

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

2009 SEP -5 P 4:06
M-N

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' REPLY BRIEF TO THE GOVERNMENT'S OMNIBUS DISCOVERY
MOTION

The defendants, by and through undersigned counsel, respectfully submit this Reply Brief to the Government's Omnibus Response to Defendants' Renewed Motion to Compel Discovery and Request for Expedited Order and Defendants' Motion to Enforce this Court's May 26, 2009 Order.

1. On March 26, 2009, after months of unsuccessful efforts to obtain adequate discovery from the government, Defendants filed a Joint Motion to Compel Discovery.
2. At the May 22, 2009, hearing on that motion, the government represented to the Court and Defendants that the government would shortly produce a wide range of discovery to the defense. The government's oral commitment led Defendants to believe that the issues raised by their Motion to Compel would be resolved promptly.
3. For more than two months after the May 22, 2009, hearing, defense counsel made repeated efforts to obtain the promised discovery from the government. Those efforts included

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DRt: ROPPCRH

numerous phone calls, emails and letters to the government seeking the discovery that it had committed to provide promptly. Those efforts to obtain the promised discovery without the Court's intervention were unsuccessful.

4. On July 2, 2009, Defendants therefore filed a Renewed Motion to Compel Discovery. On July 7, 2009, Defendants also filed a Motion to Enforce this Court's May 26, 2009, Discovery Order, with which the government has also failed to comply fully.

5. On July 13, 2009, the government filed its "Omnibus Response to Defendants' Renewed Motion to Compel Discovery and Request for Expedited Order and Defendants' Motion to Enforce this Court's May 26, 2009 Order." In its Omnibus Response, the government represented to the Court again that it would produce the promised discovery. Specifically, the government stated that it "intends to produce those items, along with the discoverable FBI 'case file,' toward the end of July." Gov't Resp. at 1.

6. As of July 31, 2009, Defendants had received no further discovery from the government. Defense counsel contacted the government about the status of the promised discovery production. The government indicated that, contrary to its written representation in its Omnibus Response, it would not be producing additional materials to the defense by "the end of July."

7. On August 4, 2009, the defendants received limited additional discovery accompanied by a letter from the government. In the letter, the government stated that it was "not yet in possession of the case file materials, as release of that information is pending final **review by the FBI.**" Letter from AUSA Glenn Kirschner to defense counsel, dated July 31, 2009 (emphasis added). The government asserted that "the FBI recently informed [the government] that the remaining forensic testing/reporting is not yet concluded, but that it

anticipates finishing in the next few weeks” and that “[o]nce the FBI concludes its work, we will forward to you the final forensic reports, as well as any discoverable case file materials.” *Id.*

The government did not indicate when the FBI’s “review” would be complete. Nor did the government explain why the case files from the vast majority of the forensic testing—much of which was completed years ago—could not be produced to the defense immediately.

8. The government has consistently failed to comply with its discovery obligations – obligations that it has conceded that it has and has promised to fulfill in a timely fashion. The government also has offered no plausible explanations or valid excuses for its failings. Its failure to produce any FBI Case files at this late date is illustrative. On May 22, 2009, the government orally represented to this Court that it would produce the case files to the defense. The government has now had more than two months to collect and produce those case files. No files have been produced. It now seeks to excuse its failure by claiming that the FBI general counsel's office is “reviewing” the case files. That excuse does not withstand scrutiny.

9. Setting aside for a moment the question of why the FBI general counsel's office would be reviewing scientific testing case files before they are turned over to the United States Attorney's Office (“USAO”) for production, the fact is that the FBI has had more than two months to collect and conduct any such “review.” Surely two months is an adequate period of time for the FBI to review files and produce them to the USAO, particularly in circumstances where the USAO has promised prompt production of those files to the defense in a serious criminal case.

10. Turning to why the FBI general counsel's office is conducting “reviews” of the case files, the defense submits that a number of issues raised by the government’s representations warrant inquiry by the Court. What type of review is the FBI general counsel's office

conducting? When did it start this review? What prompted this review? As in the thousands of other cases in which the FBI Laboratory is involved every year, the case files should be turned over--in their entirety--to the USAO. The USAO can then review the files and produce them. If the USAO decided to withhold any portion of a case file, it would be obligated to inform the defense of that fact, state the legal ground on which it was withholding any portion of a case file, and permit the defense to review and potentially challenge the propriety of the government's withholding. If the USAO never receives portions of the FBI case files because the FBI elects to withhold them, the defense will be denied the crucial ability to challenge the government's withholding of discovery materials.

11. Moreover, it is difficult to conceive of a portion of a forensic case file that could legitimately be withheld by the government. The case files consist of the testing protocols, notes, calibrations, recordings and determinations of the FBI analysts who conducted forensic testing in this case. Those scientific materials are within the government's core discovery obligations, and full disclosure of those materials is critical to preparation of the Defendants' defense.


12. According to the government, the FBI case files also contain the DNA profiles of the Defendants and Mr. Wone. On May 26, 2009, the Court ordered the government to produce Mr. Wone's DNA profile to the defense. The government has not done so. In sum, the defense submits that the entire contents of the FBI case files are discoverable under Rule 16, and are of a nature that any reasonable review by the USAO would not be time intensive. The DNA profiles, for example, consist only of a few sheets of paper delineating various numerical sequences. They are not voluminous, they require no legal review, and their disclosure has been ordered by this Court. Those profiles could and should have been produced months ago.

13. The defense has informed the government repeatedly of its immediate need for the FBI case files so that the defense can proceed with independent testing in this case. To date, that critical independent testing has been effectively prevented by the government through its withholding of the case files and the DNA profiles. Because its efforts at a cooperative resolution of these discovery matters have been unsuccessful, and because the defense already has lost valuable time in which it might have begun its independent forensic testing, the defense respectfully asks the Court to order the government to comply immediately with its discovery obligations and the existing orders of this Court.


CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' Renewed Motion to Compel Discovery and Defendants' Motion to Enforce this Court's May 26, 2009 Order. Proposed orders were submitted with Defendants' motions

Respectfully Submitted,

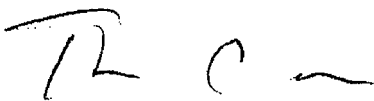

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ORDER

Upon consideration of Counsels' Motion, it is hereby ORDERED, this _____ day of August, 2009 that defendants' Motion is hereby GRANTED. The Government shall produce the "FBI Files" relating to all testing or attempted testing of any evidence in this case to the defendants' counsel no later than August 14, 2009.

JUDGE FREDERICK H. WEISBERG

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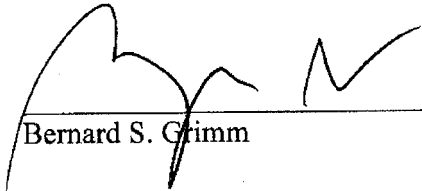
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Reply Brief to the Government's Omnibus Discovery Motion was served, via 1st class mail, postage pre-paid, this 6th day of August, 2009, upon:

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