

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ANGELO DIPIETRO,

Petitioner,

-Against-

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM  
10-cv-199 (RJH)-(HBP)

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INTRODUCTION

In its response memorandum, which starts with approximately fifteen pages of cut-and-paste, the Government concedes the existence of certain exculpatory and favorable materials, yet refuses to turn them over. The Government seeks to avoid the issue of the Westchester District Attorney's Office (WCDAO), and the New York State Police (NYSP) being joint investigative agencies, to whom the prosecutors' Brady obligation extends, through filing a "catch-all" affidavit of FBI Supervisory Special Agent Rico Falsone that scrupulously skirts the question of whether these agencies obtained and possess some of the documentary evidence DiPietro now seeks.

The Government has taken the sweeping position that none of the items sought are discoverable for various reasons, including materiality. It is beyond significant dispute, however, that, for good cause already shown, DiPietro is entitled to production of the specific discovery items requested. These disclosures must occur prior to DiPietro having to brief the issue of their "materiality" to his § 2255 petition. He can neither know nor fairly argue that which has been withheld.

The evidence against DiPietro at trial, contrary to the Government's suggestions, was not strong on the contested counts. DiPietro was not intercepted on any wiretap involving a plan to extort John Perazzo or a conspiracy to commit robbery in Eastchester, New York. Nor was any evidence found of a purported basement kidnapping, involving restraint, fireworks and guns, notwithstanding the execution of a search warrant upon DiPietro's home. There was simply no credible corroborative evidence against him in light of the exculpatory and favorable items DiPietro has specifically identified.

1. Richard Wieland

More than five years after DiPietro's trial, the Government has finally conceded that agents interviewed Richard Wieland. Contrary to key witness Maurizio Sanginiti's trial testimony, Wieland denied that he and Frank Taddeo kidnapped John Perazzo, and specifically stated that Maurizio Sanginiti's trial testimony was false. Incredibly, the Government asserts that this information is somehow not favorable to DiPietro, and that the documents memorializing this event should still not be produced.

Wieland's information was known to the Government during trial, and was plainly favorable. The Government's case was premised upon Maurizio Sanginiti's claim that DiPietro was the mastermind behind a kidnapping of John Perazzo on June 29, 2001. Sanginiti testified that DiPietro enlisted Wieland and Taddeo to execute the plan. Wieland's assertion of innocence and claim that Sanginiti's testimony was false should have immediately been disclosed. Sanginiti's testimony had been key to conviction on these counts. Later, it served as the basis for multiple sentencing enhancements for the alleged abduction, restraint, and bodily harm that DiPietro inflicted upon Perazzo, as well as for an enhancement for leadership of a group of individuals that included Wieland and Taddeo.

The Government's recent disclosure that it had interviewed Wieland in June 2005— at which point it presumably knew how to properly spell his name and needn't have persisted in misspelling it for years in court pleadings—is emblematic of the subterfuge and withholding that was continually employed to thwart defense counsel in calling favorable witnesses and presenting a fair defense. Agent Falsone essentially affirms that, although he and the Government learned Richard Wieland's true identity during the time of trial, nobody disclosed this fact to defense counsel. Nor did the Government attempt to correct its trial record by replacing the silhouette of Wieland it had entered into evidence with his picture, or by replacing the corresponding exhibit of his incorrectly-spelled name plate with the correct spelling of his name.

In sum, DiPietro has shown good cause warranting disclosure of Wieland's materials.

2. Frank Taddeo

The Government makes much of the fact that Frank Taddeo met with defense counsel pre-trial, yet fails to respond to DiPietro's specific assertion that the Government misrepresented to the District Court and defense counsel that Taddeo's proffer and phone records materially corroborated key informant Maurizio Sanginiti's testimony regarding the "kidnapping" of John Perazzo on June 29, 2001. It was these misrepresentations, only recently exposed by the production of Taddeo's attorney's notes of entirely exculpatory proffers, along with the withholding of the Government's own documentation of these interviews, that foreclosed competent counsel from calling Taddeo as a trial witness. The danger of impeachment through undisclosed proffer statements was too great. But for these misrepresentations, DiPietro would have called Taddeo as a witness. Particularly so, had Wieland's interview also not been suppressed.

The common denominator throughout the Government's response is an apparent failure to appreciate that holding back documentary evidence that is favorable or exculpatory, and instead proffering the substance of the materials so that defense counsel can attempt to go find it, does not satisfy Brady. What the Government possessed was within the ambit of Brady, and had to be produced. Simply put, the Government cannot escape turning over the favorable evidence of Taddeo's actual notes of interviews, reports, etc., that DiPietro has requested from the outset and to which he has always been entitled. This same principle can be applied to the documents withheld that relate to Richard Wieland, *supra*, and Carl Macchiarulo, Manny Pereira, Ralph Pizzuti, Bashkim Mustafaj, and Ded Nicaj, discussed *infra*.

3. Ded Nicaj

Once again, the government disregards its Brady obligation by artfully dodging DiPietro's arguments. It is noteworthy that although Agent Falsone first states, "As a result of my role in the investigation and at the trial, my discussions with the other investigators and law enforcement personnel associated with this matter, and my review of documents, I know the following," Falsone Affidavit at ¶ 3, but that, when it comes to Ded Nicaj, his inquiries become dramatically crabbed. Indeed, rather than ask the other investigators and law enforcement personnel from the FBI, WCDAO, and NYP who were associated with the joint investigation and prosecution of DiPietro whether any of them had interviewed Nicaj, Falsone states only, "I have reviewed my files and have found no record of an interview with Nicaj. I do not recall interviewing Nicaj." Id. at ¶ 3(e). Well, perhaps he should go ask the other members of the prosecution team.

Given this apparent effort to limit the scope of the inquiry on this item of evidence, it is respectfully requested that the Government be ordered to inquire as to *all* of the

members of the joint prosecution team and their agents, whether any interviews with Ded Nicaj occurred and, if so, to produce all evidence related to this/these contacts.

Parenthetically, the “Mary Vuksanaj” the Government refers to in its response to DiPietro’s § 2255 petition, which section it has cut and pasted into its response opposing discovery, remains a “Marty,” as reflected in *his* affidavit regarding Nicaj’s disclosures to *him*.

4. John Perazzo

John Perazzo apparently *did* have a cooperation agreement with WCDAO, due to his federal cooperation against DiPietro. The Government essentially defrauded the Court, defense counsel, and the jury in denying this fact at trial, and effectively hid substantial evidence of an anticipated benefit—Giglio evidence, at least—by Perazzo. The prosecutor’s deceptive statements resulted in the court giving jurors an “equally available witness charge” as to Perazzo when this was not true.

The prosecution also does not respond to the fact that John Perazzo has recently confirmed that the two surveillance tapes in question were not pornography, and that they depicted the events of June 29 and July 9, 2001. There is no fishing expedition, as DiPietro knows that any tapes that depicted those evenings would have undercut the Government’s witnesses and argument, since he is innocent of the conduct charged on those occasions.

Production of the discovery items sought as to Perazzo will, as with the other classes of items requested, enable DiPietro to fairly bear his burden of proving the materiality of these items’ suppression.

5. Maurizio Sanginiti

The Government’s attempt to shift its duty to disclose materially favorable and impeachment evidence to DiPietro is simply wrong. The Government had a duty to disclose key phone records within its possession, which would have undermined both its key witness

and the illustrative exhibits of phone records that it had introduced into evidence and relied upon in summations. Shifting the burden to disclose Brady and Giglio materials that it possessed by suggesting counsel should have gotten a subpoena is simply not the law. The records of Sanginiti's wife's phone, which he used during the dates of the alleged offenses, would have been substantial impeaching evidence with which to cross-examine Sanginiti, who had testified that Perazzo was kidnapped in a white van, since the records would reflect, at a minimum, calls to Frank Taddeo during the time they were allegedly "together" in the van.

Furthermore, the Government's claiming to the District Court that Sanginiti's state cooperation was not going to inure to his federal sentencing benefit and thus was unrelated and not a proper subject of cross-examination was shown to be false by Sanginiti's sentencing transcript, in which the prosecutor explicitly requests that the court consider Sanginiti's state cooperation in determining his sentence. When coupled with the government's false representation that Perazzo had no agreement, and Din Celaj's magical stay of deportation, despite his and the prosecutors' averments to DiPietro's jury that he was most certainly going to be deported, this "pattern" of coincidences is strong circumstantial evidence of the prosecutor engaging in a pattern of materially false statements to the court and defense attorneys. In any event, this was yet another undisclosed benefit, which should now be revealed so that DiPietro can perfect his arguments, and bear his burden.

Lastly, it would appear that Agent Falsone is confused regarding the discrepancies between the Sanginiti 302 received in § 3500 materials prior to trial, and the redacted version that was produced pursuant to a FOIA request. Contrary to his sworn claim that, "except for the "0" in the upper left hand corner, the redacted document appears to be the same FBI 302 report that the Government produced as part of its 3500 material at 3518-H, id. at ¶

3(g), a review of DiPietro's exhibit, and comparison to 3518-H makes plain that the differences exceed the "0". DiPietro respectfully requests production of the un-redacted 302 that was not produced at trial. If, as the Government suggests, the documents are virtually identical, production will be neither burdensome nor prejudicial. If not, the Falsone Affidavit is inaccurate.

6. Din Celaj

The Government asks the Court to believe that it never had an unwritten agreement to assist Din Celaj in receiving a deferral of deportation back to Albania under the Convention Against Torture (CAT), on the ground that, as a federal cooperating witness, he would be subjected to torture if returned home, while simultaneously asserting that the "discovery" it possesses on this point should be withheld. Simply put, if there were no assistance, then there would be no discovery to withhold.

The Government should be compelled to disclose the materials that it provided to Celaj, or his immigration attorney, the Department of Homeland Security, or any other agency that had any role in deciding whether to defer his deportation. Since Celaj is now imprisoned for 50 years on the new charges that arose after the USAO facilitated his release to the streets of New York, there is certainly no security risk nor state secret at issue.

Other impeaching evidence has also been withheld from the defense. Celaj's continuing to commit crimes while a cooperating witness is also likely reflected in the still-undisclosed prison recordings DiPietro has requested. Interestingly, Agent Falsone testified at trial that he had obtained and listened to these recordings, yet makes no reference to them in his current affidavit. Rather than have the case agent aver that the recordings were not favorable impeaching evidence, the Government once more ignores the facts and argues that DiPietro is "fishing." A simple review of the transcript of Celaj speaking on the phone in his most

recent case, *see DiPietro § 2255 Petition, Exhibit F*, provides proof of the almost certain impeaching value of the withheld prison calls.

7. Bashkim Mustafaj

The Government argues that disclosure of Mustafaj's statements to law enforcement is not warranted, and that any statements he made to Investigator Clutter were self-serving and unreliable. DiPietro submits that he has a good faith basis for the production of these materials, and that there is no prejudice to the Government or Mustafaj through their production. As such, the Government should be ordered to disclose all documentary evidence concerning statements made to it by Mustafaj regarding DiPietro.

8. Carl Macchiarulo, Many Pereira, Ralph Pizzuti

As with Frank Taddeo, the Government's merely apprising DiPietro of these witnesses' potentially possessing exculpatory or favorable evidence is not proxy for production of the actual favorable evidence, whether in the form of reports of investigation, rough notes, proffer statements, or the like.

9. All Other Brady/ Giglio evidence

The Government has failed to respond to DiPietro's request that the Court compel production of all other still-withheld Brady/Giglio evidence that is in the possession of any member of the prosecution team, including the WCDAO and NYSP. DiPietro renews his request.



CONCLUSION

The items sought should be produced, so that DiPietro can fairly make arguments regarding their materiality, and bear his § 2255 burden regarding the impact that suppression had on his trial and defense.

Dated: November 18, 2010  
New York, New York

Respectfully submitted,

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Joseph A. Bondy  
*Counsel to Angelo DiPietro*

**Certificate of Service**

Joseph A. Bondy, Esq., being over eighteen and not a party to this action, hereby affirms under penalties of perjury and pursuant to 18 U.S.C. 1746, that, on November 18, 2010, I sent the instant reply, seeking discovery in a §2255 proceeding, by ECF to:

AUSA Hadassa Waxman  
Office of the U.S. Attorney  
Southern District of New York  
One Saint Andrews' Plaza  
New York, New York 10007

Dated: New York, N.Y.  
November 18, 2010

          /S/            
Joseph A. Bondy