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U.S. Department of Justice

United States Attorney Southern District of New York

The Silvio J. Mollo Building One Saint Andrew's Plaza New York, New York 10007

May 16, 2022

BY EMAIL (LETTER) BY HAND (WITH CLASSIFIED ENCLOSURES)

FILED UNDER SEAL USG-CONFIDENTIAL

Honorable Jesse M. Furman United States District Judge Southern District of New York Thurgood Marshall U.S. Courthouse 40 Foley Square New York, New York 10007

Re: United States v. Joshua Adam Schulte,

S3 17 Cr. 548 (JMF)

Dear Judge Furman:

The Government respectfully submits this letter in response to the defendant's letter dated April 29, 2022, initially submitted to the Court *ex parte* and provided to the Government pursuant to the Court's order on May 11, 2022 (the "Letter"). In the Letter, the defendant seeks various relief based on discovery materials produced to him that the Government obtained from a separate, ongoing criminal investigation

(the "Investigation Materials"). Because the materials relate to, and disclose the existence and scope of, an ongoing criminal investigation that is neither known to the public nor to all of the targets of the investigation, and because they include

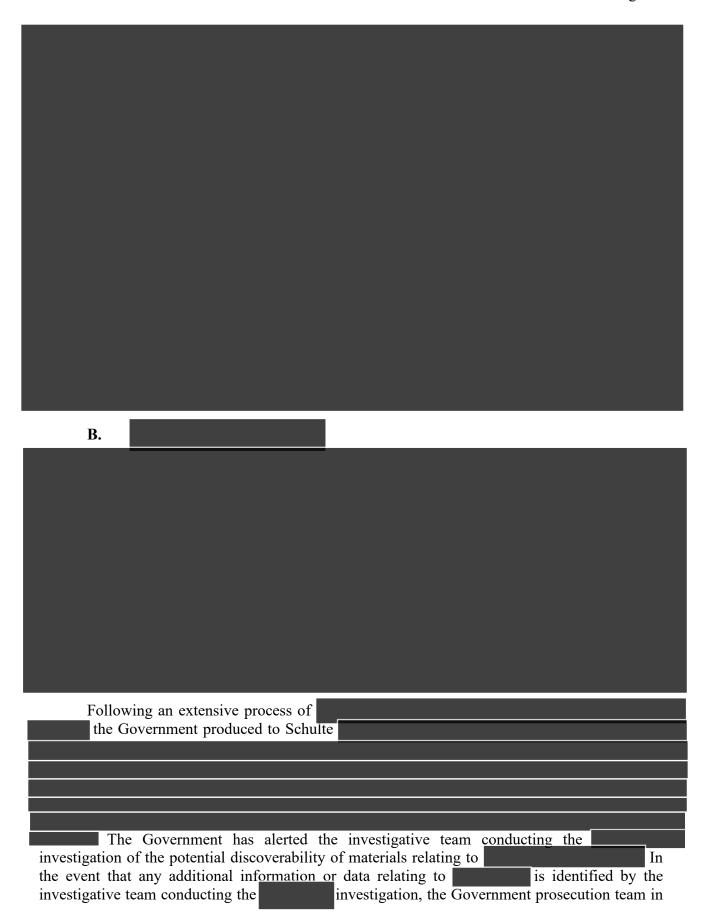
the materials are designated "USG-CONFIDENTIAL" and subject to the unclassified discovery protective order filed in this matter. (D.E. 11 (the "Protective Order")). The discovery production cover letters that accompanied the Investigation Materials are enclosed as classified exhibits to this letter. (Ex. A).

The defendant contends that the materials provided to him from this other investigation are

"relevant and helpful to the defense," and seeks an order compelling the production of additional materials; funds for an investigator; and for the removal of the materials from the scope of the Protective Order so that the defendant can publicly disclose them in motions and at trial. (Ltr. at 1).

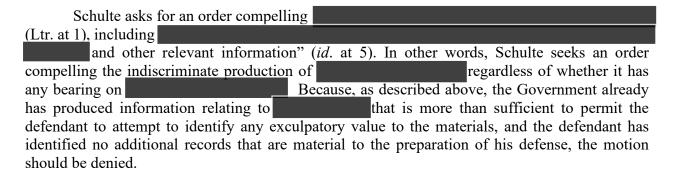
The Government takes no position on the defendant's request for funds for an investigator. However, the defendant is incorrect that the Investigation Materials are helpful to him. To the contrary, those materials are entirely consistent with the evidence of the defendant's guilt and with the Government's theory of how the defendant committed the charged offenses, and do

not po	int to an alternative perpetrator. The Government does not intend to use any of the Investigation Materials at trial, such that they also are not material to the preparation
	defense for that additional reason. Nonetheless, the defendant has been provided with
	s that are more than sufficient for him to attempt to identify any exculpatory value, and is itled to more. Moreover, because the Investigation Materials relate to an ongoing
	al investigation, and their disclosure could cause serious harms to that investigation and
	we enforcement interests, his request to remove them from the scope of the Protective Order be denied.
I.	The Investigation Materials
	As described in the discovery production cover letters, as part of the
investi	gation,
	investigation, Also as part of the
	m vestigution,
investi	Upon being alerted to the existence of potentially discoverable material by the other gative team, the Government undertook substantial efforts to identify any relevant
inform	ation and data for disclosure to the defendant. The Government has, to date, provided the
defend	ant with and certain identified relevant information
	(See Ex. A (discovery letters)).
	A.



this case will take steps to promptly review those materials and to make any necessary disclosures. The Government is not currently aware of the presence of additional potentially discoverable data related to in these other items. (See generally Ex. A).

II. The Defendant's Requests to Compel and to Remove the Protective Order Protections Should Be Denied.

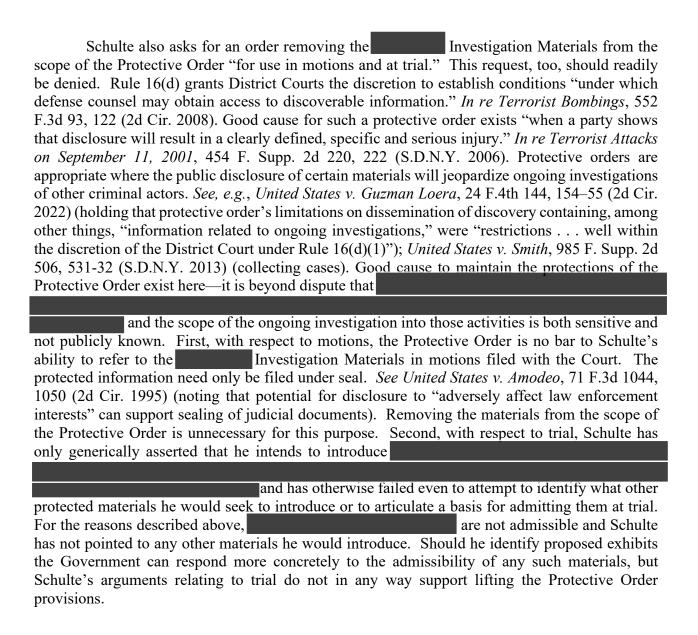


The Government's disclosure obligations in any case are governed by Federal Rule of Criminal Procedure 16 and the principles discussed in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. These obligations, though broad, are not limitless. *See United States v. Agurs*, 427 U.S. 97, 106 (1976) (noting that the Government is under "no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor"); *United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir. 1973) (reasoning that the purpose of *Brady* "is not to provide the defendant with complete disclosure of all evidence in the government's file which might conceivably assist him in the preparation of his defense, but to assure that he will not be denied access to exculpatory information known to the government but unknown to him"); *United States v. Conyers*, No. 15 Cr. 537 (VEC), 2016 WL 7189850, at *7-11 (S.D.N.Y. Dec. 9, 2016) (addressing the Government's discovery obligations). Rather, the Government is required to provide the defense with all discoverable material called for by Rule 16 and *Brady*.

Rule 16(a)(1)(E) requires the Government, upon the request of a defendant, to "permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: the item is material to preparing the defense; [or] the government intends to use the item in its case-in-chief at trial " In a motion to compel discovery, "[t]he defendant must make a prima facie showing of materiality and must offer more than the conclusory allegation that the requested evidence is material." United States v. Weigand, No. 20 Cr. 188 (JSR), 2020 WL 5105481, at *11 (S.D.N.Y. Aug. 31, 2020) (quoting United States v. Urena, 989 F. Supp. 2d 253, 261 (S.D.N.Y. 2013)); see also United States v. Maniktala, 934 F.2d 25, 28 (2d Cir. 1991); United States v. Akasha, No. 14 Cr. 716 (VM), 317 F. Supp. 3d 786, 794 (S.D.N.Y. 2018) (denying motion to compel where defendants "fail[ed] to make a prima facie showing that the documents they seek from the Government would be material to any non-frivolous defense to their prosecution"). Evidence is material within the meaning of Rule 16 if it "could be used to counter the government's case or to bolster a defense. . . ." *United States* v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993) (internal citations omitted). Put another way, evidence is material if its "pretrial disclosure will enable a defendant to alter significantly the quantum of proof in his favor." *United States v. Giffen*, 379 F. Supp. 2d 337, 342 (S.D.N.Y. 2004)

(citations omitted). "Rule 16 does not entitle a criminal defendant to a broad and blind fishing expedition among items possessed by the Government on the chance that something impeaching might turn up," *United States v. Scully*, 108 F. Supp. 3d 59, 123 (E.D.N.Y. 2015); hence the well-established rule that merely speculative or "conclusory" allegations are plainly insufficient to establish materiality. *United States v. McGuinness*, 764 F. Supp. 888, 894 (S.D.N.Y. 1991).

The Government does not intend to offer the Investigation Materials as part of its case-in-chief, nor are they helpful to the defendant or material to the preparation of the defense.
and in any event they have been disclosed in their entirety. are also not helpful to the defendant: contrary to Schulte's contention that is critical to the defense" with
is critical to the defense with
(Ltr. at 1-2),
Schulte also argues that the fact of
is exculpatory because (1) if Schulte had stolen classified information from the CIA and transmitted it to WikiLeaks to harm the Government,
transmitted it to wikiLeaks to nami the Government,
and (2)
(Ltr. at 3).
Schulte's first assertion bears no relationship to or to how the offense was committed.
committee.
Schulte's second assertion, which is inconsistent with his first, has no bearing
on the relevance, helpfulness, or admissibility of the Investigation Materials, which
contain no evidence of
Finally, Schulte argues that shows that the stolen classified
information was obtained by hackers, rather than by an insider like Schulte. (Ltr. at 5). Schulte's
argument is based on
² To the extent that Schulte's claims are interpreted as an assertion that
even crediting his incorrect assertion that
helpful to him, the Government has discharged its



As noted above, the Government takes no position on the defendant's request for funds for an investigator.

Respectfully submitted,

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cc: Standby Counsel (by email)
Joshua Adam Schulte (by mail)