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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER MAHONEY,

Defendant.

NO. CR-04-2127-RHW
CR-04-2128-RHW

**ORDER DENYING MOTION TO
DISMISS INDICTMENT, *INTER
ALIA***

Before the Court are Defendant Peter Mahoney’s Motion *in Limine* (Ct. Rec. 88, CR-04-2127-RHW), Supplemental Motion *in Limine* (Ct. Rec. 89), Motion by Defendant Peter Mahoney to Request and Compel an Order Directing the Government to Disclose *Brady/Giglio* Material, Specifically as to Pen Register Information Obtained (Ct. Rec. 112), Supplemental Demand for Discovery (Ct. Rec. 120), Motion by Peter Mahoney to Dismiss the Indictment for Governmental Misconduct by Failure to Disclose Pen Register Information (Ct. Rec. 121), Motion for Evidentiary Hearing (Ct. Rec. 123), and Motion to Expedite (Ct. Rec. 125). Also before the Court is Defendant Peggy Mahoney’s Motion for Joinder in Defendant Peter Mahoney’s Motion *in Limine* and Supplemental Motion *in Limine* (Ct. Rec. 41, CR-04-2128-RHW). A hearing was held on April 19, 2006, in Spokane, Washington. Defendant was present, as was co-Defendant Peggy Mahoney; Mark Vovos appeared on their behalf. Assistant United States Attorney Jane Kirk appeared telephonically on behalf of the Government.

1 **BACKGROUND**

2 A Second Superseding Indictment was filed against Defendants on
3 December 13, 2005. The Indictment alleges that Defendant, with co-Defendants
4 Peggy Mahoney, Lyle W. Conway, Lyle S. Conway, and Mark Van't Hul, were
5 engaged in a conspiracy to traffic in contraband cigarettes between Idaho and
6 Washington, and did traffic in contraband cigarettes between Idaho and
7 Washington, in violation of the Contraband Cigarette Trafficking Act, 18 U.S.C.
8 §§ 371, 2342(a) & 2 ("CCTA"). The Indictment also alleges that Defendant and
9 his co-Defendants engaged in money laundering and conspiracy to commit money
10 laundering, in violation of 18 U.S.C. §§ 1956, 1957 & 2.

11 **DISCUSSION**

12 **A. Defendant's Motions *in Limine***

13 Before the Court are Defendant's Motion *in Limine* (Ct. Rec. 88) and
14 Supplemental Motion *in Limine* (Ct. Rec. 89). Defendant requests exclusion of
15 various categories of evidence, including most significantly any reference to
16 \$1,432,200 in cash that was seized from Defendant's home.

17 Defendant's first motion lists thirty-two (32) categories of evidence: (1)
18 uncharged alleged offenses; (2) alleged co-conspirators' statements made after the
19 conspiracy has ended; (3) search warrants (items seized not relevant to the
20 charges); (4) opinion evidence; (5) reference to criminal convictions; (6) plea-
21 bargaining endeavors; (7) non-disclosed evidence intended to show motive, intent,
22 plan or scheme (FRE 404(b)); (8) employment of attorney; (9) non-disclosed
23 evidence in response to discovery requests; (10) filing of pretrial motions; (11)
24 reference to drug usage; (12) characterizations of Defendant as sinister, dangerous,
25 etc.; (13) "improper" evidence; (14) perjured testimony; (15) guilty pleas of co-
26 conspirators; (16) questioning witnesses to characterize other testimony as "lies";
27 (17) denigration of defense counsel; (18) exploiting "prosecutorial prestige"; (19)
28 cooperation agreements with witnesses (suggesting that the prosecutor knows what

1 the truth is); (20) misrepresentation of the record; (21) commenting on the
2 consequences of the jury's verdict; (22) possibility of mitigation; (23) using re-
3 created documents that do not comport with completed originals; (24) introducing
4 "secondary evidence"; (25) evidence in violation of FRE 1001-1004; (26) evidence
5 in violation of FRE 901 et seq.; (27) evidence in violation of FRE 403 or 404(b);
6 (28) evidence of documents or other tangible things not found or recovered
7 belonging to Defendant; (29) testimony pertaining to speculation; (30) testimonial
8 evidence in violation of *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004); (31)
9 letters to the police or other officials that may accuse someone of wrong-doing;
10 and (32) any reports, drug reports, or other reports made for the purpose of
11 producing evidence for litigation.

12 All of these categories of evidence are general and appear to be covered by
13 the Federal Rules of Evidence. Accordingly, the Court denies this motion with
14 leave to renew in the context of trial.

15 Defendant's supplemental motion *in limine* is more specific and more
16 substantive. He aims to limit any reference to \$1,432,200 in cash discovered
17 during a lawful search of Defendant's home. Defense counsel's reasoning to limit
18 any reference is that the cash is not mentioned in the Indictment, not necessary to
19 prove any of the charges, and any reference would be more prejudicial than
20 probative. Fed. R. Evid. 403. He explains that the Government has not been able
21 to link the cash to any of the present charges; they are all linked to receipts for
22 bank account transactions. Defendant reasons that therefore, the cash is not
23 relevant to this matter and unfairly prejudicial. Mention of the large amount of
24 cash would raise a presumption of illegality in the jurors' minds even though it has
25 "no connection to the present charges."

26 The Government responds that the cash discovered in the Mahoney's home
27 is relevant in two ways: it shows that contraband cigarette trafficking transactions
28 are often conducted in cash, and evidence of the currency is included in the

1 forfeiture allegation. The Government states that a witness will testify that Peter
2 and Peggy Mahoney received large sums of cash in addition to checks to pay for
3 contraband cigarettes. As the record now stands, the Court shall grant Defendant's
4 motion to exclude reference to the cash found in Defendant's home, subject to the
5 Government's ability to establish its relevance before trial or at trial outside the
6 presence of the jury. If the Government establishes relevance to the current
7 charges, then the Court will weigh the cash's prejudicial and probative value under
8 Fed. R. Evid. 403.

9 Additionally, Defendant requests the Government be limited to introducing
10 only evidence it seized from Mr. Mahoney. The Government alleges Defendant
11 burned much of his own documentation before the Government could seize it.
12 Therefore, the Government may attempt to rely on copies of invoices kept by
13 customers and suppliers. The Court denies this motion with leave to renew in the
14 context of trial.

15 **B. Motion to Disclose *Brady/Giglio* Material**

16 Defendant Peter Mahoney requests an order directing the government to
17 disclose *Brady/Giglio* material as to pen register information recently disclosed.
18 Defendant states that he received a Report of Investigation ("ROI") on February
19 27, 2006, regarding the use of a pen register on Peter Mahoney's telephone/fax
20 line. The ROI is dated May 21, 2004, and states that unauthorized pen register
21 information was inadvertently gathered after the expiration of the applicable court
22 order. The ROI also indicates that the agents immediately sealed the information
23 obtained as directed by Assistant U.S. Attorney Jane Kirk once they realized it had
24 been illegally obtained. Defendant complains that the sealed information has not
25 been provided to him, and that he has no way of knowing what impact the
26 information obtained has had on his case. He states that the existence of this
27 information creates a question as to the accuracy of the agents' rendition of the
28 facts and likely lead to evidence that is inadmissible at trial.

1 In its response, the Government states that the pen register and trap and trace
2 orders and data were provided to defense counsel and his investigator when they
3 reviewed all evidence held by the Government at the Yakima office of the Bureau
4 of Alcohol, Tobacco, Firearms, and Explosives (ATFE). Agent Keller's ROI was
5 inadvertently omitted from the case report, although it was included in the
6 discovery provided in *United States v. Louie Mahoney, et al*, Case No. CR-05-
7 2099-RHW. Agent Keller and Assistant U.S. Attorney Kirk both state that none of
8 the information obtained from the pen register and the trap and trace, either
9 correctly during the warrant's term or incorrectly after it expired, will be used in
10 the Government's case-in-chief, and it did not lead to any information related to
11 the Indictment in this case. Therefore, it appears all of the information except for
12 that which is sealed was timely provided to the defense, and the Government is
13 willing to provide the sealed information as well. At the hearing, the Court
14 delivered the sealed information to defense counsel.

15 The Government's provision of this information renders this motion moot.
16 Accordingly, it is denied.

17 **C. Motion to Dismiss Indictment for Governmental Misconduct**

18 Defendant requests dismissal of the Indictment based on "outrageous"
19 Government conduct. He argues that the government's failure to provide him the
20 sealed information and to make him aware there was a pen register and a trap and
21 trace on his phone lines make the accuracy of the information presented to the
22 Grand Jury in September 2004 questionable. Defendant asserts that the sealed
23 evidence and other pen register information could have, and likely did lead to
24 evidence that is inadmissible at trial because it was obtained illegally. Defendant
25 also requests an evidentiary hearing once the evidence is disclosed to allow counsel
26 "to appropriately address such evidence."

27 The defense of outrageous governmental conduct "applies only to conduct
28 which is so grossly shocking and so outrageous as to violate the universal sense of

1 justice.” *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991) (internal
2 quotation marks and citation omitted). A court may dismiss an indictment because
3 of outrageous government conduct on alternative grounds: a violation of due
4 process or the court’s supervisory powers. *Id.* “To justify exercise of the court’s
5 supervisory powers, prosecutorial misconduct must (1) be flagrant and (2) cause
6 substantial prejudice to the defendant.” *United States v. Ross*, 372 F.3d 1097, 1110
7 (9th Cir. 2004). Defendant argues the due process ground applies here because his
8 rights under *Brady* to exculpatory evidence were violated.

9 The Government asserts that Defendant, his attorney, and his investigator
10 had access to the properly obtained pen register and trap and trace records on
11 August 29, 2005, but they did not request copies of that information. The
12 Government also maintains that none of the properly obtained information led to
13 any information related to the pending Indictment, and that the improperly
14 obtained data was not reviewed or utilized in any manner during the investigation.

15 A trap and trace device records the originating numbers of incoming
16 telephone calls, and a pen register records the numbers dialed from a telephone.
17 *United States v. Carneiro*, 861 F.2d 1171, 1173 n.2 (9th Cir. 1988). Therefore, the
18 information “withheld” from Defendant consists of telephone numbers dialed to
19 and from Peter Mahoney’s telephone. The Government submits that this
20 information was not unknown or unknowable to Defendant, and suggests that if
21 this information were critical to the defense, Mr. Mahoney would have gathered it
22 himself while preparing for the original trial date. The Government also asserts
23 that Defendant has failed to establish a *Brady* violation in the first place.¹

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25 ¹ There are three components to a *Brady* violation: (1) the evidence at issue
26 must be favorable to the accused, either because it is exculpatory or because it is
27 impeaching; (2) the evidence must have been suppressed by the government either
28 willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*,

1 Defendant has failed to show that the Government's alleged misconduct of
2 withholding this information was either flagrant or prejudicial to his interests in
3 this case. The Court accepts as true the Government's assertion that it made the
4 properly-obtained pen register records available to Defendant when he reviewed
5 discovery in Yakima in August 2005, and his lack of interest in those records,
6 along with the nature of the sealed records, argues strongly for a finding that the
7 mistakenly withheld records are not material to his case. Defendant certainly has
8 not made a showing anywhere close to the level that would mandate a remedy as
9 drastic as dismissal of the indictment. This finding is further supported by the
10 Government's recent provision of the illegally-obtained records to Defendant.
11 Accordingly, this motion is denied. However, Defendant is granted leave to renew
12 his motion for an evidentiary hearing provided he make a showing that the pen
13 register and trap and trace information is such that the Court should hear additional
14 evidence.

15 **D. Defendant's Supplemental Demand for Discovery**

16 Defendant filed a supplemental demand for discovery for evidence including
17 any and all pen register and trap and trace information and evidence sealed by the
18 Government. The Government has provided this evidence to Defendant, so this
19 motion is moot.

20 Accordingly, **IT IS HEREBY ORDERED:**

21 1. Defendant's Motion *in Limine* (Ct. Rec. 88) is **DENIED** with leave to
22 renew in the context of trial.

23 2. Defendant's Supplemental Motion *in Limine* (Ct. Rec. 89) is **GRANTED**
24 **in part**, as to the cash seized from Defendant's home, **DENIED in part**, as to the
25 receipts and other evidence of transactions seized from Defendant's customers.

26 3. Defendant's Motion by Defendant Peter Mahoney to Request and
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527 U.S. 263, 281-82 (1999).

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1 Compel an Order Directing the Government to Disclose *Brady/Giglio* Material,
2 Specifically as to Pen Register Information Obtained (Ct. Rec. 112) is **DENIED**
3 **AS MOOT.**

4 4. Defendant's Supplemental Demand for Discovery (Ct. Rec. 120) is
5 **DENIED AS MOOT.**

6 5. Motion by Peter Mahoney to Dismiss the Indictment for Governmental
7 Misconduct by Failure to Disclose Pen Register Information (Ct. Rec. 121) is
8 **DENIED.**

9 6. Defendant's Motion for Evidentiary Hearing (Ct. Rec. 123) is **DENIED**
10 with leave to renew upon a showing of good cause.

11 7. Defendant's Motion to Expedite (Ct. Rec. 125) is **GRANTED.**

12 8. Defendant Peggy Mahoney's Motion for Joinder in Defendant Peter
13 Mahoney's Motion *in Limine* and Supplemental Motion *in Limine* (Ct. Rec. 41,
14 CR-04-2128-RHW) is **GRANTED.**

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
16 Order and forward copies to counsel.

17 **DATED** this 24th day of April, 2006.

18 *s/ Robert H. Whaley*

19 ROBERT H. WHALEY
20 Chief United States District Judge

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