

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 22-20290-CR-BLOOM(s)

UNITED STATES OF AMERICA

vs.

ERIC DEAN SHEPPARD

Defendant.

**UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT'S EMERGENCY MOTION TO EXCLUDE EVIDENCE**

The United States, by and through the undersigned Assistant United States Attorney, submits this response in opposition to the defendant's emergency motion to exclude evidence. The defendant's claim of a *Brady* violation and the other baseless accusations made in the defendant's motion neither constitute an emergency nor do they have any merit. The United States respectfully requests that the Court deny the defendant's motion.

Discussion

During the trial, the defendant raised for the first time the possible defense that a deceased former business associate, J.V., had access to the defendant's computer(s) and, unbeknownst to the defendant, uploaded false and forged document to lend support to the defendant's loan applications. The government has no information from the evidence it gathered in this case that J.V. had any criminal involvement with the defendant relating to the fraud scheme or the aggravated identity theft charges that are in the Superseding Indictment. Thus, prior to the defense's efforts to inject this issue into the trial, the government had no reason to interview J.V.'s widow.

Within the last couple of weeks, the government obtained limited consent from J.V.'s widow to search and seize specific information from J.V.'s cell phone, primarily, J.V.'s communications with the defendant. The defendant has successfully introduced voluminous reciprocal discovery during the trial that the defense withheld from the government, claiming it as "rebuttal" evidence, and now complains that the government is attempting to rebut a claim the defendant is making for the first time at trial. The defense has no basis and cites no authority for a court to order the FBI not to investigate a matter within its jurisdiction, and a matter it deems relevant to this case.

The government does not have an obligation to disclose its proposed rebuttal evidence to the defendant. *See United States v. Windham*, 489 F.2d 1389, 1392 (5th Cir. 1974); *United States v. Delia*, 944 F.2d 1010, 1018-19 (2d Cir. 1991); *United States v. Grintjes*, 237 F.3d 876, 879-80 (7th Cir. 2001). The defendant accuses the government of a *Brady* violation, but he does not point out what *Brady* violation is occurring, and cites no case law to support his accusations. The defendant's own communications with J.V. is something he should already have. Nevertheless, the government will provide a copy of those communications to the defense in time for the defense to review them before the trial resumes.¹

¹ One of the many baseless assertions in the defendant's motion is that the government stretched out the testimony of its summary witness in order to cause the defendant to be in the middle of his testimony when the Court broke for its recess. Over the course of several days, including after the close of the government's case, the defense provided the government three different witness line-ups of its first three witnesses, none of which included the defendant. The defense also specifically told the government that it was going to call multiple witnesses – not the defendant -- before the Court's recess in order to avoid going into the recess with the defendant on the witness stand. The government found out the defendant would be testifying minutes before he took the stand.

As for the scope of the items to be extracted from J.V.'s cell phone, his widow's consent was limited to specific items from the phone. The defendant does not appear to be requesting the contents of the entire cell phone, but claims that there might be *Brady* information on the rest of the device, again without providing anything specific on that point. The government does not have authority to search for and seize all of the contents of J.V.'s cell phone. The government can only take possession of the items it is authorized to search for and seize from J.V.'s cell phone. *See, e.g., United States v. Avenatti*, 559 F. Supp. 3rd 274 (S.D.N.Y. 2021) (the government had received limited consent to search and seize from the victim/witness's phone certain WhatsApp communications; government may not "access or copy the contents of the cell phone without a warrant or the person's consent the Government was under no obligation to disclose to Avenatti more than it obtained itself, so neither *Brady* nor Rule 16 calls for exclusion of the WhatsApp evidence here."); *see also, United States v. Balwani*, 2022 WL 1405404, at *6 (N.D. Ca. May 4, 2022) (information located within the targets' seized devices is not within the government's lawful possession, custody, or control, except for the information seized under the search warrant's Attachment B; the government does not have any discovery obligations with respect to the other information located within the devices. "Even if Balwani had made a proper Rule 16 demand for the remainder of the [21 terabytes of data], the Government could not have produced that data because, for the reasons discussed above, the Government did not have lawful possession, custody, or control of it."). Thus, there is no *Brady* violation from the government's non-disclosure of the contents of J.V.'s cell phone to which it does not have lawful possession, custody or control.

The defendant also seeks to relitigate – during a court adjournment – issues which the Court has ruled on, by written order, and which the Court has reaffirmed during the trial. The government strongly disagrees with the defendant’s mischaracterization of the matters he raises in this non-emergency, emergency motion. The reason for the defense’s hurry is the defendant’s displeasure that the government is continuing to investigate, and may gain evidence that the defendant already has – his communications with a deceased business associate. There has been no misconduct.

Conclusion

For the reasons set forth above, the defendant’s motion to exclude evidence should be denied. Any further arguments should be heard when the Court is back in session on January 8, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 29, 2023, I filed this motion and proposed order with the Clerk of the Court under seal, and provided a copy to counsel of record.

s/Aimee Jimenez

Aimee C. Jimenez

Assistant United States Attorney