

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	CASE NO. 1:16 cr 265
)	
Plaintiff,)	JUDGE John Adams
)	
vs.)	
)	
ERICK HENDRICKS,)	NOTICE OF MAILING OF
)	DISCOVERY LETTER
Defendant.)	

Now comes defendant, Erick Hendricks, by and through his undersigned counsel, and provides notice that a supplemental discovery letter was delivered to the United States Attorneys Office through email and placed in the regular U.S. Mail on July 28, 2017. A copy of the letter is attached as an exhibit.

Respectfully submitted,

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Counsel for Defendant Erick Hendricks

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2017, a copy of the foregoing was filed electronically. Parties may access this filing through the Court's system. Notice of this filing will be sent by operation of the Court's electronic filing system

S/ David L. Doughten
David L. Doughten

Attorney for Defendant Hendricks

July 27, 2017

BY U.S. & ELECTRONIC MAIL

Matthew W. Shepherd
Assistant United States Attorney
801 West Superior Avenue
Suite 400
Cleveland, OH 44113
(Email: matthew.shepherd@usdoj.gov)

Re: ***U.S. v. Eric Hendricks,
Case No. 16 CR 265,
Northern Dist. of Ohio***

Dear Mr. Shepherd:

On behalf of Erick Hendricks, we submit this supplemental request for discovery. This request specifically address issues where national security issues may arise, in addition to other matters. We are not contending at this point that the Government is withholding discoverable information. We acknowledge that we are in possession of literally thousands of pages of discovery and understand that discovery exchanges are ongoing.

The documents and information that we request are discoverable under the Fifth and Sixth Amendments to the United States Constitution, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), Federal Rule of Criminal Procedure 16, USAM 9-5.001, the January 4, 2010 Ogden memorandum ("Ogden Memo") (reprinted at Criminal Resource Manual 165), and other provisions of federal law set forth below. We ask that you provide the discovery requested in this letter and advise us of any specific requests with which the government declines to comply. We will be glad to discuss the requests and attempt to resolve any differences we might have. To the extent the requested materials have already been produced, of course, we are not asking the government to produce them a second time.

The documents¹ and information requested include not only documents and information in the

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The word "documents" includes all books, papers, letters, correspondence, e-mails, notebooks, reports, memoranda, studies, diaries, notes, messages, computer facilitated or transmitted materials, images, photographs, information in any computer database, audio and video tapes, recordings, transcripts, ledgers, printouts and all copies or portions thereof, and any other written, recorded, or memorialized material of any nature whatsoever.

possession, custody, or control of your office, but also documents and information in the possession, custody, or control of any agency allied with the prosecution, including the Federal Bureau of Investigation, the Department of Homeland Security, the Office of the Director of National Security, the National Security Agency, the Department of Defense, and the National Security Division of the Department of Justice (collectively "the government").

I. Rule 16 Discovery Requests

1. The substance of any oral statement made by each defendant in response to interrogation by any person then known by him to be a government agent if the government intends to use that statement at trial. Fed. R. Crim. P. 16(a)(1)(A).
2. Any relevant written or recorded statements made by each defendant within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence could be known, to the attorneys for the government. Fed. R. Crim. P. 16(a)(1)(B)(i).
3. That portion of any written record containing the substance of any relevant oral statement made by each defendant in response to interrogation by any person then known to him to be a government agent. Fed. R. Crim. P. 16(a)(1)(B)(ii).
4. Each defendant's recorded testimony (if any) before a grand jury relating to the charged offenses. Fed. R. Crim. P. 16(a)(1)(B)(iii).
5. A copy of each defendant's prior criminal record (if any) as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence could be known, to the attorneys for the government. Fed. R. Crim. P. 16(a)(1)(D).
6. All books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof (collectively "materials") that are material to preparing the defense and are within the government's possession, custody, or control. Fed. R. Crim. P. 16(a)(1)(E)(i).
7. All books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof that the government intends to use at trial as evidence in chief and are within the government's possession, custody, or control. Fed. R. Crim. P. 16(a)(1)(E)(ii). This includes not only those materials that will be marked and offered into evidence, but also those materials that will be relied on or referred to in any way by any witness (including any expert witness) called by the government during its case in chief. We ask that any materials that the government intends to use at trial as evidence in chief be specifically identified, both to enable counsel to prepare effectively for trial and to afford defendants an

As used in this letter, the words "and" and "or" mean "and/or," and the words "includes" and "including" mean "includes (or including) without limitation."

opportunity to move to suppress any such evidence. *See* Fed. R. Crim. P. 12(b)(3)(C) and 12(b)(4)(B). In addition, with respect to all materials produced pursuant to Fed. R. Crim. P. 16(a)(1)(E) or *Brady*, we ask that you identify the source of the materials.

8. All books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof that were obtained from or belong to defendants and that are within the government's possession, custody, or control. Fed. R. Crim. P. 16(a)(1)(E)(iii).
9. All results or reports of physical or mental examinations, scientific tests or experiments, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence could be known, to the attorneys for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial, Fed. R. Crim. P. 16(a)(1)(F), including:
 - A. All handwriting exemplars and opinions of handwriting experts, all handwriting or document analyses, and all documents examined or used in, or that relate to, such analyses.
 - B. All fingerprint and palmprint examples, comparisons, and opinions of fingerprint experts, and all documents examined or used, or that relate to, those opinions.
 - C. All questioned document analyses relating to any document at issue in this case, and all documents examined or used in, or that relate to, such analyses.
 - D. All voice identification analyses, and all documents examined or used in, or that relate to, such analyses.
 - E. All polygraph examinations, psychological stress examinations, hypnotic procedures, or any other scientific procedures devised to determine whether a subject is telling the truth, or to refresh a witness' memory, and all documents examined or used in, or that relate to, such examinations.
10. A written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. The summary should describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications. Fed. R. Crim. P. 16(a)(1)(G).

II. *Brady, Kyles, Giglio, et. al.*

11. Under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Giglio v. United States*, 405 U.S. 150 (1972),

and under the Ohio Rules of Professional Conduct, Rule 3.8 (made applicable to federal prosecutors by 28 U.S.C. 530B(a)), defendants request prompt disclosure of all documents and information (in whatever form) that would tend to exculpate them (or any of them) with respect to the charges in the indictment, or that would tend to reduce any sentence.

In accordance with cases such as *United States v. Safavian*, 233 F.R.D. 12, 16-17 (D.D.C. 2005), *United States v. Carter*, 313 F. Supp. 2d 921, 923-25 (E.D. Wis. 2004), and *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199-1204 (C.D. Cal. 1999), and under the Ohio Rules of Professional Conduct, Rule 3.8(d), 28 U.S.C. 530B, *see, e.g., United States v. Acosta*, 357 F. Supp. 2d 1228 (D. Nev. 2005), it is our position that the government must disclose all favorable documents and information without regard to whether there is a reasonable probability that the disclosure would change the outcome of the trial. It is our position as well that favorable documents and information must be disclosed even if inadmissible, as long as the documents and information are reasonably likely to lead to the discovery of admissible evidence. *See, e.g., Sudikoff*, 36 F. Supp. 2d at 1201. Please let us know if you disagree with these principles so we can bring any disputes to the Court for resolution. The documents and information that we request under *Brady* and its progeny include:

- A. All documents or information (in whatever form) tending to establish that any of the allegations in the indictment are not true; or that would tend to contradict or mitigate either the government's theory of its prosecution or arguments in aggravation at sentencing. This request includes, but is not limited to any and all reports, memoranda, notes or other written, recorded, or digitally preserved memorializations in the government's possession or control pertaining to the following:
 - i.. All documentation pertaining to Hendrick's interaction with government agents unknown to him in Baltimore, Maryland;
 - ii. All documents pertaining to Hendrick's connections Garland, Texas and the attempted "jihad" at the Curtis Culwell Center on May 3, 2015.

- B. All documents or information (in whatever form) that may be used to impeach any potential prosecution witness.² We note that such impeachment information includes information developed in the course of interviewing potential prosecution witnesses and preparing them for trial, whether or not memorialized in writing. *See, e.g.,* Ogden Memo Step 1.B.8. The impeachment information we

² As used in ¶ (K)(2), the term "prosecution witness" includes both witnesses whom the prosecution intends to call to the witness stand and declarants whose out-of-court statements the prosecution intends to present as non-hearsay or pursuant to a hearsay exception. *See* Fed. R. Evid. 806; Ogden Memo Step 1.B.7.

request includes all categories of information set out at Step 1.B.7 of the Ogden Memo, including:

- i. all documents or information (in whatever form) relating to any conviction or arrest of any potential prosecution witness, including any juvenile adjudication or arrest;
- ii. all documents or information (in whatever form) relating to promises, consideration, or inducements made to any potential prosecution witness, whether directly to the witness or indirectly to the witness' attorney, friends, family, or business associates. "Consideration" means anything of value or use, including without limitation immunity grants, whether formal or informal, witness fees, transportation assistance, money, or assurance of favorable treatment with respect to any criminal, civil, or administrative matter;
- iii. all documents or information (in whatever form) relating to known but uncharged criminal conduct, which may provide a motive to curry favor with the government;
- iv. all documents or information (in whatever form) relating to inconsistencies in statements or testimony given by any potential prosecution witness;
- v. all documents or information (in whatever form) relating to any polygraph examination administered to any potential prosecution witness;
- vi. all documents or information (in whatever form) that would tend to impeach the credibility of any potential prosecution witness;
- vii. all documents or information (in whatever form) bearing adversely on the character or reputation for truthfulness of any potential prosecution witness;
- viii. all documents or information (in whatever form) relating to any psychological or psychiatric treatment or condition of any potential prosecution witness that could affect the witness' memory, perception, veracity, or credibility;
- ix. all documents or information (in whatever form) relating to any drug or alcohol use by any potential prosecution witness that could affect the witness' memory, perception, veracity, or credibility;
- x. all documents or information (in whatever form) relating to any physical or organic condition of any potential prosecution witness that could affect the witness' memory, perception, veracity, or credibility; and

- xi. each specific instance of conduct from which it could be inferred that any potential prosecution witness is untruthful.

III. Predicates for Rule 12 Motions

- 12. As a predicate to motions pursuant to Fed. R. Crim. P. 12, defendants request that they be informed:
 - A. Whether the prosecution intends to offer into evidence any statement made by any defendant and the substance of any such statement.
 - B. A description of all evidence in the government's possession, custody, or control that was obtained by a search and seizure.
 - C. Whether any evidence in the government's possession, custody, or control was obtained through electronic or mechanical surveillance, including without limitation wiretaps, body wires, pen registers, interception of telephone and fax communications, interception of e-mails, or video surveillance, and a description of such evidence.
 - D. In connection with any electronic or mechanical surveillance of any defendant during the investigation of the allegations of the indictment or any related allegations, please provide: (a) video and audiotape and transcripts of the statements or conversations monitored, (b) copies of any fax communications or e-mails intercepted, (c) the procedures used to conduct such surveillance, and (d) the authority under which such surveillance was conducted.
 - E. With respect to any evidence the government obtained under the purported authority of 18 U.S.C. § 2510 *et seq.*, ("Title III"), please provide: (a) all applications, certifications, affidavits, and other materials submitted to the Court in connection with any request for authority to obtain such evidence (including all materials related to requests to extend an existing Title III order); (b) all orders of the court purporting to grant such authority; (c) all evidence relating to measures taken by the government to reduce the interception of communications unrelated to the criminal activity under investigation; (d) all documents relating to Title III that were served upon defendants, including but not limited to any notices issued after the termination of the surveillance; (e) all documents relating to the sealing of information obtained pursuant to Title III surveillance; (f) all documents relating to other investigative procedures that were tried and failed; and (g) all documents relating to the basis on which the government concluded that other investigative procedures were unlikely to succeed if tried or were too dangerous.
 - F. Any surveillance or search conducted pursuant to the pre-2008 provisions

of the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. §§ 801-12, 1821-29, 1841-46.

- G. Any surveillance or search conducted pursuant to Sections 703, 704, or 705 of FISA, 50 U.S.C. §§ 1881(b), 1881(c), 1881(d), including surveillance of Defendant’s communications with U.S. persons located outside the United States.
- H. Any surveillance or search conducted pursuant to Sections 702 of FISA, 50 U.S.C. § 1881(a), including surveillance of Defendant’s international communications and visits to foreign-based websites.
- I. Any surveillance or search conducted pursuant to Executive Order 12333, including surveillance of Defendant’s international communications and visits to foreign based websites.
- J. Any demand for records or tangible things pursuant to Section 215 of the Patriot Act, 50 U.S.C. § 1861, that produced information pertaining to Defendant, including phone records, internet records, or financial records.
- K. Any demand for records pursuant to a national security letter, *e.g.*, 18 U.S.C. § 2709, that produced information pertaining to Defendant, including phone records, internet records, or financial records;
- L. Any “sneak and peek” search pursuant to Section 213 of the Patriot Act, 18 U.S.C. § 3103(a);
- M. Any “suspicious activity reports” provided pursuant to the Patriot Act and/or the Bank Secrecy Act;
- N. Any search or surveillance authorized under Rule 41 of the Federal Rules of Criminal Procedure;
- O. Any disclosure of communications or records pursuant to the Stored Communications Act, 18 U.S.C. § 2702 -03;
- P. Any demand for records pursuant to a subpoena that produced information pertaining to Defendant, including phone records, internet records, or financial records;
- Q. Any use of a cell-site simulator (*e.g.*, Stringray or Hailstorm device) or GPS-tracking device;
- R. Any monitoring of social media platforms that produced information concerning Defendant;

- S. Any communications, chat logs, metadata, or other records that the government possesses concerning Defendant's communications through WhatsApp, Facebook, Twitter, Skype, iMessage, PalTalk, Telegram, Surespot, or any other social media or online communications platform that the government has not yet furnished to the defense.
- T. Any information favorable to the defense located in the files or databases of other agencies, including without limitation, information or data obtained pursuant to foreign-intelligence authorities, regardless of whether the government intends to use the information in this proceeding against the defendant.
- U. Whether any evidence in the government's possession, custody, or control was obtained through a mail cover or trash cover, and a description of such evidence.
- V. Whether the government employed any informant or undercover agent during its investigation of the charges.

IV. Rule 1006 Fed. R. Evid.

- 13. Under Fed. R. Evid. 1006, defendant requests that he be advised whether the prosecution will seek to offer any chart, summary, or calculation in evidence, and, if so, (1) that all such charts, summaries, and calculations be produced, and (2) that all writings, recordings, or other information on which such charts, summaries, or calculations are based be made available for inspection and copying.
- 14. Defendant requests that the prosecution disclose whether it intends to offer in its case in chief as a statement any of the following, and that it provide the substance of any such statement:
 - A. Any statement as to which any defendant allegedly manifested his adoption or belief in its truth. Fed. R. Evid. 801(d)(2)(B).
 - B. Any statement made by another which was purportedly authorized by any defendant. Fed. R. Evid. 801(d)(2)(C).
 - C. Any statement made by an agent or employee of any defendant concerning a matter within the scope of his or her agency or employment made during the existence of such a relationship. Fed. R. Evid. 801(d)(2)(D).
 - D. Any statement made by an alleged co-conspirator during the course of an in furtherance of any alleged conspiracy. Fed. R. Evid. 801(d)(2)(E).

15. Defendant requests that the prosecution disclose all evidence of any similar crimes, wrongs, or acts allegedly committed by him, upon which the prosecution intends to rely to prove motive, scheme, opportunity, intent, preparation, knowledge, or absence of mistake or accident. Fed. R. Evid. 404(b).

Please feel free to call me about this at your convenience.

Sincerely,

David L. Doughten
Stephen Hartman