UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-20792-CR-ALTONAGA

UNITED STATES OF AMERICA

vs.

JOHN PHILIP STIRLING,

Defendant.
_____/

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and submits the instant response to Defendant's Motion for New Trial (DE 199). Because Defendant was provided with a mirror image (i.e. a copy) of the hard drive of his laptop computer, he received a copy of all evidence contained thereon, including his Skype communications. Because there is no discovery violation, there is no basis for a new trial and Defendant's motion should be denied.

I. PROCEDURAL BACKGROUND

On November 10, 2011, Defendant was indicted in a two count indictment with conspiring to and possessing with the intent to distribute cocaine and heroin, while on board a vessel subject to the jurisdiction of the United States, in violation of Title 46 U.S. C. §§ 70503 and 70506 (DE 32). Defendant subsequently pleaded not guilty and demanded a trial by jury (DE 37). After granting the motion to terminate the Federal Public Defender's Office from representing Defendant, on December 8, 2011, the Court appointed Sabrina D. Vora-Puglisi, Esq. to represent Defendant, who has continued to represent Defendant throughout these proceedings (DE 71, 73).

On April 24, 2012, the instant matter proceeded to trial (DE 178). On the third day of trial, Thursday, April 26, 2012, the Government rested its case-in-chief and Defendant began his case (DE 180). Defendant's case culminated with Defendant taking the stand and testifying during the afternoon of April 26, 2012, all day Monday, April 30, 2012, and the morning of Tuesday, May 1, 2012 (DE 180, 182, 184). On Tuesday, May 1, 2012, the Government began its rebuttal case (DE 184). During the Government's rebuttal case, it called five witnesses, including Federal Bureau of Investigation (FBI) Special Agent Jeffrey Etter, who introduced Defendant's Skype communications, which were found on Defendant's laptop computer. *Id*. The Government concluded its rebuttal case on May 2, 2012; that afternoon, the parties delivered closing arguments and the Court charged the jury (DE 187). The following day, the jury returned verdicts of "guilty" as to both counts of the indictment, at which time the Court adjudicated Defendant guilty of the charged offenses (DE 189, 190).

Seven days later, on May 10, 2012, Defendant filed a motion new trial alleging a violation of Rule 16 of the Federal Rules of Criminal Procedure and the Standing Discovery Order. Specifically, the Defendant argued that the Government failed to provide Defendant with a log of Defendant's Skype communications "as soon as they received them" (DE 199:2).

II. FACTUAL BACKGROUND

On October 18, 2011, after receiving consent from the Government of Canada, the United States Coast Guard boarded Defendant's Canadian flagged sailing vessel *ATLANTIS V* (DE 1). At that time, Defendant, and other crew members, were found to be in possession of 381 kilograms of cocaine and one kilogram of heroin. *Id*. On October 27, 2011, Defendant, the crew, and the *ATLANTIS V* arrived to the United States at the Port of Miami. *Id*. At that time, Customs and Border

Protection Officers, along with special agents with the FBI, searched the *ATLANTIS V* and recovered, among other items, one *e*machines, model E625, black laptop computer, bearing serial number LXN360X0039241B45C1601 ("Defendant's laptop computer").

On January 27, 2012, the FBI case agent obtained a search warrant for Defendant's laptop computer. Counsel for Defendant was advised of the search warrant and on February 3, 2012, counsel for Defendant was advised that if she provided an external hard drive, counsel for Defendant could obtain a mirror image of Defendant's laptop computer's hard drive. On March 6, 2012, counsel for Defendant provided a blank Toshiba 320 GB external hard drive to the FBI case agent and on March 16, 2012, the FBI case agent returned to counsel for Defendant the Toshiba 320 GB external hard drive containing a mirror image of Defendant's laptop computer's hard drive. *See* Attachment A.

Subsequently, on Friday, April 20, 2012, undersigned was notified by the FBI case agent that an FBI computer examiner had located Defendant's Skype communications on Defendant's laptop computer. After being advised of the information, undersigned contacted counsel for Defendant via telephone; during that telephonic conversation, undersigned advised counsel for Defendant that inculpatory evidence was discovered on the computer, but the Government would not seek to introduce the evidence in its case-in-chief. Undersigned counsel further indicated that if Defendant took the stand and testified falsely, evidence on the computer could be used by the Government in its rebuttal case. Counsel for Defendant neither asked the Government to identify the evidence nor inquired further as to the nature of the evidence.

On the evening of May 1, 2012, after Defendant finished testifying, undersigned counsel notified counsel for Defendant that the Government intended to introduce evidence from the Defendant's laptop computer in its rebuttal case, specifically Defendant's Skype communications.

On May 2, 2012, before resuming and outside the presence of the jury, Defendant objected to the introduction of the Skype communications. The Court overruled Defendant's objection and asked how much time Defendant needed to review the Skype communications. Defendant informed the Court that he needed two hours to review the communications. After taking approximately a two-and-a-half-hour recess on May 2, 2012, wherein Defendant reviewed the communications, the Government called the FBI computer examiner Jeffrey Etter and introduced the Skype communications as Government Exhibit 16.

III. ISSUE

Whether the Government violated Rule 16(a)(1)(B) or the Standing Discovery Order by not providing Defendant a printout, or log, of the Skype communications when the Government had provided Defendant a mirror image of Defendant's laptop computer's hard drive, which contained the Skype communications.

IV. LAW

A. Motion for New Trial— Rule 33

Federal Rules of Criminal Procedure Rule 33 provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment." FED. R. CRIM. P. 33(a).

The remedy of a new trial is sparingly used, and then only where there would be a "miscarriage of justice ... and where the evidence preponderates heavily against the verdict." *United States v. Leach*, 427 F.2d 1107, 1111 (1st Cir. 1970), *cert. denied*, 91 S.Ct. 57, 400 U.S. 829, 27 L.Ed.2d 59; *see also United States v. Garner*, 529 F.2d 962, 969 (6th Cir. 1976) ("motions for new trial are not favored and are only granted with great caution.").

B. Discovery and Inspection—Rule 16

Rule 16 provides in part:

> **(B) Defendant's Written or Recorded Statement.** 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;
> ...

FED. R. CRIM. P. 16(a)(1)(B).

"[T]he purpose of rule 16 is to protect a defendant's right to a fair trial rather than to punish the government's non-compliance." *United States v. Camargo-Vergara,* 57 F.3d 993, 999 (11th Cir. 1995). Moreover, "Rule 16 is designed to provide the defendant with sufficient information to make an informed decision about a plea, to allow the court to rule on admissibility motions before trial, to minimize prejudicial surprise at trial, and to generally increase the efficiency of litigation." *United States v. Hernandez-Muniz*, 170 F.3d 1007, 1010 (10th Cir. 1999).

C. The Standing Discovery Order

The Standing Discovery Order issued in this case mirrors Rule 16 and provides: "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: Written or recorded statements made by the defendant ..." (DE 45).

V. ANALYSIS

The Government clearly did not violate Rule 16 or the Standing Discovery Order where, as here, the Government provided to Defendant a copy of Defendant's laptop computer's hard drive, which contained, among other items, Defendant's Skype communications. *See* Attachment A; *see also* Defendant's Motion for New Trial (DE 199) ("[T]he government had provided counsel with a copy of the hard drive from the laptop ....").

Nevertheless, in support of Defendant's motion for new trial, Defendant relies upon *United States v. Noe*, 821 F.2d 604 (11th Cir. 1987). Although *Noe* stands for the proposition that a Rule 16 violation can result in a new trial when the violation affects "the defendant's ability to present a defense," *id*. at 607, *Noe* is inapposite. In *Noe*, the government did not provide defendant with audio recordings made of the defendant with an undercover agent during the time of the charged crime and later introduced the audio recordings during the government's rebuttal case. *Id*. at 606. Unlike the circumstances addressed in *Noe*, here, the Government provided to Defendant his Skype communications, when it produced to Defendant the external hard drive in advance of trial.

Although Defendant concedes he received the hard drive containing the Skype communications, he apparently takes issue with the format in which he received them ("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 by Rule 16(a)(1)(B)") (DE 199:5). Defendant in essence argues that in order for the Government to comply with Rule 16, it is insufficient for the Government to produce electronic evidence containing Defendant's statements, but that the Government has to sift through the electronic evidence, categorize it as Rule 16(a)(1)(B) evidence, print it, and provide Defendant with the printout. Such position is contrary to law.

In *United States v. Warshak*, the defendants argued on appeal that "the district court abused its discretion and violated their right to a fair trial by allowing the government to turn over stupendous quantities of evidence in a disorganized and unsearchable format" and "that the government was improperly permitted to 'abdicate' its *Brady* obligations by producing gargantuan 'haystacks' of discovery that swallowed any 'needles' of exculpatory information." 631 F.3d 266, 295 (6th Cir. 2010). In *Warshak*, the government searched and seized from defendants' business computers and servers "electronic evidence" that "filled three 'tera-drives' and numbered 17 million pages." *Id*. Additionally, "discovery included 275 discs of materials gathered by the grand jury and 13 discs of potential trial exhibits compiled by the government," "all of which defendants were eventually permitted to copy." *Id*.

The Sixth Circuit Court of Appeals stated that "as an initial matter, it must be noted that the defendants cite scant authority suggesting that a district court must order the government to produce electronic discovery in a particular fashion." *Id*. at 296. "Furthermore, it bears noting that Federal Rule of Criminal Procedure 16, which governs discovery in criminal cases, is entirely silent on the issue of the form that discovery must take; it contains no indication that documents must be

organized or indexed." *Id*. After citing several factors, including that "defendants had ready access to that information" because "the discovery at issue was taken directly from [defendants'] computers," the Sixth Circuit ultimately declined to hold that "the district court abused its discretion in failing to order the government to produce discovery in a different form." *Id*. at 297.

Moreover, the Sixth Circuit held that defendants argument that the government was obliged to sift fastidiously through the evidence—the vast majority of which came from [defendants' company] itself—in an attempt to locate anything favorable to the defense "comes up empty." *Id*. The Sixth Circuit, citing the Fifth Circuit noted that "'as a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence." *Id*. *citing United States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009), *vacated in part on other grounds*, —— U.S. ——, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010); *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, the government, in not identifying information helpful to the defense contained in the hard drive, did not suppress that information, as *Brady* does not require "the Government, rather than the defense, to turn on the computer and examine the images contained therein").

Similarly, in *United States v. Healy*, a child exploitation case, the government seized three computers that belonged to the defendant. 2012 WL 213611, *1 (S.D.N.Y. 2012). Although the government did not provide copies of the hard drive's to defendant, the government permitted the defendant to inspect the hard drives at designated times. *Id*. at *1, *4. At trial, the government introduced evidence from the computers. *Id*. Defendant subsequently moved for a new trial alleging numerous discovery violations. *Id*. at *4.

The district court noted that "[i]t is common practice for the Government to produce to defendants copies of Rule 16 material, either in digital or paper form. But it is not required by the terms of the rule. Rather, Rule 16 requires that the Government disclose the material and make it available for inspection, copying, or photographing." *Id*.

In *Healey*, the defendant alleged numerous discovery violations including the Government's failure to produce "a ... webcam video ... that was particularly helpful to the Government because it showed that the defendant was engaged in chat room conversations regarding pornography." *Id*. "[Defendant] argued that this video was a 'recorded statement by the defendant' subject to disclosure ... under Rule 16(a)(1)(B)(I)." *Id*. "But, as the Government points out, even assuming that a silent video of a defendant can be considered a recorded statement, 'the Government is not required to preview its case or identify which pieces of evidence it believes will be most persuasive.'" *Id*. "**In the *Brady* context, 'the Government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence,' even when that larger mass is enormous, and defendant points to no authority suggesting that inculpatory evidence disclosed under Rule 16 is any different**." *Id*. (emphasis added).

Additionally, in *United States v. Clarke*, an importation of narcotics prosecution, "the defendant sought to compel the government to produce hard copies of transcripts of the intercepted conversations containing his voice." 2008 WL 2228991, *9 (W.D.N.Y. 2008). In that case, "[t]he government ... provided the defendant with a compact disc ("CD") that contain[ed] audio recordings of all of the conversations intercepted during the investigation (both by wiretap and by consensual monitoring) ...." *Id*. "Complaining that he [was] not sophisticated enough in the use of computers to efficiently obtain information from the CD, the defendant's counsel nevertheless [sought] to have

the government perform the additional task of identifying those conversations on the CD involving his client, and either print out the draft transcripts of those conversations or provide a numbered code by which they can be retrieved from the CD." *Id*.

The district court held that "[t]he government has satisfied its discovery obligations by providing the defendant with the CD." *Id*. at *10. Moreover, "[t]he government has no obligation to identify for the defendant and his counsel those conversations on the CD that include the defendant." *Id*. "As the defendant is undoubtedly in the best position to identify his own voice and the conversations in which he participated, it is up to the defendant and his counsel to review the CD to locate all the conversations in which he participated." *Id*.

Moreover, in *United States v. Richards*, a child exploitation case, "the government provided [defendant] with copies of hard drives seized from [defendant's] computers ...." 659 F.2d 527, 543 (6th Cir. 2012). The Sixth Circuit Court of Appeals again held that the district court did not abuse its discretion in not requiring the Government to produce discovery in a particular format. *Id*. at 544. In so holding, the *Richards* Court cited *Warshak*, *supra*, and *United States v. Jordan*, 316 F.3d 1215, 1253 (11th Cir. 2003) ("rejecting the defendant's Rule 16 challenge that the government's discovery was so massive that it hindered their pretrial preparation and observing: The discovery was indeed voluminous—because the Government gave the defense access to far more information and materials than the law required. The defendants can hardly complain about that."). *Id*. at 544-545.

Applying the general principles set forth in Rule 16, the Standing Discovery Order, and in the above cases, the Government is only obligated to permit Defendant to copy, inspect, photograph certain categories of evidence. Instantly, the Government not only met its obligations under Rule 16

and the Standing Discovery Order, but went beyond it by providing a mirror image of Defendant's laptop computer's hard drive to Defendant.

As set forth above, the Government is not required to sift through the evidence that it is obliged to produce and categorize the evidence as: Rule 16(a)(1)(B) statements, *Brady* evidence, or otherwise, nor is the Government required to assist Defendant in his defense by printing and organizing the evidence. The Government is simply required to provide access to the evidence to comport with Rule 16 and the Standing Discovery Order.

VI. CONCLUSION

The Government provided, and Defendant concedes he received, a copy of Defendant's hard drive containing the Skype communications. The Government has met its obligations under Rule 16 and the Standing Discovery Order. Because no discovery violation occurred, this Court should deny Defendant's Motion for New Trial based on such.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: /s/ Dustin M. Davis

Dustin M. Davis
Assistant United States Attorney
Court ID No. A5501193
99 Northeast 4th Street
Miami, Florida 33132-2111
Tel: (305) 961-9083, Fax: (305) 536-7213
Email: dustin.davis@usdoj.gov

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 17, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Dustin M. Davis
Dustin M. Davis
Assistant United States Attorney