

New York Law Journal

Court Faults U.S. Government For 'Cavalier' Discovery Stance Bars Use as Evidence Of Late Documents

By Mark Hamblett

January 29, 2008

The late delivery of key evidence by prosecutors to the defense in a marijuana trafficking case has prompted a federal judge to bar the government from introducing the evidence in a trial next month.

Southern District Judge Naomi Reice Buchwald said the government displayed a "cavalier" approach to its discovery obligations, including taking 11 months to turn over highly incriminating fingerprint evidence in *United States v. Mason*, 06 cr. 80. The judge ruled that the government could not introduce the fingerprint evidence and a number of documents.

The decision will be published Friday.

A January 2006 indictment charged nine people with conspiracy to distribute 1,000 kilograms or more of marijuana over a seven-year period ending in 2004. Anthony Patterson and Ronnie Mazier were the last of the nine to be arrested. They were taken into custody at a home in Miramar, Fla., on June 28, 2006.

Seized from the home were several firearms, some 16,000 rounds of ammunition, drug paraphernalia and a series of documents. In October 2006, the government provided to the defense an inventory of the seized items as well as photographs of the seized weapons and ammunition.

But prosecutors allegedly failed to produce the seized documents, including cell phone records, bank slips and records, photographs and other evidence.

Counsel for Mr. Patterson, Jeffrey Lichtman, asked for the documents by letter in May 2007 but never received a response from the government. Also in May 2007, Judge Buchwald set a "firm" trial date for Feb. 11, 2008.

But earlier this month, prosecutors wrote the defendants that they intended to obtain a superceding indictment extending the time period of the alleged conspiracy from 2004 to 2006. The superceding indictment that was returned included the drug paraphernalia, weapons and ammunition seized in Florida as the fifth overt act of the charged conspiracy.

And two days later, on Jan. 11, the government produced a fingerprint analysis taken in February 2007 that purported to show a fingerprint of Mr. Patterson's on a box of ammunition.

"Neither Patterson nor his counsel had any prior notice of physical evidence linking him to the weaponry found at the scene of his arrest or that the government intended to introduce evidence at trial," Judge Buchwald said.

At a Jan. 16 conference, the government said it had not obtained the fingerprint image and documents from other state and federal agencies in Florida. Prosecutors were ordered by Judge Buchwald to provide the material immediately. Having received only 11 pages of discovery relating to Miramar up to that point, the defense then received 385 pages from the prosecution.

The fingerprint image was finally turned over on Jan. 24 to Mr. Lichtman, a solo practitioner, who argued that he had little time to investigate challenges to the government's fingerprint analysis and possibly offer a defense that the alleged conspiracy in the first indictment was separate from the Miramar-based conspiracy.

"Here, the government concedes that 'there were shortfalls in providing expeditious discovery . . . ' but offers

no excuse or explanation, acceptable or otherwise, for the failure to timely disclose evidence which it now seeks to introduce at trial," Judge Buchwald said. "The failures to disclose are striking."

The fingerprint evidence, she said, "sat in the government's file undisclosed for 11 months."

The rest of the Miramar evidence, she noted, was not even obtained from the Bureau of Alcohol, Tobacco and Firearms until after the Jan. 16 pretrial conference.

Judge Buchwald said she was surprised "that the government did not obtain those documents for its own review before seeking and filing" the superceding indictment, "which added an overt act arising from the Miramar search and seizure."

The judge noted that the non-disclosures at issue occurred before the current prosecutors, John Zach and Julian Moore, were assigned to the case. Assistant U.S. Attorney Jocelin Strauber was the prosecutor of record during the period the judge referred to.

Sanction Imposed

In weighing what sanctions to impose, Judge Buchwald said the withheld evidence transformed what might have been Rule 404(b) evidence, which is evidence of subsequent bad acts, into "direct evidence of a newly charged conspiracy."

"Further, it is clear that this was precisely the government's intent and purpose in filing the superceder," she said.

She rejected the idea of adjourning the trial date or considering severing the cases against the defendants.

Instead, she precluded the government from introducing any of the Miramar evidence. Prosecutors now have the option of proceeding solely on the charges in the 2006 indictment.

"It takes a brave judge to issue a sanction like that, " Mr. Lichtman said yesterday. "I'm hoping that this sanction will cause them to return their phone calls and comply with their discovery obligations in a more expeditious manner going forward."

The Southern District U.S. Attorney's Office declined to comment.

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