IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-03,05-CR-W-FJG
	)	
TROY R. SOLOMON,	)	
and	)	
DELMON L. JOHNSON,	)	
	)	
Defendants.	)	

GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT SOLOMON'S AND DEFENDANT JOHNSON'S DISCOVERY MOTIONS [DOCS. 59, 60, 61, 62, 67, 68, 69, AND 70]

COMES NOW the United States of America, by and through its undersigned counsel, and files this Consolidated Response to various Discovery Motions filed by Defendant Troy R. Solomon and Defendant Delmon L. Johnson. Pending motions are: (1) Motion for Discovery (Doc. 59,68); (2) Motion for Discovery and Inspection Concerning Government's Use of Informants, Operatives, and Cooperating Individuals (Doc. 60, 67); (3) Motion for Early Production of Witness Statements (Doc. 61, 69); and Motion to Discover Evidence Favorable to Defendant (Doc. 62, 70). For the reasons stated below, defendants' motion should be denied as moot.

I. BACKGROUND

Troy Solomon, Delmon Johnson, and three co-defendants are charged in a 24-count indictment returned by a Grand Jury sitting in the Western District of Missouri on February 6, 2008. All of the defendants are charged in count one with conspiracy to distribute Schedule III, IV and V controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count Two

charges all defendants, except co-defendant Christopher Elder, with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). Counts Three through Ten charge Defendants Solomon and Johnson with illegal distribution of controlled substances, in violations of 21 U.S.C. § 841(a) and 18 U.S.C. § 2. Counts Eleven and Twelve charge Defendant Solomon with distribution of controlled substances, in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2.

On April 3, 2008, this Honorable Court issued a Discovery Order addressing Rule 16 of the Federal Rules of Criminal Procedure (Doc. 35) in Section I of the order. This Court ordered that, "**Within ten days** from the date of arraignment, the government shall disclose or make available for **inspection, copying or photographing** to defense counsel, the following information within the possession, custody and control of the government or the existence of which is known or by the exercise of due diligence may become known to the attorney for the government . . ." (Emphasis in original.) Section I of the Order lists four categories of discovery: 1) convictions; 2) statements; 3) other discovery; and 4) evidence arguably subject to suppression. Section III of the Order addresses evidence favorable to the defense.

On April 11, 2008, this Court issued a Trial Order establishing a time schedule for discovery and pretrial filings. (Doc. 41) The Trial Order addresses such issues as Rule 404(b) Evidence, Expert Witnesses, and Witness Lists.

On June 16, 2008, Defendants Solomon and Johnson filed their discovery motions. (Docs. 59, 60, 61, 62, 67, 68, 69, and 70).

II. LEGAL ARGUMENT

1. Defendants' Motions for Discovery (Docs. 59 and 68)

Defendants Solomon and Johnson move for an order to compel discovery. Their motions should be denied.

"Criminal defendants do not have a general constitutional right to discovery." *United States v. Johnson*, 228 F.3d 920, 924 (8th Cir. 2000); *citing Weatherford v. Bursey*, 429 U.S.545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). "In most circumstances, then, a defendant must point to a statute, rule of criminal procedure, or other entitlement to obtain discovery from the government." *Johnson*, 228 F.3d at 924.

The government's duty to provide discovery is governed by Rule 16, Federal Rules of Criminal Procedure. Under this rule, the Government must provide to the defendant a number of items which are material to the defense, including: the substance of any oral statement made by the defendant; any written or recorded statement made by the defendant; and the defendant's prior criminal record. Rule 16(a)(1)(E) also contains a provision to allow the defendant access to any other materials in the possession of the Government, including books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or any portions of any of these items, provided:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

Fed.R.Crim.P. 16(a)(1)(E).

In the present case, the government has made available to defense counsel all items listed in Rule 16 within its possession and which by the exercise of due diligence may become known to the attorney for the government. If the defendants are missing any reports, the government will provide them as soon as the oversight is discovered, and will continue to supplement the discovery with any report not currently in government possession. Government records indicate that more than 17000 pages of discovery have been provided to the defendants to date. An order to compel discovery is unnecessary.

With regard to the interception of communications, the government states that there has not been any interception, court ordered or otherwise. Furthermore, there has not been a lineup, photo or live, involving the defendants.

To the extent that their request for Rule 16 evidence conforms to this Court's Discovery Order dated April 3, 2008, the government has and is complying with the Court's Order. To the extent that defendants seek discovery not ordered by the Court, the government opposes their requests. One example of their requests not covered by Rule 16 or this Court's Discovery Order is "any sentencing guideline calculation material used by the government to calculate the appropriate sentence." Defendants Solomon and Johnson have cited no legal authority for their right to access internal government documents. *See United States v. Williams*, 977 F.2d 866, 871 (4th Cir. 1992) (concluding that a defendant has no right under the guidelines or the federal rules to receive information about guideline calculations before trial). To be sure, counsel for the government has been unable to locate the requirement for this disclosure in F.R.Cr.P. 16 or the Court's Discovery Order.

To the extent that defendants seek Rule 404(b) evidence, the government will provide reasonable notice of its intent to use prior and subsequent acts and convictions intended to prove

knowledge, intent or other elements identified in that rule no later than thirty days before trial, which timing would be in compliance with this Court's Trial Order. (*See* Doc. 21). Thus, it is premature to compel disclosure at this time.

Furthermore, Local Court Rule 37.1 governs the filing of discovery motions in Federal District Courts located in the Western District of Missouri. Rule 37.1 states:

(a) Except when authorized by an order of the Court, the Court will not entertain any discovery motion, until the following requirements have been satisfied:

> (1) Counsel for the moving party has in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion. Merely writing a demand letter is not sufficient. Counsel for the moving party shall certify compliance with this rule in any discovery motion...
>
> (2) If the issues remain unresolved after the attorneys have conferred in person or by telephone, counsel shall arrange with the Court for an immediate telephone conference with the judge and opposing counsel. No written discovery motion shall be filed until this telephone conference has been held.

Although Rule 37.1 appears to apply mainly to civil actions, the clear intent of the rule directs parties involved in litigation before the courts to make attempts to complete and resolve discovery disputes before involving the courts. Defense counsel has not informed counsel for the government there was a discovery dispute, nor made any attempt to resolve the matter without court involvement.

The Court is empowered to regulate discovery in criminal cases pursuant to Federal Rule of Criminal Procedure 16(d). To the extent this Court has addressed Defendants Solomon's and Johnson's requests for Rule 16 discovery in its Discovery Order, their requests are now moot. To the extent that defendants seek discovery not ordered by this Court or authorized by F.R.Cr.P. 16, they have not cited any statute or rule of discovery supporting their requests, nor have they complied in any way with Local Rule 37.1 in attempting to resolve the matter. Accordingly, the defendants' motion for discovery and inspection should be denied as moot.

2. Defendants Motions for Discovery Concerning Confidential Informants' Identities and Other Individuals (Docs. 60 and 67)

Defendants Solomon and Johnson seek an order directing the government to disclose "information concerning the use of informants, confidential informants, witnesses, informers, confidential sources, sources of information, inflitrators, cooperating individuals, security informers or intelligence assets who participated in any way or who are material witnesses to any of the events charged in the indictment." (Def. Solomon's Mtn for Discovery Concerning Use of Informants, at 1; Def. Johnson's Mtn for Discovery Concerning Use of Informants, at 1) The motion has a laundry list of information sought by the defendants. The government did not use a confidential informant. The motions should be denied.

At the outset, a criminal defendant does not have a general right to discovery. In most circumstances, without an applicable statute, rule or other entitlement, discovery shall not be forthcoming. *Johnson*, 228 F.3d at 924.

"In a motion to compel disclosure of a confidential informant, the defendant bears the burden of demonstrating a need for disclosure." *United States v. Wright*, 145 F.3d 972, 975 (8th Cir. 1998). To the extent the defendants are seeking the identity of a confidential informant and the like, they clearly have not met their burden. This motion is based on pure speculation. Defendants do not cite to any reports in which a confidential informant was employed. The government did not use any confidential informants in this case.

To the extent there are any witness inducements, that information, as set forth in the April 11 Trial Order, will be provided to the defendants no later than the Friday before the pretrial conference.

To the extent Defendants Solomon and Johnson are seeking reports of interviews of potential trial witnesses, that request should be denied. The defendants do not cite any case law in support of its request for such information. Although it had no legal obligation to do so, the government produced reports of witness interviews conducted by law enforcement agents. Under Rule 16 of the Federal Rules of Criminal Procedure, "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case" are protected from disclosure. *Fed.R.Crim.P. 16(a)(2).* Rule 16 further states that nothing in that rule is intended to "authorize the discovery or inspection of statements made by prospective government witnesses except as authorized by [the Jencks Act] 18 U.S.C. § 3500." *Id.*

To be clear, the DEA reports are not witness statements under the meaning of 18 U.S.C. § 3500. They have not been read, signed, or adopted by the persons interviewed. Instead, they are the work product of an agency investigating the instant offense. Therefore, by definition, the reports are exempt from discovery by Fed.R.Crim.P. 16(a)(2), and not discoverable under the Jencks Act. On more than one occasion, the Supreme Court has determined that an agent's report of a witness interview is not subject to disclosure pursuant to the Jencks Act. *Palermo v. United States*, 360 U.S. 343, 351-53 (1959); *Campbell v. United States*, 373 U.S. 487 (1963); *see also Kane v. United States*, 431 F. 2d 172 (8th Cir. 1970) (where witness is interviewed by an agent who takes notes during the course of the interview, but no statement is read back or shown to the witness, and the witness signs no statement, and there is no stenographic or other substantially verbatim recording of the interview, the agent's report of the interview is not producible under the Jencks Act).

The defendants motions for discovery and inspection concerning government use of of informants, operatives, and cooperating individuals should be denied.

3. Defendants' Motions for Early Production of Witness Statements (Docs. 61 & 69)

Defendants seek an order directing the government to provide them a copy of statements by any government witness before such witness testifies at trial. No present controversy exists. As discussed in subsection 2, supra, the government has provided defendants with reports of witness interviews.

Beyond Rule 16, the statute governing the production of witness statements is referred to as the Jencks Act ("Act") and is codified at 18 U.S.C. § 3500. The Act specifically provides that the pretrial statements of a witness are not subject to "subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500(a). The Act further provides that production of a pretrial witness statement is required only after the witness has testified on direct examination, and is limited to only that portion of the statement that "relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b); s*ee also United States v. Douglas*, 964 F.2d 738, 741 (8th Cir. 1992); *United States v. White*, 750 F.2d 726 (8th Cir. 1984). Courts do not have discretion to order witness statements to be furnished before the witness has testified if the Government is unwilling to do so. *White*, 750 F.2d at 729.

The Act defines the term "statement" to include only the following types of materials:

> (1) a written statement made by said witness and signed or otherwise adopted and approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

Rule 26.2 of the Federal Rules of Criminal Procedure mirrors the text of the Jenks Act. Production of a witness statement is not required until after the witness has testified on direct examination, and the only that portion of the pretrial statement that relates to the subject matter of the witness's trial testimony must be produced. Fed.R.Crim.P. 26.2(a). The rule also defines the term "statement" in the exact same manner as the Act. Fed.R.Crim.P. 26.2(f).

In the present case, the government has exceeded the discovery requirements in this case. The government has given the defendants access to internal work product documents.

4. Defendants' Motions to Discover Favorable Evidence (Docs. 62 & 70)

Defendants Solomon and Johnson seek an order directing the government to disclose material, exculpatory evidence within the government's possession. Defendants motions should be dismissed as moot.

The government is aware of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, including *Giglio v. United States*, 405 U.S. 150 (1972). Moreover, the government has complied with its obligations and will continue to do so.

Defendants' motion should be denied as moot.

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny all motions to compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on July 21, 2008, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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