

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CLERK

2009 JUL -2 P 4:24

UNITED STATES,

v.

DYLAN M. WARD,
JOSEPH R. PRICE,
and
VICTOR J. ZABORSKY,

Defendants.

Criminal No. 08-CFI-26997

Judge Frederick H. Weisberg

Status Hearing – Sept. 11, 2009

**DEFENDANTS' RENEWED MOTION TO COMPEL DISCOVERY
AND REQUEST FOR EXPEDITED ORDER**

Defendants Dylan M. Ward, Joseph R. Price and Victor J. Zaborsky respectfully renew their March 26, 2009 motion for an order compelling the government to produce discovery. The Defendants further request that the Court shorten the government's time to respond in light of the prior hearings regarding these same discovery issues and the rapidly-approaching September 11, 2009 court date to review the status of forensic testing.

FACTUAL BACKGROUND

On March 26, 2009, Defendants filed a Joint Motion to Compel. The motion was set for hearing approximately two months later, on May 22, 2009. Prior to the hearing the parties met in an attempt to resolve all of the outstanding discovery issues addressed in the Motion to Compel. After several meetings the government agreed to produce discovery in response to the Defendants' requests. At the May 22 hearing, the government reported that it had resolved the Defendants' "more than one hundred requests" by agreeing to produce a significant and wide range of discovery to the Defendants, or by confirming that no responsive material was in the



possession of the government. *See* Letter from Spagnoletti to Kirschner (June 3, 2009), attached at Exhibit A. Thus, the government avoided the Court ordering it to produce the requested discovery. Yet, to date, Defendants have received none of the promised discovery, despite repeated and continued efforts by Defendants, which include:

- On June 4, 2009, having received none of the promised discovery, Defendants wrote to the government, delineating in detail all the outstanding discovery promised by the government, and requesting that the majority of the promised discovery be provided to Defendants by June 15, 2009, and the remainder by July 1, 2009. *See* Letter from Grimm to Kirschner (June 4, 2009), attached at Exhibit B.
- Defendants received nothing on June 15, 2009. Accordingly, on June 16, 2009, Defendants again wrote delineating the promised discovery and requesting that it all be produced no later than July 1, 2009. Defense counsel indicated in their June 16 letter that if the promised discovery was not received by July 1, 2009, Defendants would have no choice but to renew their motion to compel. *See* Letter from Grimm to Kirschner (June 16, 2009), attached at Exhibit C.
- On June 18, 2009, Defense counsel again wrote the government to delineate what the defense understood was to be included in the FBI Laboratory "Case Files" which the government promised on May 22, 2009, it would produce to the defense. In this letter, defense counsel reiterated their request that all of the promised discovery be produced no later than July 1, 2009. *See* Letter from Grimm to Kirschner (June 18, 2009), attached at Exhibit D.

I. DISCOVERY THE GOVERNMENT PROMISED ON MAY 22, 2009

A. FBI Case Files

Among the items promised to the defense by the government on May 22, 2009, are the FBI Laboratory testing "Case Files," to include a legible copy of all records pertaining to all FBI Laboratory forensic testing in this case, as delineated in Exhibit C hereto, to include, but not limited to the bench notes and all communications between the United States Attorney's Office ("USAO"), as well as all records related to any forensic testing, even if located separate from the laboratory "Case File."

Defendants' June 4 letter expressly addressed the Case Files and requested that they be produced to Defendants "no later than June 15, 2009." *See* Exhibit B. The case files are of particular importance because without them, the defense cannot proceed with the independent testing of the items that the Court ordered, on May 26, 2009, be transferred to the defense. Over the past month, defense counsel has repeatedly explained to the government the urgent need for these files, as reflected in defense counsel's June 10, 2009 letter to the government:

On Friday, June 5, 2009, AUSA Pat Martin notified my office that the government was prepared, pursuant to the Court's May 26, 2009 order, to transfer the various items requested by the Defendants for independent testing and analysis (the "Items"). As you know, pursuant to the terms of the order, Defendants have twelve weeks from the date of their receipt of the items for the testing to be completed.

In light of that deadline, I informed AUSA Martin on Friday, June 5, 2009, that we need to receive along with the Items, all of the FBI Laboratory's testing "Case Files"—to include all bench notes and government communications with the FBI Laboratory—which the government indicated on May 22, 2009, it will produce to Defendants. Defendants cannot proceed with their own testing and analysis of the Items without the FBI Case Files and therefore request that all the FBI Case Files be produced along with the Items. Per my letter of June 4, 2009, we request that the Items and all FBI Case Files be produced to Defendants no later than June 15, 2009.

Letter from Grimm to Kirschner (June 10, 2009), attached at Exhibit E.

After additional calls and emails by defense counsel to the government, on Friday June 12, 2009, the government informed defense counsel that the FBI Case Files would not be produced by June 15, 2009, because Ms. Tamyra Moretti, one of the several FBI Laboratory analysts who did testing in this case, was unavailable from June 8 - June 26, 2009. Consequently, according to the government, it would be several more weeks before the Case Files could be provided to the defense. The government did not address the other discovery promised to Defendants on May 22, 2009 (including the various other FBI testing Case Files that did not involve Ms. Moretti). Nor did the government explain why Ms. Moretti had not been

asked to collect and transfer to the government her testing Case Files during the two weeks between May 22 and June 8.

B. Other Discovery Promised by the Government

As fully set forth in defense counsel's June 4 and 16 letters, in addition to the FBI Case Files, on May 22, 2009, the government also promised the defense production of a wide range of other discovery. Indeed, much of the discovery promised by the government has been in the government's possession for more than two years and all that is required is that it be photocopied and delivered to the defense. Other discovery promised by the government, like proper Rule 16 expert disclosures, have been promised and re-promised to Defendants for months, yet the discovery has not been forthcoming.

For these reasons, Defendants respectfully request that the Court enter the attached order, compelling the government to produce all discovery which the government promised to produce, no later than July 15, 2009, and for any discovery which the government anticipates it cannot produce by this deadline, the government be required to file a motion seeking additional time and setting forth good cause for why such additional time is warranted.

Since the indictment of this case more than six months ago, alleging criminal conduct which purportedly occurred nearly three years ago, the government has been—at best—dilatory in meeting its discovery obligations. Defendants should not be further prejudiced by the government. The government should be required to fully, properly and timely meet its discovery obligations now.

II. DISCOVERY PROMISED AFTER THE MAY 22, 2009 HEARING


Immediately following the May 22, 2009 hearing, Defendants alerted the government to the fact that in order to conduct the testing of the items the Court ordered be turned over to the defense on May 26, 2009, Defendants' experts required the nuclear and mitochondrial DNA profiles of all three Defendants. Defendants voluntarily submitted DNA samples to the government in August 2006. Defendants also reiterated their need for the nuclear and mitochondrial DNA of Mr. Wone, which the government had already been ordered to turn over in the Court's May 26, 2009 order. It is worth noting that as of the writing of this motion, more than a month after the Court's May 26, 2009 order was entered, the government yet to fully comply with that order either.

As with the evidence promised on May 22, 2009, and despite numerous emails, phone calls and correspondence stating the immediate need for the DNA profiles, without which Defendants' independent testing cannot, generally, proceed, the government has failed to produce the profiles, though it has repeatedly stated its intention to do so.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Defendants' Renewed Motion to Compel Discovery and Request for Expedited Order, be granted. Proposed orders are attached herewith and are being forwarded to the Court's clerk in electronic format.

Respectfully Submitted,



Bernard S. Grimm (DC Bar # 378171)

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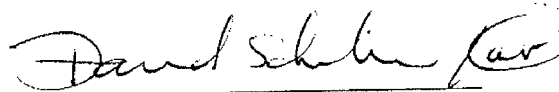
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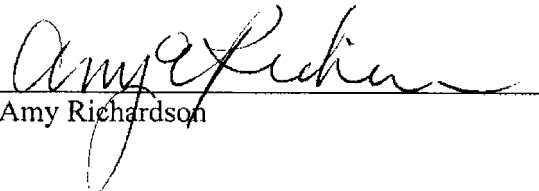
Counsel for Defendant Victor Zaborsky

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Renewed Motion to Compel Discovery and Request for Expedited Order was served, via hand, this 2nd day of July, 2009, upon:

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