IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVSION

UNITED STATES OF AMERICA, Plaintiff, v. REDFAWN FALLIS, a/k/a REDFAWN JANIS, a/k/a REDFAWN X. MARTIN, Defendant.	Case No. 1:17-cr-16 **UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO COMPEL DISCVOERY**

The United States of America, by Christopher C. Myers, United States Attorney for the District of North Dakota, and David D. Hagler, Assistant United States Attorney, hereby responds to Defendant's Motion to Compel Discovery, filed 12/13/17. (DCD 135).

The United States disclosed additional discovery on 12/15/17, including:

*follow-up reports related to Defendant's Discovery Group Exhibit
*North Dakota Highway Patrol aerial photos and videos from 10/27/16
*videos seized from arrested protesters (unknown dates)
*photos and videos from Oct. 26, 2017 (day prior to alleged charges)

None of the videos or photographs contain any depictions of the defendant.

Defendant's ¶ 7(a) – FBI Informant

RESPONSE: Provided in discovery May 5, 2017. As a witness, he will be paid a daily witness fee ($40) and standard federal government per diem and mileage rate.

Defendant's ¶ 7(b) - Informants/undercover officers

RESPONSE: None known regarding the relevant activity on October 26-27, 2016.

Defendant's ¶ 7(b) - Evidence that the violent acts used as predicates for the 'civil disorder' alleged in Counts 1 and 2 were influenced, encouraged, facilitated, or otherwise promoted by

persons employed or recruited by federal, state and/or local law enforcement agencies, by private security firms and by their agents and employees.

RESPONSE: In late October 2017, the United States sent the following request to various law enforcement agencies:

> I write to inquire whether your agency or any agents of your agency possesses any information of such conduct (that law enforcement agents or private security contractors acting as agents of law enforcement encouraged civil disorder and/or provided aid to DAPL protesters in furtherance of civil disorder) prior to or on October 27, 2016. Please make appropriate inquiry within your agency and apprise me of the results when your inquiry is complete.

The United States received no affirmative responses. The following agencies responded that they had no such information:

Morton County Sheriff's Office
North Dakota Highway Patrol
North Dakota Bureau of Criminal Investigation
Bismarck Police Department
North Dakota State and Local Intelligence Center
Stutsman County Sheriff's Office
Mercer County Sheriff's Office
Federal Bureau of Investigation
Bureau of Alcohol, Tobacco, Firearms and Explosives

Defendant's ¶ 7(c)

See United States' Response to Defendant's Discovery Group Exhibit (DCD 137).

Defendant's ¶ 7(d)

As set forth in the United States' Response to Defendant's Discovery Group Exhibit (DCD137), at the end of the day, officers with cameras were to turn them over to a custodian of video. The video was downloaded and a master copy was given to the Morton County States Attorney's Office. The United States obtained a copy of the master and has disclosed the same to the defense. The United States has disclosed over 500 videos.

Due to the high volume of videos on October 27, 2016, law enforcement officials did not create a record of which officer created the particular videos. Also, most of the videos do not contain a time stamp reflecting the time they were recorded. After, an exhaustive review of all the videos, no law enforcement videos (other than the drone video offered by the United States) has been located that depict the defendant's conduct preceding the shooting incident.

Regarding NDHP Trooper Joshua Anderson's in-car footage, the North Dakota Highway Patrol provided BCI Special Agent Joe Arenz with a copy of the entire recording known to exist. The video starts with Trooper Anderson driving to the protest site. According to the time stamp, he arrives at 14:58. Agent Arenz notes, however, that the time stamp may not be accurate. Trooper Anderson exited his vehicle and there is intermittent audio from the police radio in the vehicle. At 19:40, audio is heard that shots were fired and a suspect is in custody. Reports containing this information were disclosed in discovery on October 27, 2017.

Defendant's ¶ 7(e)

The United States is attempting to gather additional information to respond to this inquiry.

Defendant's ¶ 7(f)

Unnamed Hennepin County officer - unknown

Pennington County Deputies – Pennington County Sheriff's Office indicates that there are no additional reports.

NDBCI SA Casey Miller – did not prepare a report regarding the search of the defendant as he did not participate in the search.

Defendant's ¶ 7(g) - Private security agencies.

Law enforcement agencies certainly communicated with private security agencies during the DAPL protests. However, much of the defendants' overbroad discovery requests are fishing expeditions.

A. The Court Has Broad Discretion To Deny The Motion.

As a general matter, disposition of Rule 16 and Brady motions are matters left to the sound discretion of this Court. See United States v. Roach, 28 F.3d 729, 734 (8th Cir. 1994) (noting that denial of Rule 16 motion to compel discovery is reviewed under abuse of discretion standard); see also United States v. Van Brocklin, 115 F.3d 587, 594 (8th Cir. 1997) (noting that denial of Brady motion to compel discovery is reviewed under abuse of discretion standard). Rule 16 and Brady are different, and Brady, which is not a discovery rule, is not a legal underpinning for a Rule 16 motion. See Roach, 28 F.3d at 734.

1. Rule 16(a)(1)(E): Possession, Custody, or Control Standard

Rule 16(a)(1)(E) provides in pertinent part that the government must permit defense inspection of documents and data if: (1) the item is within the government's possession custody, or control; and (2) the item is material to preparing the defense. See Fed. R. Crim. P. 16(a)(1)(E).

With respect to the possession, custody, or control requirement, courts "have typically required the prosecution to disclose under Rule 16 documents and material to the defense that: (1) it has actually reviewed, or (2) are in the possession, custody, or control of a government agency so closely aligned with the prosecution so as to be considered part of the prosecution team." United States v. Finnery, 411 F. Supp. 2d 428, 432-33 (S.D.N.Y. 2006) (collecting cases). In determining whether an agency is so closely aligned so as to be part of

the prosecution team, courts examine whether the investigation and prosecution of the alleged offenses was a jointly-undertaken endeavor between the prosecution and the entity at issue. See, e.g., United States v. Brodnik, 710 F. Supp. 2d 526, 544-45 (S.D. W. Va. Apr. 29, 2010); United States v. Finnerty, 411 F. Supp. 2d 428, 432-33 (S.D.N.Y. 2006).

2. Brady: Possession Standard

"Brady is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." United States v. Roach, 28 F.3d at 734 (internal quotation marks and citation omitted); see also United States v. Allen, 416 Fed. Appx. 875, 879 (11th Cir. 2011) (unpublished) (observing that the "Brady rule is not an evidentiary rule that grants broad discovery powers to a defendant") (internal quotation marks and citation omitted). Brady places an obligation upon prosecutors to "learn of any favorable evidence known to the others acting on the government's behalf in the case." Kyles v. Whitley, 514 U.S. 419, 437 (1995); United States v. Graham, 484 F.3d 413, 417 (6th Cir. 2007) ("Brady and its progeny have recognized a duty on the part of the prosecutor to disclose material evidence that is favorable to the defendant over which the prosecution team has control."). Conversely, "Brady clearly does not impose an affirmative duty upon the government to take action to discover information it does not possess." Graham, 484 F.3d at 417 (internal quotation marks and citation omitted); see also United States v. Whitehead, 176 F.3d 1030, 1036 (8th Cir. 1999), overruling on other grounds recognized by United States v. Petters, 663 F.3d 375 (8th Cir. 2011) (same). Thus, "Kyles cannot be read as imposing a duty upon the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue." United States v. Pelullo, 399 F.3d 197, 216 (3d Cir. 2005).

B. Private security contractors are Not Part of the Prosecution Team.

Defendant essentially asserts that the private security contractors are part of the prosecution team, and thus information that they possess is under the prosecution's control. Private security contractors have not participated in the criminal investigation of this matter. Providing independently-generated intelligence reports to law enforcement does not make a private security contractor part of the prosecution team. See United States v. Finnerty, 411 F. Supp. 2d 428, 433 (S.D.N.Y. 2006) (noting that provision of documents by the New York Stock Exchange (NYSE) to prosecution did not convert NYSE's investigation into a joint one for discovery purposes when the documents were the product of an investigation undertaken by the NYSE on its own and without prosecution team involvement).

In a case involving related federal agencies, the contention that the participation of one arm of a federal agency in a criminal prosecution makes the entire agency part of the prosecution team was considered and rejected by the Third Circuit in United States v. Pelullo, 399 F.3d 197, 210 (3d Cir. 2005). In Pelullo, one arm of the Department of Labor (DOL), namely the Labor Racketeering Office, had agents participating in a criminal investigation of a defendant's actions with respect to an employee benefit plan. Id. at 210. Simultaneously, a separate, civil arm of the DOL, the Pension and Welfare Benefits Administration (PWBA), was monitoring a civil case to which defendant was a party that involved the same employee benefit plan. Id. PWBA had collected documents exchanged by the litigants in the civil matter, id., and defendant argued that the government's Brady obligation extended to the content of the documents possessed by the PWBA, id. at 216.

The Third Circuit reversed the district court and held that the PWBA was not part of the prosecution team and thus the PWBA documents were not subject to Brady. Id. at 216-

19. The court then reviewed apposite authority from a variety of jurisdictions establishing the general principle that "the prosecution is only obligated to disclose information known to others acting on the government's behalf in a particular case." Id. at 218. Applying that general principle to the PWBA documents, the Third Circuit held that the PWBA was not part of the prosecution team for discovery purposes:

> There is no indication that the prosecution and PWBA engaged in a joint investigation or otherwise shared labor and resources. Nor is there any indication that the prosecution had any sort of control over the PWBA officials who were collecting documents. And Pelullo's arguments to the contrary notwithstanding, that other agents in the DOL participated in this investigation does not mean that the entire DOL is properly considered part of the prosecution team, even though it was known to investigators drawn from the same agency as the prosecution team. Likewise here, the PWBA civil investigators who possessed the documents at issue played no role in this criminal case.

Id. at 218 (internal citation and parenthetical omitted); see also United States v. Merlino, 349 F.3d 144, 155 (3d Cir. 2003) (holding that audio tapes of witness statements known to be in the possession of the Bureau of Prisons were not under the control of the prosecution because the Bureau of Prisons not involved in investigation or prosecution of defendants); Brodnik, 710 F. Supp. 2d at 545 (the fact that IRS agents participated in the investigation does not mean that the entire IRS is part of the prosecution team).

The relationship in this case between the prosecution team and private security contractors is even more tenuous. Defendant attaches Exh. N[1] as support for their position. What page three of that complaint outlines is TigerSwan providing private security services and intelligence to Energy Transfer Partners. Neither TigerSwan nor Energy Transfer

[1] Verified Complaint and Request for Injunction in the matter of North Dakota Private Investigative and Security Board v. TigerSwan, LLC and James Patrick Reese, Case No. 08-2017-CV-01873.

Partners are part of the prosecution team in the case at hand. The private security contractors have not engaged in a joint investigation of the alleged criminal conduct underpinning the Indictment, and were not under control of the prosecution team. Since the private security contractors are not part of the prosecution team for Rule 16 and Brady purposes, her motion to compel should be denied.

B. The Defendant Has The Burden Of Showing Materiality

1. Rule 16(a)(1)(E): Materiality Standard

Since the defendant makes such an overreaching request for information, it is difficult to specifically respond to each claim. But with respect to defendant's Rule 16(a)(1)(E) burden to demonstrate the materiality of the requested documents or data, "[t]he courts have defined 'material' in the context of the federal rules as helpful to the defense." United States v. Vue, 13 F.3d 1206, 1208-09 (8th Cir. 1994) (internal citations omitted). Specifically, a document is material under Rule 16 if its pretrial disclosure will enable a defendant "significantly to alter the quantum of proof in his favor." United States v. Caro, 597 F.3d 608, 621 & n.15 (4th Cir. 2010) (internal quotation marks and citations omitted); see also United States v. Pesaturo, 519 F. Supp. 2d 177, 190 (D. Mass. 2007) (reviewing Rule 16 materiality standards across jurisdictions). The defendant's materiality burden is "not satisfied by a mere conclusory allegation that the requested information is material to the preparation of the defense." United States v. Krauth, 769 F.2d 473, 476 (8th Cir. 1985) (internal citation and quotation marks omitted); see also Finnery, 411 F. Supp. 2d at 431 ("Conclusory allegations are insufficient, however, to establish materiality, and the burden is on the defendants to make a prima facie showing that the documents sought are material to preparation of the defense.").

2. Brady: Materiality Standard

"The courts have defined 'material' in the context of Brady as establishing a reasonable probability that suppression of the evidence in question would undermine confidence in the outcome of the trial or, in other words, as establishing a reasonable probability that without suppression of the evidence, the result of the proceeding would have been different." United States v. Vue, 13 F.3d. 1206, 1208-09 (8th Cir. 1994) (internal citations omitted). However, before a defendant can compel production of allegedly exculpatory materials, the defendant "must first make a preliminary showing that the requested information is exculpatory." Roach, 28 F.3d at 729; see also United States v. Krauth, 769 F.2d 473, 476 (8th Cir. 1994).

C. The Defendant Has Not Demonstrated That The Requested Information Is Material For Rule 16 or Brady Purposes.

United States v. Merlino, 349 F.3d 144 (3d Cir. 2003), is instructive. In Merlino, the Third Circuit affirmed a district court's decision to deny a defendant's Brady request for access to jail tapes of government witnesses' phone calls. The federal Bureau of Prisons (BOP) had possession of audio recordings of jail calls placed by government witnesses who were in federal custody. Merlino, 349 F.3d at 153. The prosecution, at defense request, subpoenaed the recordings from the BOP, received over 300 tapes of calls, and reviewed them for Brady material. Id. After concluding there was no Brady material on the tapes, the prosecution turned over forty-six excerpts of non-Brady material. Id.

The prosecution subsequently learned there were over 2,000 additional witness calls that had been recorded and were in the possession of the BOP. Defendant, citing Brady, moved the district court for an order requiring the prosecution to get and review the

additional calls. Id. at 154. The Third Circuit agreed with the district court that the defendant had not made an adequate Brady materiality showing. Id. at 154-55. The court concluded that, particularly since the first 300 tapes did not contain exculpatory material, the defense request for the remaining 2,000 tapes would have resulted in sending the prosecution on an "open-ended fishing expedition." Id. at 154. The court emphasized that the fact the first 300 tapes contained some information favorable to the defense was not enough to satisfy Brady's materiality requirement. Id. at 155. The Third Circuit also denied defendant's claim that the Jencks Act required disclosure, concluding that the BOP was not part of the prosecution team for discovery purposes. Id.

In the case at hand, like in Merlino, defendant seeks to compel the prosecution to get and review information for which no adequate materiality showing has been made. Neither Rule 16 nor Brady and its progeny require the government to embark on a fishing expedition even more tenuous than the one grounded by the Third Circuit in Merlino.

The United States certainly understands its obligations under Kyles v. Whitely, 514 U.S. 419, 437 (1995), that prosecutors have a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. The United States has made all reasonable efforts to do so. See response to Defendant's ¶ 7(b) above.

Defendant argues that the United States also needs to obtain records of private security contractors in order to satisfy its obligations. In furtherance of this argument, the defendant presupposes and speculates, essentially engaging in a discovery fishing expedition. The United States does not have possession of records of any private security contractors. The defendant also has subpoena power. "(T)he rights protected under Brady ... are not violated when a defendant in a criminal trial has full knowledge of the existence of the

evidence (not in the possession or control of the government) prior to trial and makes no effort to obtain its production." United States v. Riley, 657 F.2d 1377, 1386 (8th Cir. 1981), citing Maglaya v. Buchkoe, 515 F.2d 265, 268 (6th Cir.).

Despite Defendant's overbroad, (some immaterial) requests, the United States responds to the specific requests in the "Summary of Defense Requests for Disclosure" (Defendant's Discovery Group Exhibit Disc-15) as follows (identified by Defendant's paragraph numbers).

Defendant's:

¶ A. All available information previously provided in discovery.

¶ B. 1. None known.
2. All available information previously provided in discovery. (Bates No. 134 and audio recording of 10/27/16 interview).
3. All available information previously provided in discovery.

¶ C. 1-4. All available information previously provided in discovery.
5-6. None known.
7. Disclosed on 9/26/17 – Bates No. P-0911
8-17. All available information previously provided in discovery.
18. Jesse Jahner Powerpoint disclosed 12/15/17
19-20. All available information previously provided in discovery.
21. Seeking information through North Dakota State Radio.
22-24. All available information previously provided in discovery.
25. Disclosed on 9/26/17 – Bates No. 934
26-35. All available information previously provided in discovery.
36-37. Control and materiality not established (see analysis above)
38-41. All available information previously provided in discovery.
42. Control and materiality not established (see analysis above)
43-46. All available information previously provided in discovery.
47. Resent by email on 12/16/17
48-52 . All available information previously provided in discovery.

¶ D-E. The United States has and will continue to comply with the relevant rules and discovery orders of the Court.

¶ F. 1. a-c. All available information previously provided in discovery.

d. Witnesses are paid a daily witness fee ($40) and standard federal government per diem and mileage rate.[2]
e-k. All available information previously provided in discovery.

2-5. All available information previously provided in discovery.

6. Giglio requests have been made on all Government witnesses and no information satisfying any of the criteria has been disclosed. BIA Officer Chad Harmon is not a Government witness.

7. All available information previously provided in discovery.

As to any such requests relating to private security contractors, this Court should deny the motion under the analysis set forth above.

Dated: December 20, 2017.

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[2] Many law enforcement witnesses do not accept as they are compensated by their agencies.