

THE HON. FRANKLIN BURGESS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIANA WATERS.

Defendant.

CAUSE NO. CR 05-5828 FDB

MOTION TO CONTINUE SENTENCING
AND RELEASE DEFENDANT

NOTED FOR: June 2, 2008

COMES NOW Briana Waters, the defendant, by and through her attorney, Neil M. Fox, and moves this Court to (1) continue the sentencing hearing now set for June 2, 2008, and (2) to release Ms. Waters pending sentencing. This motion is based upon the Government's letter dated May 28, 2008, which contains newly discovered evidence that Jennifer Kolar's testimony on a key issue at trial was materially deceptive. The Government learned of this on May 27, 2008, when Ms. Kolar's attorney, Michael Martin, informed Mr. Bartlett and Mr. Friedman of this fact. A copy of this letter is attached as Exhibit 1.¹

Ms. Waters is extremely reluctant to move this Court to continue the sentencing not only because conditions at the Federal Detention Center at Sea-Tac are harsh, but also because of the strain of her incarceration has on her family. Nonetheless, the information provided by Mr. Bartlett in his letter is extremely serious. The defense needs to be able to investigate in order to present to this Court a motion for a new trial,

¹ Exhibit 1 will "white out" the identity of "third party," but a complete version of this letter will be supplied to the Court under separate cover.

1 based upon newly discovered evidence, prior to the imposition of sentence. Moreover,
2 because of the new evidence of deception by Ms. Kolar, circumstances regarding
3 release have changed, and this Court should now change its decision, and release Ms.
4 Waters pending the new sentencing date.

5 **1. Testimony and Argument About the Box Which Allegedly**
6 **Contained the “Hey Woman” Folder**

7 A centerpiece of the Government’s case against Ms. Waters was Ex. 614, a
8 collection of inflammatory anarchist articles that Ms. Kolar claimed were contained in
9 a folder that Ms. Waters gave to her. Ms. Waters’ fingerprint was on the folder, along
10 with what Ms. Waters acknowledged was her handwritten note² stating: “Hey Woman.
11 Here’s some stuff to read that I was telling you about. We’ll hang out soon.” While
12 none of Ms. Waters’ fingerprints were on any of the inflammatory articles themselves,
13 Ms. Kolar’s prints and the prints belonging to Justin Solondz were on the articles.

14 Not only did the Government repeatedly highlight some of the most extreme
15 portions of the articles to the jury, but in closing the Government argued that Exhibit
16 614 “provides us with some guidance” as to what was inside Ms. Waters’ mind in
17 2001, RP 2610, and that the fact that Ms. Waters allegedly gave them to Ms. Kolar
18 shows that “[c]learly, she thinks these [articles] are important.” RP 2611.

19 Ms. Kolar testified that she did not read any of the articles when she allegedly
20 received them from Ms. Waters, but that she put the folder, intact, into a “sealed plastic
21 container,” along with other items from her underground life (such as lights, walkie-
22 talkies, other literature). She said she stored the container for a number of years,
23 moving it twice when she moved residences. It was only when she was trying to
24 improve her memory as to who was involved in the UW arson that Ms. Kolar
25 supposedly found the folder:

26 _____
27 ² Ms. Waters admitted the handwriting on the folder was hers, but that “[t]hese articles that
28 are here are not the ones I remember giving her. . . . What her and I had talked about were issues of
women and activism and vegetarianism and things like that. So I would think that I would have given her
those types of articles.” RP 2450-51.

1 Q. Did you do any thing to try to improve your memory. Did
2 you try to obtain any documents, collect any items?

3 A. No, other than going through and just trying to remember,
4 looking through my phonebook, no.

5 Q. In addition to looking through your phonebooks, were there
6 other things you had at your house that you collected and looked
7 through?

8 A. I did have a crate of information that I had kept for a
9 number of years, and included in there was a folder of papers that Briana
10 had given to me to read, with a note in it from her.

11 RP 1358. When asked “What did you do with the crate?”, Ms. Kolar testified:

12 I called my lawyer, Mr. Martin, and told him that I had it. He
13 acquired it and eventually gave it to you [the Government].

14 RP 1359. Ms. Kolar claimed that she had not read any of the articles
15 contemporaneously with their receipt, and only reviewed them during trial preparation.

16 RP 1525. However, she claimed that the folder had been kept intact “unless something
17 else magically changed them.” RP 1525. Essentially, she claimed that she had the
18 folder in her home, she put the folder into the crate, she moved the crate twice while
19 moving, and then she gave the crate to her lawyer, Michael Martin.³

20 Prior to trial, the defense objected to the admissibility of Ex. 614 on a variety of
21 grounds, including foundation. RP 74-75. At trial, before Ex. 614 was admitted, the
22 defense voir dired Ms. Kolar and objected to the exhibit’s admission:

23 Q. Is it true you never looked at any of these articles?

24 A. I hadn’t looked at them until I was asked to recently by the
25 government.

26 Q. You don’t know for sure that the contents of the folder were the
27 same in 2006 as they were when you received them?

28 A. I have no reason to believe otherwise. I kept them together.
Never taken them apart. I have no reason to believe they are not.

Q. And you moved several times in the intervening time?

³ The defense asked Ms. Kolar, “Is there any reason you kept boxes of materials in your basement,” to which she answered, “I was a pack rat. I should have gotten rid of those long ago.” RP 1479.

1 A. I moved twice, yes, but they were always in the same box and
2 nothing taken out.

3 RP 1364-65.

4 When the defense argued that Ms. Kolar's testimony about the articles was not
5 credible, and that Ms. Waters' testimony on this point was credible, the Government
6 responded:

7 Finally, the folder with the document, Exhibit 614. The
8 Defendant would have you believe that she gave a manila folder to
9 Jennifer Kolar, that she wrote a note on it saying here's some articles to
10 read, and there is a stack of articles there. Those aren't the articles that
11 she gave Jennifer Kolar. She gave an entirely different set of articles on,
12 I believe it was, women activism; and at some point Jennifer Kolar must
13 have pulled those articles out and subbed in a different set of articles, the
14 anarchy articles, and put them in the folder – although Jennifer Kolar
15 told you that's not what happened. . . .

16

17 Remember, Jennifer Kolar had initially not read the articles. She
18 basically took the set of articles and put it in a tub somewhere. Jennifer
19 Kolar apparently thought they were about women activism. It wasn't
20 until preparing for trial that Mr. Bartlett asked her to read the articles,
21 that she read them and found out that's not what they were.

22 RP 2742-43

23 **2. The Newly Discovered Evidence**

24 In the afternoon of May 28, 2008, the defense learned from Mr. Bartlett that he
25 had just learned from Michael Martin that Ms. Kolar's testimony at trial about the tub
26 and its contents was misleading. Contrary to the Ms. Kolar's claims at trial, Ex. 614
27 was not just thrown into a tub in 2001, and retained intact for years (because she was a
28 "pack rat"), before Kolar turned the tub over to her attorney, who turned it over the
Government. Rather, it now turns out that as soon as Ms. Kolar was contacted in New
York by FBI Special Agent Jane Quimby, soon after the Oregon indictment became
public, she asked a third party to retrieve the tub from her home.

This third party is important because testimony at trial was clear that Ms. Kolar
regularly used this same third party as a secret intermediary, to communicate with Joe
Dibee and possibly others, both in 2004 (when Agent Quimby first contacted Ms.

1 Kolar) and in 2005 when the Oregon arrests became publicized and Ms. Kolar was
2 contemplating fleeing with Mr. Dibee. So the tub was not just something Ms. Kolar
3 stumbled upon when allegedly trying to refresh her memory – she was very much
4 aware of the tub before she even returned to Seattle and asked her friend to assist her in
5 concealing it.

6 Then, when Ms. Kolar did come back to Seattle and retained Mr. Martin, she
7 told Mr. Martin about the tub. Mr. Martin obtained the tub from the third party, and
8 instead of keeping it himself, he *gave it back* to Ms. Kolar, who then had full access to
9 it and its contents. Then, at some unknown time, Ms. Kolar gave it back to Mr.
10 Martin, who then turned it over to the Government.

11 What is missing from Mr. Bartlett’s letter, though, is the following information:

12 1. How did the third party retrieve the tub, and what physically happened to
13 it – how as it handled, where was it stored, who had access to it, how long was outside
14 Ms. Kolar’s home? Did Mr. Dibee have access to it when it was in the possession of
15 the third party?

16 2. Did the third party go through the tub and review its contents? Were the
17 contents of the tub ever taken apart and examined? Were papers put into one folder
18 that had been in another folder? Were the contents of the tub adulterated (intentionally
19 or negligently) in any way?⁴

20 3. What date did Mr. Martin retrieve the tub? Did he examine its contents?
21 What was said to him that caused him to retrieve it – i.e., what did Ms. Kolar tell him
22 about the importance of the tub and why she had someone conceal it? What did the
23 third party say to Mr. Martin about the tub?

24 4. When did Mr. Martin give it back to Ms. Kolar? How long did Ms.
25 Kolar have the tub? Knowing how important the tub was, did she examine its contents
26

27 ⁴ Certainly, if the third party dropped the tub when moving it, and the contents spilled out,
28 and he put things back in a different order than what they were in originally, this would be a significant
thing.

1 at that point (thereby contradicting her trial testimony that she hadn't looked at the
2 articles until trial preparation)? Did she modify the contents of the folder? Was this
3 when Ms. Kolar's fingerprints ended up on the articles? When did she give it back to
4 Mr. Martin and how did this take place? Was Mr. Reichhold (Ms. Kolar's boyfriend)
5 or anyone else present when the tub was examined?

6 5. What is the relation between the tub's journey and the first proffer
7 session (the one where Ms. Kolar named other people as being involved in the UW
8 arson) and the date that Ms. Kolar told Mr. Martin that Ms. Waters was involved?
9 Was Ms. Kolar telling the truth when she said that it was only her address book that
10 jogged her memory? Did Ms. Kolar lie to the Government about the chain of custody
11 of the tub?

12 6. Did Ms. Kolar lie about her contacts with the third party? What other
13 interactions did she have with this friend about the case? Did she ask this third party to
14 render other services (i.e. secret communication with other conspirators)?

15 **3. The Need for Investigation and Reflection**

16 Whether Ms. Kolar technically committed perjury or not, she clearly was
17 deceptive both to the Government and to the jury about the tub and its contents. Ms.
18 Kolar made it seem like the folder was casually placed into the tub, the tub was
19 casually stored for a number of years intact, and then it was given to her lawyer, who
20 turned it over to the Government. Yet, there are clear chain of custody issues
21 connected to this tub and its contents, chain of custody issues that the defense would
22 have raised had it known of the tub's journeys in between December 2005 and May
23 2006 (when it apparently was turned over to the FBI). Had Ms. Kolar told the full
24 story in her testimony, and had the defense known the facts that were set out in Mr.
25 Bartlett's letter, not only would a defense foundational objection to the admission of
26 Ex. 614 been stronger, but also the defense argument that the content of the folder in
27 2006 was different from the content in 2001 would also have been much stronger as
28 well.

1 Moreover, the defense challenge to Ms. Kolar's general credibility would have
2 been stronger – not only was it clear that Ms. Kolar was deceptive to the Government
3 when talking about the tub, but the fact that she had secretive communications with the
4 third party to hide the tub, the fact that she failed to disclose these communications for
5 years, and the fact that she had the ability to access the tub after her lawyer retrieved it
6 would have been quite useful to show her lack of credibility on other points. The
7 Government has presented Ms. Kolar as a truthful and remorseful witness, who has
8 cooperated fully. Yet, it is now apparent that Ms. Kolar did not cooperate fully and tell
9 the complete truth, both in 2005/2006 and at trial.

10 The defense needs time to develop the facts further. Mr. Martin needs to be
11 interviewed; Ms. Kolar needs to be interviewed; the third party needs to be
12 interviewed. All three of these people have either refused to talk to the defense in the
13 past (Ms. Kolar and Mr. Martin) or (as in the case of the third party) have not been
14 completely forthright in defense interviews.

15 Moreover, the defense is unclear procedurally exactly what remedy to pursue at
16 this point. Counsel believes that a motion for a new trial under Rule 33 is probably
17 appropriate, based upon newly discovered evidence, but counsel wants to explore the
18 procedural relationship with a potential § 2255 motion. See Ruth v. United States, 266
19 F.3d 658 (7th Cir. 2001) (a bona fide Rule 33 motion based upon newly discovered
20 evidence falls outside § 2255). If a Rule 33 motion is filed, the motion should be filed
21 now, in the trial court, before judgment is imposed, before this Court loses jurisdiction
22 once a Notice of Appeal is filed.

23 Given the importance of Ex. 614 to the Government's case, there is a likelihood
24 that the newly discovered evidence will lead to a new trial. The issue is not just Ms.
25 Kolar's credibility. Rather, the issue is whether the folder with the inflammatory
26 articles, which were consistently highlighted by the Government, should have been
27 admitted at all, or even whether, if admitted, the jury should have known about the
28 tub's true journeys before it ended up in Government hands.

1 **4. Sentencing Should Be Continued and Ms. Waters Released**

2 Ms. Waters is not responsible for the late disclosure of the newly discovered
3 evidence. The fault lies with Ms. Kolar. It is not Ms. Waters' fault that she must ask
4 this relief so close to sentencing.

5 Sentencing should be delayed so that the Court and the defense can conduct an
6 appropriate investigation of the new evidence. Ms. Waters, though, should not be
7 penalized by having to remain in custody. The sentencing should be continued and
8 Ms. Waters should be released pending sentencing (on whatever terms the Court
9 wishes to impose). In this regard, there is a clear change in circumstances that justify
10 release at this point.

11 Dated this 30th day of May 2008.

12 Respectfully submitted.

13 /s/Neil M. Fox
14 _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to attorney of record for the Plaintiff and all other parties.

/s/Neil M. Fox
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