

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
UNITED STATES OF AMERICA)	
)	
V.)	Crim. No. 99-10371-DJC
)	
JAMES J. BULGER)	
_____)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOST RECENT
DISCOVERY MOTION DATED MAY 15, 2013

The government hereby files its response and opposition to defendant James J. Bulger's "Motion for Disclosure of Identity of Confidential Sources and Related Materials" dated May 15, 2013 (ECF Dkt. No. 914, hereinafter "Def.'s Mtn.")

FACTUAL BACKGROUND

Defendant Bulger is again requesting disclosure of a confidential source referenced in a document produced by the government in discovery. The government has agreed to provide the defense with a completely unredacted version of the March 2000 FBI-302 report. In that report, an FBI confidential informant reported hearsay "street talk" regarding conduct by certain government witnesses. The FBI has advised that the informant had no firsthand knowledge of any of this information, and indeed had no direct contact with the relevant individuals discussed in the FBI report: Kevin Weeks, John Martorano, Pat

Nee, Jack Curran, Patrick Linskey, Michael Linskey, Richard Buccheri and Kevin Weeks' former girlfriend. Nevertheless, the defendant seeks the identity of the confidential informant because "the defendant is entitled to investigate how the source came to know" of the rumors the informant passed on to the FBI so the defense can find "[t]he person to whom the statements were originally made" and call that person as an impeachment witness. Def.'s Mtn. at 5.¹

ARGUMENT

Because the government is producing an unredacted copy of the FBI report to the defense, the substance of the information has been disclosed and defense investigators can interview the individuals listed in the report who would have firsthand knowledge of the rumors. Indeed, the defendant has no reason to talk to the informant - in the best case scenario for the defendant, the informant would point defense investigators to a third person, who would in turn point investigators to the individuals already listed in the FBI report. Suspicious that a confidential informant may have information that may lead to another individual who may have information that may lead to a third individual who the defense already knows about does not even come close to overcoming the First Circuit's "presumption

¹ The government has also recently produced additional FBI reports from the same informant who is the subject of this motion.

in favor of confidentiality" for informants, and is certainly not "essential for an adequate defense" as required by Roviaro v. United States, 353 U.S. 53, 62 (1957). United States v. Mills, 11-1249, 2013 WL 951214 at *8 (1st Cir. Mar. 13, 2013). Thus, this Court should deny defendant's motion.

Moreover, the information sought by the defendant is of limited value, because the defense cannot call the individuals listed in the FBI report to testify that Weeks or Martorano were untruthful with the government. The First Circuit has held that Fed.R.Evid. Rule 608(b) "applies to, and bars the introduction of, extrinsic evidence of specific instances of a witness's *misconduct* if offered to impugn his credibility." United States v. Winchenbach, 197 F.3d 548, 558 (1st Cir. 1999) (emphasis in original). And indeed, the clear object of Def.'s Mtn. is to gain evidence to undermine the credibility of Weeks and Martorano² - this is impeachment through evidence of prior misconduct, and under Rule 608(b) extrinsic evidence may not be offered to prove such alleged misconduct.

²Defendant claims that "[t]he information provided by the source is highly relevant for impeachment purposes. It demonstrates the willingness of both Weeks and Martorano to shade their version of events in a manner favorable to themselves and those they wish to protect. Their intentional withholding of incriminating information about their friends raises serious questions about whether they were truthful in their dealings with the government and, consequently, whether they will be truthful at trial." Def.'s Mtn. at 4.

The defendant tries to escape this basic rule of evidence by arguing that he seeks to confront Weeks and Martorano with prior inconsistent statements under Rule 613(b).³ However, the First Circuit has stated explicitly that statements are considered under Rule 608(b), and not 613(b), when "standing alone and without any reference to [the witness's] trial testimony," the evidence "calls into question [the witness's] credibility." Winchenbach, 197 F.3d at 559. As the defense itself points out, it seeks this evidence regarding Weeks and Martorano precisely "because it shines an unfavorable light on their credibility." Def.'s Mtn. at 4.

Of course, defense counsel is free to impugn government witnesses' credibility through vigorous cross-examination, and may ask witnesses about prior inconsistent statements. However, Winchenbach prevents the defense from skirting Rule 608(b) by introducing extrinsic evidence of a witness's prior misconduct, even if that evidence contradicts the witness's testimony. 197 F.3d at 559.

Finally, as the government has repeatedly noted, the defense is not entitled to unlimited access to government files

³Under Rule 613(b), evidence of a prior inconsistent statement may be introduced "not to demonstrate which of the two [statements] is true but, rather, to show that the two do not jibe." United States v. Winchenbach, 197 F.3d 548, 558 (1st Cir. 1999). In this case, the informant was not told anything by the government witnesses.

in the discovery process. See United States v. Caro-Muniz, 406 F.3d 22, 29-30 (1st Cir. 2005). The government is aware of its discovery obligations, and will continue to produce material in compliance with applicable rules in the same way it produced the FBI report giving rise to this matter.

Respectfully submitted,

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Dated: May 20, 2013

By:

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

/s/ Brian T. Kelly
ZACHARY R. HAFER
Assistant U.S. Attorney

Dated: May 20, 2013