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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>STEVEN DWIGHT HAMMOND and DWIGHT LINCOLN HAMMOND,<br><br>Defendants. | Case No. CR 10-60066-HO<br><br>DEFENDANTS' REPLY TO UNITED STATES'S RESPONSE (CR 28) TO DEFENDANTS' FIRST MOTION FOR DISCOVERY |

Defendants agree with most of the broad statements of discovery law cited in the Government's Response and recognize that the government has provided the defense with a large amount of material.[1]

[1] Defendants also appreciate the government's approach that "it understands its continuing discovery obligations and has been and will continue to provide all relevant, discoverable materials," CR 28, pp 1-2, the government's commitment that "any additional relevant, discoverable items will be provided to defendants as they become

However, much of the voluminous discovery provided to the defense is unexplained, unclear, duplicative, and confusing. It consists of electronic copies of paper documents, but omits the name or copy of the file folders in which the documents were originally kept, often rendering it difficult or even impossible to understand the documents. There is also a great deal of duplication of documents and reports, including the incorporation of various reports into one another, which make reconstructing chronologies and original sources of particular matters extremely challenging. The discovery also contains scores, if not hundreds, of photographs that are unlabeled and not otherwise identified, making it impossible to determine what they depict and when they were taken. The government clearly has an obligation to provide discovery in an accessible form. *See United State v. W.R. Grace*, 455 F. Supp. 2d 1140 (D. Mont. 2006); *United States v. Salyer*, 2011 WL 1466887 (ED CA 4/18/11).

The defense brought these difficulties to the attention of government counsel months ago. On June 20, 2011, prior to the last status conference, defense counsel, counsel for the government, and the government discovery paralegal met and reviewed the discovery in its original, hard copy form. The government recognized that the electronic version of discovery provided to the defense made it difficult and time consuming to locate documents, that the current form of discovery was difficult to manage, and that numerous discovery photographs lacked identifying information.

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available to the government," CR 28, p. 3, the government's understanding that its obligations extend to "the files of the Department of Justice and of the investigative agency and any other law enforcement agencies that are a part of the prosecution team," CR 28, p. 3, and the government's agreement to "make appropriate inquiries" to identify and obtain discoverable information from other government agencies. CR 28, p. 4.

As a result of the June 20, 2011 meeting, the government agreed to provide clarifying data, including missing file folder names and labels, and information concerning the numerous photographs that lacked identifying labels or logs. The government advised defense counsel during that meeting that this material would be provided by approximately June 30, 2011. The defense has not yet received it. The defense remains optimistic, however, that it will be provided in the near future, along with other items promised in the government's response.

Given the additional material expected to be provided by the government, and given the government's statements that it understands its discovery obligations, *e.g.*, CR 28 pp. 1, 2, 7, 10, 13, 18. 19, 20, the defense believes it is unnecessary and premature for this Court to make an item-by-item ruling on defendant's discovery requests at this time. That does not mean that the defense anticipates that the parties will agree about everything or that rulings by the Court regarding specific items will not be required at some point, but it does not believe, with one specific exception, that that point has yet been reached.

The exception is that defendants seek a ruling on July 25, 2011 on their request for the disclosure of handwritten notes regarding statements made by witnesses or defendants to agents of the government. CR 18, pp. 17-18. In their original discovery motion, defendants relied upon *United States v. Harris*, 543 F.2d 1247, 1253 (9th Cir. 1976) and *United States v. Layten*, 564 F. Supp 1391, 1395 (D. Or. 1983) as demonstrating that they were entitled to the production of notes. In its response, the government relies primarily on *United States v. Taylor*, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986). *Taylor*, however, is distinguishable. *Taylor* holds that to establish a constitutional violation under *Brady*, the defendant must prove the rough notes contained favorable evidence

material to innocence. Defendants do not disagree with this principle. But the issue here is not whether the government's failure to produce the notes constitutes a *Brady* violation; it is whether, upon pretrial request, the notes are subject to production. *Harris* and *Layten* hold that they are. Moreover, while not deciding the issue, *Taylor, supra,* assumed that "rough notes contained 'statements within the meaning of the [Jenks} Act." 802 F.2d at 1108.

Judge Hogan's Discovery Order in *United States v. Sedaghaty*, Cr. No. 05-6008-HO, CR 191, p. 7, required, well before trial, that notes be provided: "Items B16 and 17 concern notes or memoranda of any agents of the government. The government shall provide notes regarding interviews with defendant and witnesses."

This case is also assigned to Judge Hogan. Defendants ask this Court to follow Judge Hogan's ruling in *Sedaghaty* and order the government to "provide notes regarding interviews with defendant and witnesses."

RESPECTFULLY SUBMITTED this 22nd day of July, 2011.

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