

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-20792-CR-ALTONAGA

UNITED STATES OF AMERICA
Plaintiff,

vs.

JOHN PHILIP STIRLING
Defendant.

DEFENDANT JOHN PHILIP STIRLING'S
MOTION FOR NEW TRIAL

COMES NOW the Defendant, John Phillip Stirling, by and through his undersigned counsel and hereby files this Motion for New Trial pursuant to Federal Rules of Criminal Procedure 33. Mr. Stirling reiterates the objections and motions he made before and during his trial. Additional argument in support of the motion is asserted below.

FACTUAL BACKGROUND

Mr. Stirling was charged with conspiracy from September 27, 2011 through October 18, 2011, to possess with intent to distribute more than 5 kilograms of cocaine and one kilogram of heroin while on board a vessel subject to the jurisdiction of the United States (Count 1), and with possessing with intent to distribute the drugs while on board a vessel subject to the jurisdiction of the United States (Count 2).

On April 24, 2012, a jury was sworn in Mr. Stirling's case. Mr. Stirling was subsequently found guilty on May 3, 2012. During the trial, Mr. Stirling's defense was duress and he presented evidence of duress in the form of his testimony. The government, in rebuttal, called six witnesses. One witness was FBI computer analyst, Jeffrey D. Etter. Mr. Etter testified that he was given Mr. Stirling's laptop computer that was seized from the boat to analyze.

During his analysis, he discovered a link to Skype. Mr. Etter testified that after downloading a program, he was able to recover various chats from username “beenthere42”. The government argued that these chats were statements made to and from Stirling.

The skype chats were downloaded into a communication log. This log, consisting of 214 page, was turned over to the defense the morning of May 2nd, the same day that the government planned to call FBI analyst Jeffrey Etter. At that time, defense counsel objected to the introduction of the evidence. Counsel advised the Court that these statements of Stirling had not been disclosed to the defense prior to trial. While the government had provided counsel with a copy of the hard drive from the laptop, there was no way to retrieve the skype chats by simply opening the folders.¹ The government’s contention was that these statements were admissible as an admission of a party-opponent pursuant to F.R.E. 801(d)(2). The objection was overruled and the chats were introduced into evidence as government’s exhibit 15.

The government failed to comply with the standing discovery order and Federal Rule of Criminal Procedure, Rule 33 by disclosing the statements as soon as they had received them.

ANALYSIS

Federal Rule of Criminal Procedure 33 states that on motion of the defendant, the court may grant a new trial if required in the interest of justice. The decision to grant or deny a new trial motion is within the sound discretion of the trial court and will not be overturned on appeal unless the ruling is so clearly erroneous as to constitute an abuse of discretion. *United States v. Patrick*, 181 F.3d 1264 (11th Cir. 1999).

¹ Counsel maintains that whether they were capable of being viewed from the hard drive does not alleviate the government’s discovery obligation to turn over the actual communications.

The government's failure to disclose the Skype communication log prior to trial is a discovery violation. It undoubtedly prejudiced Stirling and therefore merits a new trial. The discovery obligations of a party are laid out in F.R.C.P. Rule 16. Rule 16(a)(1)(B) provides 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;

There can be no doubt that the Skype communication logs in the current case are "written statements" by Mr. Stirling as he is one of the individuals included in the conversation according to the government. Further, the statements are "relevant" because they go directly to the heart of the defense. They are also communications between the co-defendant and Stirling and support a conspiracy charge. Discovery was requested by defense counsel at Mr. Stirling's arraignment and a standing discovery order was signed by Magistrate Judge John O'Sullivan on November 14, 2011. D.E. 45. The order states that "the government shall permit the defendant(s) to inspect and copy the following items or copies thereof, or supply copies thereof, which are within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the government: 1. Written or recorded statements made by the defendant(s)." This is a continuing duty to "immediately reveal to opposing counsel all newly discovered information or other material within the scope of this Standing Order." D.E. 45.

The Skype communication logs in question were not turned over to defense counsel until after Mr. Stirling testified and prior to the testimony of the government's rebuttal witness, an FBI

computer analyst. While it is unknown the exact date that the government obtained the defendant's statements, it is believed that it was prior to the start of trial. This case is analogous to *United States v. Noe*, 821 F.2d 604 (11th Cir. 1987). In *Noe*, the defendant was charged with drug offenses. *Id.* at 605. During trial, he testified that he had an alibi at the time the crime was committed. *Id.* On rebuttal, the government introduced a tape recording of a telephone conversation between an undercover agent and an individual identified as Noe. *Id.* at 606. This recording rebutted the defendant's alibi defense. *Id.* The defendant objected to the admission of the tape on the ground that the government had failed to provide it to him before trial. *Id.* The government argued that "to permit Noe to 'fabricate' an unsupported alibi story to conform to the prosecution's evidence, without permitting the government full opportunity to rebut, would result in a miscarriage of justice." *Id.* at 607. The Eleventh Circuit, however, stated that the government's arguments "misconstrue both the purpose of the criminal discovery rules and the concept of actual prejudice resulting from violation of those rules by the government." *Id.* The Eleventh Circuit reversed and remanded for a new trial holding that where the government introduces evidence that attacks the very foundation of the defense strategy, prejudice occurs. *Id.* The Court held that "the failure of the government to disclose 'statement[s] made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that [the] defense strategy may have been determined by the failure to [disclose], there should be a new trial.'" *Id.* (citing *United States v. Rodriguez*, 799 F.2d 649, 651 (11th Cir. 1986)). In the instant case, the Skype communication logs went directly against the defense in the case. The prosecutor argued that Mr. Stirling was not in fear because he had been continuing to discuss drug transactions after he was fired by ICE. These communications hit at the heart of Mr. Stirling's defense. This Court has condemned the sort of

tactic where a prosecutor carelessly or by design hides from discovery a statement of the defendant only to spring it in the middle of trial. See *United States v. Martinez*, 763 F.2d 1297, 1315 (11th Cir. 1985). While the government argues that the computer was turned over to defense counsel, the communication log with the defendant's statements were not turned over to the defense as obligated pursuant to Rule 16(a)(1)(B). As the court so correctly put it, "it would be hard to make an argument with any degree of plausibility that the use of this [Skype communication log] without prior production did not seriously prejudice the defendant in exercising [his] option to plead not guilty and in [his] preparation for trial." *Noe*, 821 F.2d at 608-09.

The Rules of Criminal Procedure were established to prevent "trial by ambush". *Id.* at 608. What happened during this trial is a perfect example of how a defendant is prejudiced when the government springs a statement without notice. The government had these statements made by Stirling in their possession prior to trial. However, they waited until after Mr. Stirling testified to provide them to the defense. The government's actions violated the rules of criminal procedure as well as the Court's Standing Discovery Order. For these reasons, a new trial is warranted.

Respectfully submitted,
Law Offices of Sabrina D. Puglisi
40 NW 3rd Street, PH1
Miami, Florida 33128
Tel. 305-403-8063
Fax. 305-379-6668
Sabrina@puglisilawfirm.com

By: /s/ Sabrina Puglisi
Sabrina Puglisi

Florida Bar No: 0324360

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 10, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Sabrina Puglisi
Sabrina Puglisi, esq.