

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

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M.K.

UNITED STATES,

v.

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

Defendants.

Criminal No. 08-CFI-26997

Judge Lynn Leibovitz

Status Hearing – March 12, 2010

DEFENDANTS' JOINT MOTION TO COMPEL RULE 16(a)(1)(E) DISCLOSURES

CRIMINAL DIVISION

Defendants Dylan M. Ward, Joseph R. Price and Victor J. Zaborsky, by and through undersigned counsel, respectfully submit this Motion to Compel Rule 16(a)(1)(E) Disclosures.

ARGUMENT

Pursuant to the Court's January 15, 2010 scheduling order, the government was to produce, pursuant to D.C. Super. Ct. R. Crim. P. Rule 16(a)(1)(E), expert disclosures by February 5, 2010. Rule 16(a)(1)(E) provides in relevant part that: "[a]t the defendant's request, the government shall disclose to the defendant a written summary of the testimony of any expert witness that the government intends to use during its case-in-chief at trial. . . . The summary provided . . . shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications. *Id.*

On February 8, 2010, the government produced its expert disclosures, designating twenty-four experts. *See* February 5, 2010 Letter from Kirschner to Defense Counsel, 3-9,

ARGUMENT

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attached at *Exhibit A*. With respect to the experts identified in the government's letter, the disclosures range from cursory identifications providing little more than a name and generic topics of purported expert testimony, to more complete disclosures conforming to the requirements of Rule 16(a)(1)(E). Many of the disclosures for expert designees who are either FBI Laboratory or MPD Laboratory examiners are incomplete; rather than provide the required written summary, the government states that the expert, or in some cases groups of experts, will testify consistent with examination reports prepared during the course of their employment. For example, the government provides the following disclosure:

**Ms. Florine Allen and Ms. Shelly Rensink**

Ms. Allen is a fingerprint examiner for MPD. Ms. Rensink is a fingerprint examiner for the FBI. They conducted fingerprint examinations of certain items in this case. They *may* testify concerning latent fingerprints, the recovery of latent prints (including fingerprints, extreme fingertip prints and palm prints), the examination of prints, the categorization and analysis of prints, and, specifically, the examination, analysis, and *findings concerning certain latent prints that were recovered in this case*. They prepared and submitted certain reports previously disclosed to you. They are expected to testify consistent with those reports.

*Id.* at 5 (bolding in original, emphasis added).

This disclosure and the many others like it fail to comply with Rule 16 because no written summary . . . describ[ing] the witnesses' opinions, the bases and the reasons for those opinions" has been provided. See D.C. Super. Ct. R. Crim. P. 16(a)(1)(E). Instead, the Defendants are left to guess as to which portions of the numerous latent print examination reports Ms. Allen and Ms. Rensink "may"—as the government puts it—testify. Of the hundreds of prints collected in this case, to which will these experts testify and what will that testimony be? The same is true for the chemical and DNA testing done on forensic evidence collected in this case. Dozens of items were subject to such testing. To which of that testing will the designated FBI Laboratory analyst/experts testify and what testimony will they offer? Simply



put, "Reports of Examinations," or the like, prepared by an FBI or MPD Laboratory analyst in the course of her or his work as a forensic examiner are not and cannot be substitutes for the particular written summary that Rule 16 expressly requires the government to prepare and provide to the defense.

The government cannot simply require the defense to guess what its twenty-four experts may or may not say. Indeed, it is well established that Rule 16(a)(1)(E) "is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." *Ferguson v. United States*, 866 A.2d 54 (D.C. 2005) (finding a violation of Rule 16(a)(1)(E) by the government's vague "written summary" of the testimony and basis and opinion of the proposed expert testimony). In a very recent case, *Murphy-Bey v. United States*, 982 A.2d 682, 687 (D.C. 2009), our Court of Appeals found that the Rule 16 expert notice in question was deficient and did not comply with the Rule because it "*fails to summarize the expert's expected testimony, fails to describe the expert's actual opinions, and fails to describe the bases for those opinions*. Therefore, this letter cannot be considered adequate disclosure." (Emphasis added.)

The following government disclosures fail to comply with Rule 16 for the following reason(s). For ease of reference the list of experts are numbered in accord with the numbering used in the government's disclosures:

- (2) **Douglas Deedrick**
- (a) inadequate written summary of the expert's expected testimony;
  - (b) inadequate description of the expert's actual opinions; and
  - (c) inadequate description of the bases for those opinions.



(3) **James Plant**

- (a) Inadequate written summary of the expert's expected testimony;
- (b) Inadequate description of the expert's actual opinions;
- (c) Inadequate description of the bases for those opinions; and
- (d) No description of the expert's qualifications (The disclosure simply states Mr. Plant has "extensive practical experience and instruction in S and M practices." What "experience" and "instruction" Mr. Plant has is not specified. Indeed, unlike the vast majority of its other expert designees, no CV, resume or other such designation of qualification is provided.).

(4-5) **Special Agents Steven Kopech and Scott Reed**

- (a) Inadequate written summary of the expert's expected testimony;
- (b) Inadequate description of the expert's actual opinions; and
- (c) Inadequate description of the bases for those opinions.

(6-8) **Mr. Brendan Shea, Ms. Leslie McCurdy, and Ms. Tamyra Moretti**

- (a) Inadequate written summary of the expert's expected testimony;
- (b) Inadequate description of the expert's actual opinions; and
- (c) Inadequate description of the bases for those opinions.

(9-11) **Ms. Madeline Montgomery, Mr. Robert Rooney, and Mr. Jason Brewer**

- (a) Inadequate written summary of the expert's expected testimony;
- (b) Inadequate description of the expert's actual opinions; and
- (c) Inadequate description of the bases for those opinions.

(12-13) **Ms. Florine Allen and Ms. Shelly Rensink**

- (a) Inadequate written summary of the expert's expected testimony;
- (b) Inadequate description of the expert's actual opinions; and
- (c) Inadequate description of the expert's actual opinions; and



(c) Inadequate description of the bases for those opinions.

(14-15) **Mr. Rory Doyle and Dr. Fiona Couper**

(a) Inadequate written summary of the expert's expected testimony;

(b) Inadequate description of the expert's actual opinions; and

(c) Inadequate description of the bases for those opinions.

(19) **Mr. Lucas Zarwell**

(a) Inadequate written summary of the expert's expected testimony;

(b) Inadequate description of the expert's actual opinions; and

(c) Inadequate description of the bases for those opinions.

(21-23) **Ms. Maureen Walsh, Mr. Joseph Anderson, Mr. Dave Sergeant**

(a) Inadequate written summary of the expert's expected testimony;

(b) Inadequate description of the expert's actual opinions;

(c) Inadequate description of the bases for those opinions; and

(d) No description of the expert's qualifications.

(23)<sup>1</sup> **Mr. Harold Deadman**

(a) Inadequate written summary of the expert's expected testimony;

(b) Inadequate description of the expert's actual opinions;

(c) Inadequate description of the bases for those opinions; and

(d) No description of the expert's qualifications

(24) **Ms. Maureen Bradley, Mr. Joseph Anderson, Mr. Dave Sergeant**

(a) Inadequate written summary of the expert's expected testimony;

(b) Inadequate description of the expert's actual opinions;

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<sup>1</sup> The number "23" is repeated in the government's disclosures.

(c) Inadequate description of the expert's qualifications.

(c) Inadequate description of the bases for those opinions; and

(d) No description of the expert's qualifications

**CONCLUSION**

The Defendants respectfully request that the government be required to provide proper Rule 16(a)(1)(E) disclosures within three days of entry of this Court's order granting the Defendants' Joint Motion to Compel Rule 16(a)(1)(E) Disclosures, and that the Defendants' deadline to produce their expert disclosures be moved to twenty-one days thereafter, consistent with the interval between the government's and Defendants' expert disclosure deadlines, respectively, in the Court's January 15, 2010 scheduling order.

In the interests of judicial economy and in consideration of the present deadlines imposed by the Court's January 15, 2010 scheduling order, Defendants do not request oral argument on this motion.

Respectfully Submitted,

*Bernard S. Grimm (DS)*

Bernard S. Grimm (DC Bar # 378171)

COZEN O'CONNOR Disclosures, and that the Defendants

1627 I Street, N.W., Suite 1100

Washington, D.C. 20006-4007

Telephone: 202-912-4835

Facsimile: 877-260-9435

Email: bgrimm@cozen.com

*Counsel for Defendant Joseph R. Price*

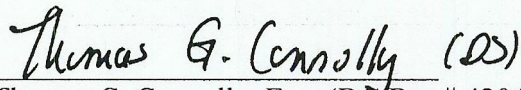
In the interests of judicial economy and in consideration of the present deadlines imposed





David Schertler (DC Bar # 367203)  
Robert Spagnoletti (DC Bar # 446462)  
**SCHERTLER & ONORATO LLP**  
601 Pennsylvania Ave., N.W.  
North Building, 9<sup>th</sup> Floor  
Washington, D.C. 20004  
Telephone: 202-628-4199  
Facsimile: 202-628-4177  
Email: dschertler@schertlerlaw.com

*Counsel for Defendant Dylan M. Ward*



Thomas G. Connolly, Esq. (DC Bar # 420416)  
**WILTSHIRE & GRANNIS, LLP**  
1200 18<sup>th</sup> St., N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036  
Telephone: 202-730-1339  
Facsimile: 202-730-1301  
Email: tconnolly@wiltshiregrannis.com

*Counsel for Defendant Victor J. Zaborsky*

Email: dschertler@schertlerlaw.com

1200 18<sup>th</sup> St., N.W., 12<sup>th</sup> Floor

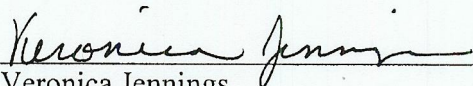
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Defendants' Joint Motion to Compel was served, via hand and first class mail, postage pre-paid, this 12th day of February 2010, upon:

Glenn Kirschner, Esq.  
Assistant United States Attorney  
Office of the United States Attorney  
for the District of Columbia  
555 Fourth Street, N.W.  
Washington, D.C. 20001

T. Patrick Martin, Esq.  
Assistant United States Attorney  
Office of the United States Attorney  
for the District of Columbia  
555 Fourth Street, N.W.  
Washington, D.C. 20001

was served, via hand and first class mail, postage pre-paid, this 12th day of February

  
Veronica Jennings

for the District of Columbia

555 Fourth Street, N.W.  
Washington, D.C. 20001



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA :  
v. :  
JOSEPH PRICE :  
DYLAN WARD :  
VICTOR ZABORSKY :

Crim. Nos. 2008-CF1-027068  
2008-CF1-026996  
2008-CF1-026997

**ORDER**

This matter is before the court on Defendants' Joint Motion to Compel Rule 16(a)(1)(E) Disclosures. Defendant's Motion is GRANTED, and accordingly, it is this \_\_\_\_\_ day of February 2010,

ORDERED that the United States, no later than \_\_\_\_\_, 2010, shall produce to Defendants complete and proper D.C. Super. Ct. R. Crim. P. Rule 16(a)(1)(E) disclosures for all of experts, describing the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications. It is further

ORDERED that Defendants shall file their D.C. Super. Ct. R. Crim. P. Rule 16(b)(1)(C) expert disclosures no later than \_\_\_\_\_, 2010.

\_\_\_\_\_  
JUDGE LYNN LEIBOVITZ



Copies to:

Glenn L. Kirschner  
T. Patrick Martin  
Office of the United States Attorney  
Homicide Section  
555 4<sup>th</sup> Street, NW  
Washington, DC 20530

Bernard S. Grimm  
Cozen O'Connor  
1627 I Street, NW, Suite 1100  
Washington, DC 20006-4007

David Schertler  
Robert Spagnoletti  
Schertler & Onorato LLP  
601 Pennsylvania Avenue, NW, North Building, 9<sup>th</sup> Floor  
Washington, DC 20004

Thomas G. Connolly  
Wiltshire & Grannis, LLP  
1200 18<sup>th</sup> Street, NW, 12<sup>th</sup> Floor  
Washington, DC 20036