UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES	:	
v.	:	Case No. 1:14-CR-135
MIGUEL ARNULFO VALLE VALLE	:	Honorable Liam O'Grady
and	:	
LUIS VALLE VALLE	:	

DEFENDANTS' MOTION TO COMPEL DISCOVERY

INTRODUCTION

In an effort to avoid the need for judicial intervention into discovery matters, counsel for defendants Miguel and Luis Valle Valle have met and discussed with the Government the timing for the disclosure of certain categories of information required to be produced pursuant to the federal rules of criminal procedure. Although the parties have reached agreement as to the majority of the issues presented, two matters remain unresolved. They involve the timing of the disclosure of: (1) recorded statements of the defendants' conversations with cooperating witness(es); and (2) the Government's expert witness notices. The defense will continue to speak with the prosecutors in this case in the hope of resolving these discovery issues and hopefully render this motion moot prior to the scheduled oral arguments, but in order to protect the record of this case, the defendants are filing this motion to compel discovery.

BACKGROUND

The defendants in this case are currently charged with a conspiracy to unlawfully distribute more than five kilograms of cocaine in the Eastern District of Virginia and

elsewhere. The charges are the result of a lengthy investigation conducted by the Federal Bureau of Investigation that involved both domestic and foreign wiretaps, searches and seizures both in the United States and Honduras, as well as the arrest of more than twenty-five persons in the United States, some of whom have apparently become cooperating witnesses. The Government has provided the defense with approximately seventeen (17) computer discs containing information relevant to the investigation and has also provided defense counsel with access to redacted law enforcement reports of interviews with potential cooperating witnesses.

At the commencement of the case, the Government provided the defense with a "proposed discovery order," that contained certain deadlines for the timing of disclosure of discovery. The parties have met and have reached an agreement about certain of these deadlines. Thus, for example, the Government agreed to provide notice of "other crimes evidence" thirty (30) calendar days before trial, rather than ten days as originally proposed. The Government also agreed to provide *Jencks* and *Giglio* information no later than ten business days before the trial, as opposed to the five-day deadline contained in the first version of the proposed order. At this juncture, however, the parties appear to be at an impasse with respect to the timing of disclosure for two categories of information.

First, the Government recently implied that within its possession are recorded conversations apparently conducted between one of more of these defendants and a cooperating witness or witnesses. The Government does wish to disclose this information until apparently immediately before the trial. Second, the Government wants to wait until ten (10) business days before trial to disclose information concerning its expert witness(es). As set forth herein, the federal rules of criminal procedure require the prompt

production of both of these categories of information and in the interest of preserving the defendants' right to a fair trial, this Court should Order their prompt disclosure.

LEGAL ANALYSIS

1. The Federal Rules Require The Production Of The Defendants' Statements

By its express terms, the federal rules of criminal procedure require the production of any and all statements of a defendant that is within the Government's possession. Rule 16(b) states that:

> 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.

By its express language, the rule does not provide for any exception or limitation for a defendant's recorded statements made to a cooperating witness, so long as the material is in the Government's possession.

In United States v. Caldwell, 543 F.2d 1333 (D.C. Cir. 1979), the Court of Appeals held that a letter written by the defendant that was provided to the Government by another inmate, should have been disclosed to the defense. The Court ruled that this communication fell within the ambit of Rule 16, holding that

> The rule requires unqualifiedly the production of "written or recorded statements or confessions made by the defendant, or copies thereof within the possession, custody or control of the government . . . ," to detect in this language the limitation the Government suggests. We believe, too, that acceptance of the language for just what it says is dictated by the fundamental fairness of granting the accused equal access to his own words, no matter how the Government came by them.

543 F.2d at 1352-53.

Similarly, in United States v. Smith, 218 Fed. Appx. 224, 225-26 (4th Cir. 2007),

the Fourth Circuit found that a tape recording of a conversation made between the defendant and the Government's cooperating witnesses was subject to disclosure when it came into the Government's possession. The requirements of Rule 16 would appear to apply even more forcefully in this case where the recorded statements at issue appear to have been made with the assistance of law enforcement agents involved in the investigation. See United States v Issa, 413 F.2d 244 (7th Cir. 1969)(district court committed error by not ordering production of recorded conversation between defendant who attempted to bribe IRS agent; defendant had right to the recording under Rule 16 without any special showing).

In this case, the prosecutors explained that they were concerned about threats to potential witness(es) if the conversations were disclosed in advance of the trial. Those concerns, however, can be addressed through a protective order or other agreement between the parties. The rule concerning disclosure is clear and provides no exception for exception because of safety concerns for the Government's witnesses. The Government always retains the option of deciding not to use the recorded conversations at any trial of this case, which would remove it from the requirements of the rule and eliminate the need for disclosure.

2. The Federal Rules Require Disclosure Of The Government's Expert Witness(es)

The federal rules of criminal procedure also direct the Government to promptly disclose the identity of its expert witness(es), along with a summary of their qualifications, the expected opinion, and the basis thereof. Rule 16(a)(1)(G) states in relevant part:

> 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.

The disclosure requirement is intended to "minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." United States v. Verges, 2014 WL 559573 (E.D.Va)(quoting from advisory committee notes to Rule 16). A defendant who fails to request the production of expert notices from the Government risks having the court find that the issue has been waived. See United States v. McCoy, 504 Fed. Appx. 228 (4th Cir. 2013).

In this case, the Government has indicated that it intends to call expert witness(es) to explain to the jurors: (1) the manner and/or means of drug trafficking; (2) the meaning of "coded" conversations; and (3) possibly other similar topics. The Government would like to wait until ten (10) business days before trial to make the disclosures. The defense has requested production of the information thirty (30) calendar days before the trial, which would require production in the middle of December, almost immediately before the start of the holiday season.

The requested extra time is necessary for several reasons. First, defense counsel will be required to review the Government's expert witness summaries and to determine whether motion(s) *in limine* need to be filed with respect to either the subject matter of the proposed testimony, or the qualifications of the putative expert witness(es). See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 679 (1993)(district court has responsibility to make determination that expert witness testimony is sufficiently reliable to aid the jury as finders of fact). Defense counsel will also have to prepare for cross-examination of the experts based upon the disclosure.

Second, after receiving the Government's notice, the defense will need to make determinations as to whether it will need to call its own experts. Indeed, the defense may be required to locate new expert witnesses in response to the Government's proffer. At a minimum, if the defense calls its own experts it will need to make its own disclosures as to the qualifications, subject matter, and opinions of its expert witnesses. These are all time consuming matters and will need to be attended to during the annual holiday season.

The ten days before the trial is the time period when the defense will be occupied with numerous other issues of trial preparation. The Government has agreed to provide defense counsel with the *Jencks* and *Giglio* material ten business days before trial. It appears at this juncture that the Government intends to call numerous law enforcement witnesses from United States and Honduras to testify at this trial, as well as a veritable army of cooperators. Defense counsel expect to be occupied full time with reviewing the *Jencks* and *Giglio* disclosures and preparing cross-examination. Defense counsel will also need the final ten days before trial to review matters of evidence and jury instructions (which need to be submitted to the Court five days before the trial commences) as well as finalizing opening statements.

There seems to be no principled reason why the prosecution should not be required to identify its experts thirty (30) calendar days before trial. In return, the Government will receive the defense notices of its experts earlier before the trial is scheduled to commence and this Court will have additional time to consider any motions that may be filed by either side concerning the expert witnesses. This will further the interests embodied in the federal rules, prevent unfair surprise and generally contribute to the prompt and efficient administration of justice in this case.

CONCLUSION

For all the reasons set forth herein and in order to protect defendant Miguel and Luis Valle Valle's right to a fair trial, the defendants respectfully request that the Motion To Compel Discovery of the defendants' statements and the Government's expert witnesses be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To Compel Discovery was filed via the Electronic Filing System upon counsel for the Government, Assistant United States Attorneys Mary Daly and William Sloan and all upon all other defense counsel of record, this 12th day of October, 2015.

Jorge E. Artieda

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