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10 Attorneys for Defendant, ALEXANDER SMIRNOV

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 * * * * *

14 UNITED STATES OF AMERICA,) CASE NO. 2:24-CR-00091-ODW

15)
16 Plaintiff,) **DEFENDANT’S NOTICE OF**
17) **MOTION AND MOTION TO**
18) **COMPEL PRODUCTION OF**
19) **DISCOVERY**

20 v.)
21)
22 ALEXANDER SMIRNOV,) **Honorable Otis D. Wright II**
23) **November 18, 2024, at 10:00 a.m.**

24 Defendant,)
25)
26)

27 **PLEASE TAKE NOTICE** that on November 18, 2024, at 10:00 am, or as
28 soon thereafter as counsel may be heard, Defendant, ALEXANDER SMIRNOV
29 (“Mr. Smirnov”), by and through his attorneys, DAVID Z. CHESNOFF, ESQ., and
30 RICHARD A. SCHONFELD, ESQ., of the law firm of CHESNOFF &
31 SCHONFELD, will ask this Honorable Court to enter an order granting his Motion
32 to Compel Production of Discovery.

1 Specifically, Defendant, Mr. Smirnov hereby moves this Honorable Court
2 to enter an Order granting the Defendant's Motion and compelling the
3 government's complete response (within five (5) days) to the requests stated in that
4 Motion.
5

6 This Motion is made and based upon the attached Memorandum of Points
7 and Authorities; the Exhibits to that Motion; any argument of counsel; and any
8 other such evidence as may be presented.
9

10 Counsel for the Defendant has communicated with Assistant United States
11 Attorney, Mr. Leo Wise, in regard to the discovery dispute, and the specific
12 requests for discovery. Counsel Wise has responded that "We have and will
13 continue to comply with our discovery obligations pursuant to Federal Rule of
14 Criminal Procedure 16, 18 U.S.C. Section 3500 (the "Jencks Act"), Federal Rule
15 of Criminal Procedure 5(f) (*see* ECF No. 43) and Brady, Giglio and related cases.
16 In addition to making appropriate discovery requests, your letters ask for
17 documents and other materials that are outside that body of law. As to that
18 information and materials, we decline to produce it."
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1 **MEMORANDUM OF POINTS AND AUTHORITITES**

2 **I. BACKGROUND**

3 **A. Indictment and Production of Discovery to Date**

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5 Mr. Smirnov is charged by a two-count Indictment with: 1) Making False
6 Statements to a Government Agent, in violation of 18 U.S.C. § 1001; and 2)
7 Falsification of Records in a Federal Investigation, in violation of 18 U.S.C. §
8 1519. *See* Dkt. 1 (Feb. 14, 2024).

9
10 As noted in prior motions, Mr. Smirnov served as a confidential human
11 source (“CHS”) for the FBI for over 10 years. While the Government has produced
12 voluminous discovery, Mr. Smirnov has made three separate written requests for
13 discovery, with many discovery requests outstanding.

14
15 As a result, Mr. Smirnov brings this Motion.¹

16 **B. Mr. Smirnov’s Discovery Requests**

17
18 On September 27, 2024, in a letter to government counsel, the defense team
19 stated as follows, in pertinent part:

20 *[W]e have previously sent three letters (dated March 5, May 28, and*
21 *August 28, 2024) requesting certain specific discovery in addition to*
22 *(or, as part of) the government’s discovery obligations under Rule 16,*
23 *Jencks, Brady, and Giglio, among others. Our comparison between*
24 *our letters and the discovery that the government has produced to*
25 *date reveals that we have not received complete (or, any) discovery,*
as follows:

26 ¹ As of time of this filing, Mr. Smirnov’s *Ex Parte* Application to Continue Trial (ECF No. 131, Sept. 26, 2024) remains pending.

1 I. *March 5 letter (no discovery in response to request, by paragraph)*

- 2
- 3 • ¶7 [No discovery.]
 - 4 • ¶10 [We assume your response only includes Oleksandr Ostapenko, in which case we have received nothing in response to subparagraphs (a) through (h). We are in receipt of a recorded interview, reports of interviews, grand jury testimony, grand jury subpoena, photographs of messages between him and AS, and photos of passport.]
 - 5
 - 6 • ¶12 [We do not see this assessment.]
 - 7 • ¶23 [We do not see any communication from the FBI's Pitt.]
 - 8
 - 9 • ¶37 [We see no response from Mr. Weiss' team.]
 - 10
 - 11

12 *In addition to the foregoing, the government's response raises the following*

13 *issues regarding our March 5 letter:*

- 14 • ¶19 [Some responsive discovery was provided in government production no. 1 (with Eric Mitchell's travel summary), but we do not have any records of compensation, cooperation benefits, or equivalent items, pertaining to the government's witnesses.]
- 15
- 16 • ¶¶24–27 [The only item that appears responsive regarding communications between AS and Associate 2 are some emails, texts, and travel records; none of these, however, appear to relate to interaction with Burisma officials.]
- 17
- 18 • ¶38 [We received the CHS reporting document in government production no. 1, but there appears to be more communication on this topic that has not been produced.]
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24 II. *May 28 Letter*

- 25 • **[NOTHING FURTHER IS NEEDED.]**
- 26

1 III. *August 28 Letter*

- 2 ● *We have not, since our specific August 28, 2024*
3 *request, received any discovery related to Hunter*
4 *Biden's or Mr. Smirnov's work or interaction with*
5 *Burisma. This request included but was not limited to*
6 *State Department released information that was*
 provided to the New York Times and a letter that was
 evidently sent by Hunter Biden to the Italian Embassy.

7 *Second, we need to confirm that the government has provided us with*
8 *all discovery documenting any contact or communication between*
9 *Mr. Smirnov and his handler. In particular, we have not received any*
10 *evidence from this category of discovery reflecting Smirnov-Handler*
11 *communications dating from before 2016. We thus request discovery*
 evidence any and all such contacts or communications, from any date.

12 *Third, should the government possess, but decline to produce, any*
13 *discoverable evidence of any sort (including, but not limited to pre-*
14 *2016 communications), we request that you 1) state your position in*
 writing, and 2) set forth the basis of the refusal to produce it.

15 *Finally, the CIPA restrictions in this case 1) have limited defense*
16 *counsel, to date, to only one authorized viewing (in the Secure Unit in*
17 *Los Angeles) of that discovery, and 2) necessarily preclude any*
18 *substantive discussion in this letter of any viewed CIPA-discovery.*
19 *Should you believe that any restricted CIPA-discovery is responsive*
20 *to any of the items identified in this letter, please notify me about that*
21 *fact only (with nothing substantive), so that the parties and security*
22 *officers can agree on a mutually acceptable way to further Mr.*
 Smirnov's effective trial preparation without compromising any
 aspect of the statutory CIPA restrictions, the Protective Order, or the
 government's interest in confidentiality.

1 Letter from Richard A. Schonfeld, Esq. to Leo J. Wise, DOJ Principal
2 Special Assistant Senior Counsel (Sep. 27, 2024) (attached as Exhibit 1)
3 (italics supplied).²
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5 In addition to the September 27, 2024 letter, Mr. Smirnov notes the
6 following:

- 7 ● The government’s responses to the May 28, 2024 letter are
8 complete.
- 9 ● To clarify the September 27 request regarding communications
10 between Mr. Smirnov (“AS”) and his handler: We do not have
11 any such communications dating from *before* April 30, 2016,
12 which is the date of the first “whatsapp” communication
13 between the two. Additionally, we have no communications
14 between AS or *anyone* before 2016. We reassert that the
15 government must produce any and all communication to or
16 from AS dating from before 2016, as such communications
17 may be discoverable under *Brady*, *Giglio*, and/or Rule 16.
- 18 ● The government has not provided complete photos of AS’s full
19 USA passport book: passport #531767667; issued: 2015;
20 expires: 2025.
- 21 ● The government must also produce all the electronic media
22 (that is, photos and videos) created before 2016.
- 23 ● As detailed in email communications between defense counsel
24 and counsel for the government, Mr. Chesnoff requested (on
25 September 26, 2024) that the government return Mr. Smirnov’s
cell phone: the defense requires that phone (which had been
upon Mr. Smirnov’s arrest) in order to be able to retrieve and
review all the data stored on it. In response, government
counsel (on September 30, 2024) declined, stating: “We can’t

26 ² Mr. Smirnov’s three prior letters to the government (dated March 5, May 28, and August 28, 2024) are attached as Exhibits 2, 3 and 4, respectively.

1 release the phone. It's a piece of evidence that needs to be
2 maintained by the FBI until the conclusion of the case."
3 Defense counsel replied (also on September 30) that "[w]e can
4 easily stipulate to the chain of custody on that specific item,"
5 and that "review [of] the actual phone" would save the defense
6 a "very measurable amount of time." Government counsel
7 again refused, stating on October 1: "Stipulating to chain-of-
8 custody doesn't address the issue. The FBI needs to keep the
9 device in order to maintain the integrity of the data on it."

10 Mr. Smirnov reasserts that he requires the physical phone to
11 provide dates, times and context for the videos and voice
12 messages exchanged with his handler.

- 13 ● Positive independent photographic identification of the FBI
14 handler for Mr. Smirnov. Such photographic identification is
15 needed (among other reasons) for Mr. Smirnov to be able to
16 identify his handler in Mr. Smirnov's photos and to document
17 the course of dealings, travel, and relationship between the two.
- 18 ● During the course of his work on behalf of the FBI, Mr.
19 Smirnov met with Associate 1, who introduced certain third
20 parties to Mr. Smirnov. Mr. Smirnov, in turn, reported those
21 persons to his FBI handler, which then (on information and
22 belief) opened official investigations into those third parties.
23 Mr. Smirnov demands full and complete information regarding
24 those third parties identified by Associate 1, including their full
25 names, contact information, aliases (if any), and the complete
26 contents of any official files or investigations (by the FBI or
any other government entity) concerning such third parties.

21 C. The Government Refuses Even to Countenance Mr. Smirnov's

22 Requests

23 In its response, the government stated in pertinent part:

24 *We have and will continue to comply with our discovery obligations*
25 *pursuant to Federal Rule of Criminal Procedure 16, 18 U.S.C.*
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1 *Section 3500 (the “Jencks Act”), Federal Rule of Criminal Procedure*
2 *5(f) (see ECF No. 43) and Brady, Giglio and related cases.*

3 *In addition to making appropriate discovery requests, your letters ask*
4 *for documents and other materials that are outside that body of law.*
5 *As to that information and materials, we decline to produce it.*

6 Email from Leo J. Wise, DOJ Principal Special Assistant Senior Counsel to
7 Richard A. Schonfeld, Esq. (Oct. 2, 2024) (attached as Exhibit 5) (italics supplied).

8 The government’s “response” to Mr. Smirnov can be succinctly summarized
9 as a refusal to produce the documents. After a cursory, non-substantive “assurance”
10 of compliance, the government flatly refuses: 1) to address, in any way, *any* of the
11 specific defects associated with the March 5 letter; 2) to even *address* the request
12 for critical information regarding all communications between Mr. Smirnov and
13 his handler, much less “set forth the *basis*” for the government’s refusal to do so;
14 and 3) to even *address* Mr. Smirnov’s CIPA-based concerns. As shown below, the
15 government’s posture necessitates judicial intervention (something Mr. Smirnov
16 had hoped to avoid, through informal letters and emails) and, more importantly,
17 violates Mr. Smirnov’s constitutional and procedural rights.
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21 **II. DISCUSSION**

22 **The Government’s Discovery Noncompliance—Manifesting in its Refusal to**
23 **Even Address Mr. Smirnov’s Concerns—Violates the Due Process Clause**
24 **and Compels Immediate Judicial Intervention**

25 The Fifth Amendment to the United States Constitution provides that “[n]o
26 person shall be . . . deprived of life, liberty, or property, without due process of

1 law.” U.S. Const. Amend. V. The government has a constitutional duty to disclose,
2 upon Mr. Smirnov request, all evidence favorable to him that is material to guilt or
3 to punishment.

4
5 In criminal prosecutions, the government must produce “evidence favorable
6 to an accused . . . where the evidence is material either to guilt or to punishment,
7 irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*,
8 373 U.S. 83, 87 (1963). This obligation also includes evidence that can be used to
9 impeach a government witness. *Giglio v. United States*, 405 U.S. 150, 154-55
10 (1972). A prosecutor is presumed to know all information gathered by his office in
11 connection with an investigation of the case. *Id.* Further, a prosecutor “has a *duty*
12 *to learn of any favorable evidence* known to the others acting on the government's
13 behalf in the case.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added).

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15 Under *Brady*, the government must disclose favorable evidence that is
16 “material” to the outcome of criminal proceeding. *Brady*, 373 U.S. at 87. “Material
17 evidence” is that which leads to reasonable probability of producing a differing
18 result or outcome. *Kyles*, 514 U.S. at 434.

19
20 The Due Process Clause is violated when the prosecution fails to reveal any
21 evidence that 1) it actually or constructively possesses, and 2) is favorable to the
22 defendants and material to the issue of guilt or punishment or in any way discredits
23 the government’s case. *Brady*, 373 U.S. at 87; *see also Miller v. Pate*, 386 U.S. 1
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1 (1967); *Giles v. Maryland*, 386 U.S. 66 (1967). The prosecution must disclose
2 material exculpatory evidence whether the defendant makes a specific request, a
3 general request, or none at all. *See United States v. Agurs*, 427 U.S. 97 (1976).
4

5 Due process necessitates that all *Brady/Giglio* material evidence be provided
6 to Mr. Smirnov as soon as possible, and certainly as soon as it comes into the
7 government's possession. *United States v. Mitchell*, 373 F. Supp. 1239, 1247
8 (S.D.N.Y. 1973) (“We perceive the due process implications of *Brady* as obligating
9 the government to disclose exculpatory information as soon as the character of
10 such information is recognized. The obligation has no chronological boundaries,
11 but applies equally to the pretrial, trial and posttrial stages of the proceeding.”).
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14 In this regard, the Supreme Court has stated: “Although there is, of course,
15 no duty to provide defense counsel with unlimited discovery of everything known
16 by the prosecutor the subject matter of such a request is material, or indeed if a
17 substantial basis for claiming materiality exists, it is reasonable to require the
18 prosecutor to respond either by furnishing the information or by submitting the
19 problem to the trial judge. When the prosecutor received a specific and relevant
20 request, the failure to make any response is seldom, if ever, excusable.”
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23 *Agurs*, 427 U.S. at 107, *holding modified by United States v. Bagley*, 473 U.S. 667
24 (1985).
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1 These principles require the government not only to *look* at Mr. Smirnov’s
2 discovery requests, but to *comply* with them in good faith and then *provide* any
3 responsive discovery. *But see* Ex. 5 (government asserts, without citation, that
4 defendant’s letters seek discovery that falls “outside” what needs to be produced).
5 Denial and suppression of any discovery that material to Mr. Smirnov’s defense
6 (including any FBI reports) violates Mr. Smirnov’s constitutional right to a fair
7 trial and due process. “If evidence highly probative of innocence is in [the
8 government’s] files, [it] should be presumed to recognize its significance even if
9 [it] has actually overlooked it.” *Giglio*, 405 U.S. at 154. Thus, precedent reaching
10 back nearly a century emphasizes that Mr. Wise—as a prosecutor for the
11 Department of Justice—is also a “servant of the law, the twofold aim of which is
12 that guilt shall not escape or innocence suffer.” *Berger v. United States*, 295 U.S.
13 78, 88 (1935).

14 Mr. Smirnov needs any and all nondisclosed evidence that is exculpatory,
15 impeaching, or both. Thus, setting to one side the fact that Mr. Smirnov cannot
16 possibly know *which* government reports remain undisclosed, reports reflecting
17 Mr. Smirnov’s FBI handler’s accuracy and thoroughness (such as noting in a report
18 what Mr. Smirnov actually told his handler, or where Mr. Smirnov said he was on
19 a certain date) bears squarely on that handler’s credibility. The government’s
20 refusal to produce the FBI reports authored by the government’s testifying
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1 witnesses (including the handler) thus negates Mr. Smirnov’s effective cross-
2 examination and deprives the jury of the chance to make a “discriminating
3 appraisal” of the witness’s accuracy. *See, e.g., United States v. Roldan-Zapata*, 916
4 F.2d 795, 806 (2d Cir. 1990) (“Cross-examination is *not* improperly curtailed if the
5 jury is in possession of facts sufficient to make a ‘discriminating appraisal’ of the
6 particular witness's credibility;” affirming conviction where district court did allow
7 “extensive cross-examination” of testifying detective); *see also Delaware v. Van*
8 *Arsdall*, 475 U.S. 673, 680 (1986) (“[A] criminal defendant states a violation of
9 the Confrontation Clause by showing that he was prohibited from engaging in
10 otherwise appropriate cross-examination designed to show a prototypical form of
11 bias on the part of the witness, and thereby to expose to the jury the facts from
12 which jurors . . . could appropriately draw inferences relating to the reliability of
13 the witness.”) (internal quotation omitted); *cf. United States v. Buske*, No. 09-CR-
14 65, 2011 WL 2912707, at *5 (E.D. Wis. July 18, 2011) (“Under *Brady* and *Giglio*,
15 agent interview notes that materially vary from the reports will also be disclosed.”).
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20 Other items specifically listed in the September 27, 2024 letter are likewise
21 critical to Mr. Smirnov’s defense. Regarding the specific request for all
22 communications between Mr. Smirnov (“AS”) and his handler, such
23 communications fall within *Brady* and/or *Giglio* because Mr. Smirnov’s course of
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1 dealings between 2015 and 2016 are in question bear upon his claims regarding his
2 alleged interactions with Ukrainian business officials during that time.

3 Regarding the incomplete contents of Mr. Smirnov's United States passport,
4 any such items implicate *Brady* and/or *Giglio* because Mr. Smirnov's locations
5 during 2015 and 2016 are crucial to his defense. Mr. Smirnov is a dual citizen of
6 both Israel and the United States. He used both passports for his travels during the
7 relevant time frame of this case. The defense discovered Mr. Smirnov's United
8 States passport because Mr. Smirnov sent a photo of it to his handler on January
9 10, 2018. The government provided Mr. Smirnov's full Israeli passport with
10 stamps but failed to produce Mr. Smirnov's full United States passport with
11 stamps.
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15 And, regarding the specific request for all media from before December
16 2016, such media falls within *Brady* and/or *Giglio* because Mr. Smirnov's course
17 of dealings between 2015 and 2016 are in question and because they pertain to Mr.
18 Smirnov's claims and travels regarding his interactions with Ukrainian business
19 officials during that time frame.
20

21
22 Finally, with regard to the information requested in our August 28 letter,
23 complete disclosure of any evidence of contact between Burisma and Mr. Smirnov
24 can be used for impeachment purposes: Mr. Smirnov must, among other things,
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1 determine whether the government's allegations as to the timing of his first
2 dealings with Burisma comport with his own recollection.

3 For the foregoing reasons, Mr. Smirnov requests the Court enter an order
4 granting the Motion to Compel Production of Discovery.
5

6 DATED this 14th day of October, 2024.
7

8 Respectfully Submitted:

9 CHESNOFF & SCHONFELD
10

11 /s/ David Z. Chesnoff

12 DAVID Z. CHESNOFF, ESQ.

13 *Pro Hac Vice*

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21 Attorneys for ALEXANDER SMIRNOV
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October 2024, I caused the forgoing document to be served via the Court’s e-filing/e-service system a true and correct copy of the foregoing to all parties listed on the Court’s Service List.

/s/ Camie Linnell
Employee of Chesnoff & Schonfeld

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