

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 07-80138-CR-MARRA/VITUNAC(S)

UNITED STATES OF AMERICA,

Plaintiff,

-versus -

FRANK SARCONA,
Defendant.

**GOVERNMENT'S *IN LIMINE* MOTION TO PRECLUDE EXPERT TESTIMONY
AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW the UNITED STATES OF AMERICA, by and through the undersigned Assistant United States Attorney, and moves this Court to preclude the defendant from seeking to introduce expert testimony in support of his motion to suppress and in the trial of this matter, and states as follows:

On October 5, 2007, and again on December 4, 2008, pursuant to Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure, the United States provided to the defense requisite summaries of the testimony of the expert witnesses it intends to use at trial. Each time, the Government also requested that the defense comply with its obligations under Rule 16(b)(1)(C) and provide the same summary of the testimony of any expert witness(es) the defense intends to use at trial. In fact, the United States has repeatedly demanded reciprocal discovery of defense experts. However, to date, the defense has not provided any such summary.

At the January 22, 2009, status conference, the defendant advised the Court that the defense had been in consultation with an expert, that files had been provided to the expert for analysis, and that the defense expert was outside of the United States. Therefore, the defendant

wished additional time to provide a statement. The Court granted the defense almost three weeks, until February 11, 2009. No information was provided as to the identity of the expert at that Court appearance; the Government was presumably to learn his /her identity when he/she furnished the expert statement in support of the motion to suppress.¹

The defendant did not furnish the Government with a Rule 16(b)(1)(C) summary on February 11, 2009, as required by the Court. Now, more than a week has passed since the Court's deadline and the defendant still has not provided any information to the Government about its proposed expert(s) and the proposed testimony. Moreover, the defense has not explained its failure to provide such information to the Government, nor has it sought an extensions of time.

Pursuant to Rule 16 and this Court's Standing Discovery Order, the defendant has a legal obligation to comply with reciprocal discovery. Rule 16 provides the Court with several possible remedies based on a party's failure to comply with its discovery obligations, including precluding the party from introducing the undisclosed evidence (in this case, expert testimony), see Fed. R. Crim. Pro. 16(d)(2)(C) or, in the alternative, fashion an order requiring the defendant to immediately disclose to the Government its experts and the nature of their testimony, or some other appropriate relief. See Fed. R. Crim. Pro. 16(d)(2)(D). The Government is concerned that

¹ The defendant moved to suppress the search of the Lipoban Clinic in part based on the assertion that the Government's expert was inaccurate. The United States pointed out that the defense motion was deficient in that no one supported their bold assertion; there was no expert statement or affidavit attached. Since the defendant failed to support his assertions regarding the inadequacy of the Government's expert opinion, this Court may determine that the defendant's assertions are insufficient to require a hearing or even form the basis for suppression.

this may be an effort by the defendant to delay this prosecution.²

WHEREFORE, the United States respectfully moves this Court for the preclusion of defense expert testimony at trial, the preclusion of the supplementation of the motion to suppress by an expert statement and/ or in the alternative, an order compelling immediate compliance with this Court's Standing Discovery Order and the Federal Rules of Criminal Procedure, particularly as to the identification of expert witness(es) and the summary of the testimony, as well as the production of all books and records the defense intends to introduce; and for any and all further relief as to this Court may seem appropriate under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 19, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

S/ Kerry S. Baron
KERRY S. BARON
ASSISTANT UNITED STATES ATTORNEY

² The defendant has already manipulated a delay by "seeking" new counsel due to counsel's purported misconduct; after having delayed the trial by his initial demand for change of counsel. Moreover, Defendant filed its extant motion to suppress at the last moment before trial.