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September 6, 2018

Hon. Joel H. Slomsky
Judge, U.S. District Court
5614 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: United States v. McKelvy, 15-cr-398-3

Dear Judge Slomsky:

Defendant Wayne McKelvy responds briefly to the government's assertions in its letter to the Court dated September 5, 2018.

While United States v. Wilson, 493 F.Supp.2d 484, 487-88 (E.D.N.Y. 2006), includes dicta which the government has quoted to support its position, that case dealt with an entirely different issue and different concept - the adequacy of the notice of a mental health defense. Contrastingly, the issue here is reciprocal discovery under the Rule 16(b)(1)(C), which provides:

(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 [with the defendant's for disclosure of the government's expert testimony].

Here, as noted in our motion filed on September 4, 2018, the defendant has made no such request for disclosure of any government expert's testimony; in fact, the government affirmatively represented in its letter to defense earlier on September 4, 2018, that three of its witnesses - Kurt Gottschall, Chris Flannery, and Joseph Piccione - were being called to testify on matters of fact, rather than to offer expert opinions, under Fed.R.Evid. 702.

Not only has the defendant not made a request of the government for disclosure of a summary of the expected testimony of a government expert witness under Rule 16(b)(1)(G), the government has made clear that it has no such expert witness information for the basic reason that it has no expected expert witnesses. Accordingly, the circumstances here could not possibly lead to a determination that the government could invoke the reciprocal discovery provisions of Rule 16.

The government's reliance on Wilson suggests that their research has been exhaustive, but unable to find a case on point.

Thank you for your consideration of this matter.

Sincerely,

Walter S. Batty, Jr.

cc: William J. Murray, Jr., Esq.
AUSA Robert J. Livermore
AUSA Sarah M. Wolfe