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F.#2009R01065/OCDETF# NY-NYE-616

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- against - Docket No. 09-CR-466(S-4)(BMC)

JOAQUIN ARCHIVALDO GUZMAN LOERA,
also known as "El Chapo," "El Rapido,"
"Chapo Guzman," "Shorty," "El Senor,"
"El Jefe," "Nana," "Apa," "Papa," "Inge"
and "El Viejo,"

Defendant.

- X

MEMORANDUM OF LAW IN OPPOSITION TO THE
DEFENDANT'S MOTION TO COMPEL

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The defendant moves to compel the production of what he contends is Brady/Giglio evidence. See Dkt. No. 243 ("Def. Mot.") at 6. He further seeks to compel the production of various additional information such as details related to the source(s) of any such evidence, the circumstances under which the government obtained it, "any and all reports" or other documents that describe that evidence and "any other information" that corroborates or supports the evidence provided. See id. Neither applicable law nor the facts of this case support the defendant's expansive request. The Court should deny it.

BACKGROUND

In the course of preparing for trial in this matter, and consistent with its obligations under governing law, the government has conducted a review of its files for information that it may be required to disclose to the defendant pursuant to Brady v. United States, 405 U.S. 150 (1972). On June 4, 2018, the government provided a letter to defense counsel that included a bullet-point summary of certain information that the government determined was potentially and/or arguably discoverable as exculpatory or impeachment evidence pursuant to Brady and/or Giglio. See Dkt. No. 238.[1] The government does not believe or concede that any of the items detailed in that letter are exculpatory and material to the defendant's guilt or punishment. The government, however, provided the details contained

[1] The government has completed its review for Brady material; to date, it has provided all information of which it is aware in its possession, custody or control that potentially or arguably is discoverable under Brady. Nonetheless, because Brady and its progeny impose a continuing obligation on the government to provide exculpatory material that is material to guilt or punishment, the government will continue to review and evaluate whether it has an obligation to provide any additional documents to the defendant under Brady. The government will disclose Giglio material at the time it discloses 18 U.S.C. § 3500 material for its witnesses in accordance with the schedule set by the Court. See Dkt. No. 162 at 8-9.

in the letter to the defendant in an abundance of caution and in an effort to make the fullest possible disclosure of any facts that could conceivably be considered favorable to the defendant and relevant to his guilt.

All of the documents that underlie the bullet-point summaries are sensitive and confidential government reports which, in turn, primarily rely on information provided by confidential informants, cooperating witnesses and other sources of information. Although these sources of information are potential witnesses against the defendant, the government does not intend to call any of them to testify at trial. Thus, it does not intend to disclose their identities during the course of this litigation. Indeed, if the government revealed their identities as informants and confidential sources, they would face serious risks to their safety.[2]

In many instances, the sources of the information summarized in the government's letter were not relating verifiable, first-hand information, but rather their own subjective impressions or rumors and hearsay that they had heard concerning the defendant. In these cases, the government has provided the defense with a summary of the arguably favorable information contained in the underlying documents (which also contained inculpatory information).

The vast majority of the items in the government's letter are not Brady material on their face, because they are not exculpatory. For instance, many of the items relate to the relative standing of the defendant vis-à-vis other drug traffickers or indicate that the defendant was in conflict with other traffickers. Although the government provided notice of such

[2] The government has previously detailed the risks posed to witness and informant safety by the defendant in numerous ex parte filings to the Court. See Dkt. Nos. 31, 45, 66, 78, 120, 169, 175, 204, 214 (ex parte filings); 101, 116, 176, 207 (related court orders).

information to the defendant in an abundance of caution, those types of relative comparisons are not exculpatory, but rather inculpatory. For example, a confidential source's account that a third person is a more powerful drug trafficker than the defendant, or that the defendant is engaged in a war for control of territory with another trafficker, even if accurate, establishes that both the defendant and the third person are drug traffickers.

That a source might believe the defendant to be more or less prolific than a rival is immaterial to the charges that the defendant now faces. The government's continuing criminal enterprise ("CCE") charge requires that the government prove that the defendant is "the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders." 21 U.S.C. § 848(b) (emphasis added). The crimes with which the defendant is charged do not require him to be the only drug kingpin in Mexico, or even the most powerful one. The fact that a source believes another trafficker to be more powerful is not exculpatory.

In an effort to provide the Court and the defendant with additional context for certain information referenced in its letter, the government has identified nine at least arguably exculpatory items from its letter for which it will provide the defendant with additional information. Concurrently with this opposition, the government is providing redacted versions of the documents underlying those disclosures to the defense. See Ex. A. It summarizes here the background of the documents that underlie those nine disclosures. Nevertheless, consistent with the governing law detailed below, see Section II infra, the government is not required to disclose the identity of the confidential sources and informants who provided the information described herein.

- Document No. 1: [redacted]
- Document No. 2: [redacted]
- Document No. 3: [redacted]
- Document No. 4: [redacted]

[3] [redacted]

[redacted]

- Document No. 5: [redacted]
- Document No. 6: [redacted]
- Document No. 7: [redacted]
- Document No. 8: [redacted]
- Document No. 9: [redacted]

[redacted]

As noted above, the remainder of the items in the letter are not even arguably exculpatory, but the government provided them to the defendant in an abundance of caution. The government is thus not providing the underlying reports for those bullet points to the defendant. The government remains aware of its obligations under Brady and its progeny, and it will continue to comply with those obligations.

ARGUMENT

I. The Court Should Deny the Defendant's Motion to Compel *Brady* Evidence

The defendant requests an order from the Court compelling the government to provide not only the documents that the defendant contends are exculpatory, but a host of additional information related to those documents, including the names of confidential informants, details regarding the "circumstances under which the government obtained the information," the names of persons to whom such information has been provided, the date that the government obtained the information, "any and all" reports and other documents memorializing the information and "any other information that supports or corroborates" the information that the defense contends is exculpatory. Def. Mot. at 6. None of these disclosures is required by Brady, and the far-reaching and expansive nature of the defendant's requests itself suggests that the defendant's true goal is a fishing expedition aimed at revealing the

[4] [redacted]

identities of the government's confidential sources rather than obtaining Brady material. In any event, the informant privilege recognized by the Second Circuit allows the government to keep confidential the identities of the sources who provided the information at issue here. Accordingly, the Court should deny the defendant's motion to compel.

A. The Information Sought By the Defendant is Not Material and Thus is Not Discoverable

Brady requires the government to disclose evidence favorable to a criminal defendant when it is material to the defendant's guilt or punishment. See United States v. Rivas, 377 F.3d 195, 199 (2d Cir. 2004). Evidence is "material" within the meaning of Brady when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Smith v. Cain, 565 U.S. 73, 75 (2012); see also United States v. Coppa, 267 F.3d 132, 135 (2d Cir. 2001). Brady does not require the government to disclose all exculpatory and impeachment material, no matter how slight its value. The prosecution "need disclose only material that, if suppressed, would deprive the defendant of a fair trial." Id. (citing United States v. Bagley, 473 U.S. 667, 675 (1985) (internal quotation marks omitted)).

Because these authorities require the prosecution to make a judgment as to the exculpatory character and materiality of evidence that might fall within the ambit of Brady, the Second Circuit and this district have recognized that it is the government which bears the responsibility for determining what evidence must be disclosed before trial. See Coppa, 267 F.3d at 143 ("'[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached.'" (quoting Kyles v. Whitley,

514 U.S. 419, 437 (1995)) (alteration in original)). Indeed, the Second Circuit has held that a district court exceeds its authority if it orders the relief requested by the defendant here—the immediate disclosure of all exculpatory evidence, no matter how marginal, slight or immaterial it is to the case. See Coppa, 267 F.3d at 146 (vacating district court's order "requiring the immediate disclosure of all exculpatory and impeachment evidence upon defendants' request" as misinterpretation of Brady and its progeny). Finally, once the government has represented in good faith that it has complied with its obligations, only a "particularized showing" by the defense that Brady materials are being withheld can open the door for any further review by the Court. See United States v. Numisgroup Int'l Corp., 128 F. Supp. 2d 136, 150 (E.D.N.Y. 2001) ("In the absence of a particularized showing by the defense that certain materials covered by Brady are being withheld, the Court accepts the government's good faith assertions as sufficient."); United States v. Rivera, No. 13-CR-149 KAM, 2015 WL 2344007, at *3 (E.D.N.Y. May 14, 2015) ("In the absence of a particularized showing by Mr. Rivera that the government is withholding Brady materials, the court accepts the government's good faith assertions that the government is aware of its discovery obligations and has provided, and will continue to provide, material in its possession to which the defendant is entitled.").

In this case, as the government has consistently represented to the defendant, the government is aware of its obligations under Brady and Giglio, and it will continue to abide by those obligations. To date, the government has identified the documents summarized in bullet points in the government's letter as containing information that was prudent to disclose in an abundance of caution. As noted above, the vast majority of these items are not exculpatory under any plausible defense theory. To take one recurring theme as an example, many of those items stem from confidential sources who informed the government that, at

some point in time, the defendant was not as powerful as other drug traffickers (which presupposes that the defendant is a drug trafficker). The same is true with respect to information derived from confidential sources that indicates that the defendant was fighting with rival cartels or that rivals wished to attack the defendant. Such information inculpates the defendant, and it does not in any way suggest his innocence of the crimes charged. Although the government decided to provide the information to the defendant, the information and the underlying documents are simply not material, and the fact that the government has chosen to voluntarily disclose those summaries to the defense does not open the door to the additional information sought by the defendant.

As noted above, the government is producing redacted versions of nine documents related to nine of the 42 bullet points in the government's letter. The government has determined that some of the information contained in these documents may be considered favorable to the defendant. To be sure, much of the information appears to be only of marginal use to the defense—such as the assertion by one source that the defendant does not like to wear a mustache (although various public photographs and videos over the years have depicted the defendant with a mustache, including those provided to the defendant in discovery in this case), or the incorrect belief of another source that the defendant was killed in Guatemala. Nonetheless, the government is producing them out of an abundance of caution, subject to the redactions discussed below. The defendant's motion has not made any "particularized showing" that he is entitled to more information, and he has not explained how any of the information he seeks would be exculpatory and material to his defense. Instead, he baldly asserts that he has "reason to believe" that the government is in possession of exculpatory information. The Court should therefore deny his motion. See, e.g., United States v. Upton,

856 F. Supp. 727, 746 (E.D.N.Y. 1994) ("As a matter of law, mere speculation by a defendant that the government has not fulfilled its obligations under Brady [] is not enough to establish that the government has, in fact, failed to honor its discovery obligations.").[5]

B. The Government Is Entitled to Protect the Identities of Confidential Informants

Without any detail as to why the specific identities of the government's sources are necessary, the defendant asks the Court to order the government to provide the names of the individuals who provided the government with the information set forth in the government's letter. See Def. Mot. at 6. The defendant is not entitled to that information. As such, the government requests that the Court deny the request for that information.[6]

[5] Defense counsel refers to his involvement in two cases previously handled by one of the three offices prosecuting this case (although not handled by any of the prosecutors involved in this case), in an effort to cast doubt upon whether the government has fulfilled its obligations here. See Def. Mot. at 5-6. The defendant's assertions regarding those cases are incorrect and misleading. With respect to the first case, United States v. Ye Gon, No. 07-CR-0181 (D.D.C.), the government dismissed the case prior to trial, and there was therefore no finding of a Brady violation. See Coppa, 267 F.3d at 140 ("[T]he scope of the government's constitutional duty . . . is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial."). In the second case referenced by the defendant, United States v. Borda, No. 07-CR-0065 (D.D.C.), defense counsel asserts that he discovered withheld Brady evidence after trial and "extensively litigated the matter." Def. Mot. at 6. The defendant's passive choice of words is telling: while the matter was indeed extensively litigated, the court rejected the defendants' claims. See No. 1:07-cr-00065 (D.D.C.), Dkt. No. 378 at 19 ("Because each of the alleged Brady materials identified by Defendants was either inadmissible, not favorable, not suppressed by the Government, or did not exist at the time of trial, there is no reasonable probability that there would have been a different result had the Government disclosed them."). In any event, these prior cases are entirely unrelated to this case, and they have no bearing on the government's compliance with its obligations here.

[6] The government has redacted information unrelated to this case and information related to the identities of its confidential informants and sources of information in the nine documents being provided with this filing, and it will seek to similarly protect the identities of its sources in any future disclosures.

The Second Circuit has held that, as a general rule, the government is "not generally required to disclose the identity of confidential informants." United States v. Fields, 113 F.3d 313, 324 (2d Cir. 1997) (citing Roviaro v. United States, 353 U.S. 53, 59 (1957)). Withholding an informant's identity "improves the chances that such a person will continue providing information and encourages other potential informants to aid the government." Id. That anonymity also helps to protect informants from physical reprisals and other threats to their safety. See Socialist Workers Party v. Attorney General, 565 F.2d 19, 22 (2d Cir. 1977).

A defendant seeking disclosure of an informant's identity bears the burden of demonstrating the need for disclosure and must show that, in the absence of such disclosure, he would be deprived of his right to a fair trial. See Fields, 113 F.3d at 324. Mere speculation that disclosure of an informant's identity would be of assistance is "not sufficient to meet the defendant's burden." Id. "[D]isclosure of the identity or address of a confidential informant is not required unless the informant's testimony is shown to be material to the defense." United States v. Saa, 859 F.2d 1067, 1073 (2d Cir. 1988). Where a defendant merely asserts that, "on information and belief," the identity of a confidential informant is relevant to his defense, and that he seeks the "opportunity to interview [the informant] in preparation for trial," this district has held that the government may maintain the confidentiality of its informants' identities. United States v. Barret, 824 F. Supp. 2d 419, 442 (E.D.N.Y. 2011); see also United States v. Badoolah, No. 12-CR-774 (KAM), 2014 WL 4793787 at *17 (E.D.N.Y. Sep. 25, 2014) ("[B]road allegations do not, absent more, demonstrate sufficient need to compel the disclosure of information regarding the government's informants and cooperating witnesses."); United States v. Shamsideen, No. 03-CR-1313 (SCR), 2004 WL 1179305 at *12 (S.D.N.Y. Mar. 31, 2004) (rejecting defendant's argument that informant's identity would be helpful to the

defense, because "[i]t would be a rare situation where the disclosure of the identity of a confidential informant would not be of some assistance to the defendant," instead concluding that the informant's identity must be "essential to the defense" in order for court to order disclosure).

Although this district does not appear to have considered the relationship between Brady obligations and a government's protection of the identities of confidential informants, other courts that have considered the question have held that the government is entitled to maintain the anonymity of its informants even where the defendant's arguments for disclosure are rooted in Brady. In United States v. Bulger, for example, the court explained that a defendant "has a heavy burden for disclosure of a confidential informant," even where the defendant argued that information provided by the confidential informant directly contradicted a key government witness and would therefore be exculpatory. See Crim. No. 99-10371-DJC, 2013 WL 1821623 at *2 (D. Mass. Apr. 29, 2013). In that case, the government had used information provided by a confidential informant to establish probable cause for the seizure and forfeiture of the defendant's share of lottery winnings. See id. The defendant argued that the expected testimony of a key government cooperating witness was directly contradicted by the information provided by the informant, and that the defense should therefore have been given access to the informant before trial. See id. The court denied the defendant's motion for disclosure of the informant's identity, noting that, among other things, the information alleged to be known to the informant was peripheral to the crimes charged, the informant did not play a role in the charged criminal conduct and the informant's information was not necessary to attacking the credibility of the expected government witness. See id. at *2-*3. As the court explained, contrasting the case before it to one in which the "informant is

the only person other than the defendant who has firsthand knowledge of the acts underlying the crime charged," it would intrude upon the informant's privilege to remain anonymous only where "vital to a fair trial." Id.

Here, the defendant has done little more than assert that the identities of the informants underlying the information provided in the government's letter (and, therefore, the nine redacted documents that the government is providing concurrently with this motion) would assist the defense in tracking down "leads" as the defendant prepares his case. See Def. Mot. at 6. This kind of speculative use for informants' identities is not sufficient to deprive them of their anonymity.[7] See, e.g., Fields, 113 F.3d at 324 ("[S]peculation that disclosure of the informant's identity will be of assistance is not sufficient to meet the defendant's burden."); United States v. Ordaz-Gallardo, 520 F. Supp. 2d 516, 520-21 (S.D.N.Y. 2007) ("Defendants must do more than simply allege that the informant was a participant in or witness to the crime charged, or that the informant might cast doubt on the general credibility of a government witness."). The Court should deny the portion of the defendant's motion that would require the disclosure of the identities of confidential informants.

C. The Information Sought By the Defendant Is Not Currently Discoverable As *Giglio* Information

Although the defendant's motion, at times, references "Brady/Giglio" evidence and requests the Court to issue an order directing the immediate production of both Brady and Giglio evidence in the government's possession, the motion generally refers to exculpatory evidence rather than impeachment evidence, and it appears to be primarily concerned with

[7] This is especially true for the two sources who are continuing to work with federal law enforcement on active investigations.

Brady disclosures. See Def. Mot. at 5-6. Nevertheless, to the extent that the motion can be read to seek the production of information related to the disclosures in the government's letter pursuant to Giglio as well as Brady, the Court should still deny that motion. Insofar as the information sought is properly considered Giglio material, which the government does not here concede, it will disclose Giglio material at the time that it discloses § 3500 material pursuant to the schedule previously set by this Court. See Dkt. No. 162 at 8-9; Dkt. No. 240 at 4-5; United States v. Morgan, 690 F. Supp. 2d 274, 286 (S.D.N.Y. 2010) ("[T]he Government is not required to produce Giglio material until it produces '3500 material' pursuant to the Jencks Act, so long as the Government provides the Giglio material in time for its effective use at trial." (citing Coppa, 267 F.3d at 145-46)); see also United States v. Nixon, 418 U.S. 683, 701 (1974) ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial.").

In any event, just as with the defendant's Brady claim, the underlying documents and other information the defendant seeks are not material under Giglio. As the Second Circuit explained in United States v. Jackson, 345 F.3d 59 (2d Cir. 2003), the materiality inquiry asks whether the purportedly favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," id. at 73; see also id. at 74 (noting that court had previously held undisclosed evidence to be material where it "contradicted" the "sole evidence" connecting the defendant to crime). Here, it is difficult to see how any of the information described in the government's letter could reasonably be expected to impact the jury's verdict. Indeed, much of the information in the letter describes informants' views of the defendant's relative strength vis-à-vis other drug kingpins and his conflicts with them. Such information is collateral to the elements of the

crimes charged, and it is not material. For that reason, any purported Giglio material identified in the government's letter would not justify invasion of the informant's privilege discussed above. See supra Section I.B. The defendant thus is not entitled to the documents underlying the government's disclosures and the other information he seeks under a Giglio theory.

II. The Government's Disclosures Were Timely

The defendant asserts that the government's Brady letter was "belated" and delivered only a "mere" three months before trial, and he therefore asks the Court to order the "immediate" production of underlying material. Def. Mot. at 2, 6. The defendant also makes much of the fact that he has previously demanded the production of Brady material from the government. See id. at 1-2.

Under governing law, however, the government's disclosures were timely. As the Second Circuit has explained:

> [A]s long as a defendant possesses Brady evidence in time for its effective use, the government has not deprived the defendant of due process of law simply because it did not produce the evidence sooner. There is no Brady violation unless there is a reasonable probability that earlier disclosure of the evidence would have produced a different result at trial.

Coppa, 267 F.3d at 144. Indeed, courts have not considered exculpatory evidence improperly "suppressed" within the meaning of Brady even when the government has disclosed the evidence immediately before or during trial. See United States v. Douglas, 525 F.3d 225, 245-46 (2d Cir. 2008).[8] See also United States v. Barrera, 950 F. Supp. 2d 461, 476 (E.D.N.Y.

[8] To be sure, the government in this case has endeavored to identify information that is even arguably Brady well in advance of trial. Following the defendant's extradition, the government conducted an extensive review of all files in its possession, custody, and control for documents and information that it was required to disclose. With respect to Brady material, that process concluded shortly before the government's letter to the defendant. Thus,

2013) ("'[I]t is the government's responsibility to determine what evidence is material and when such evidence should be disclosed in time for its effective use.'") (quoting United States v. Gustus, No. 02-CR-888, 2002 WL 31260019 at *2 (S.D.N.Y. Oct. 8, 2002)). Moreover, the defendant's previous demands for Brady material are irrelevant. "It is well-settled that the government need not immediately disclose Brady or Giglio material simply upon request by the defendant." Barret, 824 F. Supp. 2d at 455 (citing Coppa, 267 F.3d at 146). The defendant has not articulated any reason why he is unable to make effective use of the information provided in the government's letter or the documents provided with this filing (and, in any event, as detailed above, that information is not properly considered Brady material).

III. The Government's Disclosure Letter Was Properly Designated As "Protected Material" under the Protective Order

Lastly, the defendant contends that the government improperly marked its disclosure letter as "Protected Material" pursuant to the Protective Order entered in this case. See Def. Mot. at 7. The defendant acknowledges that, pursuant to the protective order in this case, the government may properly mark as "Protected Material" the following categories of information: section 3500 material, information that could lead to the identification of potential witnesses, information related to ongoing investigations and information relating to sensitive law enforcement techniques. See Dkt. No. 57 ¶ 1.a-d. Most of the information conveyed in the government's letter is derived from law enforcement reports based on reporting from confidential sources, some of whom are still active confidential sources assisting the government with ongoing investigations. Although the government does not

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while the government may have been in possession of the underlying documents when they were created, the prosecution team had not identified the documents as arguably exculpatory until recently, during the course of its review in anticipation of trial.

intend to call these persons to testify at trial, each person is a potential witness against the defendant. The informants' statements detailed in the government's disclosure letter, as well as the dates of those statements referenced therein, could allow the defendant, his associates or persons acting on his behalf to identify the government's informants. Thus, the government properly designated its disclosure letter as "Protected Material," to prevent dissemination of the letter to persons who could use that information to try to identify and harm the government's confidential sources.

IV. Sealing

Pursuant to the protective order in this case, the government respectfully requests permission to submit this letter partially under seal. See Dkt. No. 57 ¶ 8. Partial sealing is warranted because of the concerns discussed supra regarding the safety of potential witnesses and their families, and the danger posed by disclosing the potential witnesses' identities and their cooperation with the government. See United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (need to protect integrity of ongoing investigation, including safety of witnesses and the identities of cooperating witnesses, and to prevent interference, flight and other obstruction, may be a compelling reason justifying sealing). As the facts set forth herein provide ample support for the "specific, on the record findings" necessary to support partial sealing, Lugosch v. Pyramid Co., 435 F.3d 110, 120 (2d. Cir. 2006), the government respectfully requests that the Court permit the government to file this opposition to the defendant's motion to compel partially under seal. Should any order of the Court regarding this application describe the sealed information in question with particularity, rather than in general, the government likewise requests that those portions of the order be filed under seal.

CONCLUSION

For the foregoing reasons, the Court should deny the defendant's motion to compel.

Dated: Brooklyn, New York
June 25, 2018

Respectfully submitted,

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