

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANGELO DIPIETRO,

Petitioner,

-Against-

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM
OF LAW

10-CV-199 (RJH)

The following memorandum of law is submitted in support of Petitioner Angelo DiPietro's request for discovery in his 28 U.S.C. § 2255 proceeding. Mr. DiPietro has made specific allegations of prosecutorial misconduct, including suppression of various items of exculpatory and impeaching evidence to which he was entitled under Brady v. Maryland, 373 U.S. 63 (1963), Giglio v. United States, 405 U.S. 150 (1972), and progeny. Although the prosecution has finally acknowledged the existence of several undisclosed items, and essentially concedes not having sought other items that were within the custody or control of joint prosecuting agencies, including the Westchester County District Attorney's Office (WCDAO) and New York State Police (NYSP), it still refuses to produce any of the items requested to DiPietro so that he can bear his burden of proving the materiality of the items' suppression at his trial.

For the reasons set forth below, it is respectfully submitted that the Court should order disclosure of these items so that DiPietro can fairly bear his burden of showing why he is entitled to § 2255 relief.

The Brady Doctrine

In Brady v. Maryland, 373 U.S. 63 (1963), the United States Supreme Court held that “the 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.” Id. at 87. Brady has since been construed to require the prosecution to turn over not only information actually known to the prosecutor, but also information known to the prosecutor’s office, the police, and others acting on the prosecution’s behalf. See Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006) (per curiam); Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).

Three factors determine whether a Brady violation warranting reversal has occurred: “The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued.” Strickler v. Greene, 527 U.S. 263, 281-82 (1999). The purpose of Brady is to ensure that a defendant has access to evidence that would ensure him a fair trial. See United States v. Agurs, 473 U.S. 667, 675 (1985). Accordingly, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the

evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles, 514 U.S. at 434.

Furthermore, the Supreme Court has explicitly noted that the impact of the suppressed evidence is to be viewed cumulatively, not item-by-item. See id at 436. To this end, the Court has identified that there is a relevant balancing system:

On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the 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.

Id. at 437.

The prosecutor’s obligation under Brady is not limited only to exculpatory evidence, but extends to evidence that could be used for impeachment as well. See United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972). This is because, “Such evidence is ‘evidence favorable to an accused,’ so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.” Bagley, 473 U.S. at 676 (quoting Brady, 373 U.S. at 87).

Just earlier this year, in the wake of recent reversals of convictions and dismissals due to withheld evidence, Deputy Attorney General David W. Ogden wrote three memoranda reviewing Justice Department policy on Brady and Giglio disclosures. In one Memorandum, “Guidance for Prosecutors Regarding Criminal Discovery,” attached hereto as Exhibit A, prosecutors were reminded that Justice Department policy mandates them to seek Brady and Giglio materials from every

member of the prosecution team, including any involved state, local or other government officials:

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM § 9-5.001.

The Memorandum lists factors a prosecutor should consider in determining whether members of a multi-agency joint task force involving state enforcement agencies are members of the “prosecution team,” such that Brady and Giglio also extends to evidence within their control:

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law-enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor’s control; (2) the extent to which state and federal governments are part of a team, are participating in joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office’s practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over Brady and Giglio issues and avoid surprises at trial.

Exhibit A at 3-4.

Types of potentially discoverable materials that prosecutors should review for potential Brady/ Giglio evidence include the investigative agency's entire file, including e-mails, confidential informant/witness/human source files, evidence and information gathered during the investigation, substantive case-related communications, and possible Giglio information relating to law-enforcement and civilian witnesses. See Exhibit A at 4-5. "Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery." Exhibit A at 6. Furthermore, "[d]iscovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed." Id. This is particularly important to "facilitate a fair and just result in every case," which "is the Department's singular goal in pursuing a criminal prosecution." Id.

Discovery in a § 2255 Proceeding

For a petitioner to be entitled to discovery in a 28 U.S.C. § 2255 proceeding, he must make specific factual allegations that show good cause to believe that the petitioner may, through discovery, be able to obtain sufficient evidence to entitle him to relief. See Bracey v. Gramley, 520 U.S. 899, 908-909 (1997). Petitioner DiPietro has met that burden, as explained in his previous filings and below.

Why Each Item Requested Should be Produced

Here, the prosecution suppressed key pieces of evidence that would have been used to impeach the primary witnesses against DiPietro and to exercise intelligent

decisions as to whether and which witnesses to call. Prosecutors also withheld evidence of directly exculpatory statements made during numerous individuals' interviews with members of the prosecution team, including Richard Wieland, Frank Taddeo, Ded Nicaj, Ralph Pizzuti, Carl Macchiarulo, and Manny Pereira. These items, viewed individually and cumulatively, undermine faith in the fairness of DiPietro's trial and verdict.

There is good cause to believe, as set forth below, that ordering production of the following items will enable DiPietro to obtain evidence sufficient to entitle him to § 2255 relief.

1. Richard Wieland

DiPietro seeks all reports of investigation and rough notes of the FBI or prosecutors' contacts with an individual named Richard Wieland, including the substance of any statements given to law enforcement/ prosecutors but that were not memorialized in writing. Disclosure is required because Wieland, who was present during the time of the alleged kidnapping and § 924(c) count, also denies that the "victim," Ponzi scheme operator John Perazzo, was kidnapped, threatened, or restrained, or that a firearm was present. Wieland was interviewed by government agents and made directly exculpatory statements, which were never disclosed to DiPietro. His statement, dated April 29, 2010, along with Investigator Clutter's report of interview, is appended hereto as Exhibit B.

The information sought has never been the subject of legal argument, and the materials were not available to defense counsel at the time of DiPietro's trial, because

prosecutors suppressed the fact that Wieland had been interviewed and made exculpatory statements.

2. Frank Taddeo

DiPietro seeks all reports of investigation and rough notes pertaining to the FBI and prosecutor's meetings with an individual named Frank Taddeo, including the substance of any statements given to law enforcement/ prosecutors that were not memorialized in writing. Disclosure is required because Taddeo was also present during the time of DiPietro's alleged commission of a kidnapping and § 924(c) count, and specifically denied to prosecutors, pre-trial, that John Perazzo had been kidnapped. Furthermore, the recently-obtained attorney's notes of Taddeo's proffer sessions reflect that, contrary to the prosecution's representations to the Court and counsel at trial, Taddeo in no way implicated DiPietro in kidnapping and did not provide any evidence corroborating prosecution phone record evidence. Had FBI 302 reports, notes of the proffers, and the complete substance of Taddeo's exculpatory statements been produced before trial, instead of only a letter suggesting Taddeo may possess Brady material, DiPietro would have been able to follow reasonable investigative leads and to fairly and intelligently decide whether or not to call Taddeo as a witness in light of his prior statements to the government, as memorialized by the prosecution team. Taddeo's statement, dated June 3, 2010, is appended hereto as Exhibit C.

Rather than produce the exculpatory and favorable evidence that it possessed in the form of reports of interviews, proffer notes, and the like, the prosecution sent

defense counsel a letter identifying Taddeo as having made certain statements that were ostensibly Brady material. The materials requested were never the subject of a ruling on the merits, as the Court relied upon prosecutors' boilerplate statement that they were aware of their Brady obligations and would honor them. In arguing against production of Taddeo's materials, however, prosecutors represented falsely that Taddeo's proffer statements corroborated Maurizio Sanginiti's kidnapping testimony in key respects and were supported by the telephone records of June 29, 2001. The prosecution's letter to counsel was insufficient to satisfy its Brady obligation, and DiPietro's reliance upon the prosecution's representations to the Court was reasonable.

3. Ded Nicaj

DiPietro seeks all reports of investigation and rough notes of an individual named Ded Nicaj, including the substance of any statements given to law enforcement/ prosecutors, including Westchester County officers/ prosecutors who jointly prosecuted DiPietro, but that were not memorialized in writing. Disclosure is required, since Nicaj made statements to DiPietro's Investigator (Exhibit D) that DiPietro was innocent and had been framed for the Eastchester robbery, and Nicaj also asserted to another individual, Marty Vuksanaj, that he was actually interviewed by law enforcement agents as to this event. (See p. 30, Gov't § 2255 Resp.).

This issue was never decided by the district court, as the prosecution had represented throughout that it knew of its ongoing Brady obligation and would honor it. There was thus no reason to know that Nicaj had made Brady disclosures to

members of the prosecution team, believed to be members of the joint task force WCDAO or New York State police.

4. John Perazzo

DiPietro seeks all still-outstanding reports of investigation and rough notes, and the substance of any statements given to law enforcement/ prosecutors, including Westchester County officers/ prosecutors who jointly prosecuted DiPietro, but that were not memorialized in writing. Disclosure is required because Perazzo, the alleged kidnapping victim represented that he met on many occasions with Westchester County law enforcement officials regarding DiPietro and that he actually had a state cooperation agreement for his assistance in a “federal kidnapping matter.”

Perazzo has also recently confirmed to Defense Investigator Clutter that there were video surveillance tapes depicting the events of June 29 and July 9, 2001—the nights of his alleged kidnapping—that were seized pursuant to search warrants by the WCDAO. (Exhibit E). At trial, the prosecution alleged that the tapes seized from Perazzo’s home were destroyed after WCDAO investigators viewed them and deemed them to have contained nothing other than pornography. DiPietro respectfully seeks all evidence pertaining to the receipt, viewing, retention and destruction of these tapes, which would have contained visual depictions that showed the prosecution’s claims of DiPietro’s involvement in an alleged kidnapping on both June 29 and July 9, 2001 to be false.

5. Maurizio Sanginiti

DiPietro seeks all phone records pertaining to telephone number (914) 420-9773 during the period of the alleged Perazzo kidnapping, June to July 2001. The subscriber to this number was Sanginiti's wife, Fabrize Semoes. Sanginiti actually used this telephone during the time of the alleged kidnapping, not his own phone, for which records were proffered. The records sought will reflect that calls were made between Sanginiti and Frank Taddeo during the time that Sanginiti had testified they were together in the same vehicle kidnapping Perazzo. The existence of calls between the two during this time would have substantially undercut Sanginiti's testimony. Moreover, these records would have rendered the prosecution's illustrative visual charts of telephone calls, which were introduced as exhibits at trial and used during closing arguments, false.

Disclosure of all information, including but not limited to testimony, reports, and notes pertaining to Sanginiti's cooperation with WCDAO in the prosecution of Roberto DeRosario is also required, since, contrary to the prosecutors' claims to the court during trial that this cooperation was unrelated, which formed the basis for the court's precluding cross-examination on the subject, Sanginiti's sentencing transcript reflects that prosecutors argued that his cooperation in the DeRosario case was a factor warranting consideration and a reduced sentence under U.S.S.G. § 5K1.1. Sanginiti's receipt of a sentencing benefit for this cooperation is evidence that it was a proper subject for impeachment under Giglio and should have been disclosed.

Finally, a recent Freedom of Information Law (FOIL) request for all information pertaining to Angelo DiPietro yielded a heavily redacted FBI 302 report, which was still identifiable when compared to the non-redacted version of the report that DiPietro received from prosecutors as § 3500 materials. The purported “same” reports were different. These 302s vary from each other, in ways that cannot be assessed, given the redacted FOIL document. (See Exhibit F, salient pages from divergent FBI 302 Reports). Given this anomaly, it is respectfully submitted that not all FBI reports of investigation as to the key witness against DiPietro were turned over in discovery. Instead, the prosecution apparently produced a single composite report that blended all of Sanginiti’s prior interviews into one document, thereby suppressing Brady/ Giglio evidence though limiting Sanginiti’s exposure to cross-examination by prior inconsistent statement. Accordingly, disclosure of all FBI 302s, including drafts and notes of each individual interview is requested.

6. Din Celaj

All information provided by the prosecution to cooperating witness Din Celaj, his attorney, the Department of Homeland Security or any other federal agency that was provided for purposes of preventing Celaj’s removal from the United States. Disclosure is required, since the prosecution told jurors that Celaj would be deported and that DiPietro’s argument that Celaj would be freed to commit further crimes was false, when in fact that is exactly what happened. Celaj was released and avoided deportation because of his cooperation, which the prosecution knew would occur at the time it made its false argument to the jury. Indeed, absent Celaj’s cooperation, he

would not have had a basis to seek the purported political asylum relief he obtained. Assisting Celaj in obtaining relief from deportation was a material benefit that should have been disclosed under Giglio. Disclosure is also required, since Celaj testified at trial that he was not going to appeal or otherwise contest his deportation order, which was demonstrably false. It is believed that prosecutors were aware that Celaj intended to contest his deportation order, that they offered to assist his efforts, and knew his trial testimony to be false.

Also sought are recordings of Celaj speaking on the telephone from the MCC and or MDC during the time of his cooperation against DiPietro. Special Agent Rico Falsone testified at trial that he had listened to these recordings (Exhibit G), which were the subject of an earlier defense subpoena that was quashed by the Court upon the prosecution's false representation that the staff attorney for the prison had requested intervention in avoiding compliance with the subpoena as "unduly burdensome." The recordings contained evidence of Celaj's ongoing criminal activity while acting as a government cooperator. By way of example, during this time, there were calls between Celaj and at least one individual whom the prosecution has represented was a co-conspirator, Bashkim Mustafaj. Contacts such as these were valid impeachment evidence, which would have shown Celaj's continuing involvement in criminal activity despite the promises he made under his cooperation agreement, and the prosecution's willingness to look the other way.

DiPietro also seeks production of any and all notes or reports of Celaj's Westchester proffer sessions; all documents and evidence reflecting contact between

Celaj and Perazzo's girlfriend, Kaffee Ann Forde, during the time of Celaj's cooperation, including records of commissary payments from Forde to Celaj, which were derived from law enforcement funds and were thus another undisclosed Giglio benefit.

6. Bashkim Mustafaj

DiPietro also seeks all reports of investigation and rough notes, including the substance of any statements given to law enforcement/ prosecutors but that were not memorialized in writing, reflecting prosecution team members, including WCDAO and NYS police, contacts with Bashkim Mustafaj. Investigator Clutter interviewed Mustafaj, who stated that Celaj testified falsely at trial regarding material events leading up to the Eastchester robbery count for which DiPietro was convicted. The requested materials were never turned over, and prosecutors provided no notice of any impeachment or exculpatory evidence that it had derived from Mustafaj.

7. Carl Macchiarulo, Manny Pereira, Ralph Pizzuti

DiPietro also seeks all reports of investigation and rough notes, including the substance of any statements given to law enforcement/ prosecutors but that were not memorialized in writing, reflecting the prosecution and its' agents contact with Carl Macchiarulo, Manny Pereira and Ralph Pizzuti.

Although the prosecution represented to the defense pre-trial that these individuals may possess Brady information as to the alleged kidnapping on July 9, 2001, the reports of these interviews and any notes generated during their course, were never produced. Merely apprising the defendant of these witnesses' possibly

possessing exculpatory or favorable evidence was an insufficient substitute for production of the prosecution's actual reports of investigation and any rough notes of these individuals' proffer statements.

8. All Other Brady/ Giglio evidence

Finally, DiPietro requests that the Court Order the prosecution to produce any other still-withheld Brady/Giglio evidence that is in the possession of the prosecution team, including the WCDAO and NYSP. As good faith evidence that Brady and Giglio materials continue to be withheld, DiPietro invites the Court's attention to a letter written by John Perazzo that was maintained in the WCDAO files, but not produced as discovery, in which Perazzo asserts that Din Celaj told him that Angelo Capalbo was a "mastermind" of the Eastchester robbery. (See Exhibit H). At trial, Capalbo was not charged with this crime, and at sentencing, DiPietro's sentence was enhanced for allegedly leading this event. Given the pattern of suppression set forth above, it is respectfully submitted that the prosecutor should be ordered to finally conduct a complete review of DiPietro's entire SDNY, NYSP and WCDAO case file.

9. Fundamental Fairness

The items requested above fall within the scope of the prosecution's duty to disclose under Brady and Giglio. The prosecutors' duty to disclose reaches far beyond evidence that is in the prosecutors' actual possession. See Kyles, 514 U.S. at 437-38 (holding that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the

police”). Since the WCDAO and NYSP were joint investigating agencies, any WCDAO and NYSP agents involved in the investigation and joint prosecution of this case were part of the “prosecution team.” Thus, knowledge of any Brady or Giglio materials within these individuals’ possession is imputed to the prosecution, and should have been turned over.

Had the items DiPietro seeks been produced sufficiently in advance of trial, there is a reasonable probability that the result of the proceeding would have been different. *See Giglio*, 405 U.S. at 154. “A ‘reasonable probability’ of a different result is shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). DiPietro could have used each piece individually, whether to impeach key witnesses against him, generate investigative leads, or pursue and intelligently decide whether to call favorable witnesses. The cumulative effect of these materials—which include exculpatory statements of key witnesses on kidnapping, robbery, and § 924(c) charges—undermines confidence in DiPietro’s verdict and the fairness of his prosecution.

The Court’s Ordering disclosure of these materials will allow DiPietro to fairly show that these materials were favorable, material, and suppressed. To withhold these materials, years after the trial, where there is no security risk at issue, and when the government has only recently admitted several pieces’ existence, unfairly deprives DiPietro of the evidence he needs to bear his burden of proving the materiality of the Brady violations and his entitlement to § 2255 relief.

Conclusion

To enable a full and fair assertion and resolution of Petitioner DiPietro's § 2255 claim, it is respectfully submitted that production of the discovery he requests should be ordered, along with any other relief that is necessary and proper.

Dated: October 4, 2010
 New York, New York

Respectfully submitted,

_____/S/_____
Joseph A. Bondy