

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

V.

EITHAN HAIM

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Criminal No. 24-CR-00298

DEFENDANT’S RENEWED MOTION FOR CONTINUANCE

The defendant, Dr. Eithan Haim, by and through undersigned counsel, hereby respectfully renews his motion for a continuance of the trial setting which is currently scheduled to begin on October 21, 2024.

I. The government’s recent *Brady* disclosure

After the close of business this past Friday, September 13, 2024, the government disclosed new information to the defense that upends the case and vitiates the central theory of the prosecution. *See* Letter from Jessica Feinstein, AUSA, to Mark Lytle and Ryan Patrick (September 13, 2024) (Ex. A) (“Letter”). In the Letter, the government revealed that it has recently obtained information from Texas Children’s Hospital (“TCH”) which directly contradicts many significant allegations set forth in the indictment. According to the Letter, TCH revealed to the government on September 12 and 13, 2024 that its electronic medical record system reflects the following facts:

- On January 30, 2021, Haim entered progress notes for two adult patients.
- On April 19, 2021, Haim entered a progress note for a pediatric patient.
- On May 2, 2021, Haim entered a progress note for a pediatric patient.
- On May 3, 2021, Haim entered an operative note for a pediatric patient.
- On November 1, 2021, Haim entered an operative note for a pediatric patient.
- On November 13, 2021, Haim contributed to an operative note for a pediatric patient.
- On December 9, 2021, Haim is listed as a surgeon for a pediatric patient.
- On December 22, 2021, Haim is listed as a surgeon for a pediatric patient and accessed related patient records on December 22, 2021 and December 23, 2021.
- On April 14, 2023, Haim is listed as a resident on an operative note for an adult patient.

The existence of these records, which TCH has not yet produced, necessarily contradicts the government's core theory to date, which has been that Dr. Haim had no reason whatsoever to access nor even contemplate having access to TCH's records after finishing a surgical rotation at TCH in January 2021. Specifically: (Par. 9) after Dr. Haim completed his rotation at TCH in January 2021, he "did not return to TCH for any additional pediatric rotations or medical care"; (Par. 11) in April 2023, Dr. Haim sought re-activation of his TCH log-in to access "to pediatric patients not under his care" but emailed TCH "claiming urgency for adult care services . . ."; (Par. 12) Dr. Haim "did not treat or access any adult care patients during this time period at TCH"; and (Par. 15) that Dr. Haim claimed "under the false pretenses that he needed to urgently attend to adult care services."

The government has now effectively acknowledged that each of these allegations is incorrect by admitting that the numerous instances of care Dr. Haim provided to TCH's patients "occurred after Haim's residency rotation at TCH." *See* Letter. At this point, the government has acknowledged that Dr. Haim had a legitimate reason to access TCH patient records because he had a legitimate reason to be there—the treatment of pediatric and adult patients long past his last formal rotation at TCH.

The entire premise of the government's case has been that Dr. Haim was an interloper, falsely claiming responsibility for TCH patients to hide some nefarious and malicious reason for accessing TCH records. This rested on the foundational premise that Dr. Haim treated no patients at TCH after January 2021. But the government's Friday the 13th disclosure has now blown apart this entire premise. As a result, Count 1 of the indictment (false pretenses) must be dismissed and the legitimacy of the rest of the indictment is now in question. Nearly everything the government has alleged is now proven wrong.

II. The government has yet much work to do and materials to produce to satisfy its *Brady* and *Giglio* obligations

In its Response to the Defendant's first Motion for Continuance, the government doubled down on comments made to defense counsel by assuring the Court that "[t]he Government has already produced the vast majority of discovery

in the case” Dkt. No. 35, ¶ 6. But that is clearly incorrect, a vast understatement, based on its Letter. And the government’s representations raise additional concerns.

The government claims that it has “requested records related to the[] instances” specifically identified in the Letter, which it “will produce to the defense once they are provided.” In correspondence with defense counsel of Sunday night, September 15, 2024, the government stated,

We have requested that TCH produce to the Government, as soon as possible, all records pertaining to Eithan Haim after the end of his residency rotation in December 2021, including but not limited to EPIC records and badge swipes at TCH facilities. We understand that TCH expects to produce these records to the Government this week. We will provide the records to the defense as soon as we have them.

Email from Jessica Feinstein, AUSA, to Ryan Patrick (Sept. 15, 2024) (Ex. B) (“Email”).

Thus, the government is aware of key *Brady* and *Gilgio* material, and it will remain outstanding until TCH and then the government produces these records to Dr. Haim. At the same time, these representations also fall short. First, Dr. Haim finished his last TCH residency rotation at TCH in *January* 2021, so the government is inexplicably proposing to omit an entire year of relevant information. Second, even though it apparently is seeking “all records pertaining to Eithan Haim,” the mention of only EPIC records and badge swipes suggests that this effort is unlikely to be comprehensive. Indeed, even if TCH searches all EPIC records, it must also search the right fields. As the Letter demonstrates, references to Dr. Haim can

appear not only in material he entered, but also in notes that others entered. The data search, therefore, must include all references to Dr. Haim within any note—includes many types of notes like progress, history and physical, consult, and operative notes—and even within notes must be through all sections, such as the assessment and plan and assistant surgeon sections. And outside of EPIC notes, the government and TCH should be seeking *all* instances that Dr. Haim was involved in any way with TCH patient care during the broad time frame of the indictment and *all* times after the date referenced in the indictment as the last time Dr. Haim rotated through TCH. The government has already made the mistake once of not conducting a thorough search or simply relying on the efforts of TCH and risks again missing material information that could prove Dr. Haim’s innocence and challenge the basic soundness of the indictment.

Additionally, the government’s communications with TCH are themselves potential *Brady* and *Giglio* material. What TCH is saying to the government about the information it shared is also critical for understanding its import. The government should produce a summary of the communications it had with TCH to learn of this information, including the names of the TCH personnel involved (especially given that this may undermine their apparent testimony) and the content of those communications through production. Even once the government finishes producing the additional records it obtains after a thorough search, it must still

produce the voluminous exculpatory and additional material for the defense to review. So far, the government has only stated in its Email that unnamed participants had a meeting on September 12, 2024 and a call the next day with unnamed outside counsel for TCH.

Moreover, it ought to be clear by now that a search of TCH's electronic medical records system will be insufficient to locate all relevant evidence that Dr. Haim was involved in TCH patient care. Now that it is established that he was physically present for care and even surgeries during the relevant time period, it is obvious that he likely had a substantially larger involvement in patient care at the direction and consent of TCH. Physicians out of of necessity communicate and review information before and after procedures, and if they treat one patient of a particular type, they are often called on to consult on similar patients. Before continuing the prosecution, the government ought to consider and search for all of this other potential evidence which is likely exculpatory to Dr. Haim. Dr. Haim is entitled to this information so that he can present his defense at trial.

More generally, the government has other open items it must address regarding its *Brady* and *Giglio* obligations. Dr. Haim made numerous requests under Rule 16 to the government, *see* Letter from Ryan Patrick to Tina Ansari, AUSA (Sept. 5, 2024) (Ex. C). The government only responded in the Sunday night Email that it “anticipate[s] responding” “within the next day or two.”

CONCLUSION

This is not a simple two-day trial with just 10 witnesses as the government has previously told the Court.¹ Dr. Haim has been denied crucial exculpatory evidence necessary for the preparation of his defense. Dr. Haim respectfully requests that the Court continue the October 21, 2024 trial date for at least 90 days and order the government to seek out all *Brady* and *Giglio* evidence.

Counsel for Dr. Haim has conferred by email with counsel for the government. The government opposes the relief requested herein.

¹ See Government's Response to Defendant's Motion for Continuance of Jury Trial, Dkt. No. 35, ¶7.

Dated: September 16, 2024

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT EITHAN DAVID HAIM

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above and foregoing document has been filed and served on September 16, 2024 using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Marcella C. Burke
Marcella C. Burke

CERTIFICATE OF CONFERENCE

I hereby certify that on September 15, 2024, I conferred via email with counsel for the government Jessica Feinstein who confirmed that the relief requested herein was opposed.

/s/ Ryan Patrick
Ryan Patrick

EXHIBIT A



U.S. Department of Justice

*United States Attorney's Office
Southern District of Texas
1000 Louisiana St., Suite 2300
Houston, TX 77002*

*Tina Ansari
Assistant United States Attorney
Telephone: (713) 567-9598
Email: Tina.Ansari@usdoj.gov*

September 13, 2024

Via EMAIL

Mark D. Lytle
Nixon Peabody, LLP
799 9th Street NW, Suite 500
Washington, DC 20001-5327
Email: mlytle@nixonpeabody.com

Ryan Patrick
Haynes Boone
1221 McKinney Street, Suite 4000
Houston, TX 77010
Email: ryan.patrick@haynesboone.com

Re: United States of America v. Eithan David Haim, 4:24-cr-00298

Dear Counsel,

On September 12, 2024 and September 13, 2024, counsel for Texas Childrens' Hospital ("TCH") disclosed to the Government the following information pertaining to defendant Eithan Haim, based on TCH's electronic medical records system, EPIC:

- On January 30, 2021, Haim entered progress notes for two adult patients.
- On April 19, 2021, Haim entered a progress note for a pediatric patient.
- On May 2, 2021, Haim entered a progress note for a pediatric patient.
- On May 3, 2021, Haim entered an operative note for a pediatric patient.
- On November 1, 2021, Haim entered an operative note for a pediatric patient.
- On November 13, 2021, Haim contributed to an operative note for a pediatric patient.
- On December 9, 2021, Haim is listed as a surgeon for a pediatric patient.
- On December 22, 2021, Haim is listed as a surgeon for a pediatric patient and accessed related patient records on December 22, 2021 and December 23, 2021.
- On April 14, 2023, Haim is listed as a resident on an operative note for an adult patient.

The Government understands that the above-listed dates occurred after Haim's residency rotation at TCH.

The Government has requested records related to these instances from TCH, which we will produce to the defense once they are provided.

Respectfully,

ALAMDAR HAMDANI
UNITED STATES ATTORNEY

/s/ Jessica Feinstein
JESSICA FEINSTEIN
TINA ANSARI
Assistant United States Attorneys

EXHIBIT B

Sunday, September 15, 2024 at 22:04:59 Central Daylight Time

Subject: RE: Letter re US v. Haim
Date: Sunday, September 15, 2024 at 8:24:05 PM Central Daylight Time
From: Feinstein, Jessica (USATXS)
To: Patrick, Ryan
CC: Ansari, Tina (USATXS), White Tyler (USATXS)
Attachments: image001.png

EXTERNAL: Sent from outside Haynes and Boone, LLP

Ryan –

The Government opposes your renewed request for a continuance.

The Government learned the information contained in our September 13, 2024 letter from outside counsel for TCH during a meeting on September 12, 2024 to discuss scheduling of witnesses for trial, and a follow-up call with outside counsel on September 13, 2024. Special Agent Nixon learned the information at the same time as counsel for the Government.

We have requested that TCH produce to the Government, as soon as possible, all records pertaining to Eithan Haim after the end of his residency rotation in December 2021, including but not limited to EPIC records and badge swipes at TCH facilities. We understand that TCH expects to produce these records to the Government this week. We will provide the records to the defense as soon as we have them.

We anticipate responding to your September 5 discovery demand letter within the next day or two.

Best,

Jessica

EXHIBIT C

HAYNES BOONE



September 5, 2024

AUSA Tina Ansari
1000 Louisiana, Ste 2300
Houston, TX 77002
delivered via email to: Tina.Ansari@usdoj.gov

Dear Ms. Ansari,

Through this letter, I am making a written request for discovery pursuant to Federal Rule of Criminal Procedure 16. I am also requesting all discovery required by the federal rules of criminal procedure, federal statutes, and the United States Constitution. The following are my specific requests:

1. Initially, I would request early disclosure of any *Jencks* material, including but not limited to summaries of witness statements, to include FBI Forms 302 (including supporting notes) and Health and Human Services Office of Inspector General Memoranda of Interviews (including supporting notes) and transcripts of all grand jury testimony, to include the presentment of the indictment in this case. I make these requests now so that I will not need to ask for appropriate recesses and continuances during trial.

2. Pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure, I request the following discovery regarding statements made by Dr. Eithan Haim, the defendant in this case:

- a. All relevant written or recorded statements;
- b. All written records containing the substance of any relevant oral statement made by Dr. Haim in response to interrogation by a person he knew to be a government agent, including but not limited to (i) all law enforcement agency reports and (ii) all notes of law enforcement officers, whether or not used to prepare reports; and
- c. The substance of any other relevant oral statement made by Dr. Haim in response to interrogation by a person he knew to be a

government agent if the government intends to use that statement at trial.

With respect to these subcategories, I specifically request, as I believe is your obligation, that you not simply assume that any summary which already exists reflects all significant aspects of any statement. Instead, please check this with whoever wrote the report and have him or her prepare a new summary if the one that exists is not complete.

3. I also request all reports, notes, and dispatch or any other tapes that relate to the circumstances surrounding any questioning of any witnesses, including Dr. Haim. This request includes but is not limited to any rough notes, records, reports, transcripts, or other documents in which statements of Dr. Haim or any other discoverable material is contained. This is all discoverable under Federal Rule of Criminal Procedure 16(a)(1)(A) and *Brady v. Maryland*, 373 U.S. 83 (1963).

4. Pursuant to Rule 16(a)(1)(D), I request a complete copy of Dr. Haim's prior criminal record, including both state and federal "rap sheets," if any such records exist.

5. Pursuant to Rule 16(a)(1)(E), I request copies of all books, papers, documents, and photographs that the government intends to use as evidence in its case in chief at trial, which are material to the preparation of the defense, and/or which were obtained from or belong to Dr. Haim. With respect to photographs, I request my own set of photographs, not photocopies. If you wish, you may provide me with the photographs or negatives, and I will make my own photographs from those.

6. Further, I request copies of any search warrants and affidavits resulting in the seizure of evidence intended for use by the government at trial, or which was taken from, or belongs to Dr. Haim. I also request notice of whether Dr. Haim has been the subject of any electronic eavesdropping, wiretaps, or any other interception of wire or oral communications.

7. Pursuant to Rule 404(b) of the Federal Rules of Evidence, I request reasonable notice of any evidence of other bad acts which the government intends to introduce at trial. It is my position that reasonable notice means notice no later than the deadline for filing motions in this case.

8. I request all information and material subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

9. I request the following information as to each government witness, on the ground that it is discoverable under *Giglio*:
- a. Any prior criminal convictions and/or arrests and any evidence that the witness has committed or is suspected of committing a criminal act which did not result in an arrest or conviction.
 - b. Any payments made to the witness and the dates of such payments, whether in connection with this case or any other case, state or federal.
 - c. Any implicit or explicit promises of benefit which have been made by any government agent or agency, state or federal, regarding (i) non-prosecution for any offense, (ii) recommendations of leniency, or (iii) information to be provided at sentencing for any offense.
 - d. Any implicit or explicit promises of benefit which have been made to the informant, by any government agent or agency, in any other area, including but not limited to immigration status.
 - e. All known occasions on which the witness has made false statements to any person, including but not limited to law enforcement officers or any law enforcement agency or court, and specifically including but not limited to any aliases that the witness may have used.
 - f. Any false identification document that has ever been in the possession of and/or used by the witness, and each and every occasion on which the witness is known to have used said document.
 - g. Any evidence that any prospective government witness is biased or prejudiced against Dr. Haim or has a motive to falsify or distort his testimony.
 - h. Any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired; and

any evidence that a witness has ever used narcotics or other controlled substances, or has ever been an alcoholic.

- i. Any other information which adversely reflects on the credibility of the witness.

10. I request the name, address, and location of any informant or other person who was a percipient witness to a material event in the case, who was a substantial participant in the investigation of the case, or who may have information relevant and helpful to the defense.

11. I request the name of any witness who made an arguably favorable statement concerning Dr. Haim. I also request disclosure of any statement that may be “relevant to any possible defense or contention” that Dr. Haim might assert. This includes in particular any statements by percipient witnesses.

12. I request disclosure of any exculpatory witness statement, including negative exculpatory statements, i.e., statements by informed witnesses that fail to mention Dr. Haim.

13. I request that you review the personnel records of all law enforcement witnesses and disclose any *Brady* or *Giglio* material contained in those records, pursuant to *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) to include but not be limited to:

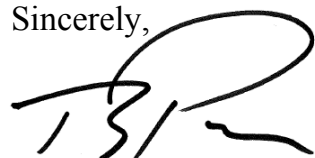
FBI SA Paul Nixon;
FBI SA Chase Mills;
FBI SA Jayme Poteet;
HHS-OIG SA Raul Portillo;
HHS-OIG SA Justin Blan; and
Any other law enforcement agent who has participated in any investigation that relates to Dr. Eithan Haim.

14. I request all records related to any government investigation that included the conduct of Dr. Haim and was performed by the Federal Bureau of Investigation (FBI); the U.S. Department of Health and Human Services (HHS), including the HHS Office of Inspector General and the HHS Office for Civil Rights; and any other governmental investigative agency, including but not limited to the HHS Office of Civil Rights inquiry with OCR Transaction Number 23-529752, including all witness

statements, summaries of witness interviews, and records that support the conclusions contained therein.

I appreciate your prompt provision of discovery so we may more quickly investigate this case and intelligently prepare this matter for trial on behalf of my client, Dr. Haim.

Sincerely,

A handwritten signature in black ink, appearing to be 'R. Patrick', written in a cursive style.

Ryan Patrick