FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **v.** **EFRAIM ATALIG,** **DEXTER APATANG,** **VANESSA CHARFAUROS** **DEAN MANGLONA,** **EUSEBIO MANGLONA,** **JOSEPHA MANGLONA,** **DENNIS MENDIOLA and** **MAGDALENA MESNGON,** **Defendants.**	**CRIMINAL CASE NO. 18-0088** **FBI CASE No. 194B-HN-2957110** **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CHARFAUROS' MOTION TO COMPEL**

I. INTRODUCTION

THIS MATTER came before the Court on July 2, 2019 at 9:00 a.m. at the Marianas Business Plaza for Defendant Charfauros' Motion to Compel Discovery. Assistant Attorney General Robert Charles Lee was present and represented the Commonwealth of the Northern Mariana Islands ("Commonwealth"). Assistant Public Defender Heather Zona was present and represented Vanessa Charfauros. Defendant Charfauros appeared telephonically from the Rota Courthouse.

II. BACKGROUND

On October 2, 2018, Defendant served a discovery request on the Office of Attorney General, seeking certain discovery including documents, tangible objects, photographs, impeachment material, and witness statements.

Defendant moves the Court to order the prosecution to discover 1) the criminal records and legal status of witnesses; 2) *Henthorn* material including Internal Affairs records, as well as any *Brady* material concerning law enforcement and anyone acting on behalf of law enforcement in investigating the case; 3) field notes and briefing notes; and 4) performance goals and awards.

III. LEGAL STANDARD

1) NMI R. CRIM. P. Rule 16

NMI Rules of Criminal Procedure Rule 16(a)(1)(C) provides:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody, or control of the government, and which are material to the preparation of his/her defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

When a defendant seeks discovery under Rule 16(a)(1)(C) on the ground that the information sought is material to prepare the defense, the defendant must make a threshold showing of materiality. *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995). That "requires a presentation of 'facts which would tend to show that the Government is in possession of information helpful to the defense.'" *Id.* (quoting *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990)). "Neither a general description of the information sought nor conclusory allegations of materiality suffice." *Id.* "Requests under Rule 16 must be sufficiently clear to inform the prosecution about what is sought." *United States v. McVeigh*, 954 F. Supp. 1441, 1450 (D. Colo. 1997).

2) Constitutional Mandate of *Brady*

The due process clauses of the Fifth and Fourteenth Amendments require that the prosecution in a criminal case disclose to the defense any evidence in the government's possession that is favorable to the accused and that is material to either guilt or punishment. *Brady v. Maryland*,

373 U.S. 83, 87 (1963). Suppression of such evidence by the government will constitute a constitutional violation, regardless of the good faith or bad faith of the prosecutor. *Id.* "An inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene*, 527 U.S. 263, 288 (1999). The constitutional obligations under *Brady* are self-executing, and they do not require a motion by the defense or an order of the court to take effect. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citing *United States v. Agurs*, 427 U.S. 97, 108 (1976)).

A defendant is entitled to evidence favorable on substantive issues, as well as evidence that materially affects the credibility of the witnesses or the admissibility of evidence. *Brady*, 373 U.S. at 87; *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Strickler*, 527 U.S. 263 (1999). This includes both potentially exculpatory evidence and impeachment evidence regarding prosecution witnesses. *Bagley*, 473 U.S. at 676.

Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Cf. Napue* v. *Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.")

IV. DISCUSSION

Defendant moves the Court to order the prosecution to discover 1) the criminal records and legal status of witnesses; 2) *Henthorn* material including Internal Affairs records, as well as any *Brady* material concerning law enforcement and anyone acting on behalf of law enforcement in

investigating the case; 3) field notes and briefing notes; and 4) performance goals and awards. The Court will address each of these requests in turn.

1) Criminal Record and Legal Status of Witnesses

For the first request, Defendant argues the criminal records and legal status of witnesses can be used for impeachment material, or motive and bias.

At the hearing on the motion, the Commonwealth did not oppose producing the criminal records, within its control and custody, of witnesses. However, the Commonwealth informed the Court that it has no mechanism to produce the legal status of witnesses within the control and custody of the federal government, which handles such matters, including immigration.

Thus, for the criminal records and legal status of witnesses within the Commonwealth's control and custody, Defendant's Motion to Compel is hereby **GRANTED**. However, this Order does not include documents and records that are within the federal government's control and custody.[1]

2) *Henthorn* material including Internal Affairs records, Performance Goals and Awards, as well as any *Brady* material concerning law enforcement and anyone acting on behalf of law enforcement in investigating the case

For the second request, Defendant argues such material can be used for impeachment material, including such information as evidence of complaints filed against law enforcement officers involved, perjurious conduct or other acts of dishonesty. Defendant also requests material concerning standards used for evaluating the conduct of all law enforcement involved in the investigation. Such information would concern qualifications of all law enforcement officers.

In *United States v. Henthorn*, the court held that upon the request of a defendant, and regardless of any showing of materiality, the prosecution must examine and determine whether the

[1] If the Parties wish to further brief this specific area of law, they may do so through a Supplemental Brief.

testifying officers' personnel files contain *Brady* material or turn them over to the court for *in camera* review to determine whether they contain *Brady* material. 931 F.2d at 30-31.

While *Henthorn* remains good law within the Ninth Circuit, multiple jurisdictions at both the state and federal levels have rejected its holding. *See, e.g.*, *United States v. Quinn*, 123 F.3d 1415, 1422 (11th Cir. 1997); *United States v. Lafayette*, 983 F.2d 1102, 1106 (D.C. Cir. 1993); *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992) (upholding government's refusal to disclose testifying officers' personnel files based only on defendant's speculation that files contained impeachment material); *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985) (noting that mere speculation is insufficient to require *in camera* inspection of personnel files of law enforcement witnesses); *United States v. Wilson*, 278 F.R.D. 145, 156 (D. Md. 2011); *State v. Robles*, 895 P.2d 1031, 1035 (Ariz. Ct. App. 1995); *People v. Shakur*, 648 N.Y.S.2d 200, 208 n.7 (Sup. Ct. 1996). This Court favors the holdings in these other jurisdictions, along with the Supreme Court of Guam, in that the better approach is one that requires a threshold showing of materiality to trigger a mandatory review by the prosecution. *People of Guam v. Mateo*, 2017 Guam 22 ¶ 17.

The Court agrees that more than mere speculation is required to trigger the Commonwealth's duty to search files and personnel records. Defendant has offered no support for her contention that personnel files, including Internal Affairs records and performance goals and awards, might contain information important to her case, besides a conclusory statement that such information would provide impeachment material. *Andrus*, 775 F.2d 843 (quoting *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984)) ("Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court.") "The Supreme Court has made clear that the *Brady* rule is not an evidentiary rule which grants broad

discovery powers to a defendant and that 'there is no general constitutional right to discovery in a criminal case.'" *United States v. Todd*, 920 F.2d 399, 405 (6th Cir. 1990) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

For the aforementioned reasons, the Court hereby **DENIES** Defendant's request for *Henthorn* material including Internal Affairs records, Performance Goals and Awards, without more than mere speculation.

3) Field Notes and Briefing Notes

For the third request, Defendant requests field notes and briefing notes. Defendant asserts the prosecution has not produced the notes from some reports.

As stated above, NMI Rules of Criminal Procedure Rule 16(a)(l)(C) addresses the discovery of documents and tangible objects. Under Rule 16(a)(l)(C), the government must permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, if the requested items (1) are material to the preparation of the defendant's defense; (2) are intended for use by the government as evidence in chief at the trial; or (3) were obtained from or belong to the defendant.

Where a defendant seeks discovery of documents and tangible objects under Rule 16(a)(1)(C) on the grounds that the information sought is "material to the preparation of the defendant's defense," such documents and tangible objects need not be disclosed unless the defendant makes a threshold showing of materiality. *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995). A general description of the item will not suffice; neither will a conclusory argument that the requested item is material to the defense. *See United States v. Carrasquillo-Plaza*, 873 F.2d 10, 12-13 (1st Cir. 1989); *United States v. Cadet*, 727 F.2d 1453, 1466 (9th Cir. 1984).

Rather, the defendant must make a specific request for the item together with an explanation of how it will be "helpful to the defense." *See, e.g.*, *United States v. Marshall*, F.3d 63, 67-68 (D.C. Cir. 1998) ("helpful" means relevant to preparation of the defense and not necessarily exculpatory); *United States v. Olano*, 62 F.3d 1180, 1203 (9th Cir. 1995). As the Fifth Circuit articulated in *United States v. Buckley*, the defendant must "show" "more than that the [item] bears some abstract logical relationship to the issues in the case. . . . There must be some indication that the pretrial disclosure of the [item] would . . . enable [] the defendant significantly to alter the quantum of proof in his favor." 586 F.2d 498, 506 (5th Cir. 1978) (quoting *United States v. Ross*, 511 F.2d 757, 762-63 (5th Cir. 1975)).

The discovery afforded by Rule 16(a)(1)(C) is limited by Rule 16(a)(2). Rule 16(a)(2) exempts from disclosure "reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case," and "statements made by government witnesses or prospective government witnesses." NMI R. CRIM. P. 16(a)(2).

In addition to the government's discovery obligations under Rule 16(a), the government must also honor the defendant's constitutional rights, particularly the due process right *Brady* established. *Brady* requires the prosecutor to turn over to the defense evidence that is favorable to the accused, even though it is not subject to discovery under Rule 16(a), since, eventually, such evidence may "undermine[] the confidence in the outcome of the trial." *United States v. Newton*, 44 F.3d 913, 918 (11th Cir. 1995) (quoting *Bagley*, 473 U.S. at 678).

The defendant's right to the disclosure of favorable evidence, however, does not "create a broad, constitutionally required right of discovery." *Bagley*, 473 U.S. at 675 n.7. Indeed, a "defendant's right to discover exculpatory evidence does not include the unsupervised right to search through the [government's] files," *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987), nor does

the right require the prosecution to deliver its entire file to the defense. *See Agurs*, 427 U.S. 97. Instead, *Brady* obligates the government to disclose only favorable evidence that is "material." *United States v. Jordan*, 316 F.3d 1215, 1251-52 (11th Cir. 2003). The "touchstone of materiality is a 'reasonable probability' of a different result." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Accordingly, under *Brady*, the government need only disclose during pretrial discovery (or later, at the trial) evidence which, "in the eyes of a neutral and objective observer, could alter the outcome of the proceedings." *Jordan*, 316 F.3d at 1252.

In the instant matter, where the defendant only makes a general request for exculpatory material under *Brady*, the government determines which information in its control and custody is exculpatory and if it determines the existence of exculpatory material, it must then be disclosed. *Ritchie*, 480 U.S. at 59 (footnote omitted). "Unless the defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." *Id.* If the defendant is aware of specific information contained in the government's file, "he is free to request it directly from the court, and argue in favor of its materiality." *Id.* However, mere speculation or allegations that the prosecution possesses exculpatory information will not suffice to prove "materiality." *See, e.g.*, *United States v. Ramos*, 27 F.3d 65, 71 (3d Cir. 1994) (mere speculation that agents rough notes contained *Brady* evidence was insufficient); *United States v. Williams-Davis*, 319 U.S. App. D.C. 267, 90 F.3d 490, 513 (D.C. Cir. 1996); *United States v. Michaels*, 796 F.2d 1112, 1116 (9th Cir. 1986). The defendant must show that there is a reasonable probability the evidence could affect the outcome of the trial. *See Baxter v. Thomas*, 45 F.3d 1501, 1507 (11th Cir. 1994).

As stated above, Rule 16(a)(2) exempts disclosure of reports, memoranda, or other internal government documents made by a government attorney or agent in connection with investigating or prosecuting the case. NMI R. CRIM. P. 16(a)(2). An agent's rough interview notes may

nevertheless be discoverable under *Brady* if the defendant shows that the notes are exculpatory and material. *United States v. Lujan*, 530 F. Supp. 2d 1224, 1265-66 (D.N.M. 2008) (citing *United States v. Sullivan*, 919 F.2d 1403, 1426-27 (10th Cir. 1990); *United States v. Pisello*, 877 F.2d 762, 768 (9th Cir. 1989) (considering whether rough notes fell within *Brady*)). Here, in her Motion to Compel, Defendant has not demonstrated why the notes she requested are material to her defense, beyond speculation and a conclusory statement that "such materials obviously would contain potentially exculpatory information." There has been no showing by Defendant that FBI Agent Haejun Park's or Office of the Public Auditor Investigator Travis Hurst's notes are exculpatory and material.

Further, the Commonwealth has indicated that Defendant is already in possession of all law enforcement reports in this case and unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to this Court's attention, the prosecutor's decision is final. *Ritchie*, 480 U.S. at 59.

However, because the contents of rough interview notes may in some cases be subject to disclosure and because the potential impeachment value of the notes may not become evident until trial, the Court **ORDERS** the Commonwealth to preserve rough interview notes made by law enforcement agents during interviews of potential witnesses, if any, for the Court's *in camera* review. *See United States v. Cooper*, 283 F. Supp. 2d 1215, 1238 (D. Kan. 2003) (granting motion to preserve rough interview notes but denying request to disclose notes because defendants had not made necessary showing for *in camera* review); *United States v. Floyd*, 247 F. Supp. 2d 889, 899 (S.D. Ohio 2002) (ordering preservation of rough notes but not disclosure).

Additionally, Defendant has not made a showing of materiality as to any specific information contained in the notes that the Commonwealth has refused to produce, and thus, her request for disclosure of the rough interview notes of law enforcement officers and agents is

DENIED under *Brady* and Rule 16. *See Pisello*, 877 F.2d at 768 (holding that defendant's mere assertion that agents' notes "might" contain impeachment evidence insufficient to order production of notes); *United States v. Hudson*, 813 F. Supp. 1482, 1490 (D. Kan. 1993) (concluding that agent's rough interview notes need not be produced under *Brady* where defendant failed to show that notes were material).

V. CONCLUSION

For the aforementioned reasons, Defendant's Motion to Compel is **GRANTED IN PART** and **DENIED IN PART**. Should Defendant become aware of other exculpatory evidence that was withheld, Defendant may bring it to this Court's attention.

Defendant's request for the criminal records of witnesses is hereby **GRANTED**

Defendant's request for *Henthorn* material including Internal Affairs records, Performance Goals and Awards is hereby **DENIED**, without more than mere speculation.

Defendant's request for disclosure of the rough interview notes of law enforcement officers and agents is **DENIED** under *Brady* and Rule 16.

SO ORDERED this 15 day of August, 2019.

ROBERT C. NARAJA, Presiding Judge