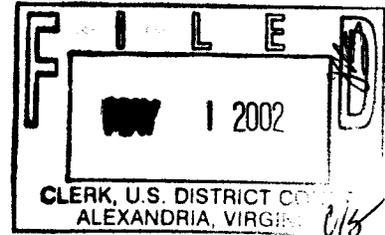


IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division



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 April 19, 2002 Motion for a Protective Order Related Primarily to Defense Discovery Request Number Four.

In its motion, the government requests the entry of an order protecting from disclosure to the defense various classified documents filed by the government under seal, for an *ex parte* and *in camera* review. Specifically, the government argues that the classified documents filed as Attachments 2 through 5 to its April 19, 2002 motion,¹ as well as a Supplemental Classified Attachment filed on April 22, 2002 and Two Additional Classified Documents filed on April 23, 2002, 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). By Order dated April 30, 2002, the government's motion for a protective order was granted as to Attachment 2, as well as the Two Additional Classified Documents. *See United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Apr. 30, 2002) (Order). Now before the Court for an *ex parte* and *in camera* review is the Supplemental Classified Attachment.²

¹ The government has disclosed to the defense the classified documents filed as Attachments 1A and 1B.

² Attachments 3 through 5 remain under review and an appropriate order will issue promptly upon completion of the Court's *ex parte* and *in camera* review of such documents.

The principles that must guide the Court's *ex parte* review of the Supplemental Classified Attachment 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 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). 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. Put differently, evidence that has no reasonable probability of affecting the result of the proceeding, including inadmissible and speculative evidence, does not constitute *Brady* material.³

³ *See, e.g., Goins v. Angelone*, 226 F.3d 312, 325-26 (4th Cir. 2000) (concluding that polygraph evidence was not "material" withing the meaning of *Brady* where such evidence was inadmissible and would not have led to the discovery of important admissible evidence); *Mueller v. Angelone*, 181 F.3d 557, 577 (4th Cir. 1999) (criticizing a *Brady* assertion due to the "speculative and indeterminate" nature of the evidence in question); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n. 3 (4th Cir. 1996) (concluding that statements related to a rape case were "immaterial" for *Brady* purposes where they "may well have been inadmissible at trial under Virginia's Rape Shield Statute"); *United States v. Polowichak*, 783 F.2d 410, 414 (4th Cir. 1986) (rejecting a *Brady* claim where the possibility that the asserted evidence would have helped the defendant was "remote").

These principles, applied here, compel the conclusion that a protective order is appropriate in the circumstances. Indeed, based on an independent, *ex parte* and *in camera* review of the documents included in the government's Supplemental Classified Attachment, it is clear, given the unsubstantiated, unsupported and inadmissible nature of the information contained therein, that none of these documents are subject to disclosure under either *Brady* or Rule 16, Fed. R. Crim. P.

Accordingly, for these reasons, and for good cause shown, it is hereby **ORDERED** that the government's Motion for a Protective Order Related Primarily to Defense Discovery Request Number Four is **GRANTED** as to the Supplemental Classified Attachment filed on April 22, 2002.

Therefore, it is further **ORDERED** that the government is not required to disclose to the defense the documents contained in the Supplemental Classified Attachment.

It is further **ORDERED** that the subject classified documents be (i) placed in an envelope marked as "Supplemental Classified Attachment to the Government's Motion for a Protective Order Related Primarily to Defense Discovery Request Number Four," (ii) maintained as classified documents in accordance with the procedures set forth in the Classified Information Procedures Act, (CIPA), Title 18 U.S.C., Appendix 3, and in the Protective Order entered in this case on February 27, 2002, *see United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Feb. 27, 2002) (Protective Order) and (ii) maintained *ex parte* and under seal for appellate review, if necessary.

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

/S/

Alexandria, VA
May 1, 2002

T.S. Ellis, III
United States District Judge