made by Mr. Phair or Mr. Louie which it
16 intends to introduce in evidence at trial, and the details of those statements. This request
17 was made at the discovery conference, in the February 21st letter, and in the follow-up
18 letter dated April 9, 2012.

19 **B. Identifying the Appropriate Materiality Standard for *Brady/Giglio***
20 **Material.**¹

21 In our discovery letter dated February 21, 2012, we asked the government to state
22 its position as to the materiality standard it was applying for *Brady/Giglio* material
23 during these pre-trial proceedings. See Appendix A to CrR16 Certificate, 02/21/12 letter
24 at pages 4-5. In our April 9, 2012 letter, we again inquired of the government on this

25 ¹ This motion is not asking the Court to re-visit the due dates set in its scheduling order.
26 This motion is addressed to the standard to be applied by the government in making its
disclosure decisions.

1 topic. 04/09/12 letter. The government has not responded to our inquiry. Therefore, we
2 ask the Court to make a ruling on this issue, and enter an order: (1) directing the
3 government to disclose any exculpatory or impeachment evidence and information; (2)
4 that this include any information that reveals any variations in the proffered testimony of
5 a witness; and (3) that the disclosure obligation applies to all favorable evidence
6 regardless of the government's view of its materiality.

7 The government has refused to respond to the defense request that it articulate
8 what standard it is applying to its disclosure obligations under *Brady/Giglio*. Our
9 concern is that the government is applying an appellate standard of materiality to
10 *Brady/Giglio* material, i.e., that exculpatory information or evidence need only be
11 disclosed if, in the government's view, it may be determinative of guilt or innocence.

12 The district courts which have repeatedly faced this issue have recognized the
13 distinction between the appellate standard of review and the much lower pretrial
14 standard for disclosure. See *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1200 (C.D.
15 Cal. 1999) (rejecting the appellate standard suggested by the government in holding that
16 "*Brady* requires disclosure of exculpatory information that is either admissible or is
17 reasonably likely to lead to admissible evidence," and specifically directing that "any
18 information that reveals any variations in the proffered testimony of an accomplice
19 witness testifying pursuant to a leniency agreement is relevant to the witness's credibility
20 and therefore must be disclosed under *Brady*," as well as "any information that reveals
21 the nature of the negotiation process that led to the leniency agreement"); *United States*
22 *v. Peitz*, No. 01-CR852, 2002 WL 226865, at *3, 2002 S. Dist. LEXIS 2338 at *7-8
23 (N.D. Ill. Feb. 13, 2002) (following the standards set forth in *Sudikoff*); *United States v.*
24 *Carter*, 313 F. Supp. 2d 921, 924 (E.D. Wis. 2004) (agreeing with *Sudikoff* and *Peitz*
25 that, "[i]n the pretrial context, the court should require disclosure of favorable evidence
26 under *Brady* and *Giglio* without attempting to analyze its 'materiality' at trial," because a

1 judge cannot know what possible effect certain evidence will have on a trial not yet held
2 and further observing that "the *Brady* materiality standard determines prejudice from
3 admittedly improper conduct and thus should not be considered as approving all conduct
4 that does not fail its test.").

5 This request for a ruling by the Court is not merely an academic exercise. Federal
6 prosecutors routinely argue that the materiality standard they should apply in the district
7 court is the same materiality standard that is applied on appellate or post-conviction
8 review. *See, e.g., United States v. Acosta*, 357 F. Supp. 2d 1228, 1232 (D. Nev. 2005).
9 The district court in *Acosta*, disagreeing with the government and the magistrate judge,
10 applied the reasoning in *United States v. Sudikoff*, in combination with the Nevada and
11 Federal Rules of Professional Responsibility applicable in that district in concluding that
12 the government must produce all favorable evidence without first conducting the
13 appellate cumulative materiality standard employed in post conviction proceedings. *Id.*
14 at 1233-1234.

15 As in Nevada, this Court has adopted the State Rules of Professional Conduct and
16 requires attorneys practicing before this Court to "comply with" those rules. *See*
17 GR2(e)(2). The Washington Rules of Professional Conduct, which have been
18 incorporated by this Court into its local rules, require that

19 The prosecutor in a criminal case shall:

* * *

20 (d) make timely disclosure to the defense of all evidence or
21 information known to the prosecutor that tends to negate the
22 guilt of the accused or mitigates the offense, and, in
23 connection with sentencing, disclose to the defense and to
the tribunal all mitigating information known to the
prosecutor, except when the prosecutor is relieved of this
responsibility by a protective order of the tribunal;

24 Wash. RPC 3.8(d). In the commentary it is noted that the prosecutor may seek an
25 appropriate protective order but only if the disclosure of the information could "result in
26 substantial harm to an individual or to the public interest." *Id.*

1 Therefore this Court is respectfully requested to enter an order directing
2 government counsel to apply the standard set forth in *Sudikoff* and the requirements of
3 the Rules of Professional Conduct for prosecutors practicing before this Court and direct
4 that the government make timely disclosure to the defense “of all evidence or
5 information known to the prosecutor that tends to negate the guilt of the accused or
6 mitigates the offense.”

7 **C. Request that the Government Be Ordered to Provide All *Brady/Giglio***
8 **“Information” Whether or Not it is Reduced to a Tangible Document,**
9 **Record or Report.**

9 In the February 21st letter, the defense requested that the government
10 acknowledge that its *Brady/Giglio* obligations apply to more than just documents,
11 reports, and other records, but that it also applies to “information” not reduced to
12 writing. *See* Appendix A to Certificate of Compliance at page 5. No response was
13 received to this letter or the follow-up request made on April 9, 2012. *Id.*

14 While it should be obvious that the government cannot avoid its responsibility to
15 disclose exculpatory or impeachment information by the device of not writing that
16 information down or recording it in any fashion, that very argument has previously been
17 made by government counsel at the appellate level, and rejected by the Second Circuit.
18 *See United States v. Rodriguez*, 496 F.3d 221, 222 (2nd Cir. 2007) (“when the
19 government is in possession of material information that impeaches its witness or
20 exculpates the defendant, it does not avoid the obligation under *Brady/Giglio* to disclose
21 the information by not writing it down.”)

22 As noted in the letter sent to government counsel in this case, the failure to report
23 exculpatory information in the Senator Ted Stevens prosecution was one of the
24 significant issues in that case. *See* Certificate of Compliance with CrR16, App. A at p.
25 5. It is also an unfortunate fact that some law enforcement agents will not record or
26 write down statements made by government witness which may damage the government

1 case or that witness's credibility.

2 Because the government has not acknowledged its duty to provide *Brady/Giglio*
3 "information" even if that information was never reduced to a document or writing, we
4 request that the Court enter an order to that effect.

5 **CONCLUSION**

6 The Court is respectfully requested to enter an order directing the government to
7 provide the items requested in Section A above, and to further enter an order directing
8 disclosure of all exculpatory and impeaching information regardless of the government's
9 view of its materiality and enter an order directing that the *Brady/Giglio* requirement
10 applies to exculpatory and impeachment "information" whether or not it has been
11 reduced to writing.

12 DATED this 17th day of May 2012.

13 Respectfully submitted,

14 s/ Michael Filipovic, WSBA No. 12319

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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