

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.	09-335 (RJL)
	:		
	:		
v.	:		
	:		
AMARO GONCALVES, <i>et al.</i>	:		
	:		
Defendants.	:		

UNITED STATES' NOTICE REGARDING AMENDED DISCOVERY AND
FILTER TEAM PROCEDURES

The United States of America, by and through its undersigned attorneys, hereby submits this Notice to apprise the Court of a change in the government's discovery procedure and its filter team procedure.¹ The revised procedures will not affect the production of trial-related materials, including Jencks Act materials and trial subpoena returns, to the relevant defendants in advance of their respective trials. These trial-related materials will be produced directly to the relevant defendants in advance of trial, at the government's expense, and will be placed at a vendor for the defendants in the remaining trial groups to order if they so choose.

Background

This case is the result of a nearly three year undercover investigation that involved thousands of hours of audio and video recordings. During the early stages of the case, instead of simply making those recordings available to the defendants, the government produced all of the audio and video recordings from the entire investigation to the defendants, at the government's expense. The government also produced, at its own expense, thousands of pages of documents

¹The original filter team procedure was laid out in the United States' Notice Regarding Filter Team Procedures ("Filter Team Notice"), which was filed on May 11, 2010. (Docket No. 58.)

related to the investigation, including Giglio and Jencks Act materials for Richard Bistrong, the cooperating witness in the investigation.

Additionally, as the Court and the defendants are aware, on January 18, 2010, the government executed a number of search warrants in connection with the investigation in this case and seized over 242,000 pages of documents and imaged or seized over 75 computers, servers, and other electronic media containing data (collectively referred to herein as “Search Warrant Materials”). All but one of the searches were conducted at the residences of the defendants or business owned by or associated with the defendants.²

Following the searches, the government returned the Search Warrant Materials to the relevant defendants or custodians.³ Additionally, in March 2010, the government produced to the defendants the seizure inventories from each of the searches, which itemize the electronic and hard copy materials seized during each search. The government also made the defendants aware of the fact that the materials had been returned to the relevant defendants or custodians. With the exception of certain electronic materials from ALS Technologies Inc., none of the defendants have requested copies of or access to the electronic Search Warrant Materials, although they have been available to the defendants since at least March 2010. As the Court recognized, the Search Warrant Materials have also been available to all defendants through subpoenas or through ongoing cooperation among the defendants.

The government also issued a number of subpoenas on January 18, 2010 in connection with its ongoing investigation and has received, and continues to receive, materials in response to

² An additional search was conducted on a location not owned by or associated with the defendants in March 2010 and the materials seized during that search are included in the Search Warrant Materials.

³ The government has recently learned that a laptop was inadvertently not returned to Protective Products International (“PPI”). The government will be returning the laptop to PPI and does not anticipate using any documents from this laptop at trial.

those subpoenas on an ongoing basis during this case (collectively referred to herein as the “Subpoenaed Materials”).

Revised Streamlined Process

As explained to the Court and the Trial Group Two defendants on August 18, 2010, and further explained herein, the government is revising its discovery procedure. The revised procedure **will not affect** the production of trial-related materials, including Jencks Act materials and trial subpoena returns (“Trial-Related Materials”), to the relevant defendants in advance of their respective trials. Trial-Related Materials will be produced directly to the relevant defendants in advance of trial, at the government’s expense. The revised procedure will however change the way Trial-Related Materials are made available to the defendants in the remaining trial groups. Trial-Related Materials will not be sent directly to the remaining defendants. Instead, they will be placed at a vendor, CACI International Inc. (“CACI”), for the defendants in the remaining trial groups and those defendants will be able to request from CACI, at their own expense,⁴ the production of any of those materials.

Additionally, to streamline any requests the defendants may have for access to or copies of Search Warrant and Subpoenaed Materials (although they have not made any such requests to

⁴ At the pretrial hearing, the Trial Group Two defendants argued that the government had an obligation to cover the expense of any discovery productions. As the government explained, to date, the government has covered all of the discovery expenses in this case but it is not required to do so by Rule 16 or any other discovery rules. Indeed, the plain language of Rule 16 requires only that the materials to be “made available for production and copying,” not that the materials be produced directly to the defendants at the government’s expense and numerous courts have recognized this fact. *See, e.g., United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir. 2003) (holding that Rule 16 does not require government to make copies of Rule 16 material for defendants and that, although court has discretion to order government to produce copies, “[w]here the defendant has in no way been prohibited from inspecting the particular documents and cannot demonstrate an undue hardship from this availability, he should not be permitted to transfer the cost of his discovery request to the government especially where, as in the instant case, the defendants are not indigent.”); *United States v. Pelullo*, 399 F.3d 197, 209 (3rd Cir. 2005) (rejecting defendant’s argument that government failed to satisfy its discovery obligations by making a warehouse full of documents available to defendant for his review and copying at his own expense, instead of providing copies at government’s expense). *See also, United States v. Runyan*, 290 F.3d 223, 245-46 (5th Cir. 2002) (where government afforded the defense full access to hard drive of seized computer, government, in not identifying information helpful to defense contained in the hard drive, did not suppress that information, as *Brady* does not require government, rather than defense, to turn on computer and examine images contained therein) (internal quotation omitted).

date), the government will place (1) the full universe of the Search Warrant Materials and (2) the Subpoenaed Materials that have not already been produced to all defendants or are subject to relevant protections at CACI. All defendants will be able to request from CACI, at their own expense, the production of any materials they determine may be relevant to their respective defenses, and all defendants will be able to request that CACI process and search the data according to the defendant's individual specifications.

To facilitate the defendants' requests, the government will provide the defendants detailed indexes of the materials available at CACI, including the custodian of the data, the type of data, and the bates numbers for the data, if applicable. With regard to the Search Warrant Materials, the index will contain the detailed information that is contained in the search warrant inventories the defendants received in March 2010. If the defendants request materials from CACI, CACI will not communicate the substance of the defendants' requests to the government, nor will CACI make the results of any searches conducted by the defendants available to the government. Accordingly, the defendants can be assured that their defense theories will not be revealed to the government if they obtain data from CACI. Additionally, the government has negotiated a pricing framework with CACI that will provide the defendants a significant cost savings to what they would normally be charged.

1. Filter Team Procedure

In placing the full universe of the Search Warrant Materials at CACI, the government recognizes that a new procedure must be put in place to protect any privileged, confidential or sensitive materials that may be in the Search Warrant Materials.⁵ The government has developed

⁵ In addition to placing the full universe of the Search Warrant Materials at CACI, the government is also placing databases that contain the Search Warrant Materials that have been processed and reviewed to date by the government filter team and determined by the custodian to be non-privileged. A subset of these documents have

a process with CACI to ensure that any privileged, confidential or sensitive materials are protected and that privilege disputes that arise will be handled promptly. Within five business days of receiving a request for data, CACI will notify the custodian whose data has been requested and the lead attorney on the government's filter team (Adam Safwat, Assistant Chief, Fraud Section, Criminal Division of the Department of Justice) that data has been requested. If the custodian has previously waived privilege or has not asserted privilege over the materials, the requested materials will be released for production by CACI in their entirety. For those custodians who have asserted that some portion of their materials may contain privileged information and have previously negotiated a list of search terms with the government, to expedite the process for the defendants, Assistant Chief Adam Safwat will provide those search terms to CACI and CACI will use those search terms to filter potentially privileged documents from the documents released for production. However, if the custodian and the requesting defendant independently determine that a different set of filter terms should be used, they may contact CACI together and ask that the modified list of terms be used.

CACI will release the documents not filtered by the search terms for production to the requesting defendant and will provide to the custodian's counsel a copy of any potentially privileged documents identified by the filter terms. The custodian's counsel will conduct its own privilege review, withhold documents based on the custodian's privilege assertions, and provide a privilege log to the requestor. Should a requestor believe that it is entitled to access any of the documents withheld and identified on the privilege log, it should contact counsel for the custodian directly.

already been produced to certain defendants in prior discovery productions but the government is now making the entire database containing the non-privileged documents available at CACI to all of the defendants.

2. Additional Discovery

In addition to the Search Warrant Materials, the government will also be making any additional discovery the government obtains or produces after the date of this Notice (“Additional Discovery”) and certain previously produced materials available at CACI to each defendant for reproduction at his/her own expense. The government anticipates that the Additional Discovery will consist of Trial-Related Materials and other discovery the government obtains for ongoing investigative reasons or obtains or produces as a result of its ongoing discussions with defense counsel regarding discovery requests.

As noted above, in addition to placing the Additional Discovery at CACI, the government will also send a copy of any Additional Discovery directly to the Trial Group Two defendants in addition to sending the materials to CACI. This will alleviate the Trial Group Two defendants’ concerns regarding delay while streamlining the discovery process for the government and the remaining defendants. As the other trial groups near their trial dates, the government will send Trial-Related Materials relevant to those trials directly to the respective trial group defendants, as it will be doing for the Trial Group Two defendants in advance of their upcoming trial.

The government will notify the defendants when materials are sent to CACI for production.

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Respectfully submitted,

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