

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
)
 v.)
)
 KEVIN A. RING,)
)
 Defendant.)
 _____)

No. 1:08-cr-274-ESH

**GOVERNMENT’S REPLY TO DEFENDANT’S OPPOSITION TO GOVERNMENT’S
MOTION TO COMPEL DISCOVERY**

The United States of America, by and through its undersigned attorneys, hereby respectfully submits this reply for its motion for an order compelling Defendant Kevin A. Ring to provide reciprocal discovery pursuant to Federal Rules of Criminal Procedure 16 and 26.2.

Defendant’s Reciprocal Discovery Obligations

As described more fully in the six Status of Discovery filings, Dkts. 20, 25, 34, 43, 47 and 48, as well as in other detailed materials submitted to the Court, the Government has provided discovery to the Defendant well beyond what is required by Rule 16. Defendant, however, has failed to provide ANY materials to the Government. The purpose of Federal Rule of Criminal Procedure 16 is to ensure that discovery is “a two way street.” United States v. Stackpole, 811 F.2d 689, 697 (1st Cir. 1987). See also United States v. Anderson, 416 F. Supp. 2d 110 (D.D.C. 2006) (discussing the reciprocity of defendant and government discovery obligations and noting that documents not identified pre-trial could be prohibited from introduction at trial if the use was planned in advance of trial). Rule 16 provide that if a defendant requests discovery from the Government and the request is complied with, the defense “must” permit the Government:

to inspect and to copy or photograph books, papers, documents, data, photographs,

tangible objects, buildings or places, or copies or portions of any of these items if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

Fed. R. Crim. Pro. 16(b)(1)(A).

The Government has complied with the Defendant's requests, but the Defendant has provided no materials to the Government or identified any documents that it intends to use during its case-in-chief. Defendant, however, has remarked that he is obtaining additional materials to "fill those holes" for preparation of the defense. Dkt. 58 at 6. If any of these materials that the Defendant has gathered during the nine months since indictment fall under the requirements of Fed. R. Crim. Pro. 16(b)(1)(A), Defendant should produce them to the Government immediately.

The Defendant argues that the Defendant's case-in-chief does not include cross-examination of Government witnesses, including impeachment. Dkt. 58 at 2-3. While there is legal support for that proposition, the spirit of Rule 16 is to ensure that both sides are treated equally and to ensure that discovery is a "two-way street." The Court has the discretion to require that Defendant identify all materials that he intends to use in advance of trial. See, e.g., United States v. Andersen, 416 F. Supp. 2d 110 (D.D.C. 2006) (discussing the reciprocity of defendant and government discovery obligations and noting that documents not identified pre-trial could be prohibited from introduction at trial if the use was planned in advance of trial).

If the Defendant refuses to provide materials that it intends to use during cross-examination of Government witnesses, then the Government will urge the Court to strictly limit the scope of Defendant's cross-examination. It is black letter law that a defendant can only ask during cross-examination about matters raised during the course of the direct examination.

United States v. Sampol, 636 F.2d 621, 663-64 (D.C. Cir. 1980) (affirming exclusion of evidence during cross-examination regarding defendant's affirmative defense); Dixon v. United States, 303 F.2d 226, 227 (D.C. Cir. 1962) (finding improper the cross-examination of witness because it was not within the scope of her direct testimony and that "[s]he had said nothing about these matters and the statements attributed to her did not directly challenge the truth of anything she had said in her direct testimony. Nor did these statements relate to her bias or prejudice."); Arnstein v. United States, 296 F. 946, 949 (D.C. Cir. 1924) (affirming exclusion during cross-examination of information outside scope of direct examination); Woodbury v. District of Columbia, 5 Mackey 127, 1886 WL 15912, at *1 (June 28, 1886 D.D.C) ("A party is confined in his cross-examination to the subject-matters entered into in the examination-in-chief. If the fact sought to be brought out is important to be established, the witness may be called as his own at another stage of the case."). In order to prevent numerous objections regarding the scope of cross-examination, maximize judicial efficiency and prevent witnesses from having to be recalled, the Government respectfully requests that the Court require Defendant to identify all materials that he intends to use in advance of trial - whether used during cross-examination of Government witnesses or after the close of the Government's case-in-chief.

Defendant argues that it is "unreasonable and a practical impossibility" to provide reciprocal discovery immediately and a preliminary list of documents to be used during his case-in-chief. Dkt. 58 at 3-4. While Defendant may not be able to provide a final exhibit list, there is nothing to prevent him from providing ANY of the documents that he has already obtained in the course of the preparation of his defense or from identifying ANY of the materials that he intends to use during his case-in-chief. While the Defendant may not know the exact contours of the

Government's case, the Defendant does have an understanding of the case and how the Government intends to prove his guilt at trial. Defendant has had nine months with the two binders containing documents supporting each paragraph of the Indictment, (provided on September 8, 2009), three months with the Government's preliminary exhibit list (provided on March 16, 2009) and months with the majority of the interview reports of the Government witnesses and the Defendant's co-conspirators.

Defendant's claim that it is impossible for him to identify ANY documents that he intends to use in his case-in-chief is simply without basis. The Court has the power to ensure that when a Defendant takes advantage of the discovery benefits provided in Rule 16, that he lives up to his own obligations under Rule 16. See, e.g., United States v. Ryan, 448 F. Supp. 810, 810-12 (S.D.N.Y.), *aff'd*, 594 F.2d 853 (2d Cir. 1978), ("Since the defendant has availed himself of the strategy to obtain discovery of the government, he must comply with the request for reciprocal discovery if he wished to use the documents directly or refer to them while testifying.").

The Government respectfully requests that the Court direct the Defendant to comply with Rule 16(b)(1)(A), immediately provide any reciprocal discovery obtained to date, and, by July 1, 2009, provide and identify with specificity a preliminary list of documents that the Defendant intends to use during cross-examination of Government witnesses and after the close of the Government's case.

Federal Rule of Criminal Procedure 26.2

Defendant fails to respond to the Government's request for witness statements pursuant to Federal Rule of Criminal Procedure 26.2. As noted in the Government's Motion to Compel, Dkt.

52 at 5, although the court cannot order earlier disclosure of witness statements than that provided in the Jencks Act or Rule 26.2, nothing prohibits the Court from encouraging defense counsel to cooperate in the early production of witness statements. Indeed, the Defendant appears to have done significant investigation on its own and likely created statements that would need to be required to be turned over under Rule 26.2.

For example, in Dkt. 53 at 5, Defendant intimates that he has gathered information regarding public officials that he intends to introduce as evidence.¹ If Defendant has interviewed witnesses and memorialized those interviews in some way, the Government respectfully requests that the Court urge the Defendant to turn over those reports of interview to the Government. The Defendant has urged the Court to broadly interpret what a “witness statement” is, and while the Government does not concede that law enforcement reports of witness interviews is a statement of the witness, the Government intends to provide not only the reports, but also the law enforcement notes underlying the interviews. The Government respectfully requests that the Court create a “two-way street” and urge the Defendant to provide the Government with the information and witness statements that he has obtained, just as the Government has provided the Defendant with the materials it has obtained.

In this case, the Government will complete the production of Jencks materials approximately two months prior to trial on July 15, 2009. The Government requests production of Defendant’s Rule 26.2 statements under a similar time frame – two months prior to Defendant’s first witness testifying. Because the Government’s case-in-chief is currently

¹ Defendant argues: “The evidence will show that others on the government’s 404(b) list would have done the same, had the government contacted them.” Dkt. 53 at 5.

scheduled to last approximately four weeks at most, the Government requests Rule 26.2 statements from the Defendant one month prior to trial, August 15, 2009.

CONCLUSION

For the foregoing reasons, Government respectfully requests the Court require Defendant to fulfill its reciprocal discovery obligations.

Respectfully submitted,

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Dated June 15, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2009, I served a copy of the above opposition on Richard A. Hibey, Esq., Andrew T. Wise, Esq., Timothy P. O'Toole, Esq., and Matthew T. Reinhard, Esq., counsel for defendant Kevin A. Ring, via filing electronically on ECF.

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