

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 16-6 MJD/LIB

UNITED STATES OF AMERICA,

Plaintiff,

v.

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S PRETRIAL MOTIONS**

NODIN MAKWA,

Defendant.

The United States of America, by and through its attorneys, Andrew M. Luger, United States Attorney for the District of Minnesota, and Clifford B. Wardlaw, Assistant United States Attorney, hereby submits its response to Defendant's pretrial motions. The United States will file separately a motion of intent to call witnesses at an evidentiary hearing. The United States will call witnesses to address the factual issues raised by the defense's motions.

1. **Defendant's Pretrial Motion for Disclosure of 404(b) Evidence** (Dkt.19)

The present motion should be denied as moot. If, however, Rule 404(b) evidence is discovered by the prosecution it will be disclosed to the defense. The United States is fully aware of its obligations under Rule 404(b) and intends on fully complying with its obligations. With respect to timing, the Federal Rules of Evidence do not require the immediate disclosure of such evidence. Fed. R. Evid. 404(b) advisory committee's notes, 1991 Amendments ("Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request will depend largely on the

circumstances on each case.") The Government intends to produce all such evidence as soon as practicable, and respectfully requests the Court order all 404 (b) disclosures be made no later than fourteen days prior to trial and on a continuing basis thereafter.

2. **Defendant's Motion to Compel Attorney for the Government to Disclose Evidence Favorable to the Defendant** (Dkt. 20)

The United States is aware of its obligations under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); and their progeny. The United States has complied, and will continue to comply, fully with Brady, Giglio, and their progeny. The United States objects to the defendant motion to the extent it goes beyond the requirements of Brady, Giglio, and their progeny.

3. **Defendant's Motion for Discovery and Inspection** (Dkt. 21)

The United States has already complied with Rule 16(a)(1)(A)-(F) and has even made discovery not required by law. However, the United States objects to any discovery order which exceeds the requirements of Rule 16. Rule 16 is the only vehicle for discovery in a criminal case and it has been held consistently that there is no general constitutional right to discovery in a criminal case. See United States v. Bursey, 429 U.S. 545, 559 (1977).

4. **Defendant's Motion for Early Disclosure of Jencks Act Material** (Dkt. 22)

The United States objects to this motion. It has been repeatedly and consistently held in this Circuit and District that the United States may not be required to make pretrial disclosure of Jencks material. Finn v. United States, 919 F. Supp. 1305, 1315 (D. Minn. 1995); see also United States v. Ben M. Hogan Co., 769 F.2d 1293, 1300 (8th Cir.

1985); United States v. White, 750 F.2d 726 (8th Cir. 1984). Accordingly, the United States objects to any court-ordered disclosure of such statements prior to the witnesses' testimony.

5. **Defendant's Motion for Discovery of Expert Under Rule 16(a)(1)(G)**
(Dkt. 23)

The United States has already complied with Rule 16(a)(1)(A)-(F) and has even made discovery not required by law on December 29, 2015. However, the United States objects to any discovery order which exceeds the requirements of Rule 16. Rule 16 is the only vehicle for discovery in a criminal case and it has been held consistently that there is no general constitutional right to discovery in a criminal case. See United States v. Bursey, 429 U.S. 545, 559 (1977). Included in the discovery was an accident reconstruction investigation conducted by the Minnesota State Patrol.

The United States has made redacted medical records available to the defense, There are factual witnesses, who are medical professionals, who may be called at trial to testify about the injuries that Deputy Hart suffered.

6. **Defendant's Motion to Suppress Statements, Admissions, and Answers**
(Dkt. 24)

The United States asks the Court to deny the defendant an evidentiary hearing on the issue of the voluntariness of his statement. He failed to identify with specificity the statement that he is challenging. The defense filed a boilerplate motion that does not warrant an evidentiary hearing.

The United States disclosed that the defendant gave a statement to Special Agent Rick Wouri of the BCA and Jonathan Tjernagel of the FBI on 9-16-2015. The statement

was recorded and a transcript was made. The defendant was given a full and complete Miranda warning. The defendant said that he understood his rights and agreed to speak with law enforcement.

7. **Defendant's Motion to Dismiss for Lack of Jurisdiction and Improper Charging** (Dkt. 25)

The motion to dismiss is not a proper motion at this time. The issue of whether Deputy Hart was under the protection of Title 18, United States Code, § 111 is a factual issue for the jury to decide. See, United States v. Janis, 810 F.3d 595, 597(8th Cir. 2016). Janis was a case that involved a tribal police officer under a 638 contract. The defense filed a motion to dismiss the Indictment because they argued the tribal officer was not a federal officer. Id. at 597-98. The district court properly denied the motion. The defense also argue that the district court improperly ruled that the tribal police officer was a federal officer as a matter of law. Id. The Eighth Circuit agreed and ruled that whether the victim was a federal officer was a factual issue that the jury should decide. Id. The same result is warranted here.

The defense unsuccessfully raised the same issue at the Preliminary Hearing. Special Agent Mark Meyers testified at the Preliminary Hearing about a high speed pursuit that started on the Red Lake Indian Reservation on August 7, 2015. Officer K. Petschel of the Red Lake Tribal Police was chasing an assault suspect on Highway 89 just north of the southern border of the Reservation. Sgt. Dow had responded to the assault scene and she was informed that an armed suspect had left the Buffalo residence. Officer Petschel located the suspect vehicle and attempted to stop it. The suspect ran

from the tribal officer. Sgt. Dow learned that the suspect was armed with a sword. A child told Sgt. Dow that the defendant had something and pointed at her sidearm. Special Agent Christopher Dudley of the FBI was driving north on Highway 89 when Officer Petschel passed him with his squad's siren and emergency lights on. Agent Dudley turned around and joined the chase. Agent Dudley called the Red Lake dispatch on his radio and then contacted Beltrami County via cell phone for assistance. Beltrami County and the Minnesota State Patrol responded to the call and took primary position during the chase. Agent Dudley did not cease the pursuit but his vehicle was not pursuit rated. The defendant's vehicle was PIT'd and Deputy David Hart got out of his squad to secure the driver/defendant. The driver/defendant looked back at Deputy Hart and put his vehicle into reverse. His vehicle struck Deputy Hart breaking his hip and causing serious head trauma. The defendant's vehicle continued into a ditch and Special Agent Dudley used his SUV to box in the suspect vehicle. The defendant was arrested.

The purpose of Title 18, United States Code, § 111 is to protect federal employees and "federal functions." United States v. Feola, 420 U.S. 671, 679 (1975). The federal function that is being protected in the present case is law enforcement in Indian country. See, United States v. Roy, 408 F.3d 484 (8th Cir. 2005); United States v. Bettelyoun, 16 F.3d 850(8th Cir. 1994).

The government's position is that Deputy Hart is covered by the protection of 18 U.S.C. § 111 because he was assisting a special agent of the FBI and a tribal police officer in the performance of federal law enforcement functions.

A factually similar case is United States v. Williamson, 482 F.2d 508 (5th Cir. 1973). Williamson is a drug case in which federal narcotics agents called for the arrest of a drug suspect after a controlled buy. Local law enforcement received the call and attempted to arrest the defendant. The defendant drove his car into a local law enforcement officer who was assisting the federal agents and struck him. *Id.* Under those facts the defendant's federal conviction was affirmed. In United States v. Smith, 296 F.3d 344 (5th Cir. 2002), Dallas police officers were assisting FBI agents in a bank robbery case. During the pursuit, the defendants fired at the police officers. The convictions for violation of 18 U.S.C. § 1114 were affirmed because the Dallas police officers were assisting the FBI. *Id.* at 347; see also United States v. Hooker, 997 F.3d 67 (5th Cir. 1993).

Other circuits have reached the identical result. In United States v. Chunn, 347 F.2d 7171, 720-21 (4th Cir. 1965), a state employee who was working with IRS officials was found to be under the protection of § 111. In United States v. Torres, 862 F.2d 1025 (3rd Cir. 1988) a local police officer working on a DEA task force was found to be a federal officer.

Recently, the Eighth Circuit affirmed the convictions of defendants who assaulted Sherburne County employees who were guarding federal detainees. United States v. Luedtke, 771 f.3d 453 (8th Cir. 2014). The Sherburne County employees were working under a contract from the U.S. Marshal Service to guard the federal detainees. While the presence of a contract is an important fact, it is not required for a conviction. In United

States v. Gedman, 208 F.3d 1006 (5th Cir. 2000), a conviction was affirmed for an assault of a local jailer who was watching federal detainees under 18 U.S.C. § 111. Id.

Dated: 18 February 2016

Respectfully Submitted,

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