

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	09 CR 383-3
v.)	
)	Judge Ruben Castillo
JESUS VICENTE ZAMBADA-NIEBLA)	

**MEMORANDUM OF LAW
ON BEHALF OF DEFENDANT JESUS VICENTE ZAMBADA-NIEBLA IN
OPPOSITION TO THE GOVERNMENT’S MOTION TO DELAY DISCOVERY.**

Jesus Vicente Zambada-Niebla, by his attorneys below, hereby submits this brief and accompanying exhibit, in opposition to the government’s motion to delay discovery in this case. Mr. Zambada-Niebla asks the Court to compel the government to provide long overdue discovery in a prompt and timely manner that will allow defendant to prepare meaningfully for trial and to reject out of hand the government’s various requests to unreasonably delay discovery in a manner that is neither realistic nor conducive to a fair and speedy trial.

Background

The indictment in this case charges a complex, international conspiracy spanning some three years and involving multiple defendants and untold numbers of conspirators and witnesses. It charges that from May 2005 to December 2008, Mr. Zambada-Niebla, ten other defendants and multiple others “known and unknown” participated in a conspiracy to import “multi-ton quantities” of cocaine and heroin from Central and South America into Mexico and thereafter to export it from Mexico to numerous U.S. locations including Chicago. Indictment at ¶¶2-5. The charged conspiracy involved the leadership

of the Sinaloa Cartel, including two specific “factions” of that cartel as well as other cartels. ¶3. Defendant, according to the indictment, “was a high-level member of the Sinaloa Cartel and the Zambada-Garcia Faction, and was responsible for many aspects of the cartel’s operations.”¶8. He “acted, among other things, as a logistical coordinator who coordinated deliveries of multi-kilogram quantities of cocaine and heroin into the United States ... and deliveries of bulk quantities of United States currency... from its customers in the United States.” ¶8.

Mr. Zambada-Niebla has been in custody since March of 2009 under harsh and punitive conditions. The indictment was returned on August 6, 2009, and he was extradited to the United States in January, 2010. In its first discovery letter dated May 21, 2010 (attached hereto as Exhibit A), the government provided limited and heavily-redacted discovery pledging that it would be the “first of several productions of documents” and that further discovery would proceed on a “rolling basis.” *Id.* at 1. (The letter also stated that the government had no *Brady* material to disclose. *Id.* at 3.) Since that time, however, defense counsel have received only very limited discovery, consisting primarily of previously produced documents with redactions relating to defendant Tomas Arevalo-Renteria eliminated – presumably because of his extradition to the United States and his appearance in court on this matter.

On September 29, 2010, the defense served on the government a detailed 30-page request for discovery. While the government in its motion deems this request “extraordinary in its scope,” Gov’t Br. at 3, it is a request that is dictated by the equally “extraordinary” scope of the charges in the indictment as well as the underlying facts and defenses that the defense will raise. The government responded to the request by letter

dated November 8, 2010. Apart from the government's motion to "delay" discovery, as addressed herein, other issues regarding discovery requests the government fails to answer or to comply with, will be addressed in further, affirmative motions to the Court.

The government asks for delay in discovery in part because "[i]t has become apparent in light of the scope of defendant's discovery request, as well as the potential theories of defense raised in defendant's request, that the government will be required to review classified materials held by various government agencies to determine whether classified information exists that may be subject to discovery." Gov't Br. 3. The government, however, has long known of the need to obtain documents from various agencies. As the government said in its May 21, 2010 letter: "[I]n light of the international and multi-jurisdictional aspects of parts of this case, the U.S. Attorney's Office for the Northern District of Illinois has inquired and is continuing to inquire of various agencies of the U.S. government regarding any materials related to the superseding indictment in this case that require disclosure...." See Exh. A at 4.

The government also asks the Court to take into consideration "extraordinary" security issues occasioned by the fact that this case involves the Sinaloa Cartel. It was inappropriate for the government to make an *ex parte* submission as it did in response to this request. See Gov't Br. 5. The government should not be permitted to use this concern as some sort of catchall reason to delay discovery. If the government has a specific reason to delay specific discovery it must say so and ask the Court to rule.

In addition, the Court should note that virtually all of the charges against the defendant concern acts which allegedly occurred in Mexico. As a result, the defense may

need to undertake investigations in Mexico and it may be necessary to take Rule 15 depositions in Mexico which further underscores the need for discovery being provided as quickly and comprehensively as possible. The discovery provided may also require the filing of additional motions, as a consequence of what is revealed in the discovery.

Finally, as the Court is aware, the defense has recently filed a notification of the defense of public authority under Rule 12.3 of the Federal Rules of Criminal Procedure. Much of the discovery requested pertains to that issue, and it is believed that much of the evidence to support the defendant's defense on that issue is either in the possession of various agencies of the United States government or in Mexico.

ARGUMENT

Point One

The Government's Motion to Delay Discovery Should Be Denied Because the Proposed Delays Would Materially Prejudice the Defense and Prevent Effective Use at Trial of Mandated Discovery.

The government's motion should be denied because the proposed delays are wholly unreasonable and unjustified, would materially prejudice the defense and would prevent effective use at trial of discovery that is mandatory. The categories of delay proposed by the government are addressed sequentially.

A. Rule 404(b) Notice

The government seeks authorization to "file a formal Rule 404(b) motion 30 days prior to trial." Gov't Br. 6. Rule 404(b) requires that the government provide reasonable advance notice of its intention to use such evidence and the general nature thereof. The

purpose of this requirement is to “reduce surprise and promote early resolution on the issues of admissibility.” Fed.R.Evid. 404(b), Notes of Committee on the Judiciary, Sen Rep. No. 93-1277.

The court should order immediate notification of any Rule 404(b) evidence the government intends to introduce at trial. The charges in this case are complex and far reaching enough, and any eve-of-trial Rule 404(b) disclosure will only serve to disrupt and delay proceedings. The government has had ample opportunity to determine what, if any, Rule 404(b) evidence it intends to introduce. There is no reason to delay that further.

Moreover, as set forth above, it is anticipated that any such Rule 404(b) disclosures will necessitate further investigation, much of which will most certainly be in Mexico and could require the taking of Rule 15 depositions in Mexico. The Rule 404(b) evidence is understood to derive from the separate indictment in Washington, D.C., and thus could constitute quite literally a trial within a trial. Moreover, it dramatically expands the time frame of the case to include the years approximately from 1992 to 2003, and the evidence concerning these allegations is almost entirely in Mexico. The defense could need an enormous amount of time to reasonably carry out the necessary defense investigation and tasks. Clearly, allowing the government to wait to make its Rule 404(b) notification will only serve to disrupt and delay proceedings.

B. Santiago Proffer

The government seeks leave to file 30 days before trial its proffer pursuant to *United States v. Santiago*, 582 F.2d 1128, 1130-31 (7th Cir.1978), where the Seventh

Circuit held that as a condition of admission of co-conspirator statements under Fed R. Evid. 801(d)(2)(E), the government should proffer in advance that the conspiracy existed, the defendant and declarant were members and that the statement were in the course of and furthered the conspiracy. Gov't Br. 6. The Court of Appeals has strongly encouraged pre-trial proffers to examine these questions. *E.g., United States v. Rodriguez*, 975 F.2d 404, 406 (7th Cir. 1992).

The Court should direct immediate notice. *Santiago* proffers can raise extremely complex factual and legal questions. *See, e.g., United States v. Shoffner*, 826 F.2d 619, 630 (7th Cir.1987)(setting forth trial procedures in “excruciating detail” and counseling that pretrial examination of proffer was far better course). The government emphasizes the breadth and complexity of the conspiracy in question. Waiting until 30 days before trial to begin the examination of such evidence would only ensure that the issues will not be properly vetted as the *Santiago* line of cases envisions.

C. Cooperating Witness Materials

The government seeks leave to provide *Giglio* material as to cooperating witnesses a scant 7 days before the witness would testify. Gov't Br 6. That would be absurd in a case of this complexity. Such material and *all* statements should be provided immediately.

1. Witness statements

Initially the government states that it has “already produced redacted copies of certain witness statements.” Gov't Br. 6. The defense understands this to refer to statements of cooperators Pedro and Margarito Flores (“Flores brothers”). The

statements the government has produced, however, are heavily redacted. When defendant Tomas Arevalo-Renteria appeared in this case the government “unredacted” statements relating to him, suggesting the government is applying a standard that the statements are only discoverable if they concern defendants who have appeared in this case. That is nonsensical. The Court should order the government to follow a standard of producing statements where they concern the conspiracy charged in the indictment. The Jencks Act requires production of any statement that “relates to the subject matter as to which the witness has testified.” 18 U.S.C. § 3500(b).

Also, this Court’s standing order in criminal cases states as follows:

The Assistant United States Attorney is requested to produce all § 3500 material to defense counsel as soon as possible after the return of an indictment in order to give defense counsel adequate time to review the material, evaluate it with his or her client, and be prepared for trial, without using court time.

Under this exhortation, the government should provide witness statements now. The government seeks to hold back statements of cooperators until seven days before testifying. That is absurd in a case of this complexity. That is especially so with respect to the Flores brothers who are *the* critical witnesses in this case.

2. Giglio material

The government also has a duty under *Giglio v. United States*, 405 U.S. 150 (1972) to provide defendant with all impeachment evidence regarding the witnesses the government intends to call at trial. In a case such as this, *Giglio* material should be disclosed immediately. *Giglio* material broadly covers “information in the possession of the government that is favorable to the accused and material to guilt or punishment,”

including “information concerning the credibility of key government witnesses.” *United States v. Carter*, 313 F.Supp.2d 921, 923 (E.D.Wisc. 2004). In the pretrial setting the issue is not “materiality” to any future trial outcome but simply whether it is favorable to the defense. *Id.* See also *United States v. Peitz*, No. 01-CR-852, 2002 WL 226865, at *3 (N.D.Ill. Feb. 13, 2002) (“government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case, with doubt as to usefulness resolved in favor of disclosure.”). Given the breadth of this obligation, and the extremely broad scope of the allegations and evidence in this case, *Giglio* material must be turned over immediately to the defense to allow the requisite analysis and investigation necessary to adequately prepare for trial.

D. Law Enforcement Witness Material

The government proposes to disclose law enforcement witness material such as prior testimony and reports 21 days before the witness testifies. Gov't Br. 7-8. Again, the Court's standing order in criminal cases, as quoted above, requests the government to provide such materials after indictment. There really is no reason to delay such disclosure. This case involves a tremendous amount of law enforcement investigation into the activities of multiple cartels in Mexico over a long period of time. The government's need to consult multiple federal agencies about the discovery in this case simply underscores the necessity for immediate disclosure. To wait simply until the eve of trial to dump a huge quantity of discovery on defendant would serve no valid purpose.

E. Defendant Statements

The government states that it recognizes its “ongoing” duty to provide statements of the defendant under Rule 16. Gov’t Br. 7. It then states it has disclosed “certain” statements of the defendant but also that the government has made inquiry of other governmental agencies. The government says that it will disclose further statements if it becomes aware of them, “or address them with the Court.” Gov’t Br. 7.

These comments are hardly reassuring in terms of the government discharging its responsibilities. If, as the government’s brief implies, the government is aware of any statements of the defendant that have not been disclosed there is no excuse for not disclosing them immediately. Under Rule 16(a)(1)(A) and (B), the government “must disclose” statements to the defendant “[u]pon a defendant’s request.” The government is also implying that it knows or expects additional statements are held by other agencies and that it may address such statements with the Court. The government should not hide behind this kind of vague and ambiguous rhetoric. It should be candid about statements by the defendant as to which there is an absolute duty to disclose under Rule 16.

F. Expert Witnesses and Summaries of Expected Testimony

The government seeks to provide expert disclosures “at least sixty days prior to trial” under Rule 16(a)(1)(G). Gov’t Br. 7. There is no reason not to make this disclosure now. Expert testimony will only serve to complicate an already complex case. It serves no purpose to delay every category of discovery and make everything subject to concentrated litigation in the weeks before trial. Disclosure should be immediate.

Point Two

**The Government Cannot Justify Across-the-Board “Delay”
By Mere Citation of “Security Concerns.”**

The government attempts to make an across-the-board justification for its motion by citing its obligation “to protect witnesses and preserve the integrity and security of the trial process.” Gov’t Br. 9.

Most notably, the government makes almost no attempt to state specific “security” reasons for its specific delays in discovery. There is no “security” reason given for why expert disclosure must be delayed, for example. There is no “security” reason why the government cannot disclose its Rule 404(b) claims. No “security” reason is offered why the government cannot immediately make its *Santiago* proffer. No “security” reason is given why, as this Court exhorts in its standing order, the government cannot immediately provide the statements of law enforcement witnesses.

Moreover, the Court should note that all of the defendant’s attorneys have signed protective orders which prevent them from disclosing any information obtained through government discovery.

The only hint of a “security” argument lies in discovery as to cooperating informant witnesses, *i.e.* the Flores brothers and anyone else in this category. But on any scrutiny, the government fails to justify any delay as to them either. With regard to witness statements, the government has *already* provided witness statements by the Flores brothers. While these statements are redacted, it is clear that the basis for redaction is not security related at least in substantial part. That became clear when

defendant Tomas Arevalo-Renteria appeared in this case and the government removed redactions in the statements that related to him. Redacting statements because they are not specifically about an appearing defendant in a conspiracy charge is improper to begin with, *see* Argument, *supra*, but it is clear that this basis for redaction does not relate to “security.”

Finally, the government fails to establish that security concerns justify a wholesale and unreasonable delay in *Giglio* discovery. The defense has already been led to believe that the Flores brothers are in protective custody. In no way shape or form does the defense seek the particulars as to the whereabouts of the Flores brothers. The defense does not seek to be told of the whereabouts of *any* witnesses. It does not compromise any security arrangements for the defense to be advised as to basic *Giglio* material. *Giglio* material concerns such matters as plea agreements or other understandings with the government and prior wrongdoing, and its disclosure poses no security concern that the government identifies. These matters do not pose security issues.

The government’s cases (Gov’t Br. 8) do not support the kind of broad, across-the-board delay that the government seeks. The government relies primarily on appellate decisions, but these cases concern whether the defendant was denied a fair trial, focusing in large part on the overwhelming evidence against those defendants. In the pretrial setting here, the issue is whether to guarantee a fair trial going forward, not whether discovery rulings were harmless from the standpoint of appellate review.

The cases also concern issues and facts that are not applicable here. Thus, for example, *United States v. Celis*, 608 F.3d 826 (D.C. Cir. 2010) was a case where the prosecution was permitted to conceal the identities of certain witnesses until one week before trial when they were disclosed to counsel only. Here, the defense already knows the identity of the Flores brothers and does not seek to learn their whereabouts or of other witnesses. Moreover, in *Celis* the government made specific showings as to specific evidence that raised security concerns and the court granted multiple adjournments to allow defense counsel to review late-disclosed evidence. *Id.* at 834-35. The district court found the discovery question to be debatable despite the subsequent conclusion by the court of appeals that the evidence was “overwhelming.” *Id.* at 836-37.

Similarly, in *United States v. Edwards*, 47 F.3d 841 (7th Cir. 1995) the government specifically argued that it needed to withhold the name of a witness who would testify as to Rule 404(b) evidence because of concern for his safety. Defendant did not object and on appeal identified no prejudice. *Id.* at 842-44. Here the government makes no such argument, but rather tries to use the atmosphere of “security” to delay any and all Rule 404(b) disclosure. *United States v. Peters*, 732 F.2d 1004, 1008-09 (1st Cir 1984) and *United States v. Higgs*, 713 F.2d 39 (3d Cir. 1983) are fact-specific cases concerning the appellate issue of whether non-disclosure had compromised the defendants’ due process rights in cases where the defendants were not shown to be prejudiced.

The point here is that the government is not making any specific argument for delay but rather is seeking delay across the board due to amorphous security concerns. The government makes no attempt to explain how the disclosures it seeks to delay poses

any security risks. The kind of information sought has not been shown to pose such a risk. Indeed, this Court can, as it does in its standing order ask the government to provide such information in a manner to assure an orderly and fair trial. Indeed, *United States v. Napue*, 834 F.2d 1311, 1317 (7th Cir. 1987)(Gov't Br. 8) states that although a defendant has no right to a witness list, the court can still order one to assure the proper administration of justice. And, in defendant's submission the Court *can* order the production of *Giglio* material to assure its fair use at trial

In sum, the "security" concern here is a red herring, not a specific argument for specific relief in a specific instance. The Court should reject this attempt to slow down all discovery because of a concern the government fails to defend, involving witnesses whose identities are already known.

CONCLUSION

The motion to delay discovery should be denied.

Dated: July 29, 2011

Respectfully submitted,

s/Edward S. Panzer
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CERTIFICATE OF SERVICE

The undersigned counsel for defendant Vicente Jesus Zambada-Niebla certifies in accordance with Fed. R. Crim P. 49, Fed. R. Civ. P. 5, LR 5.5 and the General Order on Electronic Case Filing (ECF), that on July 29, 2011 the attached MEMORANDUM OF LAW ON BEHALF OF DEFENDANT JESUS VICENTE ZAMBADA-NIEBLA IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DELAY DISCOVERY was filed with the Clerk of Court and served pursuant to the district court's ECF system as to ECF filers:

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EXHIBIT A



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May 21, 2010

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Re: U.S. v. Zambada-Niebla, 09 CR 383

Dear Messrs. Santangelo, Panzer, and Michaelson:

Pursuant to Local Rule 16.1 (formerly local rule 2.04) and Rule 16 of the Federal Rules of Criminal Procedure, and pursuant to the Protective Order entered in the above-captioned case, the enclosed documents represent an initial production of discovery in this case. It is the government's expectation that this will be the first of several productions of documents, which will be produced on a rolling basis. You will note that we have chosen to produce certain discovery beyond what is required by relevant discovery obligations. See Fed.R. Crim.P. 16 and 26.2, 18 U.S.C. § 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). By electing to produce certain discovery beyond its technical obligations, however, the government is not committing to any discovery obligation beyond the discovery obligations set forth above.

Enclosed please find 2 compact disks (CDs) labeled 5/21/10 Discovery Docs and Phone Calls-011129_003 and WS_30021. Enclosed on these CDs are the following categories of documents and recordings:

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1. Numerous DEA-6 reports related to the case. These include, in some instances, reports related to seizures identified in the superseding indictment, and in some instances, witness statements, as well as other aspects of the investigation. The DEA reports are generally in chronological order based on the date they were prepared, rather than topical order. These reports bear bates numbers VZN_P1_0001 through VZN_P1_0316. Many of these reports have been redacted either because they involve aspects of the investigation not directly involving your client, security concerns, and/or protecting the integrity of ongoing investigations. Upon request, should the case proceed to trial, we will re-evaluate the redactions of the documents produced herein.
2. Audio recordings of two recorded telephone calls, call 30021 and call 081129-003. Multiple additional recordings of telephone calls are identified and briefly summarized within the DEA-6 reports that are being produced. The government will make these recordings available for inspection should you wish to listen to them. Additionally, the government will deliver to the United States Marshals Service a CD containing calls that you may review with your client, should he wish to do so. Should the case proceed to trial, the government will produce copies of calls it intends to introduce into evidence and will produce finalized English transcripts in due course.
3. Grand jury statements of Pedro Flores and Margarito Flores. Additional grand jury statements will be produced in advance of trial consistent with the government's discovery obligations, above. These bear bates numbers VZN_P1_0317 through VZN_P1_0328.
4. Extradition documents related to the case of *U.S. v. Zambada-Niebla*, case number 03-034, pending in the United States District Court for the District of Columbia. These reports bear bates numbers VZN_P1_0329 through VZN_P1_0715.
5. Extradition documents related to the above-captioned case. These reports bear bates numbers VZN_P1_0716 through VZN_P1_0784.

Set forth below is a summary of how the various materials produced to date relate to the various subsections of Rule 16:

1. Statements of Defendant

The U.S Attorney's Office for the Northern District of Illinois is not in possession of any relevant Rule 16 statements made by the defendant. If we become aware of any such statements, we will produce them promptly.

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2. Results of Examinations, Tests, or Experiments

The government will produce additional lab reports shortly under separate cover. Certain lab reports are attached as exhibits to the extradition documents referenced in paragraph 5, above.

3. Grand Jury Testimony by Defendant

None.

4. Defendant's Criminal Record

The government is not aware that the defendant has a criminal record in the United States.

5. Defendant's Property in Government Custody

None.

6. Evidence Favorable to Defendant

The government is unaware of any evidence favorable to your client at this time. Any further Rule 16 and/or Brady discovery material obtained by the government will be provided to you shortly after it is received.

7. Other Matters

The government will discuss with you and will be prepared to present to the Court a reasonable schedule for the filing of pre-trial motions, including the government's Santiago proffer, Rule 404(b) evidence, and/or expert witness disclosures, if the case proceeds to trial.

The government will provide you with additional and/or supplemental § 3500 materials a reasonable period in advance of additional witnesses' testimony at trial. The government does expect to call witnesses, including additional cooperating witnesses, in addition to the witnesses identified in the materials being produced at this time.

As noted, the government expects to produce additional sets of discovery in the future, and is cognizant of its ongoing discovery obligations. As noted, much of the discovery produced today is beyond that required by its technical discovery obligations. However, should your review of this set of discovery give rise to questions, or additional early discovery you would like to review, please contact me, and we will discuss in good faith either directly producing those materials to you, or making them available for your inspection, consistent with the government's discovery obligations. The government does have various tangible objects, or photographs thereof, including but not limited to narcotics seizures, currency seizures, drug ledgers, and other materials related to narcotics trafficking. The government expects to produce portions of these materials to you in due course. However, as with your review of other parts of the discovery produced herewith, should you wish

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that any particular aspect of those materials be of particular significance to you, please contact me and we will endeavor to expedite the disclosure of those materials, consistent with the government's discovery obligations.

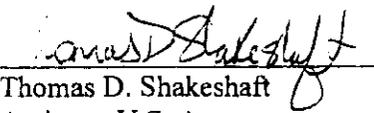
Finally, in light of the international and multi-jurisdictional aspects of parts of this case, the U.S. Attorney's Office for the Northern District of Illinois has inquired and is continuing to inquire of various agencies of the U.S. government regarding any materials related to the superseding indictment in this case that require disclosure under the government's discovery obligations, above. Those disclosures will be made, if required, shortly after it is received.

In return, I am requesting all discovery material to which the government is entitled pursuant to Local Rule 16.1 and the Federal Rules of Criminal Procedure, including but not limited to:

1. the opportunity to inspect and copy anything you may mark as an exhibit at trial;
2. the results of any examination or test that defendant may raise at trial;
3. notice of any alibi or similar defense the defendant intends to raise, including the defense of necessity or coercion and any defense asserting the defendant's unavailability, on or near the dates named in the indictment; and
4. notice of any defense that may possibly be raised of a mental defect inconsistent with the state of mind required for the offense charged.

Very truly yours,

PATRICK J. FITZGERALD
United States Attorney

By: 
Thomas D. Shakeshaft
Assistant U.S. Attorney

Enclosures