

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

United States of America,)	
)	
Plaintiff,)	ORDER RE DEFENDANT’S
)	DISCOVERY MOTION AT
vs.)	DOC. NO. 81
)	
Michael Arthur Giron, a/k/a)	Case No. 1:17-cr-0031
Michael Geron,)	
)	
Defendant.)	
)	

I. INTRODUCTION

Defendant is charged in this criminal case, which arises out of the protests over the Dakota Access Pipeline (“DAPL”), with the offenses of engaging in civil disorder and using a fire to engage in civil disorder. The charged conduct is alleged to have occurred on October 27, 2016. Presently, trial is scheduled for April 20, 2018.

On April 21, 2017, and pursuant to the stipulation of the parties, the court entered a Stipulated Discovery Order and Protective Order (“Stipulated Discovery Order”). (Doc. No. 25). Now before the court is defendant’s “Motion for the Search and the Disclosure of Particularized Brady Exculpatory Evidence Revealing Entrapment or Factual Innocence and Related Giglio Impeachment Evidence.” (Doc. No. 81). This motion is in addition to a series of earlier discovery motions that were addressed by the court in an order dated December 18, 2017. (Doc. No. 86).

In the present motion, defendant asks the court to “order the Government to conduct an adequate search of its own files and those of related cooperating, private security firms and disclose to the defense all exculpatory evidence and impeaching evidence including on the following

exculpatory matters[.]” The defendant then lists the items he claims constitute exculpatory or impeachment evidence.

II. THE GOVERNMENT’S OBLIGATIONS UNDER *BRADY/GIGLIO*

Before addressing the merits of the motion, some general observations are in order with respect to the government’s obligations under Brady v. Maryland, 373 U.S. 83 (1963) (“Brady”), Giglio v. United States, 405 U.S. 150 (1977) (“Giglio”), and Kyles v. Whitley, 514 U.S. 419 (1995) (“Kyles”).

In Brady, the Supreme Court held that the suppression of evidence after request for it having been made violated due process. In subsequent cases, the Supreme Court extended Brady to impose upon the government an affirmative obligation of disclosure of exculpatory evidence irrespective of whether a request had been made. See, e.g., Kyles, 514 U.S. at 432-34 (reciting the relevant history). In Giglio, the Supreme Court extended the framework established in Brady to impeachment material that may affect the credibility of government witnesses. Then later, in Kyles, the Supreme Court made clear that the government's obligations of disclosure under Brady/Giglio extend beyond the prosecutor's files to what is also in the hands of its investigators.

In addressing the present motion, it is helpful to emphasize what is not required of the government under Brady/Giglio. First, the government’s obligations of disclosure under Brady/Giglio are limited to evidence that is either exculpatory or has value for impeachment. Notably, “[t]he Government has no duty to disclose [under Brady/Giglio] evidence that is neutral, speculative, or inculpatory, or evidence that is available to the defense from other sources.” United States v. Pendleton, 832 F.3d 934, 940 (8th Cir. 2016). Any discovery of these latter categories of evidence is limited to that permitted by Fed. R. Crim. P. 16(a) or that may be secured by subpoena pursuant to Rule 17(c).

Second, the obligations of disclosure under Brady/Giglio extend only to evidence that is within the government's possession and control. There is no obligation to search for Brady/Giglio material that may be in the possession of others. See, e.g., United States v. Graham, 484 F.3d 413, 417 (6th Cir. 2007) (“Brady and its progeny have recognized a duty on the part of the prosecutor to disclose material evidence that is favorable to the defendant over which the prosecution team has control. But Brady clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess.”) (internal quotations omitted).

Finally, the responsibility for insuring compliance with Brady/Giglio rests primarily upon the good faith and professionalism of the government's prosecutors, particularly since prior to trial it is difficult for the court to determine “the significance of an item of evidence [in terms of Brady/Giglio] until the entire record is complete.” United States v. Agurs, 427 U.S. 97, 108 (1976).¹ At this stage, if a defendant makes a general request for all Brady/Giglio material, there is often little for the court to do, particularly when the government acknowledges its obligations of disclosure, represents it has conducted the necessary searches, and states it will continue to comply with its obligations. See, e.g., United States v. Tran, No. 09-172, 2009 WL 10678874, at *2 (D. Minn. Oct. 9, 2009) (motion for disclosure of all evidence favorable to the accused deemed moot when the government stated it was aware of its obligations under Brady/Giglio and that it had complied and would continue to comply).

If a more targeted motion is made seeking specific items of evidence claimed to be Brady/Giglio material, the defendant must make a preliminary showing that amounts to more than mere surmise, conjecture, or speculation that the evidence sought constitutes Brady/Giglio material

¹ It is for this reason that court enforcement of Brady/Giglio often occurs following trial, first in a motion for a new trial and then later, if necessary, upon appeal.

before compliance will be ordered. See, e.g., United States v. Van Brocklin, 115 F.3d 587, 594–95 (8th Cir. 1997) (stating it is the prosecutor's duty to determine whether any document or file constitutes Brady/Giglio material and that the district court is not obligated to conduct an *in camera* review absent a colorable showing that the document or file constitutes such material); United States v. Roach, 28 F.3d 729, 734 (8th Cir. 1994) (trial court did not err in denying a motion for production of exculpatory evidence when defendant made no preliminary showing that the requested information was exculpatory); United States v. Krauth, 769 F.2d 473, 476 (8th Cir. 1985) (same). In many instances, the defendant may not possess the information required to make the preliminary showing. But this is simply another situation where the responsibility for compliance with Brady/Giglio rests primarily upon the government's prosecutors with the court only becoming involved later if it turns out the prosecutor was less than diligent.

III. DISCUSSION

A. **Requests A-C & F**

- A. *All evidence that government and state law enforcement, undercover officers, informants, paid or otherwise, or employees or agents of private security firms, instigated, participated, facilitated, or any in any way encouraged the commission of violent acts on October 27, 2016, or the setting of any fires including fuel or other supplies necessary to ignite fires. [footnotes omitted]*
- B. *All evidence that government and state law enforcement, undercover officers, informants, paid or otherwise, or employees or agents of private security firms were involved in the planning or suggestion of acts of violence and/or fires on October 27, 2016, in connection with the events of that day involving the vicinity of County Road 34 and Highway 1806, including the barricade alleged to have been ignited by Defendant Giron and any acts of violence directed towards the law enforcement officers at the scene of the retaking of North or treaty camp on October 27, 2016.*
- C. *Any evidence of law enforcement or private intelligence or security firm personnel behavior or actions on or before October 27, 2016, which would support the defense of outrageous governmental misconduct or entrapment in connection with the acts of violence alleged on October 27, 2016, by water protectors also known as protesters, and the setting of fires on that day. The request includes all evidence*

regarding persons recruited, paid, encouraged, sponsored, or directed by law enforcement or private firms, including all investigations of private security, federal or state, by law enforcement for suspected crimes and reports provided to State's and US Attorneys. Request includes organization chart and/or incident organization chart listing the commanding officers and indicating the command structure which would include both law enforcement and private intelligence and security personnel.

- F. All evidence that the violent acts used as predicates for the 'civil disorder' alleged in Counts 1 and 2 were influenced, encouraged, facilitated, or otherwise promoted by persons employed or recruited by state and federal law enforcement agencies and private security firms, and any cooperators testified for purposes of this motion.*

Defendant contends in these requests that the government is obligated to search all of the records and query all of the personnel of every federal, state, and local law enforcement agency that had anything to do with the DAPL protests (including those from out-of-state that provided assistance) as well as doing the same for a private security firm employed by the owner of the pipeline so as to insure that defendant is provided with any information that conceivably might be Brady/Giglio material. In support of this contention, defendant proffers evidence which he contends proves that all of these government entities, along with the private security firm, coordinated their efforts in dealing with the DAPL protests that took place at various sites and over an extended period of time.

The government's response with respect to requests A-C and F essentially is that: (1) it is aware of its obligations under Brady/Giglio, including its obligation to search beyond the prosecutor's files for information that is in the hands of its investigators or others who may have acted on its behalf as required by Kyle; (2) that it does not have in its possession (as it defines possession) any of the described material; and (3) that it has made efforts to determine whether such material exists beyond what it is required to do under Brady/Giglio/Kyle (albeit with no guarantee that these additional efforts have been exhaustive) and that no information has been found. In making this response, the government does not agree, however, that it has an affirmative obligation

to secure responsive information from every law enforcement agency (whether from within the State or from without) that was involved in the DAPL protests or from the private security firm. Rather, it contends its obligation under Brady/Giglio extends only to the “prosecution team” involved in the investigation and prosecution of the acts for which the defendant has been charged and that this notably did not include the private security firm.²

In this instance, the court agrees with the government. Any coordinated effort that may have been engaged in by federal and state law enforcement agencies to protect the peace and private property during the DAPL protests does not *ipso facto* make every such federal and state agency, or the private security firm, part of the prosecution team with respect to the investigation and prosecution of the specific acts of criminal conduct with which the defendant is charged. Rather, the government’s obligation to search for Brady/Giglio material is more narrow and is limited to the information in its possession as well as those who may have acted, or can be said to have acted, on its behalf, if there was a joint effort with other law enforcement agencies to investigate and prosecute the defendant for the acts he is charged with committing on October 27, 2016. See, e.g., United States v. Naranjo, 634 F.3d 1198, 1211–13 (11th Cir. 2011) (Brady applied only to information possessed by the federal government where the federal and state investigations were separate and distinguishing cases where there was a pooling by federal and state authorities of their investigative resources for purposes of investigation and prosecution and the state investigators functioned as agents of the federal government); United States v. Pelullo, 399 F.3d 197, 216 (3d Cir. 2005) (“Kyles cannot be read as imposing a duty on the prosecutor's office to learn of information possessed by

² While defendant has proffered evidence that the pipeline’s private security firm in some instances provided information to law enforcement agencies with respect to the DAPL protests and also in some instances coordinated their efforts with law enforcement, defendant has offered no evidence that the private security firm was involved in the investigation and prosecution of this defendant with respect to the conduct charged in this case. In other words, its suggestion that the private security firm is or was part of the “prosecution team” is nothing more than speculation.

other government agencies that have no involvement in the investigation or prosecution at issue.”) (internal quotations omitted); United States v. Ferguson, 478 F. Supp. 2d 220, 238–39 (D. Conn. 2007) (discussing cases that address when a joint investigation and prosecution might trigger an obligation for disclosure of Brady/Giglio material in the possession of state or local law enforcement authorities).

Consequently, given (1) the government’s representation that it has made a search for any Brady/Giglio information within its possession and control as defined by the foregoing cases that would be responsive to Requests A-C and F and has found none, (2) the government’s representation that it will continue to comply with its obligations of disclosure under Brady/Giglio should any responsive information be uncovered, and (3) the defendant’s failure to make a preliminary showing that amounts to more than speculation and conjecture that the government possesses any Brady/Giglio material responsive to Requests A-C and F, the court will not order any affirmative relief. See, e.g., United States v. Loera, No. 4:13-cr-3025, 2013 WL 2947681, at *1 (D. Neb. June 13, 2013) (denying Brady motion to compel additional documentary evidence based on the government’s representations that it provided all such information and absent any preliminary showing by defendant to the contrary); United States v. Huggans, No. 4:07-cr-541, 2008 WL 4066398, at *12 (E.D. Mo. Aug. 27, 2008) (denying Brady motion for production of investigation reports for a separate conspiracy when defendant could only offer the possibility the reports contained exculpatory information and the government acknowledged its obligations under Brady to disclose any information in the investigation of the separate conspiracy that might be exculpatory as to the defendant).

That being said, in making Requests A-C and F, the defendant has put the government on notice of what he contends constitutes Brady/Giglio evidence in the context of this case. If it turns

out later that the government did have such material within its possession and control (as defined by the foregoing cases) and that the material was in fact either exculpatory or helpful for impeachment, then the government will have to deal with the consequences, most likely in a post-trial motion brought by defendant for dismissal or a new trial. And, in any such instance, the court's ruling now provides no immunity to the government later.

B. The remaining requests

D. All evidence and documentation of property confiscated, intercepted, seized by state, law enforcement or private security or which was left behind or abandoned by water protectors or protestors on October 26-30, 2016.

The government responds to this request stating that, to its knowledge, (1) the protesters were given the opportunity to take their property, (2) any property that was left behind was removed and destroyed, and (3) any relevant property of which the government is aware has been disclosed. Given this, as well as, more fundamentally, the fact defendant has made no preliminary showing that any property left behind constitutes Brady/Giglio material, no relief will be granted with respect to this request.

E. All evidence of land ownership, land claims and disputes, non-ceded territory claims, the existence of sacred sites, BIA communications and enforcement authority, involvement with the Meyer's Ranch, communications regarding law enforcement and private security presence on Turtle Hill, and communications regarding law enforcement permissions given to Water Protectors as to access to land, provision of services at the Oceti Sakowin camp, and access to sacred sites.

The court denies this request based on the lack of showing that the requested information constitutes Brady/Giglio material with respect to the specific acts of charged conduct. Also, the request is overbroad, vague, and lacking in materiality.

G. All evidence that would serve to impeach, contradict or otherwise provide evidence of inconsistent statements by state and federal law enforcement and private security firm witnesses called by the government or the defense in their trial or pretrial hearing testimony including claims that no such informants, provocateurs or other

citizen cooperators were involved in the instigation, initiation, suggestion, planning, aiding, encouragement or commission of violent acts or arson on October 27, 2016. This includes but is not limited to law enforcement's personal phone and email communications relevant to the DAPL and Water Protector operations, additional video evidence including GoPros, body cams, officers personal cell phone photographs, helicopter and aircraft video, forward looking infrared (FLIR), drone video and photos and intercepted cellular traffic and all radio communications.

This request appears to be cumulative to what is demanded in Requests A-C & F. The only material difference appears to be a more specific listing of places where the defendant suggests the government needs to look for any Brady/Giglio information.

For the reasons articulated with respect to Requests A-C & F above, no relief will be granted with respect to this request.

III. REQUEST FOR A HEARING

After careful review of the motion, briefs, and the extensive material filed by defendant in support of the motion, the court concludes that what has been filed is sufficient to resolve the motion and that a hearing is not required.

IV. COURT ORDER

For the reasons articulated above, including the government's representation that it is aware of its obligations under Brady/Giglio and will continue to comply with them, the court **DENIES WITHOUT PREJUDICE** defendant's motion for discovery at Doc. No. 81.

Dated this 11th day of January, 2018.

/s/ Charles S. Miller, Jr.

Charles S. Miller, Jr.

United States Magistrate Judge