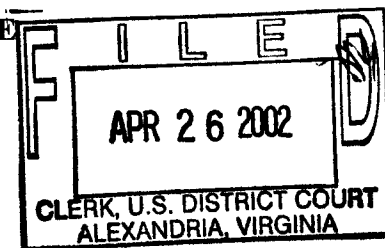


IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division



UNITED STATES OF AMERICA)
)
 v.)
)
 JOHN PHILLIP WALKER LINDH)

Criminal No. 02-37-A

ORDER

The matter is before the Court on the Government's *Ex Parte* Motion for a Protective Order Regarding Thirteen Non-Exculpatory Reports of Detainee Interviews, filed pursuant to Rule 16(d)(1), Fed. R. Crim. P.

In its *ex parte* motion, the government requests the entry of an order protecting from disclosure to the defense thirteen reports of interviews taken of detainees who are currently housed at Guantanamo Bay, Cuba, which reports are attached to the government's *ex parte* motion. These reports, the government argues, do not contain any material required to be disclosed to the defense under either Rule 16, Fed. R. Crim. P. or *Brady v. Maryland*, 373 U.S. 83 (1963). Nonetheless, to ensure full compliance with its obligations under *Brady* and this Court's April 1, 2002 discovery order, the government submitted the thirteen reports under seal, for an *ex parte* and *in camera* review by the Court. *See United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Apr. 1, 2002) (Order).

The principles that must guide the Court's *ex parte* review of the thirteen reports are clear and well settled: *Brady* requires the government to disclose to the defendant all "evidence ...material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (extending *Brady* to include impeachment evidence). This obligation is rooted not in the federal discovery rules, but rather in the Due Process Clause of

the Fifth Amendment. *See United States v. Agurs*, 427 U.S. 97, 107 (1976). Thus, it is a defendant's constitutional right to prepare and present a full defense at trial that entitles him to disclosure of exculpatory and impeachment evidence. *See Horton v. United States*, 983 F. Supp. 650 (E.D. Va. 1997) (citing *Smith v. Secretary of N.M. Department of Corrections*, 50 F.3d 801, 823 (10th Cir.1995)). It is important to note, however, that the requirements of *Brady* extend only to evidence that is material and “not available to the defendant from other sources.” *See United States v. Bagley*, 473 U.S. 667, 677 (1985); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir.1990). And, in this regard, evidence is material only if there is a reasonable probability that were it disclosed to the defense, the result of the proceedings would be different. *See Bagley*, 473 U.S. at 682.

These principles, applied here, compel the conclusion that a protective order is appropriate in the circumstances. Indeed, based on an *ex parte, in camera* review of the thirteen reports submitted by the government, it is clear that, although five of the reports contain brief references to the defendant, or brief references regarding discussions the particular detainee allegedly had with the defendant, none of the reports contain any information that can reasonably be construed as either exculpatory under *Brady* or discoverable under Rule 16, Fed. R. Crim. P.

For this reason, and for good cause shown, it is hereby **ORDERED** that the government's *Ex Parte* Motion for a Protective Order Regarding Thirteen Non-Exculpatory Reports of Detainee Interviews is **GRANTED**.

Accordingly, it is further **ORDERED** that the government is not required to disclose the thirteen non-exculpatory reports of detainee interviews to the defense.

It is further **ORDERED** that the government's *Ex Parte* Motion for a Protective Order Regarding Thirteen Non-Exculpatory Reports of Detainee Interviews, together with the attached

reports, be placed in a marked envelope and maintained *ex parte* and under seal for appellate review, if necessary.

The Clerk is directed to send a copy of the Order to all counsel of record.

/S/

Alexandria, VA
April 26, 2002

T.S. Ellis, III
United States District Judge