

10 CR 800



U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

904 Sahara Trail - Suite 3
Youngstown, Ohio 44514
October 28, 2010

Baker Hostetler
Attn: George Stamboulidis
45 Rockefeller Plaza
New York, NY 10111

RE: Anthony M. Calato
sent via fax and mail

Dear Mr. Stamboulidis:

The Federal Bureau of Investigation (FBI) has been forwarded a copy of your request made to the Special Prosecutors for Mahoning County for additional records from the case files of the FBI.

The FBI has provided some investigative assistance to the Special Prosecutors. We have located and provided documents within our case file records to the Special Prosecutors to assist their investigation and will continue to provide those additional documents which may be responsive to discovery request obligations.

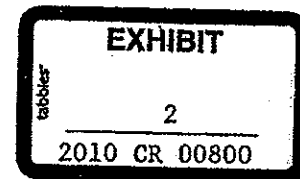
Your letter made reference to FBI case file numbers 194B-CV-68254 and 194B-CV-72723. For context and background, neither one of these case files are singular subjects in nature and both include investigative material completely unrelated to your client. To the extent that materials relate to the Mahoning County case under indictment, those records have been provided to the Special Prosecutors.

Within the records provided to the Special Prosecutors were redacted interview reports (sometimes referred to as FD-302s). The basis of the redactions were simply based on the criteria of materials were either non-responsive to the original case currently under indictment in Mahoning County or the materials relate to other on-going criminal investigations which have not yet been indicted. A very limited number of redactions were done for privacy compliance to include Social Security Account Numbers.

To the extent that material within the redacted portions of the FD-302s goes to the potential impediment of a



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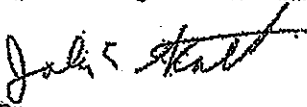
witness (for example an admission to a crime unrelated to the Mahoning County indictment), those portions of the interviews will be un-redacted and provided at a time in which the Special Prosecutors make a determination with certainty that they intend to actually call the witness to the stand.

Your letter made reference to 1A envelopes. The envelope itself is merely a containment envelope to maintain records or evidence within a case file. The envelope itself is not evidentiary, the contents are. A review of our case files (including 1A envelopes) has located thousands of documents related to and responsive to the Mahoning County case under indictment and those documents have been provided to the Special Prosecutors. It is our understanding, those documents have already been produced to you in discovery of the Mahoning County case. In continuing assistance to the Special Prosecutors, as additional documents are identified as responsive to discovery, they will be provided to the Special Prosecutors.

To the extent that there are other on-going investigations relative to the conduct of your client, an invitation to discuss the resolution of those matters is sincerely extended to you and your client. If you wish to schedule a meeting on this, please co-ordinate it through Special Agent Deane Hassman in our Youngstown office at (330) 965-2940.

Sincerely,

C. Frank Figliuzzi
Special Agent in Charge


By:
John E. Stoll
Supervisory Senior
Resident Agent

cc: Martin Weinberg

November 29, 2010

VIA EMAIL AND REGULAR U.S. MAIL

Dennis P. Will
Anthony D. Cillo
David P. Muhek
Special Prosecutors for Mahoning County
c/o Lorain County Prosecutor's Office
Lorain County Prosecuting Attorney
225 Court Street, 3d Floor
Blyria, OH 44035

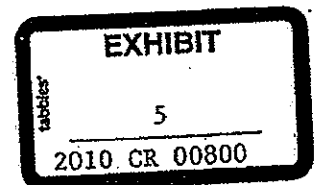
Paul M. Nick
Special Prosecutor for Mahoning County
c/o Ohio Ethics Commission
William Green Building
30 West Spring Street, L3
Columbus, OH 43215-2256

Re: *State of Ohio v. Anthony M. Cafaro, Sr., et al.*, Case No. 2010-CR-00800
Mahoning County Court of Common Pleas

Dear Counsel:

We write on behalf of Anthony M. Cafaro, Sr., The Cafaro Company, Ohio Valley Mall Company, The Marion Plaza, Inc., and Flora Cafaro. We have been reviewing, and continue to review, the State's discovery production to date, consisting of well over 56,000 pages of documents. During the course of our review, we have confirmed that the State's discovery production is deficient in several significant areas, and therefore incomplete. We note that this is not the first occasion one or more of us has written to you urging disclosure of specific discovery information in the possession of the State and/or its investigating agencies. Specifically, correspondence to one or more of you dated October 11, October 21, and November 12, 2010 produced no responsive documents or acknowledgment of our requests. As you are aware, Judge Wolff has set January 3, 2011 as a pretrial motion filing deadline. Reciprocal discovery is also required 90 days following the completion of your discovery disclosures.

In prior face-to-face communications, you indicated a strong preference that we communicate directly with each other to resolve issues like discovery disputes. For this reason, we write one last time addressing the State's discovery deficiencies. The defendants are entitled to receive, and the State is required to immediately produce, the promised bills of particulars and complete production of discovery and other materials each of the defense counsel identified below first requested from you by individual requests in August 2010. If we do not receive, on a timely basis, the complete production of discovery materials and other information requested, we will move to compel the State's production of this material.



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Set forth below are several other specific concerns regarding the State's improper handling of its discovery obligations to date. Although we have endeavored to provide a comprehensive list of the State's deficiencies, the fact that a particular deficiency may not be noted herein is not intended to be, and shall not constitute a waiver of, any defendant's right to insist that the State promptly address such deficiency at a date in the future.

Numerous materials in possession of the FBI have not been produced, or the information contained in materials that have been produced are heavily redacted through the physical blacking out of information contained in the FBI reports.

Each of us on behalf of our respective client(s) furnished a written demand for detailed discovery and other materials a defendant is entitled to receive under the Ohio Rules of Criminal Procedure and well-established federal and state case law. Specifically, Crim. R. 16(B)(6) provides that "the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case . . . (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents . . ." (emphasis added).

The FBI's FD-302s produced in discovery do not comply with Crim. R. 16 and the General Assembly's clear mandate that the State provide defendants with "open-file discovery." In response to a letter dated October 21, 2010 from counsel for Anthony M. Cafaro, Sr. seeking production of un-redacted FBI FD-302s, the Special Prosecutors provided no response. Rather, FBI SSRA John Stoll wrote on October 28, 2010 that:

The basis of the redactions were simply based on the criteria of: materials were either non-responsive to the criminal case currently under indictment in Mahoning County or the materials relate to other on-going criminal investigations which have not yet been indicted To the extent that material within the redacted portions of the FD-302s goes [*sic*] to the potential impeachment of a witness (for example an admission to a crime unrelated to the Mahoning County indictment), those portions of the interviews will be un-redacted and provided at a time in which Special Prosecutors make a determination with certainty that they intend to actually call the witness to the stand.

See FBI SSRA Stoll letter to Stamboulidis dated October 28, 2010, attached hereto.

This is clearly not the criteria by which Ohio courts have mandated open file discovery be provided to defendants. SSRA Stoll's belief that responsive FBI FD-302s are exempt from production if they "relate to other on-going criminal investigations which have not yet been indicted" is in direct conflict with Crim. R. 16. Likewise, SSRA Stoll's belief that disclosure of *Giglio* materials must await a "determination with certainty" that a witness will in fact be called is again inconsistent with applicable federal and state law.

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Further, SSRA Stoll's letter confirms that the FBI possesses *Brady* material but misunderstands when and how it is to be provided to the defense. Accordingly, we request that you immediately direct the FBI to produce un-redacted FD-302s, as well as the agents' original notes from the interviews of those individuals. SSRA Stoll's letter meets none of the criteria justifying the further withholding of discoverable information from production to the defendants.

With respect to SSRA Stoll's letter responding to our specific request for photocopies of the 1A envelopes in the FBI's possession, his representation that 1A envelopes were produced among the over 50,000 documents provided thus far in discovery is mistaken. Production of the 1A envelopes is necessary to determine issues affecting the chain of custody of certain evidentiary materials in the FBI's possession, and the authenticity and admissibility of such materials. SSRA Stoll's letter represents these 1A envelopes have been produced to the Special Prosecutors. Therefore, we request the immediate production of copies of these 1A envelopes in a manner which permits us to determine the specific materials associated with the 1A envelopes.

With respect to witness interview notes or the rough notes contemporaneously taken by agents during the course of interviews, these materials are discoverable and extremely relevant in this matter where numerous interviews conducted by the FBI were completed over the course of several months (e.g. Lisa Antonini, John Reardon, Martin Yavorcik, Bruce Zoldan, etc.). The case law is clear that an FBI agent's rough notes of witness interviews and associated materials may constitute *Brady* material. See, e.g., *United States v. Pellulo*, 105 F.3d 117, 122 (3d Cir. 1997); *United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996) (finding that FBI agents' rough interview notes may often constitute *Brady* material); *United States v. Ramos*, 27 F.3d 65, 67-68 (3d Cir. 1994).

In this context, the recognition that agent rough notes and associated materials can amount to invaluable exculpatory or impeachment evidence is a consequence of the courts' practical observance that agent notes of an interview can vary from (or, in some cases, conflict with) the description of the same interview appearing in the agent's corresponding FD-302. The sensitivity to discrepancies between rough notes of agent interviews and the FD-302s linked to those notes is heightened in cases where, as here, many FD-302s relate to events extending over a substantial period of time and witness statements – ultimately reflected in a single FD-302 – are collected over the course of a series of separate interviews. In such circumstances, contradictions or discrepancies in the statement of a witness collected from one interview to the next exculpate the accused and serve to impeach his accusers. Such impeachment evidence is critical to the defense in this matter and, because such evidence plainly falls within the scope of *Brady*, it is subject to disclosure. See *United States v. Bagley*, 473 U.S. 667, 676, (1985) (holding that impeachment evidence, as well as exculpatory evidence, falls within the ambit of *Brady*). We have reason to believe that material variances in certain witness statements

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should have been memorialized, even if they are within the same interview, and should be provided to us as *Giglio* information (see discussion on *Giglio* information below). The case law is also clear that rough notes of interviews with any defendant or any employee of a corporation whose statement can bind a charged entity must be disclosed, yet no such notes were disclosed as to the interview of defendants Reardon, Yavorcik, or any corporate employee. See e.g., *United States v. Almohandis*, 307 F.Supp. 2d 253 (D. Mass. 2004); *United States v. Vallee*, 380 F. Supp. 2d 11 (D. Mass. 2005).

We have reason to believe that the FBI is also in possession and withholding from production other written documentation outside of the FD-302s produced thus far in discovery which is responsive to the information requested in our discovery letters. These materials include investigative inserts, memoranda, email communications, text messages, proffer letters, and other such reports. This discoverable information contains substantive case-related communications. These are communications occurring: (1) among prosecutors and/or agents; (2) between prosecutors and/or agents and witnesses and/or victims; and (3) between other investigative agencies and the prosecutors and/or agents. These communications are "substantive" in that they include factual reports about investigative activity, factual discussion of the relative merit of evidence, factual information obtained during interviews or interactions with witnesses, and factual issues relating to the assessment of witness credibility. This was a particularly problematic area for government agents in *United States v. W.R. Grace*, No. 05-07, at 3-4 (D. Mont. Apr. 28, 2009), a criminal prosecution of W.R. Grace company and several of its former executives, because the government failed to disclose, until late in the trial, information regarding extensive meetings and emails involving government agents and the government's star witness. The format of the information does not determine whether it is discoverable. Just because the information may not be recorded on an FD-302 by an agent does not render it otherwise undiscoverable. These materials are clearly responsive to our pending discovery requests.

We note also that there does not appear to be any reports prepared by members of the Mahoning County Sheriff's Department, Mahoning County Prosecutor's Office, or the Ohio Ethics Commission. These agencies have been directly involved in the investigation prior to the November 2008 appointment of Special Prosecutors and certain employees of these agencies have been identified as witnesses. It is your obligation, in preparing for trial, to seek all exculpatory and impeachment information from members of the prosecution team, which clearly includes federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of this case, and to provide any reports of the agencies or the employee-witnesses in accord with Rule Crim. P 16.

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We have yet to receive any information or material showing you are discharging the production obligation articulated in *Giglio v. United States*, 404 U.S. 150 (1972), which requires that prosecutors provide defendants with material evidence that tends to impeach the credibility of government witnesses. Such materials include, but are not limited to, prior inconsistent statements (possibly including inconsistent attorney or witness proffers), statements or reports reflecting witness statement variations, benefits provided to witnesses (dropped or reduced charges, immunity, expectations of downward charges, or motions for reduction of sentence, assistance in a federal, state or local criminal proceeding, considerations regarding forfeiture of assets, monetary benefits, non-prosecution agreements, and letters to other law enforcement officials setting forth the extent of a witness' assistance or making substantive recommendations on the witness' behalf, consideration or benefits to culpable or at-risk third parties), other known conditions that could bias the witness (animosity toward a defendant, animosity toward a group of which the defendant is a member or which the defendant is affiliated, relationship with victim, known but uncharged criminal conduct), prior acts evidence under Ohio R. Evid. 608, prior convictions under Ohio R. Evid. 609, known substance abuse or mental health issues, or other issues that could affect the witness' ability to perceive and recall events.

Of particular concern to The Cafaro Company, Ohio Valley Mall Company, and The Marion Plaza, Inc. is whether your attention to Crim. R. 16 and other discovery obligations has been sufficiently broad. For instance, particular attention to agent notes generated during an interview of a defendant or individual whose statement may be attributed to a corporate defendant needs to be made. We know the FBI is in possession of certain employee interviews (e.g., Dominic Rosselli the CFO of the referenced Cafaro entities) but several of those FD-302s and related materials have been withheld from production.

We are also requesting the production of any Fed. R. Crim. P. 6(e) or Ohio Crim. R. 6(E) letters which document the disclosure of matters occurring before the grand jury to state and/or federal prosecuting attorneys. Upon information and belief, the FBI has furnished you with materials subpoenaed by a federal grand jury. We seek those federal grand jury materials which the FBI provided to the Special Prosecutors. If the production of such material to you was caused by the issuance of a state grand jury subpoena to the FBI, to the U.S. Attorney's Office for the Northern District of Ohio, or the federal grand jury initially obtaining such material, please produce the state grand jury subpoena or equivalent document resulting in your coming into possession of materials originally subpoenaed by a federal grand jury.

It appears from our review of the discovery materials produced thus far that certain surveillance activities involving one or more of the defendants occurred. Accordingly, we

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are requesting copies of all surveillance logs, photographs, and the like. Please note that these surveillance materials may in fact contain *Brady* material.

Upon information and belief, we believe that the FBI is in possession of written and recorded statements made by the individual defendants and representatives of the Cafaro related entities. The discovery production is incomplete without the production of these materials.

We note that we have received no materials relating to information or summaries of information from cooperating witnesses or informants.

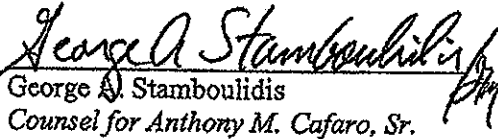
The material and information requested is not unique or new. Rather, these requests were specifically set forth and identified in the Cafaro Defendants' discovery letters served on you in August 2010. Accordingly, we renew, yet again, our request for materials we are entitled under Ohio Crim. R. 12 and 16, Ohio Evid. R. 404(B), and established federal and state case law, and note your continuing obligation to supplement the disclosure of discoverable material.

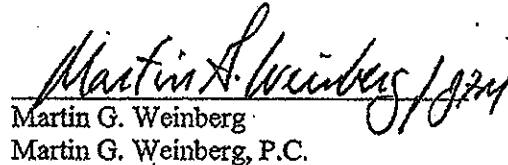
Problems in discovery can arise when the prosecutor delegates the review of case files to investigative agents who are not as familiar with the scope of the State's criminal discovery obligations, as is apparently the case here as evidenced by SSRA Stoll's letter of October 28, 2010 to George Stamboulidis. In the United States' recent unsuccessful prosecution of W.R. Grace, referenced above, important exculpatory material initially was not produced to defendants because an agent, not a prosecutor, conducted a *Brady* review of his file using an incorrect standard. One of the most significant failures by the government in that case was an agent's failure to produce emails. You are ultimately responsible for compliance with discovery obligations. We trust you have developed a process for review of pertinent information to ensure that discoverable information is identified. Because ultimate responsibility for compliance with discovery obligations rests with you, your decisions about how to conduct this review is controlling. Although you may elect to delegate the process and set forth criteria for identifying potentially discoverable information, you should not delegate the disclosure determination itself. Unfortunately, , as evidenced by SSRA Stoll's letter, it appears that this is precisely what has happened.

We believe that receipt of FBI SSRA Stoll's October 28, 2010 letter, without any further communication from you, represents the Special Prosecutors' surrendering, in part, their discovery obligations to FBI agents located in Youngstown. We request that you immediately address this issue and the discovery deficiencies noted above.

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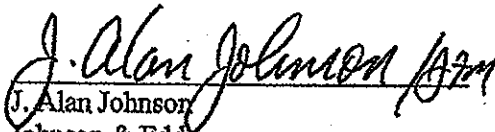
Very truly yours,


George A. Stamboulidis
Counsel for Anthony M. Cafaro, Sr.


Martin G. Weinberg
Martin G. Weinberg, P.C.
Counsel for Anthony M. Cafaro, Sr.


John F. McCaffrey
McLaughlin & McCaffrey
Counsel for Ohio Valley Mall Company &
The Marion Plaza, Inc.


Ralph E. Cascarilla
Walter & Haverfield, LLP
Counsel for The Cafaro Company


J. Alan Johnson
Johnson & Eddy
Counsel for Flora Cafaro

Enclosure



U.S. Department of Justice

Federal Bureau of Investigation

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October 28, 2010

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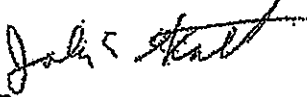
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Sincerely,

C. Frank Figliuzzi
Special Agent in Charge


By:
John E. Spill
Supervisory Senior
Resident Agent

cc: ~~Martin~~ Weinberg