

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

AFFIDAVIT

v.

Case No.: 15-CR-227-A

RICHARD PETIX,

Defendant.

STATE OF NEW YORK)
COUNTY OF MONROE) ss:

STEPHEN M. LEONARDO, being duly sworn, deposes and says:

1. I am an Attorney admitted to practice in the Western District of New York and, am the Attorney for the Defendant herein. As such, I am fully familiar with the facts and circumstances of the charges pending against the Defendant in this Court, namely, an Indictment accusing the Defendant of making false statements in violation of 18 USC 1001(a)(2).

2. That to date your affiant is familiar with the facts and circumstances of this matter by virtue of my review of the indictment, pleadings and papers filed to date together with my receipt and review of the items furnished in conformity with the Government's voluntary discovery process.

3. That the relief requested herein is not intended to be duplicitous, relates to the Indictment filed against the above caption Defendant, and is timely and in conformity with the existing order issued by this Court. Indictment attached as Exhibit "A".

A. DISCOVERY AND INSPECTION: RULE 16

4. Defendant requests an order of pre-trial Discovery and Inspection pursuant to Federal Rule of Criminal Procedure, Rule 16, the following:

a. Any statement of the defendant in any form intended to be utilized by the

Government within Rule 16 (a) (1) (A).

b. Any statement in any form of which the Government is aware or through the exercise of reasonable diligence should be aware of any alleged co-conspirator, or accomplice, indicted or unindicted, or co-defendant, made during, in the course of and in furtherance of the alleged crime charged in the indictment. (U.S. v. Nakashian, 635 F. Supp. 716, S.D. NY 86). Hereunder all co-defendant/co-conspirator statements are demanded. It is submitted that the Defendant is entitled to pre-trial disclosure as well, of all statements of non-testifying co-conspirators and accomplices, charged or uncharged, and within or without the present indictment, that may be potentially imputable to the defendant if admitted into evidence under the co-conspirators hearsay rule (See: F.R.E. 801 (d) (2) (E); U.S. v. Jackson, 757 F.2d 1486 (C.A. 4 1986; U.S. v. Feola, 651 F. Supp. 1068).

c. Any statement, representation or communication ascribed to this defendant by any witness alleged to have been made during the course of any conspiracy or substantive crime charged in the indictment.

d. Any statement, representation or communication ascribed to this defendant made to any charged or un-indicted co-conspirator or co-defendant at any time relevant to any event charged in this indictment.

e. Any statement, representation or communication ascribed to this defendant made during and after the commission of the alleged crimes and whether part of the alleged crime or not.

f. A copy of this defendant's prior criminal record if any (Rule 16 (a) (1) (B) and the reservation of right *in limine* to apply to this Court for a fact--finding hearing regarding the extent and nature of the Government's use on cross-examination of any such criminal record and/or any of the underlying facts thereto.

g. Directing the Government to turn over all documents, photographs, video tapes and tangible objects not already disclosed pursuant to Rule 16 (a) (1) including, without limitation, duplicate images of any hard drive, thumb drive, flash drive (in encase format) or similar electronic data storage device alleged to be possessed by the Defendant. The Defendant requires an Order from this Court directing the Government turn over/disclose this information as the Government as previously refused to do so without such Order. See, Exhibit "B".

h. All reports of examinations and tests pursuant to Rule 16 (a) (1) (D); U.S. v. Feola, 651 F. Supp. 1068 S.D. NY 87, inclusive but not limited to forensic examinations of the items referred to in paragraph (g) above.

i. Copies of all surveillance reports of the defendant for the period of time covered in the indictment herein together with copies of all rough or raw police notes taken as part of the investigation regardless of whether same have been incorporated in official records.

j. All videotapes in which the defendant's image appears.

k. All photographs in which the defendant's image appears, including, but not limited to, any photograph used in an identification procedure.

l. Any search warrant obtained by law enforcement officials for any property or premises allegedly belonging to, or possessed by, the Defendant. Any reports, statements or logs regarding the Defendant's arrest, or the arrest of any accomplices, whether charged or uncharged.

m. All requests hereunder apply to materials in the Government's possession or which should be known to same through the exercise of reasonable diligence; are statutorily authorized and are material, necessary and reasonable to the Defendant's preparation of his defense, the effective assistance of counsel and due process of law.

B. BILL OF PARTICULARS; RULE 7 (f)

5. Pursuant to Rule 7 (f); the 6th Amendment to the United States Constitution; U.S. v. Bortnovsky, 820 F.2d 572 (2nd Cir. 1987); U.S. v. Santoro, 647 F. Supp. 153 (E.D. NY 1986) and U.S. v. Ramirez, 602 F. Supp. 783 (SD NY 1985) the defendant requests the following:

a. With respect to Count 1 the defense requests:

i. A more precise indication of the time and date that the act described in the Indictment occurred.

ii. A more precise indication of the exact place where the act described in the Indictment occurred.

iii. The substance of the Defendant's conduct encompassed by the charge contained in the Indictment.

6. A Bill of Particulars must be furnished where the information necessary to effectively defend a criminal charge is not contained in the indictment or otherwise provided; (Bortnovsky, supra; U.S. v. Panza, 750 F.2d 1141 (2nd Cir. 1984).

7. While it is clear that the Government is not obligated to preview its case or expose its legal theory, U.S. v. Leonelli, 428 F. Supp. 880 (SD NY 1977) it is also clear that fairness and due process must be afforded to a defendant and that he must be given sufficient notice of the nature of the charges against him. (U.S. v. Davidoff, 842 F.2d 1151 (2nd Cir. 1988).

8. With regard to the indictment, it is crucial to the preparation of an adequate defense that the requested information be provided to the defense.

C. "BRADY", "AGURS", AND "GIGLIO" MATERIAL

9. The defendant herein requests that the Government under the due process clause of the Constitution, statutes of the United States and their case law interpretations specifically turn over evidence at this time in its possession or which through the exercise of due diligence

it should be aware of which is in any way favorable to the defendant and material to guilt, innocence or punishment (*Brady*) including but not limited to any illegal conduct inclusive of any unauthorized video surveillance, electronic surveillance, wire-tapping or trespassory search effectuated against this defendant in any way or to statements, grand jury testimony, witnesses, books, papers, reports, photographs, handwritten notes or synopses of statements made by any witness or non-witness, or any other tangible items of evidence in the custody or control of the prosecution or any other governmental agency or agents working under the supervision of the Government and inclusive of the rough notes, surveillance notes or memos of any government agent regardless whether ultimately utilized in this prosecution; or in any way impeaches the credibility, factual assertions, testimony or allegations of any government as to any phase, particular or aspect of his or her testimony or as to the case, theory or presentment by the Government and all within the opinions, mandates and requirements of *U.S. v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Giglio*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). It is asserted that the due process clause requires the pre-trial disclosure of exculpatory or impeachment material (See: *U.S. v. Agajanian*, 852 F.2d 56 (2nd Cir. 1988) and access to evidence (See: *Arizona v. Youngblood*, 109 S.Ct. 333 et seq.) in order to assure the defendant overall fairness, due process, compulsory process and those rights guaranteed by the 6th Amendment. In *U.S. v. Percevault*, 490 F.2d 126 (2nd Cir. 1974) the Court recognizing "those abhorrent lengthy pauses at trial to examine documents" (at 132) and noting its discretion in administering disclosure encouraged pre-trial disclosure that would redound to the benefit of all parties, counsel and the court.

10. The substance of any "deals", understandings, contracts, or agreements by the government or any of its agents or agencies with any individuals who may serve as witnesses, consultants or sources of information to any law enforcement agency whereby the said

individual may expect immunity or other favorable treatment inclusive of sentence, parole, probation or sentence reduction in return for his/her cooperation or testimony in this or any other prosecution and/or any interest, motive or bias on the part of any Government witness (*Bagley v. U.S.*, 105 S.Ct. 3375 (1985)).

a. Any polygraph results, questions; answers, evaluations; "print-outs"; tapes or any papers, documents, reports, notes or memoranda as to any Government witness inclusive of any informant, co-conspirator indicted or unindicted or accomplices as a matter of fact or law--particularly, if this information contradicts or is at variance in the slightest degree to any police report; agents notes, prior sworn or unsworn statement or testimony of said witness. (*Carter v. Rafferty*, 826 F.2d 1299; *Giglio v. U.S.*, 405 U.S. 150).

b. The criminal records of any prospective prosecution witnesses and any information indicating that these witnesses have prior to or during the trial itself perpetrated any immoral, vicious or criminal acts (*Giles v. Maryland*, 386 U.S. 66).

c. Any information relative to the psychiatric history of any potential witness or source of information utilized in any manner in the framing or preparation of this case.

11. That the early production of the instant exculpatory ("*Brady*"; "*Agurs*" impeachment ("*Giglio*") material is of a constitutional dimension and implicates the due process clause. (See: *U.S. v. Deutsch*, 373 F. Supp, 289 (SD NY 1974); *U.S. v. Agajanian*, 852 F.2d 56 (2nd Cir. 1988); *Arizona v. Youngblood*, 109 S.Ct. 333; *U.S. v. Valenzuela-Bernard*, 458 U.S. (1982), implicating the due process clause and the constitutionally guaranteed access to evidence; *U.S. v. Pollack*, 534 F.2d 964 (DC Cir. 1976, cert. den. 429 U.S. 924 (1976)).

12. The defendant also requests the Government, in the interests of sound trial management, judicial economy and due process, provide all so called "Jencks Act material"

thirty days prior to jury selection (*U.S. v. Percevault*, 490 F.2d 126 (2nd Cir. 1974); *U.S. v. Feola*, 651 F. Supp. 1068 (SD NY 1987)).

D. RULE 12 (d) (2) NOTICE

13. That to date the defendant has received some voluntary discovery.

14. That the relief sought herein is the product of the culling through and analysis of the implications of these documents.

15. That should the Government intend to utilize any additional matters or materials as specifically requested here or elsewhere in this motion a particularized recitation of same together with all such potential evidence is requested.

16. Defendant would specifically requests the following items:

a. Exact duplicate copies of any hard drives, thumb drives, flash drives (in encase format) or similar electronic storage devices.

b. The substance of any "deals", understandings, contracts, or agreements the government has with any cooperating witnesses. *Bagley v. U.S.*, 105 S.Ct. 3375 (1985).

c. To the extent the Government has provided or provides discovery electronically and/or by compact disc, that it do so in a format that is readable and/or accessible to defense counsel.

E. MOTION IN LIMINE (PRIOR BAD ACTS, ETC.)

17. Defendant moves this Court to restrict the evidence upon the trial of this indictment as follows:

a. Rules 404 (b) and 607; 608 and 609.

Defendant requests that the Government submit to the defendant a list of any and all convictions, crimes, wrongs, bad acts, immoral or vicious acts, charged or uncharged to be utilized pursuant to Rules 404 (b) and 609. Herein the defendant specifically requests the

Government to disclose the use of any of the acts described herein in its case in chief which have as their purpose the establishment of motive; intent; identification; absence of mistake or similarity in modus operandi. If the Government intends to do so, then defendant requests that the Government be required to disclose the names and addresses of any witnesses and the evidence on which it intends to rely in attempt to establish same. Although F.R.E. 404 (b) fails to specifically require advance notice of such other crimes, criminal acts, bad acts, wrongful conduct prior to trial for use on the Government's direct case, the Court, nevertheless has the power to require such pretrial disclosure as an exercise of discretion in the interests of fairness; the elimination of prejudice and the efficient and orderly administration of justice (See: *Weinstein's Evidence* §404 (01), p. 404-13).

b. Pursuant to F.R.E. 607, 608 and 609 the 5th and 6th Amendments.

The defendant requests more particularly all specific instances of conduct within Rule 608 (b) and 609 which the Government intends to use at trial for purposes of impeaching the credibility of the accused upon cross examination.

c. Co-conspirator Declarations.

Defendant requests an advance ruling pre-trial or at least at side-bar or by offer of proof or in such manner as this Court shall direct prior to the elicitation of any evidence regarding alleged co-conspirator, co-defendant or accomplice declarations until and unless a proper foundation is established by the Government and a determination made as a matter of fact and law by the Court outside the presence of the jury so as to avoid the deleterious effect of the improper and prejudicial admission of such statements which many times, for example, are offered on a basis of subject to connection and which as common practice and experience has demonstrated repeatedly that the prejudicial effect of same are lasting and not easily

removable by curative instructions or a particularly adroit charge. (*Bourjaily v. U.S.*, 107 S.Ct. 2775 (1987)).

F. SUPPRESSION OF STATEMENTS

18. Defendant, **RICHARD PETIX** moves that this Court to suppress any and all statements made by the Defendant to Government agents on December 3, 2015 and other dates pursuant to FRCP 12(b)(3), due to violations of Defendants Fifth, Sixth and Fourteenth Amendment rights.

19. As described in the Discovery, the Defendant is alleged to have made statements to Government agents at the time of his detention and arrest. .

20. The Defendant submits that any statements he made to law enforcement were involuntarily made in violation of the Sixth Amendment Right to Counsel. See *Crane v. Kentucky*, 476 U.S. 218 (1973) (totality of circumstances test). Defendant was arrested, and subsequently questioned, as he left court for a related charge. Defendant had counsel on the related charge. This questioning, therefore, took place in violation of his right to counsel. *United States v. Mills*, 412 F.3d 325, 327-28 (2ND Cir. 2005).

21. Any statements were also taken in violation of his Fifth Amendment Right to Remain Silent.

22. Further, the statements made by Defendant were in the course of custodial interrogation. Defendant was under arrest in the inherently coercive environment of a police station. See *Dunaway v. New York*, 442 U.S. 200 (1979).

23. Any statements were taken without the benefit of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

24. Any statements made by Defendant were involuntary as he was threatened by law enforcement officials and promises were made to him to get him to speak to law enforcement.

Upon information and belief, the source being my conversation with the Defendant and/or Brittany Benight (who was also subsequently charged with a violation of 18 USC 1001 stemming from the same incident), during the interrogation of the Defendant, officers told him that his live in and longtime girlfriend, Brittany Benight would not cooperate with law enforcement and was going to be arrested and the their respective children, (who were there at the time) would be placed with a child protective agency. Defendant was, threatened that if he did not give a statement he would spend a long time in prison. Implied in that threat, on the other hand, is the promise that if he makes a statement he would receive leniency. Thus, the statements were involuntarily made as a result of threats of a harsh sentence and a promise of leniency. *United States v. Harrison*, 34 F.3d 886, 891-92 (9TH Cir. 1994).

25. Based upon the foregoing, Defendant requests a Hearing, pursuant to 18 U.S.C. § 3501, and *Jackson v. Denno*, 378 US 368 (1964) to determine whether statements made by him to Government agents should be suppressed.

G. SUPPRESSION OF ITEMS RECOVERED DURING A SEARCH OF DEFENDANT

26. Defendant moves to suppress evidence obtained during a search of his person on December 3, 2015 as this search and seizure was not based upon probable cause or otherwise lawful, and done in violation of his Fourth and Fourteenth Amendment rights and *Terry v. Ohio*, 392 US 1 (1968).

27. Specifically, the Defendant, while in a public restaurant and awaiting the arrival of his mother and in the general company of Brittany Benight and their respective children, was taken into custody by federal probation and/or Homeland Security officers on December 3, 2015. Thus, Defendant was “seized” by this police action. *Brendlin v. California*, 551 US 249 (2007).

28. At this point, Defendant was arrested and frisked. Nothing was found on his person except a cellular telephone and laptop computer where nearby the Defendant and seized. Thereafter, government agents went to the automobile the Defendant was riding in, where Brittany Benight and their respective two children were seated, and searched said automobile, without permission or consent, and seized additional items, including, upon information and belief, several flash drives.

29. The seizure of the cellular telephone and/or the laptop computer was not justified under the circumstances. And, after the seizure of these items, the subsequent search and seizure of items from the automobile the Defendant was riding in was unreasonable.

30. Defendant, therefore, requests hearing to determine the reasonableness of the law enforcements actions on December 3, 2015 that resulted in the arrest of the Defendant and search and seizure of the items described above.

H. PRESERVATION OF ROUGH NOTES

31. Defendant move for an Order of this Court requiring all governmental enforcement officers who participated in the investigation of the defendant in this instant case to retain and preserve all rough notes taken as part of their investigation whether or not the contents of the notes are incorporated in official records.

32. This motion is made so that the Trial Court can determine whether disclosure of the notes is required under Brady, Agurs, Giglio, and/or the *Jencks Act* (18 U.S.C. Sec. 3500 or the Fifth and/or Sixth Amendments to the U.S. Constitution).

33. The thrust of this motion is to put the government and its agents on notice that from this point on any and all rough notes referred to above should be preserved. Any destruction of notes after this request for preservation cannot be claimed to have been made in good faith.

34. For authority please consult U.S. v. Sanchez, 635 F.2d 47 (2d Cir. 1980); U.S. v.

Eleusma, 849 F.2d 76 (2d Cir. 1988); *U.S. v. Koskerides*, 877 F.2d 1129 (2d Cir. 1989).

I. RESERVATION OF RIGHT TO BRING FUTURE APPLICATIONS

35. Your affiant requests an order preserving Defendant's right to bring such other and further relief as may be just, appropriate and reasonable as consistent with the premises herein. The Court has the authority to grant such Order based upon its inherent jurisdiction in all matters before it and fairness in the administration of justice (Rules 12 and 2).

WHEREFORE, your affiant requests an order granting the relief sought herein together with such other and further relief as is just, reasonable and equitable under the circumstances extant.

/s/ Stephen M. Leonardo, Esq.
STEPHEN M. LEONARDO, ESQ.

Sworn to before me this
23rd day of February, 2016.

/s/ Joseph R. Sullivan
NOTARY PUBLIC