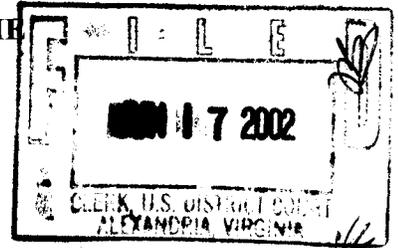


IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division



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 Second *Ex Parte* Motion for a Protective Order Regarding 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 eleven 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 eleven 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).

By Order dated June 6, 2002, the Court (i) concluded that virtually all of the information contained in the eleven reports falls outside the scope of *Brady* but (ii) directed the government to file an *ex parte* and under seal memorandum addressing whether certain small portions of three of the eleven reports should be required to be disclosed to the defense pursuant to *Brady* and, if not, the reasons therefor. *See United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. June 6, 2002) (Order).

The government submitted its supplemental memorandum on June 13, 2002, and the matter is now ripe for disposition.

The principles that must guide the Court's *ex parte* review of the eleven 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 eleven reports at issue, as well as the government's supplemental memorandum filed in accordance with the June 6, 2002 Order, it is clear that none of the eleven 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

Second *Ex Parte* Motion for a Protective Order Regarding Non-Exculpatory Reports of Detainee Interviews is **GRANTED**.

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

It is further **ORDERED** that the government's Second *Ex Parte* Motion for a Protective Order Regarding Non-Exculpatory Reports of Detainee Interviews, together with the attached reports, be 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  
June 17, 2002

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T.S. Ellis, III  
United States District Judge