

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Case No: 3:12-CR-317-L
	§	Hon. Sam A. Lindsay
BARRETT LANCASTER BROWN	§	

MOTION TO CONTINUE TRIAL AND PRETRIAL DEADLINES

Defendant BARRETT LANCASTER BROWN files this motion to continue trial and pretrial deadlines and in support thereof, would show the Court the following:

I.

Mr. Brown is charged with seventeen counts in three separate indictments. This matter is presently scheduled for a trial on September 3, 2013. *See* Pretrial Order, Dkt. 40. Undersigned counsel entered an appearance into this case on May 1, 2013. This Court has set a deadline of August 9, 2013 for the filing of pretrial motions. *See* Pretrial Order, Dkt. 68.

The volume of discovery in this case is substantial. The discovery in this matter consists of the following sets of material, among others:

- (1) Electronically Stored Information (ESI) comprising a two-terabyte external hard drive containing seven images derived from three hard drives.
- (2) Six DVD ROMs obtained from the Office of the Federal Public Defender (FPD), consisting of scanned documents and other evidentiary items (documents, video files and audio files) in electronic form.

(3) Seven search warrants and their related returns, applications, affidavits and attachments.

(4) The transcript from the Probable Cause and Detention Hearing held in September of 2012.

Undersigned counsel for Mr. Brown only began receiving discovery (in the form of six DVD ROMs from the FPD) in June and has been cataloging it since that time.

Additionally, Mr. Brown has retained a forensics vendor to complete the processing of the electronically stored information (ESI). According to the vendor, the ESI consists of several million files including files that contain Internet history, email, chat, system, metadata, embedded metadata, and other potentially relevant information. The vendor has indicated that while he is continuing the work already started by the FPD's forensic examiner, there is a significant volume of files that are still being processed and filtered. On July 30, 2013, the vendor provided an updated estimate that it will take an additional one to two months to fully complete the processing and review required for the investigation. It is undersigned counsel's understanding from the ESI vendor and the FPD's investigator that the length of time required by the vendor to complete the processing is significantly less than the time that the FPD would have required to due to the vendor's superior hardware and software. Once the ESI has been processed, counsel for Mr. Brown will require a period of no less than four weeks to review and assimilate the discovery to determine what pretrial motions, if any, are appropriate.

Over the course of reviewing the discovery provided to the FPD by the government, counsel became aware that there were several categories of discovery not included in the initial disclosure including: (1) seven search warrants and their related returns, applications, affidavits and attachments, and (2) transcripts of the probable cause and detention hearing conducted in September of 2012. Counsel promptly wrote to the government requesting, *inter alia*, all search warrant materials. *See* Defendant's Discovery Letter of July 1, 2013 (attached as Exhibit A). The government responded that it was in the "process of requesting that the search warrant documents be unsealed for the limited purpose of providing discovery" and was still "in the process of reviewing additional data more recently received to determine whether the same contains Brown's statements for discovery purposes." *See* Government's Discovery Response of July 12, 2013 (attached as Exhibit B). The government provided materials related to seven search warrants on July 15, 2013. The probable cause and detention hearing transcripts have yet to be received.¹

Counsel also requested a bill of particulars clarifying certain allegations in the indictments, in an effort to expeditiously prepare a defense without having full access to the discovery. *Id.* The government responded that the "indictments and discovery provided to the defense to date contain considerable specificity about the allegations and the available evidence." Government's Bill of Particulars Response of July 12, 2013 (attached as Exhibit C). Thus, without a review of the processed ESI, Mr. Brown is

¹ The government filed an unopposed motion to conditionally unseal the transcripts on July 12, 2013. It was granted on July 17, 2013.

unable to determine whether the particulars sought are indeed satisfied by the discovery, or whether he needs to move this Court for appropriate relief.²

The undersigned certify to this Court that they are preparing for this case with due diligence and that this Motion is not made for purposes of delay. When they entered an appearance into this case, counsel indicated their intent to try this case as scheduled. At that hearing, the FPD attorney assigned to Mr. Brown noted that this was ambitious given the state of discovery. Indeed, at that time, undersigned counsel was not as well acquainted as the FPD attorney with the status of discovery or the progress of the ESI processing.

Undersigned counsel and staff continue to process and prepare the large amount electronic discovery so that it is accessible to counsel, counsel's staff, and Mr. Brown. A district court may continue a case when:

the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), [but] would . . . deny counsel for the defendant or the attorney for the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. § 3161(h)(8)(B)(iv).

Without access to the extraordinary amount of forensic evidence at issue, Mr. Brown cannot prepare for trial. Nor can he file appropriate motions that are likely to have impact on what evidence will be presented at trial. Thus, the defense will need an opportunity to review several terabytes of *data that is currently being processed*, in

² To the extent a review of the processed ESI does not satisfy the particulars sought by the Defendant, counsel intends to seek leave to file a Motion for a Bill of Particulars.

addition to conducting meaningful research and investigation of the issues presented therein. This is particularly so given the complexities and novel issues in this case, and the particulars sought by the Defense in their Letter of July 1, 2013.

For these reasons, the Defense respectfully submits the following proposed scheduling order to the Court:

Substantive Motions

Motions due on or before November 18, 2013.

Oppositions due on or before December 2, 2013.

Replies due on or before December 9, 2013.

Motions *in Limine*

Motions due on or before December 30, 2013.

Oppositions due on or before January 13, 2013.

Replies due on or before January 20, 2013.

Motion Hearings

Substantive Motion Hearing on or before December 23, 2013.

In Limine Motion Hearing and Pretrial Conference on or before January 27, 2013.

Trial Dates

Trial Dates on or before February 3, 2013.

II.

The undersigned has discussed the above issues and proposed schedule with the government. The government opposes any continuance.

III.

WHEREFORE, PREMISES CONSIDERED, for the reasons set forth above, and in the interest of judicial economy, Defendant Brown moves for a Scheduling Order as set forth above.

Respectfully submitted,

-s- Ahmed Ghappour

AHMED GHAPPOUR

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Attorneys for Barrett Lancaster Brown

CERTIFICATE OF CONFERENCE

I certify that on July 30, 2013, I conferred with Ms. Candina Heath, counsel for the government and she is in not in agreement with the relief requested.

/s/ Ahmed Ghappour

AHMED GHAPPOUR

/s/ Charles Swift

CHARLES SWIFT

/s/ Marlo P. Cadeddu

MARLO P. CADEDU

Attorneys for Barrett Lancaster Brown

CERTIFICATE OF SERVICE

I certify that today, July 31, 2013, I filed the instant motion using the Northern District of Texas's electronic filing system (ECF) which will send a notice of filing to all counsel of record.

/s/ Ahmed Ghappour

AHMED GHAPPOUR

/s/ Charles Swift

CHARLES SWIFT

/s/ Marlo P. Cadeddu

MARLO P. CADEDU

Attorneys for Barrett Lancaster Brown

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July 1, 2013

BY ELECTRONIC MAIL

Candina Heath
Assistant United States Attorney
Northern District of Texas
1100 Commerce St, Third Floor
Dallas, TX 75242

RE: *United States v. Barrett Brown*
3:12:CR:317-L
3:12:CR:413-L
3:13:CR:030-L

Dear Ms. Heath:

This letter is submitted on behalf of Barrett Lancaster Brown, whom I represent in the above captioned matters, along with Charles Swift, Esq., and Marlo Cadedou, Esq., and requests additional discovery materials and a Bill of Particulars.

I. Demand for Discovery

It is acknowledged that the government has already made documents available to the defense, including the documents accompanying your letters dated January 3, 2013, January 8, 2013, January 11, 2013, February 1, 2013 and March 7, 2013 . However, Mr. Brown demands the discovery enumerated in this letter in the event it has not yet been produced. Accordingly, if the government believes documents¹ already produced or made available for copying satisfy part

¹ When used in the following requests, the term "document" is intended to be construed as broadly as possible and means, in each instance in which it is used, any and all documents, including, but not limited to, writings, drawings, graphs, charts, books, papers, photographs, tangible objects, audio or video recordings, computer data and other data compilations from which information can be obtained, translated, if necessary, by the government through detection devices into reasonably usable form, or copies or portions thereof, and includes copies of all subpoenas issued by the grand jury or any other entity in the course of the investigation of this case and all responsive documents. To the extent there exists information known to the government that has not been reduced to writing, but which would be responsive to any of these requests had it been so reduced, it is requested that such information be reduced to writing and produced.

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or all of any of the following requests, please so indicate. Please also specifically indicate any materials the government does not intend to make available. Of particular concern are enumerated items 8-13 regarding surveillance, searches and seizures related to Mr. Brown's case.

It is further requested that the government preserve and maintain all relevant notes, reports, and recordings prepared by or for government agents or prosecutors, as well as any document, paper, tangible object, tape recording or other potential item of evidence which is now or may hereafter come within the government's possession, the production of which is requested in this letter.

Pursuant to Rule 16, Fed.R.Crim.P., the Fifth and Sixth Amendments to the United States Constitution, and Rule 16.1 of the Local Rules of the U.S. District Court for the Northern District of Texas, it is requested that the government promptly disclose to the defense and make available for inspection and copying, to the extent that they have not already been provided, the following materials:

1. Any and all written or recorded statements, or copies thereof, made by Mr. Brown or by any indicted or unindicted coconspirator, accomplice or abettor whose statements the government will claim are binding on Mr. Brown. Rule 16(a)(1)(A), F.R.Cr.P.
2. Any and all documents and property obtained from Mr. Brown or any entity the government claims is owned or controlled by Mr. Brown, or from any alleged accomplice, or from any employee, agent, or professional consultant, or from any third party having custody of property belonging to Mr. Brown. Rule 16(a)(1)(C), F.R.Cr.P.
3. Any and all documents the government intends to use at trial as evidence in its case in chief. Rule 16(a)(1)(C), F.R.Cr.P. This request includes not only those items which will be marked and offered into evidence, but all documents which will be relied upon or referred to in any way by any witness called by the government during its case in chief. It is requested that any documents in this category be specifically identified from among the mass of documents that have been or will be produced to the defense by the government, both to enable counsel to prepare effectively for trial and afford them an opportunity to move to suppress or preclude any evidence the government intends to use in its case in chief. See Rules 12(b)(3) & 12(d)(2), F.R.Cr.P.
4. Any and all documents that are material to the preparation of Mr. Brown's defense. Rule 16(a)(1)(C), F.R.Cr.P. This request includes, but is not limited to:
 - a. any and all audiotape or videotape recordings, whether made by the government or private individuals, other than those already produced by the government;



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- b. any and all draft transcripts of such recordings (we agree not to use such drafts as impeachment material at trial) and line sheets;
 - c. any and all final transcripts of such recordings;
 - d. all documents reflecting or relating to the chain of custody of physical evidence.
5. Any and all documents, or copies thereof, reflecting or relating to results or reports of physical or mental examinations, scientific or computer tests, experiments, analyses, surveys or retrievals, accounting work papers or other financial analyses that were conducted in connection with the government's investigation of the charges contained in the indictment (Rule 16(a)(1)(D), F.R.Cr.P.)
 6. Any and all documents pertaining to any criminal conviction of Mr. Brown or any person the government will claim at trial to have been an accomplice or co-conspirator of Mr. Brown.
 7. Any and all surveillance photographs or videotapes depicting Mr. Brown, whether or not such surveillance was conducted in connection with this case.

As a predicate to defense motions to suppress evidence, pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure, it is requested that you provide the defense the following materials and items of information:

8. A statement whether any information known by the government, or any evidence in the government's possession, custody, or control, was obtained by a search, and if so, a description or inventory of such evidence.
 - a. for every search conducted pursuant to a warrant:
 - i. all search warrants, and related papers;
 - ii. all warrant applications and affidavits in support of any warrant or extension, and related papers;
 - iii. all orders, returns, inventories and extensions, and related papers.
 - b. for every search conducted without a warrant:
 - i. a list of the personnel involved in the search;
 - ii. a statement of the date and time of such search;



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- iii. a statement of the place where such search was conducted.
9. A statement whether any information known by the government, or any evidence in the government's possession, custody, or control, was derived from, or obtained by any type of surveillance of any defendant, including, but not limited to, electronic surveillance, eavesdropping or other evidence-gathering, conducted through the use of wiretaps, pen registers, telephone subscription and toll records, videotapes or audiotapes, or otherwise, and if so, a description of such evidence.
 - a. for any surveillance conducted pursuant to a warrant:
 - i. all eavesdropping warrants and other warrants, and related papers;
 - ii. all applications and affidavits in support of any warrant or extension, and related papers;
 - iii. all surveillance logs, seven-day reports, orders, returns, inventories and extensions, and related papers.
 - b. for any surveillance conducted without a warrant:
 - i. a list of the personnel involved in the search or surveillance;
 - ii. a statement of the date and time of such search or surveillance;
 - iii. a statement of the place where such search or surveillance was conducted.
 10. A list of all confidential sources who provided information for any application for a search warrant, arrest warrant or eavesdropping warrant in this case, regardless whether such warrant was actually sought or obtained.
 11. A statement whether any evidence in the government's possession, custody, or control was obtained through the use or derivative use of a beeper or other tracking device, and if so, a description of such evidence.
 12. A statement of whether any evidence in the government's possession, custody, or control was obtained through a confidential informant, and if so, a description of such evidence.
 13. If any recordings, reports of communications, fruits of any interception or search, or notes of any interview have been, or are intended to be, discarded or destroyed, please

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identify such material in sufficient detail to permit a timely request to the Court for appropriate relief.

II. Demand for a Bill of Particulars

A request for a Bill of Particulars is herewith made demanding the following particulars:

12:CR:317 (“October 2012 Indictment”)

1. With respect to allegations in Count One, please identify specifically
 - a. the “threats to injure the person of another,”
 - b. the “communications” containing “threats to injure the person of another,” including any communications alleged to have occurred between March 6, 2012 and September 4, 2012.
 - c. the precise manner in which Mr. Brown “transmit” the each communication “in interstate and foreign commerce” including
 - i. the location Mr. Brown “transmitted” the “communication” from;
 - ii. the date and time Mr. Brown made the “communication;”
2. With respect to allegations in Count Two, please identify specifically
 - a. the “restricted personal information” Mr. Brown conspired to make publicly available;
 - b. the “crime of violence” Mr. Brown “intended to incite the commission of” by making the “restricted personal information” publicly available;²
 - c. the precise manner the “restricted personal information” was to be used to “incite the commission of a crime of violence;”
 - d. the precise manner by which Mr. Brown “requested another person” to “assist him find on the Internet restricted information;”

² 18 U.S.C. §119(a)(1)

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- e. whom Mr. Brown “requested to “assist him find on the Internet restricted information;” and
- f. the precise nature of the “search on the internet,” alleged as an overt act;

3. With respect to allegation in Count Three, please identify specifically

- a. the precise manner by which Mr. Brown “threatened to assault” a Federal Law Enforcement Officer;
- b. the precise manner by which Mr. Brown’s threat was to be used “impede, intimidate, and interfere” with a “Federal law enforcement officer while engaged in the performance of official duties;”
- c. the “official duties” that Mr. Brown sought to “impede, intimidate and interfere” with;
- d. the precise manner by which Mr. Brown’s threat was to be used “retaliate” against a “Federal law enforcement officer on account of the performance of official duties;”
- e. the “official duties” that Mr. Brown sought to “retaliate” against;

12:CR:413 (“December 2012 Indictment”)

1. With respect to allegations in Count One, please identify specifically

- a. the precise manner by which Mr. Brown “transferred” Card Verification Values;
- b. whom Mr. Brown was aiding and abetting.

2. With respect to allegations in Count Two, please identify specifically

- a. the precise manner in which Mr. Brown possessed “stolen credit card account numbers” and “Card Verification Values;”
- b. the precise manner in which the alleged “possession” was to “defraud;”
- c. whom Mr. Brown was aiding and abetting.

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3. With respect to allegations Counts Three through Twelve, please identify specifically
 - a. the precise manner in which Mr. Brown possessed without lawful authority the means of identification of identification of the persons referenced in Counts Three through Twelve.
 - b. the precise manner in which Mr. Brown transferred without lawful authority the means of identification of identification of the persons referenced in Counts Three through Twelve.
 - c. whether the felony violation of 18 U.S.C. 1028(a)(2) referenced in Counts Three through Twelve is the same as that alleged in Count One.
 - d. whom Mr. Brown was aiding and abetting.

13:CR:030 (“January 2013 Indictment”)

1. With respect to allegations in Count One, please identify specifically
 - a. the precise manner by which Mr. Brown “concealed” two laptop computers;
 - b. the precise manner by which the alleged concealment was to “impede, obstruct and influence” the execution of a search warrant in relation to an investigation; and
 - c. whom Mr. Brown was aiding and abetting.
2. With respect to allegations in Count Two, please identify specifically
 - a. the precise manner by which Mr. Brown “corruptly concealed” records, documents and digital data contained on two laptop computers;
 - b. the precise manner by which the alleged concealment was to “impede, obstruct and influence” a proceeding before a federal Grand Jury in the Northern District of Texas;
 - c. the precise manner by which the alleged concealment was to “impede, obstruct and influence” a proceeding before a United States Magistrate Judge in the Northern District of Texas; and
 - d. whom Mr. Brown was aiding and abetting.

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Regarding all discovery requested herein, it is noted that the government shoulders a continuing duty of disclosure as further information becomes known, and further material becomes available to the government and to the prosecution. Please contact me as soon as practicable after you have reviewed this letter in order that any questions, clarifications, or disputes can be raised and resolved, if possible, prior to motion practice.

Very truly yours,

Ahmed Ghappour
Civil Rights Clinic
University of Texas at Austin School of Law
727 Dean Keeton St
Austin, TX 78705

CC: Charles Swift, Esq.
Marlo Cadedu, Esq.
Ranjana Natarajan, Esq.



U.S. Department of Justice

United States Attorney
Northern District of Texas

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July 12, 2013

Ahmed Ghappour
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727 Dean Keeton St.
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Re: *United States v. Barrett Lancaster Brown*
3:12-CR-317-L, 3:12-CR-413-L, 3:13-CR-030-L

Dear Mr. Ghappour,

This correspondence serves to respond to your discovery letter dated July 1, 2013. The "Demand for a Bill of Particulars" will be addressed in a separate letter. Please note that the government's responses to your specific requests begin on page 6.

General Discovery Principles

First, the government wishes to review in clear terms the nature, scope, and purpose of Fed. R. Crim. P. 16 and 26.2; 18 U.S.C. § 3500 (Jencks Act); and *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny with reference to defendant's lawful entitlement by way of discovery.

Fed. R. Crim. P. 16 Except as provided by 18 U.S.C. § 3509(m), discovery is governed by Fed. R. Crim. P. 16. Under the discovery provisions of the Rule, a defendant is entitled to four things: (1) his statement (a) if written or recorded and in the possession or control of the government, (b) if made orally "in response to interrogation by a person the defendant knew was a government agent," or (c) if recorded while testifying before

the grand jury; (2) his prior criminal record; (3) documents and tangible objects which are material to the preparation of the defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant; and (4) results or reports of scientific tests or experiments which are material to the preparation of the defense or intended for use by the government as evidence in chief at the trial.

Fed. R. Crim. P. 16(a)(2) Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Fed. R. Crim. P. 16(a)(3) This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2. With regard to a defendant's entitlement under Rule 16, the government will continue to make available for the defendant inspection and copying all documentary material and physical evidence which they are entitled to discover under the Rule. This material constitutes the bulk of the government's investigative file. It should also be pointed out that Rule 16 does not make all statements made by a defendant discoverable. Specifically, unrecorded statements made by a defendant to a third person who is not a government agent are not discoverable. A contrary result would present an obvious conflict with the Rule itself (Fed. R. Crim. P. 16(a)(2)), Fed. R. Crim. P. 26.2 and with 18 U.S.C. § 3500 (Jencks Act). *United States v Pollock*, 534 F.2d 964, 975-76 (D.C. Cir. 1976); *United States v. Walk*, 533 F.2d 417 (9th Cir. 1975). Moreover, as a defendant will receive both exculpatory evidence and the statements of those witnesses who will testify against him at trial, all such statements ultimately will be provided to him, either as Brady material or under Fed. R. Crim. P. 26.2. It is quite plain from the above that Rule 16 does not give the defense the right to discover all the government's evidence. The government will provide the defendant with all material to which they are entitled under Fed. R. Crim. P. 16(a).

Fed. R. Crim. P. 26.2 and 18 U.S.C. § 3500 Fed. R. Crim. P. 26.2 and 18 U.S.C. § 3500, also known as the *Jencks Act*, specifically define a criminal defendant's

entitlement to statements by prospective government witnesses. Rule 26.2 establishes the defendant's entitlement and, in relevant part, provides:

After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and his attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

In regard to such production, 18 U.S.C § 3500, the *Jencks Act*, is a specific statutory prohibition against the premature disclosure of such material. *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979). In relevant part, the Jencks Act states:

In any criminal prosecution brought by the United States, no statement or report . . . which was made by a government witness or a prospective government witness shall be the subject of . . . discovery, or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500.

Agent's debriefing reports (302s) and notes, unless specifically approved or adopted by the non-agent witness, are not Jencks materials to that witness. *United States v. Martinez*, 87 F.3d 731 (5th Cir. 1996). The purpose of the disclosure mandated by Rule 26.2 itself is to facilitate meaningful defense cross-examination. Neither the courts nor Congress believe that earlier disclosure is necessary. Therefore, a request by defendant for such material is clearly satisfied by the government in voluntarily providing witness statements prior to the witness's testimony. The United States will provide witness statements to the defendant the day before that witness's trial testimony. The United States expects reciprocal discovery from the defendant pursuant to the same rule.

Brady v. Maryland In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court ruled:

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 punishment.

Later cases, such as *Giglio v. United States*, 405 U.S. 150 (1972), further interpreted and expanded the government's duties in this regard. However, the affirmative duty imposed

on the government by *Brady* and its progeny remains only the duty to disclose certain evidence favorable to the defense. *Brady* did not impose on the government the duty of allowing the defense to search the government's files for possibly exculpatory material. *United States v. Agurs*, 427 U.S. 97, 110-111 (1976).

In addition, *Brady* and its progeny are not applicable to pretrial discovery. *United States v. Frick*, 490 F.2d 666 (5th Cir.); *Archer v. United States*, 393 F.2d 124 (5th Cir. 1968). As the Fifth Circuit has stated, "this Court and others have recognized that the rule announced in *Brady* is not a pretrial remedy and was not intended to override the mandate of the *Jencks Act*." *United States v. Scott*, 524 F.2d 465, 467 (5th Cir. 1975); *United States v. Harris*, 458 F.2d 670 (5th Cir. 1972). The Fifth Circuit, in fact, has not established any general rule as to when *Brady* material must be disclosed. *United States v. Crockett*, 534 F.2d 589, 603 n. 16 (5th Cir. 1976). Indeed, if *Brady* material is contained in a *Jencks Act* statement, such disclosure is timely for the purposes of the *Brady* rule when the *Jencks Act* material is turned over. *United States v. Brown*, 699 F.2d 704, 709 (5th Cir. 1983); *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978); *United States v. Dotson*, 546 F.2d 1151 (5th Cir. 1977).

Therefore, *Brady* is not and was not intended to be a discovery tool for defendants, but was only a recognition of the unfairness of the prosecution's withholding of exculpatory material. See, *United States v. Persico*, 621 F. Supp. 842, 870 (S.D.N.Y. 1985) ("*Brady* is not to be utilized as a discovery device to supply a defendant with all evidence in the government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence only known to the government."); *United States v. Beasley*, 576 F.2d 626 630 (5th Cir. 1978) ("*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." (internal citation omitted)). Nor is the government required to provide a defendant with information he already has or which he can obtain himself "with any reasonable diligence." *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977). The government recognizes its continuing duty in this respect and has and will turned over all such material to the defense.

Prosecution Team In all criminal cases, the scope of a federal prosecutor's discovery obligations depends in part on the scope of the "prosecution team," that is, those individuals and agencies who are so closely aligned with the prosecution that documents and data in their possession are "in the possession, custody, or control" of the government

for purposes of discovery. See *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (the prosecution team may include local law enforcement if it significantly participated in the investigation of the government's case). On the other hand, the prosecution team generally. See *United States v. Lekhtman*, 2009 WL 5095379, at *7 (E.D.N.Y. Dec. 15, 2009) (The prosecution team does not include private organizations that provide information or evidence to the government). Recently, Judge Fitzwater relied on, cited, and quoted *United States v. Josleyn*, 206 F.3d 144, 154 (1st Cir. 2000), which held, "[w]hile prosecutors may be held accountable for information known to police investigators, we are loath to extend the analogy from police investigators to cooperating private parties who have their own set of interests."¹

It is well established that "[t]he government has no affirmative duty to take action to discover information which it does not possess," *United States v. Jones*, 34 F.3d 569, 599 (8th Cir. 1994) (quoting *United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991)), and a significant body of case law limits the reach of the government's "possession, custody, or control" of information.

Federal courts have long recognized that "the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require [courts] to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *United States v. Gambino*, 835 F.Supp. 74, 95 (E.D.N.Y.1993)); see also, e.g., *United States v. Pelullo*, 399 F.3d 197, 217 (3d Cir. 2005); *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999).

¹ The Honorable Chief Judge Sidney A. Fitzwater's Memorandum Opinion and Order in *United States v. Simpson*, 2011 WL 978235 *5 (N.D.Tex. March 21, 2011).

Specific Discovery Requests and Responses

In response to all the requests, the government understands its continuing obligation to provide discovery. As additional evidence useful to the prosecution team or to the defense of Brown is obtained by or becomes known to the prosecution team, the same will be provided to the defense.

1. Any and all written or recorded statements, or copies thereof, made by Mr. Brown or by any indicted or unindicted coconspirator, accomplice or abettor whose statements the government will claim are binding on Mr. Brown. Rule 16(a)(1)(A), F.R.Cr.P.

a. Except as provided below, and other than Brown's numerous statements posted online and publically available to the defense (such as Twitter, YouTube, Pastebin, various media articles or interviews, etc.), the prosecution team has produced or made available to the defense all Brown's statement's in its possession.

b. The prosecution team is in the process of reviewing additional data more recently received to determine whether the same contains Brown's statements for discovery purposes.

c. Statements of witnesses (including coconspirators, accomplices, abettors, etc.) are considered Jencks materials, and will produced in accordance with local practice, that being one day before the witness testifies.

2. Any and all documents and property obtained from Mr. Brown or any entity the government claims is owned or controlled by Mr. Brown, or from any alleged accomplice, or from any employee, agent, or professional consultant, or from any third party having custody of property belonging to Mr. Brown. Rule 16(a)(1)(C), F.R.Cr.P.

The prosecution team has produced or made available to the defense all requested items in its possession.

3. Any and all documents the government intends to use at trial as evidence in its case in chief. Rule 16(a)(1)(C), F.R.Cr.P. This request includes not only those items which will be marked and offered into evidence, but all documents which will be relied upon or

referred to in any way by any witness called by the government during its case in chief. It is requested that any documents in this category be specifically identified from among the mass of documents that have been or will be produced to the defense by the government, both to enable counsel to prepare effectively for trial and afford them an opportunity to move to suppress or preclude any evidence the government intends to use in its case in chief. See Rules 12(b)(3) & 12(d)(2), F.R.Cr.P.

The prosecution team has not begun its preparation for trial, and therefore has not identified those items it intends to mark as exhibits for its case in chief. However, the prosecution team has produced or made available to the defense, all the items seized or subpoenaed, or otherwise acquired (except for items found online and equally accessible to the defense).

4. Any and all documents that are material to the preparation of Mr. Brown's defense. Rule 16(a)(1)(C), F.R.Cr.P. This request includes, but is not limited to:

a. any and all audiotape or videotape recordings, whether made by the government or private individuals, other than those already produced by the government;

Other than items found online and equally accessible to the defense, the prosecution team does not have the requested items.

b. any and all draft transcripts of such recordings (we agree not to use such drafts as impeachment material at trial) and line sheets;

The prosecution team has not transcribed any recordings.

c. any and all final transcripts of such recordings;

The prosecution team has not transcribed any recordings.

d. all documents reflecting or relating to the chain of custody of physical evidence.

The prosecution team agrees to produce the requested item.

5. Any and all documents, or copies thereof, reflecting or relating to results or reports of

physical or mental examinations, scientific or computer tests, experiments, analyses, surveys or retrievals, accounting work papers or other financial analyses that were conducted in connection with the government's investigation of the charges contained in the indictment (Rule 16(a)(1)(D), F.R.Cr.P.)

The prosecution team agrees to produce the requested item.

6. Any and all documents pertaining to any criminal conviction of Mr. Brown or any person the government will claim at trial to have been an accomplice or co-conspirator of Mr. Brown.

The prosecution team provided Brown's criminal history information to the defense.

7. Any and all surveillance photographs or videotapes depicting Mr. Brown, whether or not such surveillance was conducted in connection with this case.

The prosecution team does not have the items requested above.

8. A statement whether any information known by the government, or any evidence in the government's possession, custody, or control, was obtained by a search, and if so, a description or inventory of such evidence.

- a. for every search conducted pursuant to a warrant:
 - i. all search warrants, and related papers;**
 - ii. all warrant applications and affidavits in support of any warrant or extension, and related papers;**
 - iii. all orders, returns, inventories and extensions, and related papers.****
- b. for every search conducted without a warrant:
 - i. a list of the personnel involved in the search;**
 - ii. a statement of the date and time of such search;**
 - iii. a statement of the place where such search was conducted.****

The prosecution team is in the process of requesting that the search warrant documents be unsealed for the limited purpose of providing discovery. Once conditionally unsealed, the same will be provided to the defense pursuant to the limitations and restrictions set out in the Agreed Protective Orders. To the extent that this production does not satisfy the above request, the prosecution team objects to the request as exceeding the scope of permissible discovery.

9. A statement whether any information known by the government, or any evidence in the government's possession, custody, or control, was derived from, or obtained by any type of surveillance of any defendant, including, but not limited to, electronic surveillance, eavesdropping or other evidence-gathering, conducted through the use of wiretaps, pen registers, telephone subscription and toll records, videotapes or audiotapes, or otherwise, and if so, a description of such evidence.

a. for any surveillance conducted pursuant to a warrant:

- i. all eavesdropping warrants and other warrants, and related papers;**
- ii. all applications and affidavits in support of any warrant or extension, and related papers;**
- iii. all surveillance logs, seven-day reports, orders, returns, inventories and extensions, and related papers.**

b. for any surveillance conducted without a warrant:

- i. a list of the personnel involved in the search or surveillance;**
- ii. a statement of the date and time of such search or surveillance;**
- iii. a statement of the place where such search or surveillance was conducted.**

The prosecution team disclosed telephone subscription and toll records. The remaining items do not exist.

10. A list of all confidential sources who provided information for any application for a search warrant, arrest warrant or eavesdropping warrant in this case, regardless whether such warrant was actually sought or obtained.

a. A confidential human source (CHS) is any individual who is believed to be providing useful and credible information to the FBI for any authorized information collection activity, and from whom the FBI expects or intends to obtain additional useful and credible information in the future, and whose identity, information or relationship with the FBI warrants confidential handling. see <http://www.justice.gov/oip/docs/ag-guidelines-use-of-fbi-chs.pdf>.

b. The prosecution team did not rely on any CHSs in applying for search or arrest warrants in Brown's cases.

11. A statement whether any evidence in the government's possession, custody, or control was obtained through the use or derivative use of a beeper or other tracking device, and if so, a description of such evidence.

The prosecution team does not have the requested items.

12. A statement of whether any evidence in the government's possession, custody, or control was obtained through a confidential informant, and if so, a description of such evidence.

The prosecution team did not rely on any CHSs in presenting the facts to the Grand Jury for the return of Brown's Indictments. (See the definition of CHS in the response to #10 above.) If the prosecution team receives/reviews any information or evidence from a CHS and determines the same to be discoverable, it will notify the defense.

13. If any recordings, reports of communications, fruits of any interception or search, or notes of any interview have been, or are intended to be, discarded or destroyed, please identify such material in sufficient detail to permit a timely request to the Court for appropriate relief.

The prosecution team has not discarded or destroyed, and does not intend to discard or destroy any referenced item.

Sincerely,

SARAH R. SALDAÑA
UNITED STATES ATTORNEY

s/ Candina S. Heath

CANDINA S. HEATH
Assistant United States Attorney



U.S. Department of Justice

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July 12, 2013

Ahmed Ghappour
Civil Rights Clinic, UT School of Law
727 Dean Keeton St.
Austin, TX 78705

Re: *United States v. Barrett Lancaster Brown*
3:12-CR-317-L, 3:12-CR-413-L, 3:13-CR-030-L

Dear Mr. Ghappour,

This correspondence serves to respond to the letter demand for a bill of particulars dated July 1, 2013. The government finds that the demand for a bill of particulars is without merit. The indictments and discovery provided to the defense to date contain considerable specificity and detail about the allegations and the available evidence.

Notwithstanding the above, the government will disclose the names of its witnesses who constitute unindicted coconspirators and aiders and abettors in a timely fashion.

Sincerely,

SARAH R. SALDAÑA
UNITED STATES ATTORNEY

s/ Candina S. Heath

CANDINA S. HEATH
Assistant United States Attorney