

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**MIAMI DIVISION
Case No. 08-20916-CR-GRAHAM**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

**HELIO CASTRONEVES,
KATIUCIA CASTRONEVES, and
ALAN R. MILLER,**

Defendants.

**MOTION OF DEFENDANTS
HELIO CASTRONEVES, KATIUCIA CASTRONEVES, AND ALAN MILLER
FOR PRODUCTION OF GOVERNMENT INTERVIEW MEMORANDA**

Defendants Helio Castroneves, Katiucia Castroneves, and Alan Miller, through undersigned counsel, move the Court to order the government to produce interview memoranda for all testifying witness because of the government's failure to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and paragraph C of the Standing Discovery Orders applicable to each of the Defendants. (*See* D.E. 6, 44, 55.)

On Friday, March 6, 2009, the government for the first time disclosed to defense counsel the exculpatory testimony of two foreign witnesses. These sworn statements have been in the government's possession for nearly two years, but the government did not produce them until it was too late for the Defendants to mention the exculpatory testimony in their opening statements and too late for the Defendants to question the government's other witnesses about the exculpatory testimony provided in the sworn statements.

The government gave no explanation for its tardiness other than that it was an oversight. These untimely disclosures undermine the government's repeated reassurances to the Court that it understands and is in compliance with its *Brady* obligations. Moreover, these untimely disclosures show that the government is incapable of determining if material is exculpatory under *Brady* because it does not understand the defense that the Defendants are raising. Because the government has demonstrated that it is unable to determine what material is subject to disclosure under *Brady*, the Defendants request that the Court order the government to produce to the Defendants all interview memoranda created by government investigators for each witness in the case, including those who have already testified.

Pursuant to local rule, undersigned counsel for the Defendants have attempted to contact Assistant United States Attorney Matthew Axelrod, who was advised in open court today that Defendants may be filing this motion. The government has repeatedly opposed Defendants' requests for production of such materials.

Respectfully submitted,

/s/ Roy Black
ROY BLACK, ESQ.
(FL Bar No. 126088)
Black, Srebnick, Kornspan & Stumpf, P.A.
201 S. Biscayne Blvd., Suite 1300
Miami, FL 33131
Tel: 305-371-6421

/s/ David M. Garvin
DAVID M. GARVIN, ESQ.
(FL Bar No. 347736)
David M. Garvin, P.A.
200 S. Biscayne Blvd., Suite 3140
Miami, FL 33131
Tel: 305-371-8101

Attorneys for Defendant Helio Castroneves

/s/ Howard M. Srebnick

HOWARD M. SREBNICK, ESQ.
(FL Bar No. 919063)
Black, Srebnick, Kornspan & Stumpf, P.A.
201 S. Biscayne Blvd., Suite 1300
Miami, FL 33131
Tel: 305-371-6421

/s/ Scott A. Srebnick

SCOTT A. SREBNICK, ESQ.
(FL Bar No. 872910)
Scott A. Srebnick, P.A.
201 S. Biscayne Blvd., Suite 1380
Miami, FL 33131
Tel: 305-285-9019

Attorneys for Defendant Katiucia Castroneves

/s/ Lilly Ann Sanchez

LILLY ANN SANCHEZ
(FL Bar No. 0195677)
FOWLER WHITE BURNETT P.A.
Espirito Santo Plaza
14th Floor
1395 Brickell Avenue
Miami, Florida 33131-3302
Tel. (305) 789-9279
Fax (305) 789-9201
lsanchez@fowler-white.com

Robert S. Bennett
Carl S. Rauh
David B. Leland
David W. Foster
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, NW
Washington, DC 20005
Tel. (202) 371-7000
Fax (202) 393-5760

Attorneys for Defendant Alan R. Miller

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2009, the foregoing document was electronically filed with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Lilly Ann Sanchez
Lilly Ann Sanchez

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**MIAMI DIVISION
Case No. 08-20916-CR-GRAHAM**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

**HELIO CASTRONEVES,
KATIUCIA CASTRONEVES, and
ALAN R. MILLER,**

Defendants.

**MEMORANDUM IN SUPPORT OF THE MOTION OF DEFENDANTS
HELIO CASTRONEVES, KATIUCIA CASTRONEVES, AND ALAN MILLER
FOR PRODUCTION OF GOVERNMENT INTERVIEW MEMORANDA**

The Defendants in this case have asked repeatedly for exculpatory material under *Brady*, and the government has repeatedly assured the Defendants that it understands its obligations under *Brady* and that it has complied with them. The Defendants now know that the government's representations were not correct. Late on March 6, 2009, the government disclosed for the first time to the Defendants that two foreign witnesses, Adir Assad and Joao Rodrigues de Cunha Neto, had given exculpatory testimony on one of the central issues in this case – the role of Helio Castroneves's father negotiating the sponsorship deals with Coimex and, as a related matter, in creating Seven Promotions.

The government's failure to comply with *Brady* on this essential fact calls into doubt its ability to comply with *Brady* as to other key issues. Therefore, to safeguard their

constitutional rights, the Defendants respectfully request that the Court order the government to produce all interview memoranda for witnesses who have already testified or who will testify later in the trial.

FACTS

Nearly two years ago, on March 15, 2007, the government obtained sworn statements from Adir Assad and Joao Rodrigues de Cunha Neto that help prove one of the central elements of the defense in this case—that Seven Promotions was owned by Helio Castroneves’s father, not by Helio Castroneves.

Over the next two years, the government investigated the Defendants and their relationship with Seven Promotions, and it obtained an indictment on October 2, 2008. Throughout the month of October, the Court issued Standing Discovery Orders as to each Defendant. (*See* D.E. 6, 44, 55.) Those Standing Discovery Orders could not have been more clear: “The government shall reveal to the defendant(s) and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).” Nor could the order have been more clear regarding how long the government had to comply. The required productions were to be made “on or before fourteen (14) days from the date of this Order.”

The fourteen day deadline passed, and the government did not disclose the exculpatory statements of Mr. Assad and Mr. Cunha Neto.

The Defendants in this case have been at a significant disadvantage because the international nature of the charges leaves some witnesses beyond the subpoena power of the Court. The government, through its three-year investigation, has avoided this problem by

convincing other governments to help it extract testimony from witnesses. When it came time to move for Rule 15 depositions, defense counsel initially placed Mr. Assad and Mr. Cunha Neto on their list. However, because defense counsel were unsuccessful in communicating with Assad and Cunha Neto, counsel made a strategic decision not to seek their testimony. Had defense counsel known that Assad and Cunha Neto would offer exculpatory testimony, they would have pursued their depositions. Instead, the government silently remained in violation of the Standing Discovery Order, and the deadline for the Defendants to seek Rule 15 depositions passed.

It has long been clear to the government that ownership of Seven Promotions in general would be central to the defense in this case. In his Motion to Compel Disclosure of *Brady* and Rule 16 Material, (D.E. 112, filed December 29, 2008), Alan Miller specifically requested “All information favorable to the accused relating to the ownership of Seven Promotions Corp.” (*See id.*, page 4 of 21.) At oral argument, counsel for Mr. Miller requested *Brady* material, and the Court denied the request:

[I]f they haven’t provided it, and at some later point you determine that they have violated the standing discovery order, then they have acted at their peril. The system contemplates that the parties act in good faith.

(D.E. 187 at 12 ll. 13-17.). In response to Mr. Miller’s motion, the Court held:

In this case, the Government maintains that it has complied with its disclosure obligations and the Court notes that with respect to disclosure of information, the Court considers the parties are acting in good faith. Therefore, the Court grants Defendant Miller’s motion [D.E. 107, 112] solely to the extent that the information is discoverable under the Standing Discovery Order, but denies the request to the extent that it seeks material beyond matters governed by the Standing Discovery Order.

(D.E. 195, at 3.)

The Castroneves Defendants have likewise laid out for the government the centrality of the ownership of Seven Promotions to their defense: “Thus, there are two principal

disputes in this case: (1) who owned Seven Promotions? and (2) why did Castroneves Racing pay professional fees to Dad? As to the first question, the government claims Helio was the legal or beneficial owner of Seven Promotions; Helio and Kati deny this allegation.” Castroneves Defendants’ Response Memorandum in Opposition to Government’s Motion *in Limine* to Exclude Irrelevant and Prejudicial Defense Exhibits, at 3. (D.E. 220.)

Yet the government still did not produce the *Brady* material. Instead, the government failed to produce the exculpatory evidence through opening statements and the questioning of witnesses who testified about the relationship between Coimex and Seven Promotions. Only after one week of trial did the government produce this *Brady* material. On Friday, March 6, 2009, the government sent the letter attached as Exhibit A to defense counsel explaining that, over two years ago, Assad and Cunha Neto had given sworn statements that exculpated the Defendants. These witnesses swore to the government that Helio’s father, not Helio, handled the negotiation of the Coimex sponsorship and actually signed the contract on behalf of his son.

The government has given no explanation for its longstanding violation of the Standing Discovery Order and its obligations under *Brady*.

ARGUMENT

The Supreme Court’s decision in *Brady* requires the government to produce any information in the government’s possession, custody, or control that is “favorable to an accused.” *Brady*, 373 U.S. at 87. Information is favorable to the accused if it “relates to guilt or punishment” and “tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses.” *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (citing *United States v. Bagley*, 473 U.S. 667, 676-77 (1985)). Disclosure is required “without

regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.” *Id.*

As the Court has repeatedly observed, the criminal defense system depends upon the good faith of the government to determine when material meets the *Brady* standard and to disclose that material to the defense in a timely fashion. Defense counsel have in good faith requested specific *Brady* material, and they have laid out their theory of the case. The government has resisted the Defendants’ requests at every opportunity, and the Court and the Defendants have been forced to rely on the government’s representations. The government’s failure to live up to the standard set by the Court has prejudiced the defendants in three ways:

First, the Defendants were unaware of the exculpatory information that these foreign witnesses would offer and made the strategic decision not to seek their depositions under Rule 15. The Defendants were unaware of what the witnesses would say, and the Defendants therefore chose not to seek their depositions under Rule 15. In the ordinary criminal case, the Court can cure the problems caused by late *Brady* disclosures by allowing the exculpatory witnesses to be subpoenaed. Because of the international nature of this case, these witnesses are beyond the subpoena power of the Court. The government’s tardy disclosure therefore effectively denied the Defendants the opportunity to present exculpatory testimony.

Second, the Defendants were unable to explain in their opening statements that independent witnesses from Coimex would testify that Helio’s father, not Helio, negotiated and signed the contract with Coimex. This testimony would bolster the defense that Helio’s father negotiated the Coimex deal and that Seven Promotions was set up to secure such sponsorship deals and to repay Helio’s father for the substantial funds father had paid to establish Helio’s

racing career. Had the Defendants been made aware of these statements, as they should have been, they would have featured them prominently in their opening statements.

Third, during the first days of trial, the government presented a stipulation and witnesses, who testified regarding the transactions with Coimex. The statements of Assad and Cunha Neto would have served as impeachment material to undermine the testimony of the government's witnesses.

The government has repeatedly, over the course of many months, reassured the Court and the Defendants that it understands its obligations under *Brady* and the Standing Discovery Orders and that it has complied with them. On Friday, three days into the trial, the Defendants learned that the government's representations have not been accurate. These untimely disclosures call into substantial doubt the government's ability to comply with the Standing Discovery Orders.

The government's untimely disclosures are troubling enough on their own terms, but they suggest a deeper problem. The government does not understand the defense theory of the case well enough to review its material to determine if that material is subject to production under *Brady* and that Standing Discover Orders. The cooperative process of discovery that the Court has set forth has broken down. At this point, the Defendants cannot be confident that the government has complied with its discovery obligations.

Government agents, in their years of investigating this case, have compiled interview memoranda for many of the witnesses that are listed on the government's witness list. The government has refused to produce these memoranda on the theory that they are not *Jencks* material under Eleventh Circuit precedent. However, even memoranda not covered by *Jencks* are subject to production if they are material to the defense under *Brady*. The government has

proved that it cannot timely determine when information is favorable to the defense. To protect the Defendants' constitutional rights, the Court should order the government to produce all interview memoranda for witnesses who have testified and who will testify at trial. If the government cannot determine if its reports or portions thereof are favorable to the defense, the Defendants must be allowed to make these determinations for themselves.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court order the government to produce all interview memoranda for witnesses who have already testified or who will testify at trial.

Respectfully submitted,

/s/ Roy Black
ROY BLACK, ESQ.
(FL Bar No. 126088)
Black, Srebnick, Kornspan & Stumpf, P.A.
201 S. Biscayne Blvd., Suite 1300
Miami, FL 33131
Tel: 305-371-6421

/s/ David M. Garvin
DAVID M. GARVIN, ESQ.
(FL Bar No. 347736)
David M. Garvin, P.A.
200 S. Biscayne Blvd., Suite 3140
Miami, FL 33131
Tel: 305-371-8101

Attorneys for Defendant Helio Castroneves

/s/ Howard M. Srebnick
HOWARD M. SREBNICK, ESQ.
(FL Bar No. 919063)
Black, Srebnick, Kornspan & Stumpf, P.A.
201 S. Biscayne Blvd., Suite 1300
Miami, FL 33131
Tel: 305-371-6421

/s/ Scott A. Srebnick

SCOTT A. SREBNICK, ESQ.
(FL Bar No. 872910)
Scott A. Srebnick, P.A.
201 S. Biscayne Blvd., Suite 1380
Miami, FL 33131
Tel: 305-285-9019

Attorneys for Defendant Katiucia Castroneves

/s/ Lilly Ann Sanchez

LILLY ANN SANCHEZ
(FL Bar No. 0195677)
FOWLER WHITE BURNETT P.A.
Espirito Santo Plaza
14th Floor
1395 Brickell Avenue
Miami, Florida 33131-3302
Tel. (305) 789-9279
Fax (305) 789-9201
lsanchez@fowler-white.com

Robert S. Bennett
Carl S. Rauh
David B. Leland
David W. Foster
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, NW
Washington, DC 20005
Tel. (202) 371-7000
Fax (202) 393-5760

Attorneys for Defendant Alan R. Miller

Exhibit A