

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 16-CR-80107-ROSENBERG

UNITED STATES OF AMERICA

vs.

GREGORY HUBBARD
_____ /

GREGORY HUBBARD'S MOTION TO COMPEL DISCOVERY

Gregory Hubbard hereby respectfully submits his Motion to Compel Discovery. For the reasons set forth below, he respectfully requests that the Court order the government to provide the requested discovery with regard to certain allegations set forth in the indictment.

In the indictment, the government makes the following allegations:

- Mr. Hubbard did “knowingly combine, conspire, confederate, and agree with [his co-defendants], and with others known and unknown to the Grand Jury to ‘provide material support or resources’” to ISIL (Count 1); and
- Mr. Hubbard did “knowingly attempt to provide ‘material support or resources,’ including personnel” to ISIL (Count 2).

FBI Special Agent Brian King, in his sworn affidavit in support of the criminal complaint, explicated that “[t]he information contained in this affidavit is **not** inclusive of **all** the facts of the investigation and is provided for the limited purpose of establishing probable cause to obtain a criminal complaint.” DE 1 at 4.

Specifically, the criminal complaint focused on Mr. Hubbard's conversations with the confidential sources about travel to Syria to join ISIL.

Through this motion, Mr. Hubbard is requesting the government produce, pursuant to Federal Rule of Criminal Procedure 16, any documents or information that support these allegations, including, but not limited to the list of requests that undersigned counsel has provided to government counsel and sought unsuccessfully to resolve without the need for judicial intervention. For clarity and brevity's sake, that list is appended as Exhibit A to this motion.

Under Rule 16, the government must disclose any documents or objects that are material to preparing the defense or that the government intends to use in its case-in-chief. Fed. R. Crim. P. 16(a)(1)(E) (requiring government to permit defendant to inspect and copy items in the government's possession when "the item is material to preparing the defense"). "The language and the spirit of [Rule 16] are designed to provide to a criminal defendant, in the interest of fairness, the widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case." *United States v. Libby*, 429 F.Supp.2d 1, 5 (D.D.C. 2006) (quoting *United States v. Poindexter*, 727 F.Supp. 1470, 1473 (D.D.C.1989)).

Therefore, the Rule 16 "materiality standard normally is not a heavy burden; rather, evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *United States v.*

Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993)(internal quotation marks omitted). In other words, the defense simply must show that items being sought would be “helpful” to *preparing* the defense. *United States v. Jordan*, 316 F.3d 1215, 1250-51 (11th Cir. 2003) (emphasis added).¹

“Helpful” information includes both exculpatory and inculpatory evidence. *Id.* at 1250 (citing *United States v. Marshall*, 132 F.3d 63 (D.C. Cir. 1998)). In *Marshall*, the Court held that Rule 16(a)(1)(E) is not limited to evidence that is favorable or exculpatory to the defense and does not immunize inculpatory evidence from disclosure. *Marshall*, 132 F.3d at 67. “Inculpatory evidence, after all, is just as likely to assist in ‘the preparation of the defendant's defense’ as exculpatory evidence [I]t is just as important to the preparation of a defense to know its potential pitfalls as to know its strengths.” *Id.*

Here, there can be no dispute that the information requested would be helpful to the preparation of Mr. Hubbard’s defense. The defense seeks information that is directly tied to allegations in the indictment. As such, either inculpatory or exculpatory information surely will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.

Rule 16 does not limit the government’s discovery obligations to only provide a portion of the material information at the government’s disposal. Rather, when an

¹ 16(a)(1)(E) is formally Rule 16(a)(1)(C).

allegation is made in an indictment, the government must provide all the evidence that is helpful to preparing the defense.²

To be clear, the evidence that the defense seeks is not limited to information contained in the local United States Attorney's files. Rule 16 mandates that documents and objects in the "possession, custody or control" of the government must be disclosed. Fed. R. Crim. P. 16(a)(1)(E). Under *Brady*, "[t]his personal responsibility [of the Justice Department] cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies." *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir.1992). The same principle applies with equal force to the government's Rule 16 obligations. *United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005).

In the course of their investigation, and in collecting and reviewing evidence, the prosecutors must ensure that any information relevant to this case that comes into the possession, control, or custody of the *government* remains available for disclosure. See *United States v. Marshall*, 132 F.3d 63, 69 (D.C.Cir.1998)(emphasis added). The "government" includes any and all agencies and departments of the Executive Branch of the government and their subdivisions, not just the Justice Department, the FBI, and other law enforcement agencies. *Safavian*, 233 F.R.D. at

² Not only does Rule 16 support the view that this information should be produced, but the government's own internal guidelines support the defense's request. In a memo dated January 4, 2010, David W. Odgen, then-Deputy Attorney General of the United States, encouraged prosecutors "to provide discovery broader and more comprehensive than the discovery obligations." See <http://www.justice.gov/dag/discovery-guidance.html>. Through this request, the defense is only seeking Rule 16 discovery and not the "broader and more comprehensive" discovery that the Department of Justice has identified as the best practice.

14-15. Accordingly, Mr. Hubbard requests the Court to order the government to consult with other Executive Branch agencies who possess material that is helpful to the defense with regard to the allegations identified in this motion.

Based upon the foregoing, Mr. Hubbard respectfully requests that the Court grant his Motion to Compel. Prior to filing this motion, counsel have conferred in a good faith effort to resolve the issues raised in the motion and have been unable to do so.

Respectfully Submitted,

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FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY certify that on **March 3, 2017**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Vanessa L. Chen
Vanessa L. Chen

EXHIBIT A

Initial list of discovery disclosures requested by counsel for Mr. Hubbard

1. Any evidence that Hubbard had direct contact or interaction, prior to meeting the CHS/s, with anyone connected with or believed to be connected with any individual, group or organization designated as a foreign terrorist organization or state sponsor of terror.

If so, identify the person or describe the contact, when it occurred, and the content and circumstances of the interaction.

2. Any evidence that any of the codefendants had direct contact or interaction, prior to meeting the CHS/s, with anyone connected with or believed to be connected with any individual, group or organization designated as a foreign terrorist organization or state sponsor of terror.

If so, identify the person or describe the contact, when it occurred, and the content and circumstances of the interaction.

3. Any evidence that Hubbard, during his meetings with the CHS/s had direct contact or interaction with anyone who was actually connected to or believed to be connected to any individual, group or organization which is on the United States that is designated as a foreign terrorist organization or state sponsor of terror.

If yes, when, how and with whom did he have the contact and the contents of that communication.

4. Any evidence that any of the co-defendants during their meetings with the CHS/s had direct contact or interaction with anyone who was actually connected to or believed to be connected to any individual, group or organization which is on the United States that is designated as foreign terrorist organization or state sponsor of terror.

If yes, when, how and with who did he have the contact and the contents of that communication.

5. A copy of any and all the written agreements, including ones proposed but not executed by both parties, between the CHS/s and any agencies of the U.S. Government - including but not limited to the FBI- regarding his use as a CHS/s

6. A copy of any and all the written agreements, including ones proposed but not executed by both parties, between the CHS/s and any agencies of any foreign government regarding his use as a CHS/s.

7. The content of any and all the oral agreements or understandings between the CHS/s and any agencies of the United States government - including but not limited to the FBI- regarding his use as a CHS/s.

8. The content of any and all the oral agreements or understandings between the CHS/s and any agencies of any foreign government regarding his use as a CHS/s.

9. A copy of any and all written instructions provided to the CHS/s regarding/directing his conduct in the investigation of Mr. Hubbard and his co-defendants.

10. The content of any and all written instructions provided to the CHS/s regarding/directing his conduct in the investigation of Mr. Hubbard and his co-defendants.

11. The results of any and all polygraph examinations and any reports summarizing those examinations administered to the CHS/s prior to, during the investigation of Mr. Hubbard and his codefendants and subsequent to Mr. Hubbard's arrest. If yes, for each polygraph examination, when and where each was administered, the identity and qualifications of the administrator, the duration of the examination, and the individuals to whom the results and/or report were made available.

12. The amount of money the CHS/s, his friends or family members have received as a result of his activities on behalf any and all agencies of the United States government prior to his involvement in the investigation of Mr. Hubbard and his co-defendants.

13. The amount of money the CHS/s, his friends or family members have received as a result of his activities on behalf of any and all agencies of the United States government as a consequence of his involvement in the investigation of Mr. Hubbard and his co-defendants.

14. The amount of money the CHS/s, his friends, or family members have received as a result of his activities on behalf of any and all agencies of the United States government as a consequence of his involvement in other investigations.

15. When and how did the CHS/s first come to the attention of the United States government?

16. Is there any understanding as to additional money which could be paid to the CHS/s, his friends or family members? If so, what is the amount and what are the conditions under which this money will be provided?

17. Has the CHS/s ever provided testimony under oath regarding his undercover activities on behalf of any and all agencies of the United States government? If so, please specify when, where and in what matters.

18. Regarding the immigration status of the CHS/s: a native born United States citizen? Naturalized United States citizen? Permanent legal resident? Other status?

19. Regarding the immigration status of the CHS/s family members: are they native born United States citizen? Naturalized US citizen? Permanent legal resident? Other status?

20. In addition to monetary benefits has the CHS/s, his friends or family members received any benefits or preferential treatment as a consequence of the CHS/s activities on behalf of the United States Government prior to the investigation of Mr. Hubbard and his co-defendants?

21. In addition to monetary benefits has the CHS/s, his friends or family members received any benefits or preferential treatment as a consequence of the CHS/s activities on behalf of the United States Government during the investigation of Mr. Hubbard and his co-defendants?

22. In addition to monetary benefits, is there any understanding that the CHS/s, his friends or family members might receive any benefits or preferential treatment as a consequence of the CHS/s activities on behalf of the United States Government prosecution of Mr. Hubbard and his co-defendants?

23. Prior to the investigation involving Mr. Hubbard and his co-defendants was the CHS/s, his friends or family given permission to use false personal identifying information?

24. During the investigation involving Mr. Hubbard and his co-defendants was the CHS/s, his friends or family given permission to use false personal identifying information?

25. Since the arrest of Mr. Hubbard and his co-defendants has the CHS/s, his friends or family given permission to use false personal identifying information or be placed in a witness protection program?

26. Is there any understanding with the CHS/s, his friends or family that in the future they will be given permission to use false personal identifying information or be placed in a witness protection program?

27. Prior to or during the government's use of the CHS/s did the government investigate whether the CHS/s that any mental health or substance abuse issues? If

yes, please specify the nature of the issue, whether has been any treatment and whether during the course of the investigation of Mr. Hubbard and his co-defendants the CHS/s was prescribed to take medications.

28. Does the CHS/s have any, arrests, convictions, civil proceedings, civil judgments, bankruptcy proceedings in his past, which were pending during the course of the investigation of Mr. Hubbard and his co-defendants or now pending?

29. Were there any intercepts of conversations, text messages or emails between Mr. Hubbard and the co-defendants during which the CHS/s, his friends or family members were not present? If yes, Mr. Hubbard requests the contents of those intercepted communications. If yes, please also provide the Title III application and specify whether a stingray, cell site simulator, or IMSI catcher was involved.

On February 24, 2014 undersigned counsel received one DVD containing text messages, email and videos downloaded from you to from the defendants to a CHS and forwarded to FBI. On the same day undersigned counsel was provided with two DVD's containing photos of text and WhatsApp messages from defendants to a CHS. Please advise if the government anticipates any further disclosures or whether the government believes this disclosure resolves this request in full.

30. Were there any intercepts of conversations, text messages or emails between the co-defendants during which Mr. Hubbard and the CHS/s, his friends or family members were not present? If yes, Mr. Hubbard requests the contents of those intercepted communications. If yes, please also provide the Title III application and specify whether a stingray, cell site simulator, or IMSI catcher was involved.

On February 24, 2014 undersigned counsel received one DVD containing text messages, email and videos downloaded from you to from the defendants to a CHS and forwarded to FBI. On the same day undersigned counsel was provided with two DVD's containing photos of text and WhatsApp messages from defendants to a CHS. Please advise if the government anticipates any further disclosures or whether the government believes this disclosure resolves this request in full.

31. Were there any intercepts of conversations, text messages or emails between the co-defendants and the CHS/s, his friends or family members where Mr. Hubbard was not present? If yes, Mr. Hubbard requests the contents of those intercepted communications. If yes, please also provide the Title III application and specify whether a stingray, cell site simulator, or IMSI catcher was involved.

On February 24, 2014 undersigned counsel received one DVD containing text messages, email and videos downloaded from you to from the defendants to a CHS and forwarded to FBI. On the same day undersigned counsel was provided with two DVD's containing photos of text and WhatsApp messages from defendants to a

CHS. Please advise if the government anticipates any further disclosures or whether the government believes this disclosure resolves this request in full.

32. Were any of the CHS/s friends or family members present or participants in conversations and/or actions which formed the basis of the charges against Mr. Hubbard and his co-defendants? If yes; who, when and why were they present? Did they have written authorization to be present/participate? If yes; provide the written documentation. Did they have an oral authorization to be present/participate? If yes; provide the contents of the oral authorization and the individual who gave the authorization.

33. Mr. Hubbard is requesting a mirror image of his computer and the computers of his co-defendants.

On February 24, 2017 undersigned counsel received one DVD containing the search warrant results for codefendant Jackson's laptop computer and one SD card associated with the Jackson's cell phone. Please advise if the government anticipates any further disclosures or whether the government believes this disclosure resolves this request in full.

34. Mr. Hubbard is requesting a mirror image of his cellphone and the cellphones of his co-defendants.

35. Mr. Hubbard is requesting copies of any and all CDs, DVDs, thumb/flash drives, digital storage devices and videos seized from other individuals that were reviewed as part of the investigation in the case against Mr. Hubbard and his co-defendants.

On February 24, 2017 undersigned counsel received one DVD containing the search warrant results for codefendant Jackson's laptop computer and one SD card associated with the Jackson's cell phone. Please advise if the government anticipates any further disclosures or whether the government believes this disclosure resolves this request in full.

36. Mr. Hubbard is requesting a copy of the Islamic State manifesto/training manual that the government alleges Mr. Hubbard sent to the Confidential Source in this case in May 2015, including all electronic communications relating to this conversation.

The government has provided undersigned counsel with a copy of the Islamic State manifesto/ training manual which was requested. Please advise if the government anticipates any further disclosures or whether the government believes this disclosure resolves this request in full.

37. Information as to when precisely before April 2015 any government agency first identified Mr. Hubbard as a possible target of investigation and how long Mr. Hubbard was surveilled or investigated prior to April 2015 and the results of that or those separate investigations.

38. The underlying federal or state criminal charges initially brought against the CHS/s, the facts underlying those charges against him, including the testimony the CHS/s provided against his co-defendant in that case.

Supplemental list of discovery disclosure requested by undersigned counsel

39. Does the CHS/s , his friends or family members have citizenship in countries other than the USA or in addition to US citizenship? If yes, please specify the countries of the citizenship and render if the individual is the confidential source, his friends or family members.

40. Was the CHS/s specifically directed by any agency of the United States of America to target Mr. Hubbard and/or his codefendants?

41. Was the CHS/s allowed to choose the individual/s to target without being specifically directed by any agency of the United States of America?

42. Was the CHS/s required to inform any US government agency prior to targeting an individual?

43. Did the CHS/s ever disclose to any US Government agency individuals who he targeted which did not result in evidence of criminal wrongdoing? If yes, please specify the number of individuals he targeted which did not result in evidence of criminal wrongdoing.

44. At any point, have CHS/s, friends, or family been on the “no fly” list?

45. Have any payments, including payments outside of the United States, been made on the behalf of the CHS/s, friends, or family by any and all agencies of the United States government due to his involvement in this investigation or previous ones? If so, please provide the amounts of the payments, to whom they were made, what the payments were for, and which investigation those payments were made.

46. Does the CHS/s have any arrests, convictions, civil proceedings, civil judgments, bankruptcy proceedings in another country?

47. Have Mr. Hubbard's co-defendants made any statements, including post-arrest statements or proffers, that would potentially implicate the *Bruton* doctrine and the potential for severance, namely that their statements may expressly implicate and incriminate Mr. Hubbard?

48. Please provide any policy manuals, guidance, and/or documents related to law enforcement investigation and use of confidential sources and informants in general and in national security cases in particular.

49. Was the CHS/s subjected to a Type 5 assessment prior to being used by the FBI?

50. Which were the purported area(s) for the Type 5 assessment for CHS? Specifically, was it criminal, counter Intelligence, domestic terrorism, cyber, international terrorism, weapons of mass destruction, possible foreign intelligence, another category, or a combination?

51. Was the CHS/s considered "open," as that term is defined in the policy and procedures of the FBI for more than 5 consecutive years?

52. How long was the CHS/s considered "open," as that term is defined in the policy and procedures of the FBI?

53. Was the CHS/s subjected to a Department of Defense or any other government agency records check prior to being "opened" as a confidential source?

54. Was the CHS/s subjected to a Department of Defense or any other government agency records check during any time after the CHS/s had been considered "opened?"

55. Was the CHS/s ever evaluated for, offered or requested to be placed in any witness protection program?

56. Was the CHS/s ever provided money for expenses or advanced money for expenses? If so, how much, for what expenses, when, and as a part of which investigation?

57. Where any expenses relating to the CHS/s's friends or family paid by any agency of the United States Government?

58. Was the CHS/s ever approved for extraterritorial operations, as that term is defined in the policy and procedures of the FBI?

59. Was any information regarding Mr. Hubbard or his co-defendants or the CHS/s obtained pursuant to § 702 of the Foreign Intelligence Surveillance Act of 1978 ("FISA")?

60. Was any information regarding Mr. Hubbard or his co-defendants or the CHS/s obtained pursuant to Executive Order 12333?

61. Was any information regarding Mr. Hubbard or his co-defendants or the CHS/s obtained pursuant to the DEA's phone database that is shared with the NSA?

62. Was any information regarding Mr. Hubbard or his co-defendants or the CHS/s received from a foreign country?