Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. JOHNATHAN PHAIR and DEZI-RAY THOMAS ARNEZ LOUIE, Defendants.	No. CR12-16RAJ ORDER

This matter comes before the court on defendants' motions to sever (Dkt. # 98, # 101) and motion for discovery (Dkt. # 97). The court heard oral argument on June 19, 2012 at 9:00 a.m. As stated on the record, with the concurrence of defendants' counsel, the court deferred ruling on defendants' motions to sever. The court set new deadlines for a potential motion regarding access to witnesses, if needed, and for supplemental briefing regarding the motions to sever. Defendants may file a motion regarding access to witnesses no later than September 28, 2012. The government may respond no later than October 5. The court will hear oral argument on October 12, 2012 at 10:00 a.m. With respect to the motion to sever, defendants may file supplemental briefing on November 16, 2012, the government may respond by November 30, 2012, and the court will hear oral argument on December 7, 2012. The Clerk of Court shall issue an amended case scheduling order reflecting these dates. The court encourages the parties to meet and confer before filing motions.

With respect to the discovery motions, defendants argued, in part, that the court should apply the pre-trial disclosure standard articulated by the Honorable Dean Pregerson in *United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Cal. 1999) with respect to disclosure of *Brady/Giglio* material. The Government argued that the court should not alter Supreme Court *Brady/Giglio* precedent.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the court held "that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See Strickler*, 527 U.S. at 282 (for *Brady* violation, *inter alia*, "evidence must have been suppressed by the State, either willfully or inadvertently") (emphasis added). The duty to disclose includes impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). The duty to disclose such evidence is applicable even where no request has been made by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). A prosecutor's constitutional duty also requires him/her to learn of any favorable evidence known to others acting on the government's behalf in the case, including police. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Accordingly, the rule encompasses evidence known only to the police investigators and not to the prosecutor. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). Evidence is material[1] under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682; *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir.

[1] Courts often use the terms "material" and "prejudicial" interchangeably in *Brady* cases. *United States v. Price*, 566 F.3d 900, 911 n.12 (9th Cir. 2009).

1997) ("Evidence is material if it might have been used to impeach a government witness, because 'if disclosed and used effectively, it may make the difference between conviction and acquittal'").

The Government does not dispute its obligations under *Brady* and its progeny. Rather, it argues that the court should not stray from these precedents to require the government to produce information not included within *Brady* and its progeny or within its discovery obligations under Fed. R. Civ. P. 16. The court ordered the parties to address during oral argument the dicta provided in *United States v. Price*, 566 F. 3d 900, 911 n.12 (9th Cir. 2009) that looked favorably on *Sudikoff*.

Having considered the memoranda, oral argument, and the record herein, the court GRANTED defendants' motion for discovery with respect to this issue for the reasons stated on the record and herein.

In *Sudikoff*, Judge Pregerson concluded that "post-trial standards and cases applying [*Brady's* materiality standard] are not helpful for determining the government's disclosure obligations." *Sudikoff*, 36 F. Supp. 2d at 1199. Judge Pregerson reasoned that "[w]hether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed *Brady* material." *Id.* at 1198-99. Judge Pregerson then held that "the government must disclose upon request all favorable evidence that is likely to lead to favorable evidence that would be admissible." *Id.* at 1200.

In *Price*, the Ninth Circuit stated in dicta:

> For the benefit of trial prosecutors who must regularly decide what material to turn over, we note favorably the thoughtful analysis set forth by two district courts in this circuit:
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> [T]he 'materiality' standard usually associated with Brady . . . should not be applied to pretrial discovery of exculpatory materials. . . . [J]ust because a

> prosecutor's failure to disclose evidence does not violate a defendant's due process rights does not mean that the failure to disclose is proper. . . . [T]he absence of prejudice to the defendant does not *condone* the prosecutor's suppression of exculpatory evidence [*ex ante*]. . . . [Rather,] the proper test for pretrial disclosure of exculpatory evidence should be an evaluation of whether the evidence is favorable to the defense, i.e., whether it is evidence that helps bolster the defense case or impeach the prosecutor's witnesses. . . . [If] doubt exists, it should be resolved in favor of the defendant and full disclosure made. . . . [T]he government [should therefore] disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case, even if the evidence is not admissible so long as it is reasonably likely to lead to admissible evidence.

566 F.3d at 913 n.14 (Reinhardt, J., Goodwin, J., Pregerson, J.[2]) (emphasis in original).

As stated in open court, whether other Circuits have adopted *Sudikoff* is not the relevant inquiry. *Price* is the only Ninth Circuit precedent the court has in terms of guidance on this issue, albeit in dicta. For that reason, the court is favorably inclined to follow *Sudikoff*, and GRANTS defendants' motion for discovery with respect to this issue.

DATED this 19th day of June, 2012.

The Honorable Richard A. Jones
United States District Judge

[2] The Honorable Harry Pregerson of the United States Court of Appeals for the Ninth Circuit is, of course, not the Honorable Dean Pregerson of the United States District Court, Central District of California.