

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO:07-20999-CR-LENARD/GARBER

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANKLIN DURAN,

Defendant.

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**MOTION TO COMPEL DISCOVERY PURSUANT TO
FED. R. CRIM. P. RULE 16 WITH INCORPORATED MEMORANDUM OF LAW**

Defendant, Franklin Duran ("Duran"), by and through his undersigned counsel, hereby moves this Honorable Court to enter an Order compelling the government to provide Duran's defense counsel with discovery which the government is required to produce under Fed. R. Crim. P. Rule 16, and *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. In support of this motion, Duran will show the following:

1. By this motion, Duran seeks discovery of e-mail and text messages sent by Duran, Carlos Kauffmann and Moises Maionica to Alejandro Antonini between August 4 and December 11, 2007 which will be referred to as "the undercover portion of this case."
2. On September 12, 2007, the government's informant, Alejandro Antonini recorded a conversation with Wladimir Abad. This recorded conversation is Government Exhibit 133.
3. At page 13 of the transcript of Government Exhibit 133, the following exchange takes place between Antonini and Abad:

AA: And, well, they told me that-DSIP had sent two million - one million dollars to be given to me, then they would due-that they will - - that they would double the - amount.

WA: Who are they? Carlos and Frank?

AA: Carlos and Frank.

WA: So then, what do Carlos and Franklin have to do with that money? I don't understand now.

AA: [OV] I don't un-that's what I can't understand. But they told me - and - and - and I have - and I have e-mails, and SMS [PH] and messages - - well, Carlos told me to my face, "If you don't take responsibility for that, they are going to destroy us." (underline supplied)

4. As of this date, the government has not provided discovery in this case which contains the "e-mails and SMS Messages" Antonini claimed to have received from Duran and Kauffmann and to have in his possession on September 12, 2007. Nor has the government provided to the defense any other e-mails or text messages received by Antonini from Duran, Kauffmann or Maionica. The e-mails and SMS messages specifically referenced by Antonini on September 12, 2007 came from Franklin Duran and Carlos Kauffmann. The items Duran seeks are discoverable pursuant to Rule 16, Federal Rules of Criminal Procedure, the Standing Discovery Order in this case and, potentially as *Brady* material.

ARGUMENT

Rule 16(a)(1)(A)(1)(B) requires the government produce, upon defendant's request, all written and recorded statements of the defendant which are within the government's "possession, custody or control." Certainly, Duran's own e-mails and SMS Messages to

Antonini would constitute written statements of the defendant and, because Antonini was at the relevant times working as a government agent in this case, such statements are certainly within the “control” of the government, if not in their actual possession. Moreover, e-mails and SMS messages referred to during conversations involving Alejandro Antonini would certainly constitute documents “material to preparing the defense” as well as items which were “obtained from or belonged to the defendant” within the meaning of Rule 16 (a)(1)(E). Regardless of when Antonini received them, the same would be true as to any text or e-mail messages from alleged coconspirator and now cooperating witness, Carlos Kauffmann or Moises Maionica.¹

4. Pursuant to Local Rule 88.9(A), the undersigned counsel has unsuccessfully attempted to confer with the government regarding this motion.

¹The government has provided in discovery disks containing messages recovered from Moises Maionica’s and Franklin Duran’s Blackberrys, a transcript of text messages obtained from Franklin Duran, Forensic exam and WAV files obtained from Franklin Duran. They have also provided a disk of telephone calls obtained from the hard drive of Antonini’s computer. They have not, however, provided the text and e-mail messages sent by Duran, Kauffmann and Maionica to Antonini during the undercover portion of this case.

WHEREFORE, Defendant Franklin Duran, respectfully moves this Court to enter an Order compelling the government to provide the discovery requested in this motion.

Respectfully submitted,

BIERMAN, SHOHAT, LOEWY & KEGERREIS

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/S/ Edward R. Shohat

By: _____
EDWARD R. SHOHAT, ESQ. #152634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on, August 8, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in another authorized manner for those counsel or parties not authorized to receive electronically Notices of Electronic Filing.

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/s/ Edward R. Shohat

EDWARD R. SHOHAT, ESQ.