UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No. 10-018-10 (JDB)
	)	
RAMIRO ANTURI LARRAHONDO	)	
	)	
a/k/a "Fiscal" a/k/a "Doctor"	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR PRODUCTION OF CONFIDENTIAL INFORMANT FILE

Comes now the United States of America, by and through the undersigned attorney, and hereby responds to the defendant ANTURI's motion for production of the confidential informant file. Defendant moves that this Court order the production of the DEA file for a deceased informant who provided information regarding ANTURI's criminal activity. The Government asks that this Court find that *Giglio* does not apply since the informant will not be testifying. Alternatively, the Government asks that this Court find that even if *Giglio* does apply, it does not permit Defendant unlimited access to government files, including the DEA informant file. Accordingly, the Government asks this Court to deny Defendant's motion.

ARGUMENT

I. THE DEFENDANT IS ONLY ENTITLED TO *BRADY* MATERIAL CONTAINED WITHIN THE CONFIDENTIAL INFORMANT FILE

It is well established that there is no right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and Brady did not create one"). The Supreme Court has held,

> A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [State's] files. Although the eye of

> an advocate may be helpful to a defendant in ferreting out information, this Court has never held -- even in the absence of a statute restricting disclosure -- that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.

Pennsylvania v. Ritchie, 480 U.S. 39, 59-60 (1987) (citations omitted). *See United States v. Lloyd*, 992 F.2d 348, 352 (D.C. Cir. 1993) (noting that a prosecutor's decision as to whether exculpatory Brady information exists or is material is usually final).

The Government clearly has an obligation to disclose to the defense "evidence favorable to the accused." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This includes "evidence affecting" witness credibility, where the witness "reliability" is likely "determinative of guilt or innocence." *Giglio v. United States*, 405 U.S. 150, 154 (1972). However, "the Constitution does not require the prosecutor to share all useful information with the defendant." *United States v. Ruiz*, 536 U.S. 622, 629 (2002). The right to impeachment evidence is not as all-encompassing as the right to exculpatory evidence. Unlike exculpatory evidence, for example, there is no obligation for prosecutors to disclose impeachment information before a plea. *Ruiz*, 536 U.S. at 633.

The Government is well aware of its obligations under *Brady*, and any relevant information from the informant's file has been turned over to the defense. The circuits are split over the issue of what impeachment discovery must be provided to the defendant where the witness does not testify. The Tenth Circuit, for example, has held that *Giglio* was inapplicable when the government did not call the informant as a witness, even though the informant's

statements were introduced at trial. *United States v. Green*, 178 F.3d 1099, 1109 (10th Cir. 1999). *See also, United States v. Mullins*, 22 F.3d 1365 (6th Cir. 1994)(finding "no authority that the government must disclose promises of immunity made to individuals the government does not have testify at trial"). The Second Circuit, on the other hand, in *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003) held that *Giglio* does apply to declarants who do not testify (but not requiring the disclosure of the informant file).

This Circuit, in *United States v. Williams-Davis*, 90 F.3d 490, 513 (D.C. Cir. 1996) stopped short of saying that any and all impeachment materials needed to be turned over, as the defendant is requesting in his motion. Nothing in the *Williams-Davis* opinion could be read for the proposition that a declarant's previous convictions needed to be turned over, for example. Instead, the Court focused only on those instances where the declarant's statements on a *key point* are contradictory. Even then, the Court only ventured so far as to opine that such contradictions would *likely* require disclosure. The D.C. Circuit has never held that *Giglio* applies to declarants who are never called to the stand.

If the Court determines that *Giglio* applies for non-testifying witnesses, the Government will provide such information as directed by the Court. This obligation, however, lies with the Government. The defense does not have the right to rummage through Government files to determine whether or not the Government has complied with its discovery obligations.

II. ROVIARO ONLY REQUIRES THAT THE GOVERNMENT PROVIDE THE IDENTITY OF THE CONFIDENTIAL INFORMANT

Defendant argues that *Roviaro v. United States*, 353 U.S. 54 (1957), requires the disclosure of the informant's file after the death of the informant. This reliance on *Roviaro* is misplaced. *Roviaro* stands for the proposition that the so-called "informant's privilege" dies with

the defendant, and accordingly, the government may be obligated to disclose the name of the informant. There is no language in *Roviaro* or its progeny that extends that obligation to disclose to anything beyond the name of the informant. *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003)(disclosure of confidential source's name, social security number, and criminal record satisfied requirements of Roviaro). In this case, the Government has already supplied the Defendant with the name of the informant, as well as relevant portions of DEA reports, and accordingly, the Government has met its obligation under *Roviaro*.

Neither *Roviaro* nor the Federal Rules of Evidence create an obligation to provide statements of non-testifying witnesses beyond the requirement of the Jencks Act. As the Second Circuit stated, "[w]e have found [no case] holding that this language in *Roviaro* provides defendants with a generalized affirmative right, independent of the Government's obligations under the Jencks Act and under *Brady v. Maryland*, to obtain statements of non-witnesses merely because they happen to be informants." *United States v. Saa*, 859 F.2d 1067, 1075 n.3 (2d Cir. 1988) (citations omitted). In *United States v. Williams-Davis*, the D.C. Circuit held that "a declarant is treated as a witness for purposes of Rule 801(d)(2)(E) or Rule 806 does not mean he becomes one for purposes of the Jencks Act." 90 F.3d at 513 (D.C. Cir. 1996). As the Court in *Williams-Davis* noted, the decision not to apply the Jencks Act to declarants "by no means leaves the defendant bereft of means for discovering a declarant's statements to the government. If a declarant contradicted himself on a key point, then *Brady v. Maryland*, would likely require disclosure." 90 F.3d 490, 513 (citations omitted).

Contrary to Defendant's assertion, the Court in *United States v. Pesaturo*, 519 F.Supp.2d 177 (D. Mass. 2007) did not mandate that the Government must provide the defense with copies of the "debriefing reports" prepared by law enforcement agents of their meetings with the

informant (motion at 6). The *Pesaturo* court ordered disclosure of reports that contained material that pertained to "a central issue in the case at trial." 519 F.Supp at192. The court specifically rejected the defendant's request for other Form 302 Reports noting that "the defendant has not established that documents containing information regarding the informant's activities pertaining to persons other than defendant are exculpatory or 'material to the preparation of the defense." These documents, the court concluded, did not pertain to the issues in the case.

III. THE DEFENDANT IS NOT ENTITLED TO THE ENTIRE CONFIDENTIAL INFORMANT FILE.

Defendant has cited no case, and the Government is unaware of a single case, where any court has ordered that an entire law enforcement file be disclosed to the defense. Defendant speculates as to what potential *Brady* information the file might contain and cites cases which support the argument that such information should be disclosed. The Government has every intention of disclosing relevant *Brady* material as it arises, but that obligation gives the Defendant no right to unfettered access to the Government's informant files.

The Government has good reason to protect the confidentiality of the informant's file. Obviously, the file contains information that is well beyond the scope of *Brady*. As the Seventh Circuit noted, the government has a "substantial interest in maintaining the secrecy of its files, which may contain not only the names of the informants themselves, but also information concerning ongoing investigations into other matters, government investigation techniques, and the like." *United States v. Phillips*, 854 F.2d 273, 277 (7th Cir. 1988). Disclosure of the informant's file may result in the disclosure of information regarding other informants, other investigations, recruitment techniques, and any number of other issues that are not relevant to the

matter at hand. Defendant provides no authority for the claim that he is entitled to this information but requests access to it, nonetheless.

The Defendant's request for the "entire informant file," which clearly contains material not properly subject to discovery, appears to be a blatant attempt to obtain government documents without complying with the requirements of the "*Touhy* Regulations." Disclosure of documents and testimony by Department of Justice employees is covered by 28 C.F.R. §§ 16.21 - 16.26. These regulations provide that no present or former employee of the Department of Justice may testify or produce Departmental records in response to subpoenas or demands of courts or other authorities issued in any state or federal proceeding without obtaining prior approval by an appropriate Department official. In the present case, the Government's position is that disclosure of the entire confidential informant file is not authorized by the rules of discovery and further implicates the factors set forth in 28 C.F.R. §§ 16.26. The *Touhy* regulations state that when, in the attorney's judgment, any of the factors set forth in Section 16.26(b) exist which preclude testimony or disclosure, no testimony or disclosure may be made without the express prior approval of the Assistant Attorney General in charge of the division responsible for supervising the case or matter or such person's designee 28 C.F.R. 16.23(a).[1] The regulations further provide that if both the attorney in charge of the case or matter and the component agree that a denial is appropriate, the matter is to then be referred to the Assistant Attorney General in charge of the division that supervises the case or matter in litigation.

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[1] The factors include instances where disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures, the effectiveness of which would thereby be impaired.

The Defendant has no right to access the entirety of government files. *See, e.g.*, *Jackson*, 345 F.3d at 67 (district court did not order production of DEA's internal informant file as requested by defendant). Because of the sensitive information contained in such files, the Defendant is not entitled to discovery of the confidential informant file, regardless of whether *Giglio* is applicable.

CONCLUSION

The Government will continue to comply with its *Brady* obligations. The Defendant's discovery request, seeking production of the entire confidential informant file, however, far exceeds the scope of *Brady*, *Giglio*, or the Federal Rules. For these reasons, the defendant's motion should be denied.

Respectfully submitted this 30th day of March, 2012.

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