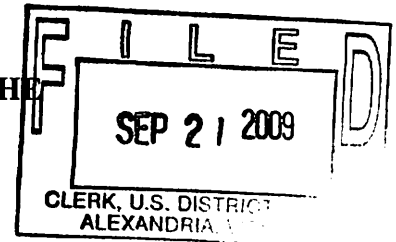


**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**



UNITED STATES OF AMERICA

v.

**WILLIAM J. JEFFERSON,
Defendant.**

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CRIMINAL No. 1:07cr209

CORRECTED¹ ORDER

This matter is before the Court on defendant's motion for a new trial pursuant to Rule 33, Fed. R. Crim. P. At issue on defendant's motion is (i) whether evidence relating to a sexual relationship between a non-testifying government witness and a non-testifying investigating FBI agent was improperly excluded at trial, and (ii) whether the government's failure to disclose information relating to the sexual relationship prior to the trial and in greater detail constituted a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Defendant contends that these are both grounds for granting him a new trial. The issues have been fully briefed, and defendant's motion is now ripe for disposition.

On Monday, June 8, 2009, the government submitted a pleading *ex parte* stating that counsel for the government had learned, late on Friday, June 5, 2009, that a cooperating witness had engaged in a sexual relationship with an FBI agent during the proactive phase of the investigation. Specifically, the government disclosed in this pleading that its counsel were informed at approximately 7:45 p.m., Friday, June 5, 2009, by Special Agent Thibault, the agent in charge of the FBI's investigation of defendant, that cooperating witness Lori Mody had just

¹ This Corrected Order amends the Order entered September 18, 2009, to complete the sentence on page 6 that begins, "It is clear." The sentence in the original Order was truncated due to clerical error.

informed Agent Thibault, for the first time, that she had engaged in sexual relations with then-FBI agent John Guandolo while Guandolo was serving under cover as Mody's driver. The government claimed that disclosure of this information to defendant pursuant to *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972), was not required, and it sought *in camera* determination of whether disclosure was in fact required. The Court advised the government's counsel that resolution of the question should not proceed *ex parte*, both for reasons of fairness and because the Court's determination would benefit from the views and arguments of defense counsel. In the end, at the Court's urging, the government withdrew its objection to disclosure of the information to defendant and defendant's counsel, and the Court ordered the disclosure subject to a protective order precluding disclosure of the information at trial or to the public absent further order of the Court. The Court also indicated that if defendant wished to use the evidence at trial he should file a motion seeking leave to do so. *See United States v. Jefferson*, No. 1:07cr209 (E.D. Va. June 29, 2009) (Order).

Thereafter, on July 7, defendant filed such a motion. Defendant argued that the government was offering certain declarations by Mody for the truth of her assertions and thus, under Rule 806, Fed. R. Evid., the information concerning the Mody-Guandolo relationship was admissible impeachment evidence. In response, the government indicated that it would not call Mody as a witness and withdrew from evidence Mody's out-of-court hearsay declarations. Defendant also argued that the information related to Special Agent Thibault's credibility and the integrity of the FBI investigation more generally, and moved for permission to use the information concerning the Mody-Guandolo relationship during defendant's cross-examination of Special Agent Thibault, or, in the alternative, during his case-in-chief.

Defendant's motion was denied. *See United States v. Jefferson*, No. 1:07cr209 (E.D. Va. July 7, 2009) (Order). The Court concluded that the government had withdrawn from evidence all declarations offered for the truth of Mody's assertions, and so the information was not admissible to impeach her under Rule 806, Fed. R. Evid. Moreover, the Court concluded that the Mody-Guandolo relationship was not relevant either to Special Agent Thibault's credibility or to the integrity of the FBI investigation more generally. Specifically, there was no indication that Special Agent Thibault knew of the Mody-Guandolo relationship prior to June 5, 2009, and there was no basis to conclude that Special Agent Thibault's ignorance of the relationship was relevant to his credibility. Moreover, the fact that Mody had a relationship with Guandolo, whose role in the investigation was merely to pose as Mody's driver and security provider, was not relevant to the reliability of the evidence collected during the course of the investigation. Finally, any hypothetical relevance that information concerning the Mody-Guandolo relationship may have had to the integrity of either Special Agent Thibault or the investigation was clearly and substantially outweighed by the danger of unfair prejudice under Rule 403, Fed. R. Evid.

On August 12, 2009, defendant filed this motion for a new trial. In his motion, defendant renews his argument that he should have been allowed to use the information concerning the Mody-Guandolo relationship at trial to challenge Special Agent Thibault's credibility or the integrity of the investigation more generally. Defendant also alleges that the government's failure to disclose the Mody-Guandolo relationship earlier, and in greater detail, constituted a *Brady* violation that warrants a new trial.

A new trial may be granted if "the interest of justice so requires." Rule 33(a), Fed. R. Crim P. Granting a new trial is a matter "committed to the sound discretion of the district judge"

and is reviewable only for an abuse of that discretion. *United States v. Greene*, 834 F.3d 86, 88 (4th Cir. 1987). Nevertheless, the Fourth Circuit has held that a district court “‘should exercise its discretion to grant a new trial sparingly,’ and that it should do so ‘only when the evidence weighs heavily against the verdict.’” *United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003) (quoting *United States v. Wilson*, 118 F.3d 228, 237 (4th Cir. 1997)). Moreover, the Fourth Circuit has suggested that it would be a “rare case” that a new trial would be justified solely on the basis of impeachment evidence that was unavailable at trial. *United States v. Custis*, 988 F.2d 1355 (4th Cir. 1993).

This is not such a “rare case.” Defendant offers no basis for concluding that evidence of the Mody-Guandolo relationship was relevant to any matters in issue at trial and therefore admissible. First, defendant concedes that Mody’s credibility was not in issue at trial because she did not testify and the government did not offer any of her out-of-court declarations for the truth of her assertions. *See* Rule 806, Fed. R. Evid. Therefore, the evidence was not admissible to challenge Mody’s credibility.

Second, the evidence was not relevant to Special Agent Thibault’s truthfulness or credibility. There is absolutely no indication that Thibault knew about the Mody-Guandolo relationship prior to June 5, 2009. Moreover, Thibault’s apparent failure to discover the relationship does not undermine the credibility of the matters on which he testified. His testimony consisted primarily of (i) describing instructions he gave Mody prior to her meetings with defendant, (ii) identifying documents Thibault provided to Mody and those that Mody provided to him, and (iii) introducing the tape recorded conversations between Mody and defendant. Thibault’s apparent ignorance of what defendant characterizes as “a sexual

relationship between two consenting adults [that] is not unusual . . . in this day and age” simply has no bearing whatsoever on Thibault’s credibility as to the matters to which he testified. Def.’s Resp. to Gov’t’s Pos. on Sealed Matters at 4.

Third, evidence of the Mody-Guandolo relationship was not admissible evidence relevant to the integrity of the FBI investigation. The Mody-Guandolo relationship has no relevance to the character for truthfulness of the cooperating co-conspirator witnesses. There is no indication that any of the witnesses knew of the relationship. Moreover, the fact that Guandolo—whose role in the investigation was limited to posing as Mody’s driver and security provider—engaged in this relationship is not relevant to defendant’s claim that the government “coached” the trial testimony of its cooperating witnesses. Neither Mody nor Guandolo participated in interviews of those witnesses. For the same reasons, the Mody-Guandolo relationship has no bearing on the reliability of the evidence obtained through the investigation.

Finally, even if the Mody-Guandolo relationship were relevant to a matter directly in issue at trial, the probative value of such evidence as it relates to the credibility of trial witnesses and the integrity of the investigation was clearly and substantially outweighed by the danger of unfair prejudice. *See* Rule 403, Fed. R. Evid. Accordingly, the evidence was properly excluded.

Defendant’s allegation that the government breached its obligation under *Brady v. Maryland* is also without merit. At the outset, it is impossible as a matter of pure logic that disclosure of information that is irrelevant to all material issues at trial was somehow “material to the outcome of [the] trial.” *United States v. Kelly*, 35 F.3d 929, 936 (4th Cir. 1994). Because it was determined that evidence relating to the Mody-Guandolo relationship was irrelevant and inadmissible, it could not have constituted exculpatory evidence. Therefore, the information in

question was not *Brady* material.

Nevertheless, even assuming, *arguendo*, that the information fell within the purview of the *Brady* requirements, defendant was not prejudiced by any delay in the government's disclosure of it. Defendant received the information in time for him to attempt to use it at trial, and indeed, he attempted to do so. Therefore, defendant does not and cannot demonstrate that "the result of the proceeding would have been different" if the government had disclosed the material earlier. *United States v. Bagley*, 473 U.S. 667, 678 (1985).

Defendant also contends that the government failed to disclose sufficient information to meet the government's *Brady* obligations. Specifically, defendant claims that *Brady* entitled him to the material gathered during the Office of Professional Responsibility's ("OPR") investigation into Guandolo's conduct. Defendant does not cite any authority for the proposition that the government's *Brady* obligation extends to nonmaterial evidence pertaining to an internal investigation of a non-witness.² It is clear that defendant has not met his burden to show that any prejudice resulted from the government's nondisclosure of Guandolo's OPR file.

Accordingly, and for good cause,

It is hereby **ORDERED** that defendant's motion for a new trial (Docket No. 575) is **DENIED**.


It is further **ORDERED** that defendant's motion to set a public hearing date (Docket No. 585), filed Friday, September 18, 2009, is **DENIED** as the facts and legal contentions are

² Indeed, the lone case cited by defendant in support of disclosure of the OPR file notes that "mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial." *United States v. Valentine*, 59 F.3d 171, 1995 WL 390322, at *5 (quoting *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992)). Accordingly, the Sixth Circuit affirmed the conviction.

adequately set forth in the existing record and oral argument would not aid the decisional process.

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

Alexandria, Virginia
September 21, 2009



T. S. Ellis, III
United States District Judge