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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) No. CR-S-09-73 EFB
11)
Plaintiff,)
12) AMENDED
v.) MOTION IN LIMINE TO EXCLUDE
13) DEFENDANT'S STATEMENTS DUE TO
OSCAR FOREMAN,) DISCOVERY VIOLATIONS
14)
Defendant.)
15) Date: January 12, 2010
Time: 9:30 a.m.
Judge: Hon. Edmund F. Brennan
16

17 **To:** Benjamin B. Wagner, United States Attorney
Matthew Stegman, Assistant United States Attorney:

18 Oscar Foreman, by and through undersigned counsel, moves this Court for an order precluding the
19 government from introducing any and all statements that he allegedly made to Jamie Baldwin on
20 December 10, 2008, because the government failed to disclose those statements until January 5, 2010,
21 despite repeated prior opportunities to comply with its disclosure obligations.
22

23 Dated: January 7, 2010

24 Respectfully submitted,

25 DANIEL J. BRODERICK
Federal Defender

26 /s/ Lauren Cusick

27 _____
LAUREN CUSICK
Assistant Federal Defender
Attorney for Defendant
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MEMORANDUM IN SUPPORT OF MOTION

I. BACKGROUND

The government filed an information charging Oscar Foreman with a violation of 18 U.S.C. § 111(a) on February 26, 2009. Mr. Foreman was arraigned on March 12, 2009, and the Office of the Federal Defender was appointed to represent him in this case. Mr. Foreman, through counsel, requested discovery in this case on the next day, March 13, 2009. (Ex. A.) That request included a request for any and all statements allegedly made by the defendant, as well as written records containing the substance of any statement allegedly made by the defendant.

Only two days earlier, on March 11, 2009, Magistrate Judge Dale Drozd issued an order in another misdemeanor, criminal case sanctioning the government for failing to abide by its discovery obligations by its 11th hour release of a statement by the defendant that had been in the government's possession for months. Exhibit D. In light of this, counsel for Mr. Foreman expected the government to abide by its mandated discovery obligations in every misdemeanor case.

Mr. Foreman's case was originally scheduled for trial on May 12, 2009; at the April 27, 2009 trial confirmation hearing, the parties agreed to continue the trial to August 18, 2009.

On July 27, 2009, the parties appeared for a second trial confirmation hearing, at which the government moved to continue the August 18 trial date, over prior defense counsel Michael Petrik's objection. The court continued the trial to August 27, 2009. On August 19, 2009, one week before trial, the government provided 162 pages of additional discovery to the defense. This discovery included previously undisclosed statements *written by the defendant*, personnel records relating to previous conflicts between complaining witness Ernie Barbour and Mr. Foreman, and reports containing statements by many government witnesses. (Ex. B.) This additional discovery did not include the defendant's statements released on January 5, 2010.

This unexplained, unjustified late disclosure of discovery caused defense counsel to move to vacate the August 27 trial date. The court vacated the trial date and set the case for status on September 28, 2009. At the September 28, 2009 status conference, the parties set a new trial date of January 12,

1 2010, and a new trial confirmation hearing date of December 28, 2009. During the intervening three
2 months, the government provided no additional discovery to the defense. Mr. Foreman appeared with
3 counsel on December 28, 2009, and the parties confirmed for trial.

4 On January 5, 2010, the parties filed motions *in limine*, proposed jury instructions, proposed *voir*
5 *dire* topics and questions, and the government submitted a trial brief. On the afternoon of January 5, the
6 defense received additional discovery from the government during the court run between the U.S.
7 Attorney's Office and the Federal Defender's Office. Counsel did not receive this discovery until the
8 morning of January 6, 2010. Certified Law Student Christina Eastman was present in court with
9 undersigned counsel at 10:00 a.m. on January 5, 2010, and emailed undersigned counsel about another
10 matter at 4:37 p.m. on January 5, 2010, but neither provided the new discovery in court nor attached it to
11 the email.

12 The cover letter that accompanies the new discovery reads, "Please find enclosed additional
13 discovery in this case that we recently learned of and just received today, consisting of 2 pages numbered
14 0198 to 0199." (Ex. C.) The letter is dated January 4, 2010, and signed by Certified Law Student Christina
15 Eastman. Neither the letter nor any other communication has informed the defense how "recently" the
16 government learned of these statements that it was obligated to disclose. Nor does the letter explain how
17 the government's attorney obtained this information.

18 The new discovery consists of a report written by Contract Security Officer Jamie Baldwin
19 regarding the incident charged in the information. That report contains the substance of a two-paragraph
20 oral statement allegedly made by Mr. Foreman after he was arrested in this case, and while he was in a
21 holding cell. The report contains additional statements allegedly made by Mr. Foreman, as well as an
22 account of his arrest. Although Ms. Baldwin's name is mentioned in discovery previously provided by the
23 government, none of these statements by Mr. Foreman were previously disclosed to the defense, nor was
24 Ms. Baldwin's incident report.

25 **II. ARGUMENT**

26 This discovery violation is the latest in an unfortunate history of similar discovery violations by the
27 United States Attorney's Office in misdemeanor cases. The government's conduct in this case must be
28 viewed in light of the following similar conduct:

1 *United States v. Anthony Guillebeau*, CR-S-09-082 EFB

2 Defense counsel was forced to move for a continuance on January 5, 2010, the date of trial, after
3 the government disclosed new statements by the defendant one business day before trial. The government
4 had objected to multiple previous defense motions to continue the trial, each time indicating that it was
5 fully prepared.

6 *United States v. Jordan Crittle*, CR-S-09-023 GGH

7 Defense counsel moved to exclude statements by the defendant that the government disclosed for
8 the first time on August 17, 2009, following a June 19, 2009 evidentiary hearing on a motion to suppress
9 and a July 27, 2009 trial confirmation hearing at which the government indicated that it was prepared for
10 trial.¹

11 *United States v. Jerrod Stranahan*, CR-S-08-0368 DAD:

12 On March 11, 2009, Judge Drozd issued a written order precluding the use of statements by the
13 defendant that were disclosed on February 26, 2009, three weeks after a trial confirmation hearing at
14 which the government objected to the defense's request for a continuance and indicated that it was
15 prepared for trial. (Attached as Ex. D.)

16
17 These cases represent *every* jury trial that the Office of the Federal Defender confirmed for trial at
18 a trial confirmation hearing in 2009. Thus, in every one of the last four misdemeanor cases prosecuted by
19 the U.S. Attorney's office and confirmed for jury trial, the U.S. Attorney's office for the Eastern District of
20 California has violated its discovery obligations regarding statements by the defendant.

21 **A. The government violated its discovery obligations in this case.**

22 The government's late disclosure of Ms. Baldwin's incident report containing Mr. Foreman's
23 alleged statements is a clear violation of Rule 16(a)(1)(A) and (B)(ii) of the Federal Rules of Criminal
24 Procedure. Mr. Foreman requested discovery under these rules over nine months ago. Mr. Foreman also
25 requested notice under Rule 12 of the government's intention to introduce any statements made by Mr.
26 Foreman at trial, so as to allow the defense an opportunity to move to suppress evidence. The

27
28 ¹ This case was dismissed on the day of trial, pursuant to the U.S. Attorney's Office's changed
policy regarding medical marijuana possession.

1 government's late disclosure has denied Mr. Foreman the opportunity to file any appropriate motions
2 necessary to guarantee that his constitutional rights are respected and that he receives a fair trial.²

3 **B. Exclusion is the appropriate remedy for this violation.**

4 It could be argued that a repeated, consistent practice of discovery violations by the United States
5 Attorney's misdemeanor unit warrants the strongest sanction possible, dismissal of this case. Certainly
6 such action would be justified in light of the fact that this practice has continued even after the issuance of
7 a strongly- worded written order by Magistrate Judge Drozd. Nonetheless, Mr. Foreman requests only that
8 the government be precluded from introducing or referencing the late-disclosed evidence in any way.

9 The Court has wide discretion to fashion a remedy for a discovery violation. Fed. R. Crim. P.
10 16(d); *see also United States v. Basinger*, 60 F.3d 1400, 1407 (9th Cir. 1995); *United States v. Burgess*,
11 791 F.2d 676, 681 (9th Cir. 1986). This is the government's second attempt to disclose the defendant's
12 statements on the eve of trial. The defense merely requested a continuance to remedy the August violation,
13 but it is clear that the government learned nothing from its earlier mistakes in this case, as it is again
14 attempting to provide the defense with the defendant's statements at the eleventh hour.

15 Knowing that she was again disclosing significant evidence at a late date, Ms. Eastman made no
16 efforts to ensure that the defense learned of the evidence as soon as possible. She did not contact the
17 defense as soon as she became aware that the government would be disclosing additional statements
18 allegedly made by the defendant.³ She neither emailed nor faxed a copy of the discovery to the defense on
19 January 4, but instead sent it out with the January 5 court run, knowing that pretrial motions *in limine* had
20 to be filed on January 5. Although Ms. Eastman was present in Court while undersigned counsel appeared
21 at 10:00 a.m. on January 5, she made no attempt to inform counsel of the new information at that time.
22 The Court should exclude the evidence in part to deter the government and its agents from engaging in
23 similar conduct in future cases.

24
25
26 ² Defense counsel has insufficient information at this time to determine whether any motions to
27 suppress the newly disclosed statements would be appropriate.

28 ³ In fact, Ms. Eastman's letter is deliberately vague regarding when the government became aware
of these alleged statements.

1 **III. CONCLUSION**

2 In its trial brief in this case, the government requested that the Court exclude any evidence that the
3 defense had not yet disclosed as required under reciprocal discovery rules. (Gov. Tr. Brief, p. 9.) The
4 defense makes that same request in this motion *in limine*. For the above reasons, Mr. Foreman moves this
5 Court to exclude any statements allegedly made by Mr. Foreman to Jamie Baldwin in connection with this
6 case.

7
8 Dated: January 7, 2010

Respectfully submitted,

DANIEL J. BRODERICK
Federal Defender

/s/ Lauren Cusick

LAUREN CUSICK
Assistant Federal Defender
Attorney for Defendant
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