

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL ACTION

VERSUS

NO. 12-291

DAVID RAINEY

SECTION "N" (3)

DISCOVERY ORDER NO. 1

The United States Department of Justice ("Government") has previously recognized that providing broad and early discovery promotes the truth-seeking mission of the Department of Justice and fosters speedy resolutions of cases such as this, which furthers compliance with the Speedy Trial Act, Title 18, United States Code, Section 3161. In addition to obligations imposed on the Government pursuant to Fed.R.Crim.P. 16 and 26.2, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), 18 U.S.C. § 3500 (the Jencks Act), and Chapters 9-5.001 and 9-5.100 of the United States Attorney's Manual,

I.

A. **IT IS ORDERED** that counsel of record for the Government shall provide to the defendant (through his authorized counsel) any "covered information" –

(1) that is within the possession, custody, or control of the prosecution team; or

(2) the existence of which is known, or by the exercise of due diligence would

become known, to the attorney for the Government and/or any member of the prosecution team.

B. In this Order,

(1) the term "covered information" means information, data, documents,

evidence, or objects that may appear to be favorable to the defendant in this prosecution with respect

to –

(a) the determination of guilt;

(b) any preliminary matter before this Court in these proceedings; or

(c) the sentence which might be imposed in the event of conviction.

"Covered information" shall also include "e-communications" which includes but shall not be limited to emails, text messages, SMS (short message service), instant messages, voicemail, pin-to-pin communications, social networking sites, bulletin boards, blogs, and similar means of electronic communication.

(2) the term "prosecution team" includes:

(a) The Deep Water Horizon Task Force including all counsel associated with or previously associated with such Task Force, and any other person employed by or expending efforts on behalf of or in coordination with the Deep Water Horizon Task Force by way of investigation or prosecution of any person or entity by such Task Force.

(b) The United States Attorney's Office for the Eastern District of Louisiana;

(c) any entity or individual, including a law enforcement or investigatory agency or official, that –

(i) acts on behalf of the Government with respect to this criminal prosecution, either pre- or post indictment;

(ii) acts under the control of the Government with respect to the criminal prosecution, either pre- or post indictment; or

(iii) participates jointly with the Government in any investigation with respect to this criminal prosecution, either pre- or post indictment.

(d) "Prosecution Team" shall also include any federal, state or local law enforcement officer and/or other government official participating in the investigation and prosecution of this case by the Deep Water Horizon Task Force.

(e) Government counsel of record are to err on the side of inclusiveness when identifying the members of the "prosecution team" for purposes of this Order.

C. Materiality. –

(1) In identifying and compiling "covered information" in compliance with this Order, the prosecution team shall not, in any way, consider, distinguish or omit documents or other

information on the basis of materiality of such information to the prosecution or defense in this matter. Evaluations of materiality shall not in any way limit the Court's Order, or the prosecution team's responsibility to comply with it.

(2) To the extent the Government believes, in good faith, that any "covered information" compiled in connection with this Order is not subject to disclosure pursuant to Fed.R.Crim.P. 16(a)(1)(E)(i), the Government shall prepare an itemized log of all such covered information, and submit such log along with any and all documents to the Court *ex parte* for in-camera review.

II.

IT IS FURTHER ORDERED that the Government shall provide to the defendant any covered information –

- (1) within thirty (30) days of the signing of this Order;
- (2) if the existence of the covered information is not known on the date of the initial disclosure under this Order, as soon as is reasonably practicable upon the existence of the covered information becoming known;
- (3) except as provided in paragraph II (4) ("classified information"), the requirements under this Order shall apply notwithstanding 18 U.S.C. § 3500(a);
- (4) classified information (as defined in section 1 of the Classified Information Procedures Act (18 U.S.C. app. 3)) shall be treated in accordance with the Classified Information

Procedures Act. In the event the Government deems any covered information to be so classified under this Order, and withholds production to the defendant on such grounds, it shall immediately notify the Court in writing that it has done so; and

(5) This Order is continuing in nature. The obligations set forth hereunder shall not terminate at any time prior to final disposition of this matter.

III.

IT IS FURTHER ORDERED that, with regard to protective orders,

A. Upon motion of the Government, the Court may issue an order to protect against the immediate disclosure of covered information otherwise required to be disclosed under this Order if –

(1) the covered information is favorable to the defendant solely because the covered information would provide a basis to impeach the credibility of a potential witness; **and**

(2) the Government establishes a reasonable basis to believe that –

(a) the identity of the potential witness is not already known to any defendant; and

(b) disclosure of the covered information to a defendant would present a threat to the safety of the potential witness or of any other person.

B. The Court may delay disclosure of covered information under this Order until the date that the Court determines provides a reasonable amount of time before the date set for trial.

C. The Government may file all or a portion of a motion under this Order under seal to the extent necessary to protect the identity of a potential witness, but the United States –

(1) may not file a motion under this subsection ex parte; and

(2) shall summarize any undisclosed portion of a motion filed under this Order for the defendant in sufficient detail to permit the defendant a meaningful opportunity to be heard on the motion, including the need for a protective order or the scope of the requested protective order.

IV.

IT IS FURTHER ORDERED that the defendant may not waive a provision of this section except in open court. The Court may not accept the waiver of a provision of this Order by the defendant unless the Court determines that –

(1) the proposed waiver is knowingly, intelligently, and voluntarily offered; and

(2) the interests of justice require the proposed waiver.

V.

IT IS FURTHER ORDERED that,

A. Upon motion of the defendant or by the Court sua sponte, if there is reason to believe that counsel for the Government has failed to comply with this Order, the Court shall order the Government to show cause in writing why the Court should not find the Government is not in compliance with this Order.

B. If the Court determines under paragraph V.A. that the Government is not in compliance with this Order, the Court shall –

- (1) determine the extent of and reason for the noncompliance; and
- (2) enter into the record the findings of the Court.

C. If the Court determines that the Government has violated the requirement to disclose covered information under this Order or the requirement to disclose covered information in a timely manner under this Order, the Court shall order an appropriate remedy:

- (1) A remedy under this subsection may include –
 - (a) postponement or adjournment of the proceedings;
 - (b) exclusion or limitation of testimony or evidence;
 - (c) ordering a new trial;
 - (d) dismissal of the proceedings with or without prejudice;
 - (e) sanctioning responsible counsel, including but not limited to monetary penalty assessed against him/her personally; disqualification from further representation in this matter and striking him/her as counsel of record; institution of criminal contempt proceedings against responsible counsel; reporting counsel's conduct to relevant bar associations for further investigation and institution of disciplinary proceedings; or
 - (f) any other remedy determined appropriate by the Court.

In fashioning a remedy under this subsection, the Court shall consider the totality of the circumstances, including –

- (i) the seriousness of the violation;
- (ii) the impact of the violation on the proceeding;
- (iii) whether the violation resulted from innocent error, negligence, recklessness, or knowing conduct; and
- (iv) the effectiveness of alternative remedies to protect the interest of the defendant and of the public in assuring fair prosecutions and proceedings.

(2) Defendant's costs. –

D. If the Court grants relief under paragraph V on a finding that the violation of this Order was due to negligence, recklessness, or knowing conduct by the Government, the Court may order that the defendant, or the attorney for the defendant, recover from the Government the costs and expenses incurred by the defendant, and/or the attorney for the defendant, as a result of the violation, including reasonable attorney's fees (without regard to the terms of any fee agreement between the defendant and the attorney for the defendant).

Costs and expenses ordered by the Court under this Order –

- (i) shall be paid by the Government, and/or
- (ii) shall be paid personally by individual counsel of record, where such conduct, demonstrated by clear and convincing evidence, is the result of bad faith or contumacious conduct by individual counsel.

VI.

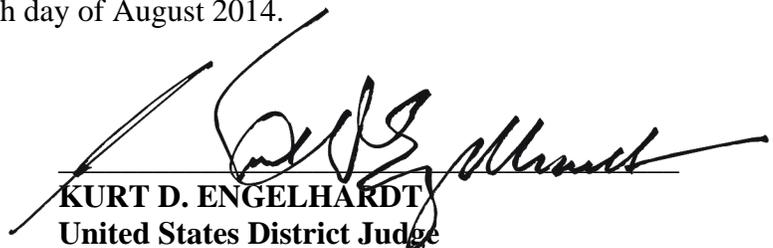
IT IS FURTHER ORDERED that the prosecution team shall, at all times, comply with 28 C.F.R. § 50.2, Chapter 1-7.000, *et sequitur* of the United States Attorney's Manual; Local Criminal Rule 53 of the United States District Court for the Eastern District of Louisiana; and Rules 3.8 and 8.4 of the Louisiana Rules of Professional Conduct, and be prepared to certify on the record that all members of the prosecution team are in compliance at the outset of the trial in this case.

VII.

IT IS FURTHER ORDERED that, upon completion of all disclosures set forth in paragraph I of this Order, Deep Water Horizon Task Force counsel of record shall forthwith file into the record a sworn certification of compliance with all the provisions of this Order, affirmatively stating the Government's completion of compliance with this Order, signed personally by all counsel of record for the Government.

The Court will, in a subsequent Order, require disclosure of discovery items from defendant at a later date.

New Orleans, Louisiana, this 11th day of August 2014.


KURT D. ENGELHARDT
United States District Judge