

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE IGNACIO GORIS	)
PETITIONER	)
	)
V.	)
	)
UNITED STATES OF AMERICA	)
RESPONDENT	)

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Federal Rule of Criminal Procedure 16(a)(1)(E) grants a defendant the right to inspect and copy all documents and items in the government's possession, custody, or control which are "material to preparing the defense." The question this case presents is whether the definition of materiality in this rule includes information that may not "significantly ... alter the quantum of proof" in the defendant's favor, i.e., it may be inculpatory rather than exculpatory.

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All parties appear in the caption of the case on the cover page.

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I. CITATION TO THE REPORT OF THE OPINION IN THE CASE

The case below was decided by the United States Court of Appeals for the First Circuit in United States v. Goris, 876 F.3d 40 (1st Cir. 2017), rehearing and rehearing en banc denied (January 8, 2018). App: 1-9, and 17. The district court denied the defense motion for discovery in a bench decision. App: 10-16.

II. BASIS FOR THE JURISDICTION OF THIS COURT

The opinion and judgment of the Court of Appeals were entered on November 27, 2017. The Court of Appeals denied a timely filed petition for rehearing and rehearing en banc on January 8, 2018. App: 17.

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254.

III. STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 16 states:

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Defendant's Oral Statement.* Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) *Defendant's Prior Record*. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects*. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests*. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- (i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert witnesses.* At the defendant’s request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant’s request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant’s mental condition. The summary provided under this subparagraph must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.

(2) *Information Not Subject to Disclosure.* Except as permitted by Rule 16(a)(1)(A)–(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in [18 U.S.C. § 3500](#).

(3) *Grand Jury Transcripts.* This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Documents and Objects.* If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

- (i)** the item is within the defendant's possession, custody, or control; and
- (ii)** the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) *Reports of Examinations and Tests.* If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- (i)** the item is within the defendant's possession, custody, or control; and
- (ii)** the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) *Expert witnesses.* The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

- (i)** the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or
- (ii)** the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications

(2) *Information Not Subject to Disclosure.* Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

- (A)** reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or
- (B)** a statement made to the defendant, or the defendant's attorney or agent, by:
 - (i)** the defendant;
 - (ii)** a government or defense witness; or
 - (iii)** a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

- (1)** the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) *Protective and Modifying Orders.* At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) *Failure to Comply.* If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

IV. STATEMENT OF THE CASE

The defendant was charged in a one count indictment with knowingly and intentionally attempting to possess with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and 21 U.S.C. §846. After a jury trial the defendant was found guilty. The defendant was sentenced to a term of 60 months imprisonment and a term of four years supervised release.

From May through August 2014, the defendant had numerous conversations and some meetings with undercover law enforcement officials posing as drug dealers about the purchase of narcotics. Generally speaking, these contacts were memorialized with video surveillance and/or

recordings of the conversations. On August 14, 2014, the defendant met twice with the key undercover agent. The second meeting took place at a home improvement store in Cranston, Rhode Island. Before the meeting at the store, law enforcement decided that the defendant would be given a kilo of fake cocaine. A bag with the sham kilo of cocaine was placed in the Drug Enforcement Agency car which the undercover agent was using.

One of the key issues in this case was the way law enforcement recorded and preserved the conversations between the defendant and the undercover agent, particularly the conversation at the home improvement store on August 14, 2014. This was a conversation in which the defendant allegedly agreed to purchase a kilo of cocaine, although he provided no money for the alleged purchase and his previously expressed desire to test or sample the cocaine before making a purchase was acknowledged in testimony by two law enforcement officers.

After the meeting at the home improvement store, a law enforcement officer testified he observed the defendant leave the store, go to the undercover agent's vehicle, and take the black duffel bag which contained the sham kilo of cocaine. The defendant was then placed under arrest.

The pretrial phase of the case included a motion for discovery. The defendant sought discovery of the original recording of the critical conversation between himself and the undercover agent in the home improvement store just prior to his arrest as well as the technology used to preserve the recording so that it could be examined by a defense expert. The Government opposed that motion. There was an evidentiary hearing on that motion on May 6, 2015. App: 18-61. At the hearing, the defense presented an expert witness on computer forensics. He focused his attention on the recording at the home improvement store of the conversation

between the undercover agent and the defendant. App: 32. He said the conversation, "...didn't flow the way I would expect it with the activity that I was told that took place that day." App: 35. After listening to the audio recording, he did a spectrographic analysis of the recording which allowed him to view it visually. App: 36. He defined noise floor as the background noise and testified that at one point there was a "dramatic change in the noise floor." App: 37, 40. He then opined this dramatic change in the noise floor meant that the audio had been edited at that point. App: 37, 38. On cross-examination, he reaffirmed his opinion that the words before the drop in background noise and the words after the drop were not part of the same conversation. App: 47.

The expert further testified that another step that could be taken would be a comparison of the original audio recording with the copy that the defense had been provided. App: 39-40. He testified such a comparison could be accomplished by comparing the hash values of the two recordings. App: 51, 52. He likened the hash values to the digital equivalent of a fingerprint or DNA analysis. Id.

At the hearing, the government introduced an affidavit from one of the agents which described the recording system which was used. Among other things the affidavit explained that once a recording was created in the database, it could be accessed but not altered or deleted thereafter. See, Decision of the District Court, App: 14; United States v. Goris, 876 F.3d at 45; App: 6.

The District Court denied the discovery motion in a bench decision on May 7, 2015. App: 10-16. The Court held that the defendant had not met his burden of showing that the access to the database was material to his "presenting an adequate defense." App: 15. The Court also

held that the requested information was protected on the basis of a proprietary privilege. App: 15.

Just before the start of the trial, the trial judge who was not the judge who decided the motion for discovery, denied a request to revisit the ruling on the discovery motion. United States v. Goris, 876 F.3d at 44; App: 4.

The Court of Appeals affirmed the District Court decision on the materiality question and did not reach the proprietary privilege issue. United States v. Goris, 876 F.3d at 46; App: 6. The opinion of the Court of Appeals is considered below.

V. REASONS FOR GRANTING THE WRIT

A. THE OPINION OF THE COURT OF APPEALS

Federal Rule of Procedure 16(a)(1)(E) states in pertinent part:

(E) *Documents and Objects*. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

- (i) the item is material to preparing the defense;

The question this case presents is what the definition of materiality is.

The Court of Appeals noted that the term had not yet been defined in the First Circuit but also noted that several Courts of Appeals:

... have displayed remarkable uniformity in concluding that it is not enough that what is sought "bears some abstract logical relationship to the issues in the case." United States v. Ross, 511 F.2d 757, 762 (5th Cir. 1975). Rather, a showing of materiality requires "some indication" that pretrial disclosure of the information sought "would have enabled the defendant significantly to alter the quantum of proof in his favor." *Id.* at 763; accord United States v. Caro, 597 F.3d 608, 621

(4th Cir. 2010); *United States v. Jordan*, 316 F.3d 1215, 1251 (11th Cir. 2003); *United States v. Graham*, 83 F.3d 1466, 1474, 317 U.S. App. D.C. 418 (D.C. Cir. 1996); *United States v. Maniktala*, 934 F.2d 25, 28 (2d Cir. 1991); *United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976).

United States v. Goris, 876 F.3d 40, 44-45 (1st Cir. 2017); App: 5.

The Court seemingly adopted this standard, noting later in the opinion that:

...the defendant failed to provide some indication that allowing the discovery request "would have enabled [him] significantly to alter the quantum of proof in his favor." *Ross*, 511 F.2d at 763.

United States v. Goris, 876 F.3d 40, 46 (1st Cir. 2017); App: 6. In adopting this standard, the Court noted that the significant alteration in the quantum of proof could take place in a number of different ways including, "aiding witness preparation...." *Id.* at 45, citing *United States v. Lloyd*, 992 F.2d 348, 351, (D.C. Cir. 1993) (citations omitted); App: 5.

Applying this standard to the facts of this case, the Court of Appeals concluded that the requested discovery, "would not have tipped the balance on any relevant issue." *United States v. Goris*, 876 F.3d at 46. App. 6. As a practical matter the Court was saying that the requested discovery would not help the defendant with respect to the quantum of proof in this case. In coming to this conclusion, the Court identified a number of factors. It noted the defense expert's lack of familiarity with the kind of recording technology used in this case. *Id.* at 45. App. 6. It also noted the affidavit submitted by the government at the evidentiary hearing, which explained the recording system did not allow modification of a stored communication and further that it relied on cellular transmission of a recording making the quality of the recording subject to the strength of the cellular signal. *Id.* The Court of Appeals also noted the absence of any defense evidence as to what was contained in the alleged missing part of the transmission. *Id.*

In a footnote, the Court addressed the specific request of the defendant for access to the original recording of the conversation between the defendant and the undercover agent at the home improvement store just prior to the defendant's arrest. United States v. Goris, 876 F.3d at 46, n. 1. App. 6. The Court said:

The defendant claims that he should have at least been given access to the original version of the August 14 recording stored in the database so that he could compare it to the copy he had received from the government. But granting this request in the absence of some indication of tampering would be highly unorthodox: under Rule 16, a defendant has no absolute right, on demand, to require the court to help him independently confirm the integrity of materials produced in discovery. In the case at hand, we are satisfied that the district court did not abuse its discretion when it denied even this limited request based on its acceptance of the government's affidavit indicating that the file could not have been edited.

United States v. Goris, 876 F.3d at 46, n.1. App. 6.

Contrary to the opinion of the Court of Appeals, access to the requested discovery and particularly the original August 14 recording was material because it clearly would have aided in the preparation of the defense expert witness. It would have allowed him to generally assess the methodology which was used to record, transmit, and store the conversations between the defendant and the undercover agent, including particularly the critical conversation at the home improvement store on August 14, 2014. The defense expert testified at the hearing on the discovery motion that he could have used specialized software to compare the recording he received with the original recording by comparing the hash values which he likened to the digital equivalent of a fingerprint or DNA analysis. App: 51-52. The discovery also would have made the defense expert much more prepared for the cross-examination he faced, thereby enhancing his appearance before the jury. It would have avoided or diminished an attack on his credibility based on his lack of familiarity with the recording system employed by the government.

There is another possible outcome if the defense expert had been given access to the requested material. His opinion might have changed. There is no way of knowing whether access to the requested discovery would have affected the defense expert's opinion. The defense submits that even if his opinion had changed, the defense was prejudiced by the expert not having access to the requested discovery. If the expert's testimony were changed as a result of access to the requested discovery, the defense had a variety of options, but it would not have been tethered to what turned out to be a vulnerable expert opinion.

The Court of Appeals noted that the defense expert was not familiar with the recording technology being used by the government, but clearly the defense expert was familiar with using hash values to compare digital files. The defense expert also testified at trial that he was familiar with examining servers and doing computer forensics on computer images and hard drives. It would have aided the preparation of the defense expert if he had been allowed to conduct the hash value comparison he sought of the file he had with the original recording.

During the trial, the government made a proffer of testimony by the president and founder of the company whose communications system was used by the government in this case. The proffer included proposed testimony that shortly before the trial the company compared the hash mark for the file created of the recording at the home improvement store on August 14, 2015, with the hash mark of the file provided to the government of this recording and that they matched. The Government also said it provided this information to the defense in the week prior to the trial. Clearly, the government placed value in comparing files by comparing the hash values. Concededly, the fact and contents of the government proffer were not available to the District Court Judge making the ruling on the motion for discovery, who was not the trial judge.

Nonetheless, this proffer by the government demonstrates that the very kind of comparative testing which the defense expert testified he wanted to conduct was a methodology which the government itself endorsed.

B. THE COURT OF APPEALS OPINION CONFLICTS WITH FEDERAL RULE OF CRIMINAL PROCEDURE 16 AND IS PART OF AN EVOLVING CONFLICT AMONG THE COURTS OF APPEALS AS TO THE DEFINITION OF MATERIALITY IN RULE 16

Federal Rule of Criminal Procedure 16 provides that the defense is entitled to inspect and copy items within the possession of the government if they are “material to preparing the defense.” While acknowledging that witness preparation may be one means of demonstrating materiality, the Court of Appeals opinion appears premised on the requirement that the requested item or items must enable the defendant to significantly, “alter the quantum of proof in his favor.” United States v. Goris, 876 F.3d at 46, citing United States v. Ross, 511 F.2d 757, 763 (5th Cir. 1975); App: 6. This would seem to say that the requested discovery must be favorable to the defendant. It would appear to impose a requirement that the requested discovery “alter the quantum of proof” in the defendant’s favor, i.e., that it be exculpatory.

The defense contends that Federal Rule of Criminal Procedure 16 does not require that the requested discovery be favorable to a defendant. Discovery may be material to the defense without being favorable to the defense. A 2013 opinion from the Ninth Circuit Court of Appeals states:

Rule 16 "grants criminal defendants a broad right to discovery," *id.*, requiring disclosure of all documents "material to preparing the defense,"

Fed. R. Crim. P. 16(a)(1)(E)(I). Rule 16 is thus broader than Brady. Information that is not exculpatory or impeaching may still be relevant to developing a possible defense. See *United States v. Doe*, 705 F.3d 1134, 1151 (9th Cir. 2013) ("Even if the documents [**7] [requested under Rule 16] caused [defendant] to completely abandon [his] entrapment defense and take an entirely different path, the documents would still have been 'material to preparing the defense' under Rule 16(a)(1)(E)(i)."). Even inculpatory evidence may be relevant. A defendant who knows that the government has evidence that renders his planned defense useless can alter his trial strategy. Or he can seek a plea agreement instead of going to trial.

United States v. Muniz-Jaquez, 718 F.3d 1180, 1183 (9th Cir. 2013). See also, *United States v. Mackin*, 793 F.3d 703 (7th Cir. 2015), citing *United States v. Muniz-Jaquez* and holding that a defendant was prejudiced by the late disclosure of inculpatory evidence and that a motion for a mistrial should have been granted, noting that "Adequate preparation of a defense includes the ability to intelligently weigh one's plea options." *United States v. Mackin*, 793 F.3d at 711.

The United States Court of Appeals for the District of Columbia, in addressing the meaning of the term materiality, has stated:

The plain language of Rule 16(a)(1)(C) does not support the government's interpretation. This rule covers evidence which is material "*to the preparation of the defendant's defense.*" (emphasis added). The government ignores the words we have just italicized, reading the rule to refer to evidence which is "favorable or helpful to a defendant's defense." See Govt. Br. at 35 n.15. The rule as written does not compel the conclusion that inculpatory evidence is immune from disclosure. Inculpatory evidence, after all, is just as likely to assist in "the preparation of the defendant's defense" as exculpatory evidence. In other words, it is just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths.

United States v. Marshall, 132 F.3d 63, 67 (D.C. Cir.1998).

There are cases from other Courts of Appeals which essentially hold that items are not discoverable under Federal Rule of Criminal Procedure 16 unless they are favorable or exculpatory to the defense. In *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975), reh.

denied, 1975, cert. denied, 423 U.S. 836 (1975), the court held that materiality requires that, “There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.” Citing to this conclusion of United States v. Ross, the Court of Appeals for the Fourth Circuit reached a similar result. See United States v. Caro, 597 F.3d 608, 621 (4th Cir. 2010).

In United States v. Stevens, 985 F.2d 1175 (2nd Cir. 1993), the court also adopted a similar position. The Court said:

Evidence that the government does not intend to use in its case in chief is material if it could be used to counter the government's case or to bolster a defense; information not meeting either of those criteria is not to be deemed material within the meaning of the Rule merely because the government may be able to use it to rebut a defense position. *See, e.g., United States v. Delia*, 944 F.2d 1010, 1018 (2d Cir. 1991). Nor is it to be deemed material merely because it would have dissuaded the defendant from proffering easily impeached testimony.

United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993). This case was cited favorably by the Sixth Circuit in United States v. Lykins, 428 F. App'x 621, 624 (6th Cir. 2011), which held that a Rule 16 violation could not be predicated, “... merely on an argument that disclosure would have resulted in reconsideration of defendant’s decision to testify or formulation of a more effective defense strategy. *Id.* at 624-625. See also, United States v. Henderson, 564 F. App'x 352, 366 (10th Cir. 2014) citing favorably this holding of United States v. Stevens.

A recent case from the district of New Hampshire chronicles the strengths and weaknesses of this division of authority. It states:

Thus, there are two diverging lines of authority on the general question of "materiality" under Rule 16(a)(1)(E)(i), and both have strengths and weaknesses. As Marshall observes, the plain language of Rule 16 -- "material to preparing the defense" -- "does not compel the conclusion that inculpatory evidence is immune from disclosure" because it "is just as likely to assist in 'the preparation of the defendant's defense' as exculpatory evidence." 132 F.3d at 67. As particularly

relevant here, such "assistance" extends to the decision to present "a defense which is undercut" by the evidence. *Id.* at 68 (quoted in 2 Charles Alan Wright and Peter J. Henning, *Federal Practice and Procedure*, § 254, n.17 (4th ed. 2009)).

On the other hand, as the Court of Appeals acknowledged in *Marshall*, such a rule runs the risk of requiring prosecutors to predict what defenses, strategy and tactics a defendant or defense counsel might employ at trial. "The prosecutor need not guess that evidence may become material as a consequence of defendant's not-yet revealed strategic decisions." 132 F.3d at 69 n.2.36 Such a requirement may be prohibitively burdensome, if not impossible, to satisfy. Moreover, an interpretation of Rule 16 that essentially requires the government to assist the defendant in deciding whether to commit perjury or offer otherwise false testimony is decidedly unattractive. Again, as the D.C. Circuit Court of Appeals stated in *Marshall*, "Nor must the prosecutor assume that the defense will make false assertions about the facts, hence making relevant contrary evidence that would not have been relevant had the defense adhered to the truth." *Id.* at 69 n.2. [Footnote omitted].

United States v. Smith, 2017 U.S. Dist. LEXIS 201062 at pp. 27-28 (D. N.H. 2017). Earlier in its opinion the court in United States v. Smith noted the significance of the decision in United States v. Marshall, *supra*, in its reliance on the plain language of Rule 16(a)(1)(E). The Court pointed out that Rule 16(a)(1)(E) requires disclosure of items material to preparing the defense or to be used by the government in its case in chief. The Court went on to note that the statutory use of the disjunctive and the rule against surplusage supported the proposition that the term material "at least includes inculpatory evidence." *Id.* at 18. The issue in United States v. Smith arose in the context of a motion for mistrial which was denied because of the defendant's inability to show prejudice, so the court never decided the materiality question, though it indicated that in most circumstances it favored the government interpretation of materiality. *Id.* at 28.

The court in United States v. Smith noted that United States v. Marshall, *supra*, was cited in 2 Charles Alan Wright and Peter J. Henning, Federal Practice and Procedure § 254 (4th ed. 2009).¹ The text of the treatise states:

It is said that to satisfy the requirement of materiality a defendant must provide some indication that the pre-trial disclosure of the disputed evidence would enable defendant significantly to alter the quantum of proof in his or her favor. But this language does not mean that inculpatory evidence may never be material.

Too much should not be required in showing materiality. [Footnotes omitted]

Id. at § 254, pp. 114-116.

In this case, if the defense had been given access to the original recording and allowed to compare it with the recording analyzed by the defense expert, one possible outcome is that the defense might have changed its strategy and not relied on what turned out to be a vulnerable defense, to wit, that the recording had been altered. The defendant's decision to go to trial might have been affected. The testimony of the defense expert almost certainly would have been affected. He would have been more informed about the systems employed by the government if he had been given access to the original recording and the devices used to make the recordings and store the same.

The discovery sought in this particular case was also central to the evidence produced by the government. What the defense was seeking was directly related to the key government claim, that the defendant was attempting to possess 500 grams or more of cocaine with the intent to distribute the same. The discovery which was sought was not about a tangential or collateral matter; it was about the heart of the case. Rule 16 of the Federal Rules of Criminal Procedure gives a defendant the right to inspect and copy items which are material to preparing a defense.

¹ The references are clearly to the volumes on the Federal Rules of Criminal Procedure.

The defense had retained an expert who had identified what he perceived to be a real problem with the government's case. The defense identified specific discovery it requested that might have the effect of either bolstering or undercutting the expert's opinion. Nothing could be more clearly material to preparing a defense.

VI. CONCLUSION

The petition for a writ of certiorari should be granted for the reasons set forth above.

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