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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF IDAHO
(HONORABLE B. LYNN WINMILL)

7 UNITED STATES OF AMERICA,) CR-10-148-N-BLW
)
8 Plaintiff,)
) MEMORANDUM IN SUPPORT OF
9 vs.) MOTION FOR DISCLOSURE
) OF INFORMANT MATERIAL
10 EDGAR STEELE,)
)
11 Defendant.)

12 TO: WENDY J. OLSON, UNITED STATES ATTORNEY
TRACI J. WHELAN, ASSISTANT UNITED STATES ATTORNEY
13

14 EDGAR STEELE submits the following memorandum in support of
15 his motion for disclosure of Informant Material.

16 **I. INTRODUCTION AND RELEVANT BACKGROUND**

17 Mr. Steele is charged in a four count Indictment with violations of
18 Use of Interstate Commerce Facilities in the Commission of a Murder for
19 Hire, Use of Explosive Material to Commit a Federal Felony, Possession
20 of a Destructive Device in Relation to a Crime of Violence, and
21 Tampering with a Victim. Thus far, Government provided discovery
22 indicates that a Cooperating Individual contacted the FBI sometime in
23 June, 2010 indicating that he had been participating in a murder for hire

24 MEMORANDUM IN SUPPORT OF
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1 plot.¹ The Informant agreed to participate in two recorded meetings
2 which occurred on June 9th and June 10th. The Informant met with FBI
3 Agents before and after each of these meetings. After the meeting on the
4 10th, the Informant and an accomplice allegedly traveled to Oregon.² Mr.
5 Steele was arrested on June 11th.

6 After Mr. Steele's arrest, an alleged explosive device was located on
7 the car of Cyndi Steele while she was getting an oil change on June 15,
8 2010. The Informant was arrested by law enforcement after the
9 discovery. A video recorded interview between AFT and the Informant
10 was provided in discovery; however, the interview starts and stops
11 abruptly. Additionally, a summary of a report of a "free talk" between
12 the Informant, the Assistant United States Attorney, and law
13 enforcement that took place on July 12, 2010 has been provided. A
14 phone log has also been provided in discovery, however the phone log
15 does not indicate any subscriber information to assist in determining
16 whose phone the information relates to.

17 II. INFORMATION SOUGHT

18 Mr. Steele seeks information on the Confidential Informant in this
19

20 ¹The Confidential Informant's identity is known to Mr. Steele but not used
21 here.

22 ²This same accomplice allegedly traveled to Oregon with the Informant prior
23 to law enforcement involvement on June 4, 2010.

1 case including: (1) any contemplated charges that were not filed as well
2 as actual charges the informant had pending at the time of this incident
3 and any agreement or reward this witness has received or expects to
4 receive; (2) criminal history of this informant including arrest history
5 and any unauthorized criminal activity; (3) telephone records from any
6 telephone used by the Informant to contact Mr. Steele from November,
7 2009 through the date of arrest; (4) evidence that is inconsistent with the
8 Informant's testimony; (5) information concerning prior bad acts of the
9 Informant; (6) reports of polygraph examinations performed on the
10 Informant; (7) reports of any psychiatric treatment or drug or alcohol
11 abuse treatment received by the Informant; (8) the Informant's tax
12 returns; and (8) law enforcement files maintained regarding this
13 Informant including any FBI Informant file from any cooperation this
14 Informant has provided in any prior proceeding as well as in this
15 proceeding. Additionally, information from the accomplice, identified as
16 the Confidential Informant's cousin is also requested to include any
17 agreements, promises, and investigation regarding the accomplice.

18 III. ARGUMENT

19 Mr. Steele is requesting additional material available only to the
20 Government at this time for motion preparation and trial.

21 (1) *CONTEMPLATED CHARGES AND AGREEMENTS*

22 Mr. Steele's arrest on June 11, 2010 is based upon information
23 conveyed by a Confidential Informant. Accordingly, information relevant

1 to the credibility, bias, perception, character, and veracity of this
2 witness is vital to Mr. Steele's ability to present a defense, to file
3 motions, and to prepare for trial.

4 [T]he use of informants to investigate and prosecute persons is
5 fraught with peril.

6 By definition, criminal informants are cut from untrustworthy
7 cloth and must be managed and carefully watched by the
8 government and the courts to prevent them from falsely accusing
the innocent, from manufacturing evidence against those under
suspicion of crime, and from lying under oath in the courtroom.

9 *United States v. Bernal-Obesco*, 989 F.2d 331,333 (9th Cir. 1993).

10 Accordingly, we expect prosecutors and investigators to take all
11 reasonable measures to safeguard the system against treachery.
12 This responsibility includes the duty as required by Giglio to turn
over to the defense in discovery all material information casting a
shadow on a government witness's credibility.

13 *Id.* at 334 (quoting, *United States v. Shaeffer*, 789 F.2d 682, 689(9th Cir.
14 1986).

15 Evidence relating to these witnesses is material to the guilt or
16 punishment of Mr. Steele and must be disclosed to the defense in a
17 timely manner. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence
18 that will "play a role in uncovering admissible evidence, aiding witness
19 preparation, corroborating testimony, or assisting impeachment or
20 rebuttal" must be provided by the government. *United States v. Lloyd*,
21 992 F.2d 348, 351 (D.C. Cir. 1993). *See also United States v. Bagley*, 473
22 U.S. 667 (1965).

23 Taken together, this group of constitutional privileges delivers

1 exculpatory evidence into the hands of the accused, thereby protecting
2 the innocent from erroneous conviction and ensuring the integrity of the
3 criminal justice system." *California v. Trombetta*, 467 U.S. 858, 867
4 (1984). If this material evidence exists in the hands of the government
5 or an agent of the State, the failure to disclose this evidence is a violation
6 of the precepts of *Brady v. Maryland*, supra; See also, *Kyles v. Whitney*,
7 115 S.Ct. 155, 157 (1995).

8 Mr. Steele requests to know the nature of the CI's agreement or
9 favorable treatment for his cooperation including any formal or informal
10 agreement. Any payments, promises of immunity, leniency, preferential
11 treatment, or other inducements made to prospective government
12 witnesses are discoverable. Such detailed information and records are
13 needed to demonstrate the motive of the witness. *Giglio v. United*
14 *States*, 405 U.S. 150 (1992); *United States v. Williams*, 954 F.2d 668
15 (11th Cir. 1992). The witness' motive to testify in favor of one party and
16 against another is a matter open to discovery and introduction into
17 evidence. Fed. R. Evid. 608.

18 Similarly, unconsummated promises of financial or other awards or
19 benefits are discoverable as to the informant including any Contingency
20 Fee Agreement. *United States v. Cuellar*, 96 F.3d 1179 (9th Cir. 1996);
21 *United States v. Friedman*, 854 F.2d 535, 563 (2nd Cir. 1988) (Holding
22 that the effect of a Contingency Fee Agreement on the witness'
23 credibility is an issue for the jury).

1 In this case, the Confidential Informant has been charged by
2 Indictment with a severely reduced charge from that of Mr. Steele. It is
3 requested that all memorandum or other material discussing the nature
4 of the plea agreement for the Informant be provided as well as any
5 additional promises, payments, or inducements be provided.

6 As to the accomplice to the Informant on alleged trips to Oregon,
7 any promises, agreements not to testify, or other inducements are
8 requested as well.

9 (2) *CRIMINAL HISTORY RECORDS*

10 An informant's history of criminal activity and other misconduct is
11 relevant to the consideration of his credibility, bias, motive and modus
12 operandi. The informant's history and pattern of criminal activity and
13 misconduct serve to illustrate the methods normally employed by the
14 informant to achieve his goals. Such evidence "might easily extend
15 beyond that of mere impeachment." *United States v.*
16 *Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990).

17 It is important in this matter to have all records of criminal history
18 that relate to the Informant.

19 (3) *INFORMANT'S PHONE RECORDS*

20 The telephone records of all telephones used by the Informant are
21 crucial to Mr. Steele's investigation. Because Mr. Steele does not know
22 the number to any and all telephones the Informant used, this
23 information is uniquely available to the Government. Phone records in

1 the relevant time period of any phone used by the Informant would
2 clarify if the Informant called Mr. Steele on other occasions besides those
3 reported. Some telephone records have been provided but do not
4 reference the subscriber information.

5 (4) *CONFLICTING WITNESS STATEMENTS*

6 The conflicting statement of a witness must be turned over to the
7 defendant. *Kyles v. Whitely*, 115 S.Ct. 115 (1995). In *Schneider v. Estell*,
8 552 F.2d 593, 595 (5th Cir. 1977), the court held that the government's
9 failure to disclose an eyewitness' prior statement that was inconsistent
10 with the testimony of the government's key trial witness was reversible
11 error. Additionally the Court in *Jones v. Jago*, 575 F.2d 1164, 1166, (6th
12 Cir. 1978), cert. denied 439 U.S. 883 (1978), found that an eyewitness'
13 statement to the government, while not expressly exonerating the
14 defendant, and made no reference to the defendant's presence or
15 participation in the offense, was Brady material and that the failure to
16 disclose such a statement required the reversal of the conviction. *Id.* at
17 1164.

18 Along the same line, the courts have held evidence of the
19 unreliability of an informant witness to be discoverable and highly
20 relevant information. For example, information regarding prior or
21 contemporaneous perjury or bizarre testimony of an informant would be
22 discoverable. *Mesarosh v. United States*, 352 U.S. 1, 10 (1956).

23 (5) *WITNESS RECORDS OF "PRIOR BAD ACTS"*

1 Pursuant to Fed. R. Evid. 608(b) a witness may be cross-examined
2 as to specific instances of conduct "concerning the witness' character for
3 truthfulness or untruthfulness." Thus, some courts have held that in
4 certain circumstances a witness may be questioned regarding prior
5 arrests which have not led to a conviction. Similarly, uncharged
6 misconduct of a witness is fair game for impeachment on
7 cross-examination. *United States v. Ray*, 731 F.2d 1361, 1364-65 (9th
8 Cir. 1984) (reversible error to refuse to permit cross-examination of a
9 government witness as to alleged post-plea drug activities); *United*
10 *States v. Steinberg*, 99 F.3d 1486, 1490 (9th Cir. 1996)(ordering new trial
11 when government disclosed that confidential informant was involved in
12 illegal conduct while cooperating); *United States v. Brumel-Alvarez*, 976
13 F.2d 1235, 1244 (9th Cir. 1992)(reversing conviction when government
14 failed to disclose memo written by retired DEA agent criticizing main
15 government informant's integrity and role in investigation); *United*
16 *States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990)
17 (government witness' misconduct bears directly on credibility); *United*
18 *States v. Cohen*, 888 F.2d 770, 776-777 (11th Cir. 1989) (conviction
19 reversed where trial court excluded evidence offered under Fed. R. Evid.
20 404(b) that prosecution witness had previously concocted and managed a
21 fraudulent scheme); *United States v. McClure*, 546 F.2d 670, 673 (5th
22 Cir. 1977) (conviction reversed where trial court excluded evidence
23 offered under Fed. R. Evid. 404(b) to show that informant had previously

1 entrapped other defendants).

2 (6) *RESULTS OF POLYGRAPH TESTS*

3 If the Confidential Informant was given any polygraph test, the
4 results are requested.

5 (7) *REPORTS OF PSYCHIATRIC OR SUBSTANCE*
6 *TREATMENT*

7 If the Confidential Informant has been treated for any mental
8 illness or substance abuse treatment, that records related to that
9 treatment be provided.

10 (8) *INFORMANT'S TAX RETURNS*

11 It is requested that any tax returns for 2007-2009 be provided.

12 (9) *INFORMANT'S FILE*

13 Federal law enforcement agencies maintain at least two separate
14 files on informants. The first is the investigative file, and the second
15 contains the informant or witness' background, payment and false
16 identity.

17 In *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1465 (9th Cir.
18 1992), the court held that the failure to disclose an internal DEA
19 memorandum regarding informant's conduct which impeached the
20 informant's credibility was reversible error. Thus the Court required the
21 disclosure of the memorandum pursuant to the dictates of Brady. *Id.* at
22 1461.

23 "An [AUSA] using a witness with an impeachable past has a

1 constitutionally derived duty to search for and produce impeachment
2 information requested regarding a witness". *United States v. Osorio*, 929
3 F.2d 753, 760 (1st Cir. 1991), (citing *Giglio*).

4 *Kyles* is not the first case to put an affirmative duty on prosecutors
5 to search out impeaching information regarding informer witnesses. In
6 *United States v. Osorio*, 929 F.2d 753 (1st Cir. 1991), the Court held that
7 a prosecutor charged with discovery obligations cannot avoid finding out
8 what 'the government' knows (about the witness) simply by declining to
9 make reasonable inquiry of those in a position to have relevant
10 knowledge.....The government, as represented by its prosecutors in court,
11 is under a duty of inquiry regarding information concerning the criminal
12 past of its cooperating witnesses." *Id.* at 760.

13 It is requested that any law enforcement "memorandum of
14 investigation" or other information contained in the Informant's file
15 maintained by law enforcement be provided. An in camera review can be
16 utilized so that the Court may determine whether information contained
17 in the file is exculpatory and/ or material to the defense. If this
18 Informant has acted as an informant in any past action, that information
19 is also requested as well as the results of that investigation. Finally, any
20 memoranda or other law enforcement generated material that relates to
21 the veracity, credibility, or character of the Informant is requested to be
22 produced.

23

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1 IV. CONCLUSION

2 Mr. Steele needs these additional materials in order to prepare
3 further motions and to prepare a defense. A protective order or in
4 camera review are two devices the Court may use to protect the
5 government's informant while still providing necessary information to
6 Mr. Steele that is relevant and necessary in preparing his defense.

7 Dated: October 4, 2010

8 Respectfully Submitted,

9 s/ Roger J. Peven
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15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on October 4, 2010, I electronically filed the
17 foregoing with the Clerk of the Court using the CM/ECF System which
18 will send notification of such filing to the following: TRACI J. WHELAN,
19 Assistant United States Attorney.

20 s/ Roger J. Peven
21 WA 6251
22 Attorneys for Steele
23 Federal Defenders of
24 Eastern Washington and Idaho
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