IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 08-12548-AA
DISTRICT COURT NO. 8:07-CR-342-T-23MAP

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

YOUSSEF SAMIR MEGAHED,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRIEF OF YOUSSEF SAMIR MEGAHED

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No. 08-12548-AA

United States of America v. Youssef Samir Megahed

CERTIFICATE OF INTERESTED PERSONS

The persons listed below have an interest in the outcome of this case:

1. Allen, Adam B., Assistant Federal Public Defender;
2. Cakmis, Rosemary, Assistant Federal Public Defender, Chief - Appellant Division;
3. Dyer, Dionja L., Assistant Federal Public Defender;
4. Elm, Donna Lee, Federal Public Defender;
5. Goudie, Lyann, Counsel for district court case co-defendant, Ahmed Abdellatif Sherif Mohamed;
6. Hoffer, Jay L., Assistant United States Attorney;
7. McNamara, Linda Julin, Assistant United States Attorney, Deputy Chief Appellate Division;
8. Megahed, Youssef Samir, Defendant-Appellee;
9. Merryday, Honorable Steven D., United States District Judge;
10. Mohamed, Ahmed Abdellatif Sherif Mohamed, district court case co-defendant;
11. Monk, Robert, Assistant United States Attorney;

12. Moreno, Linda, Counsel for district court case co-defendant, Ahmed Abdellatif Sherif Mohamed;

13. O'Neill, Robert E., United States Attorney;

14. Pizzo, Honorable Mark A., United States Magistrate Judge; and

15. Rhodes, David P., Assistant United States Attorney, Chief - Appellate Division.

STATEMENT REGARDING ORAL ARGUMENT

Appellee requests oral argument. It is respectfully submitted that argument by counsel familiar with the issue, the facts, and the record on appeal will provide this Honorable Court with assistance in resolving this action.

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STATEMENT OF JURISDICTION

This is an appeal from the district court's May 2, 2008, oral order excluding evidence in a criminal case. Docs.231, 232, 251. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States filed its notice of appeal on May 5, 2008. Doc.231. *See* Fed. R. App. P. 4(b)(1)(B)(i). This Court now has jurisdiction to review the district court's orders pursuant to 18 U.S.C. § 3731.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT DID NOT CLEARLY ABUSE ITS BROAD DISCRETION IN EXCLUDING HIGHLY PREJUDICIAL FORENSIC COMPUTER EVIDENCE WHICH WAS ONLY MINIMALLY PROBATIVE TO ISSUES OF KNOWLEDGE OR INTENT [APPELLANT'S ISSUES II AND III]

II. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION IN EXCLUDING EVIDENCE AS A DISCOVERY VIOLATION SANCTION WHERE EVIDENCE WAS NOT DISCLOSED TO DEFENSE UNTIL EIGHT MONTHS AFTER INITIATION OF PROSECUTION, THREE AND A HALF MONTHS AFTER THE DISCOVERY DEADLINE AND ONLY SEVEN BUSINESS DAYS PRIOR TO TRIAL [APPELLANT'S ISSUE I]

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

In August 2007, a grand jury in the Middle District of Florida returned a one-count indictment charging Youssef Samir Megahed and Ahmed Abdellatif Sherif Mohamed with knowingly transporting explosive materials without a federal license, in violation of 18 U.S.C. §§ 842(a)(3)(A) and 2. Doc.1. In April 2008, the grand jury returned a superseding indictment, which again charged Mr. Megahed and Mr. Mohamed with violating sections 842(a)(3)(A) and 2 (count three), and charged them with knowingly possessing an unregistered destructive device, in violation of 26 U.S.C. §§ 5861(d) and 5871, and 18 U.S.C. § 2 (count four), and charged Mr. Mohamed alone with several additional counts. Doc.198.

In April 2008, Mr. Megahed filed three (3) motions in limine to exclude evidence. Docs.195, 202, 219. On April 28, 2008, Mr. Megahed filed a motion for sanctions based on a discovery violation (Doc.217), as well as a motion to suppress evidence (Doc.216). The United States filed responses to those motions. Docs.218, 223, 226, 229, 230. Following a hearing on May 2, 2008, the district court granted Mr. Megahed's motion for sanctions; granted in part his first motion in limine, excluding evidence on Fed.R.Evid. 401/403 grounds; and granted in part his third

motion in limine, also on Fed.R.Evid. 401/403 grounds. Docs.232, 251. The court denied the second motion in limine and denied the motion to suppress as moot. Doc.232. The government filed a notice of appeal of the district court's order on May 2, 2008. Docs.231, 247. This interlocutory appeal followed.

B. STATEMENT OF THE FACTS

Youssef Samir Megahed is a twenty-one year old college student with no prior criminal history. Doc.34 at p.35. At the time of his arrest, Mr. Megahed was pursuing his Engineering Degree at the University of South Florida and was only three credit hours short of graduation. Doc. 34 at p.6; Doc.36 at pp. 35- 36. Although born in Egypt, Mr. Megahed has resided with his family in the United States for over ten years. Doc.36 at p.63; Doc.54 at p.65. At the time of his arrest, Mr. Megahed was residing with his siblings and his parents at their residence located in Tampa, Florida. Doc.34 at p.37. Mr. Megahed's family consists of his parents; his older brother, who is a graduate engineering student; his younger sister, who is a freshman in college; and his younger brother, who is ten years old and suffers from Down's Syndrome. Doc.49 at pp.53-54, 78. Mr. Megahed and his entire family have lawful, permanent residence status and, at that time of Mr. Megahed's arrest, the entire family had pending applications for United States Citizenship. Doc.34 at p.30; Doc. 49 at pp.75-76.

1. The Arrest

On August 4, 2007, Mr. Megahed and Ahmed Mohamed,[1] an Assistant Professor and graduate student in the Engineering Department of the University of South Florida, took a weekend college "road trip" from Tampa, Florida, to Sunset Beach, North Carolina. Docs.141, 148 (Defendant's Exhibit List), Exhibits 10-11; Doc.159 at p.49. The trip involved stops at beaches in Jacksonville, Florida; Tybee Beach, Georgia; Savannah, Georgia; Charleston, South Carolina; and Walterboro, South Carolina. Doc.276 at p.12.

[1]Ahmed Mohamed was also charged in this case but is not involved in this appeal.

Just shortly after purchasing gasoline at a Murphy Oil gas station located at the Wal-Mart department store in Goose Creek, South Carolina, the vehicle in which Mr. Megahed was a passenger was stopped by local law enforcement. Docs.141, 148 (Defendant's Exhibit List), Exhibit 2; Doc.159at pp.54, 61. At the time of the stop, Mr. Mohamed was driving and Mr. Megahed was in the front passenger seat. Doc.190 at p.68. When questioned by law enforcement, Mr. Mohamed and Mr. Megahed advised they had left Tampa, Florida, in the early morning hours of August 4, 2008, and they were en route to Sunset Beach, North Carolina. Doc.159 at p.49. Additionally, they both advised law enforcement they had traveled from Florida through Georgia, stopping at various beaches along the way, and into South Carolina on their way to Sunset Beach, North Carolina.[2] *Id.* A subsequent forensic review of the GPS device located inside the vehicle confirmed Mr. Megahed and Mr.

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[2]Although not relevant to this appeal, the government alleges that the occupants of the vehicle gave "inconsistent versions" of the trip, the audio/video recordings of the stop establish that the statements of travel were not inconsistent. Mr. Megahed respectfully maintains that listening to the entire content and context of the questions and answers reveals that the Government's characterization is inaccurate. *See* Docs.129, 125, Government Exhibit 1.

Mohamed's reported multiple stops at various beaches and historic cities and that their final destination was Sunset Beach, North Carolina. Doc.95, Exhibits 4-7; Docs.141, 148, Exhibit 2; Doc.276 at pp.12-13.

After verifying that both Mr. Megahed and Mr. Mohamed had valid Florida driver's licenses and that the car was properly registered to Mr. Megahed's older brother, the stopping officer elected to issue Mr. Mohamed a warning citation for speeding. Doc.146 at p. 165; Doc.150 at p. 4. However, prior to issuing the warning citation, the deputy decided to search the vehicle. *Id.* Prior to the search, Mr. Mohamed was asked if the searching officers would find any guns, knifes, or drugs in the vehicle. Docs.129, 125, Government Exhibit 1. In response, Mr. Mohamed advised "no," but that the officers would find "just fireworks, fuses and small, homemade rockets."[3] *Id.* During the search, the officers found items consistent with a college "road trip" such as clothing, towels, food, bottles of soda, numerous store receipts, and a laptop computer.[4] Doc.146 at pp.100, 180, 181; Doc.129, Doc.125, Exhibit 1.

A subsequent FBI forensic search of Mr. Mohamed's laptop computer found

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[3]When Mr. Megahed was asked the same question, he advised that he was unaware of any such items in the vehicle. *Id.*

[4]The officers also found a box of .22 caliber ammunition under the front passenger seat of the vehicle. No weapons were found inside the vehicle. *Id.*

that it contained information on how to make "sugar rockets" and research related to explosives. Doc.37 at pp.4-5. Also located on the computer were several video clips depicting scenes from the Middle Eastern military conflict. *Id.* The government established that one "forty-minute video," which related to the "armed struggle in the Middle East" and the "use of Qassam rockets in the Middle East," was viewed on August 4, 2007, the date of the traffic stop in Goose Creek, South Carolina. Doc.218 at p.15. Finally, also located on Mr. Mohamed's laptop was an instructional video crafted by Mr. Mohamed on how to convert a remote-controlled toy car into a detonator device. Doc.37 at p.5.

In the trunk of the vehicle, officers observed sleeping bags, a tent, additional clothes, a half-empty red plastic gasoline container, a one-gallon plastic container with water inside, a role of safety fuses, as well as a plastic grocery bag containing three small four-inch pieces of plastic PVC pipe filled with an unknown substance. Docs.129, 125, Exhibit 1. Based on the unknown nature of the substance inside the small plastic PVC pipes, other law enforcement personnel were called to the scene. *Id.*

At the scene and in a subsequent FBI post-arrest interview, Mr. Mohamed advised law enforcement that the small plastic PVC items were his and that Mr. Megahed had no knowledge of the items. Doc.34 at p.20. Additionally, Mr. Mohamed advised that the small PVC pipe items were "sugar rockets" he learned how to make

from the internet, that he purchased the materials to make the "sugar rockets" from stores in Tampa, Florida, and that the "sugar rockets" were not designed to explode but to simply and harmlessly travel a few feet into the air and smoke a lot. Doc.276 at pp.7-9. Mr. Mohamed also advised that he had made the detonator device video and that Mr. Megahed had no knowledge or connection to the video or his laptop computer. Docs.64, 71, 75; Doc.276 at pp.22, 41-42. Mr. Megahed denied all knowledge of the small PVC items or the material on Mr. Mohamed's laptop computer. Doc.32 at p.20. At pretrial proceeding, the government conceded that it had no direct evidence connecting Mr. Megahed to Mr. Mohamed's instructional video.[5] Doc.34 at p.20.

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[5]As a result of the lack of any evidence connecting Mr. Megahed to Mr. Mohamed's instructional video, the district court granted Mr. Megahed's motion to sever this count, which only charged Mr. Mohamed, from the transporting explosive materials count, which charged both Mr. Mohamed and Mr. Megahed. Docs.64, 71, 156, 162.

Subsequent laboratory analysis and testing by the FBI revealed that the substance found inside the small plastic PVC pipe sections, as well as in a separate, small plastic grocery deli container inside the trunk of the vehicle, was a "pyrotechnic mixture compound" of "potassium nitrate and sugar." Doc.95, Exhibit 1a, p.2 (included herein as "Attachment A"). According to FBI experts, examples of "pyrotechnic mixtures" include "fireworks, black powder, and road flares." *Id.* FBI laboratory testing further revealed that if the small plastic PVC pipe items in the trunk were ignited, they would not explode. *Id.* Instead, the items would either smoke, expel smoke and gas, or do nothing at all. *Id.* A defense expert's video account of the results of igniting the small plastic PVC pipe items similarly revealed that the items either expelled smoke and gas, did nothing at all, or would, at most, propel a few feet into the air and then land harmlessly to the ground.[6] Both the FBI testing and defense expert's testing revealed that the small PVC pipe items did not explode, were not weapons, and did not cause any damage to property or person if ignited. *Id.*

2. The Government Seizure of the Megahed Family Computers

On August 6, 2007, the FBI seized three computers located at Mr. Megahed parents' residence in Tampa, Florida. Doc.250 at p.19. The entire Megahed family

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[6]The defense expert testing video has been placed in the record under seal and is marked as Defense Video #1 for identification.

resided at the residence, had access to and used the three computers. Doc.49 at pp.28, 54. The hard-drives of these computers were copied or "mirror-imaged" by the FBI and the original computers were returned to the family on August 8, 2007. *Id.* at p.20. The FBI then began "processing" or analyzing these hard-drives on or about August 11, 2007. *Id.* The processing consisted of running a forensic tool kit software program which segregated and categorized the information on the drives for "easier review" by breaking down the information into subgroups, such as videos, emails, deleted information and indexes. *Id.* The imaged hard-drives were then placed onto a centralized storage network of the FBI so that the sorted information could be reviewed by FBI agents directly from their own computer stations. *Id.* A "good number of agents" reviewed the hard drives over a period of "many weeks." *Id.* at p.21.

The "review" of the Megahed family computers was a "tagging or bookmarking" of pertinent material. Doc.250 at p.22. Agents either tagged items as pertinent or eliminated things that were not. *Id.* Those items determined to be pertinent were included in a smaller portion of information that was being "created." *Id.* at p.22. This initial search process was completed on January 17, 2008. *Id.* As such, this smaller subset of information deemed pertinent was transferred onto sixteen (16) discs. *Id.* These discs were then further reviewed and evaluated for relevancy and

agents had the capability of printing out the information. *Id.* at p.23. Once the discs were created on January 17, 2008, they were put into an "FBI 1b evidence folder." *Id.* This folder was placed in a separate area along with the remaining information previously made available to the defense, stored within FBI headquarters. *Id.*

Upon a more specific review by the FBI agents, it was later determined that some information "previously" brought "to their attention" could not be read on the sixteen (16) discs. *Id.* at pp.23-24. Once it was discovered that "videos **previously found to be relevant and pertinent**," thus tagged on the hard-drives prior to January 17, 2008, were "unreadable" on the sixteen (16) discs, a computer technician within the local FBI office was able to immediately remedy the situation. *Id.*; Doc.223 at p.3. It appears that this "inability" to read/view the pertinent videos, which are the subject of this appeal, was due to a software programming error. *Id.*

The government provided the defense with "mirror image" copies of the hard drives prior to the January 9, 2008, discovery deadline. However, the government elected not to provide the defense with copies of these sixteen (16) discs or even notify the defense that these sixteen (16) discs had been created and were available for viewing at the FBI headquarters. Doc.259 at pp.20-24. Instead, the government waited to disclose that any relevant pertinent evidence had even been discovered on the Megahed family computers until seven (7) business days prior to the start of trial.

Doc.250 at pp.12-13, 24. Prior to this "eleventh hour" disclosure, the only evidence provided by the government regarding the search of the Megahed family computers was a single computer forensic report noting that nothing of evidentiary value was found on the Megahed family computers. Doc.250 at p.12.

Contrary to the single computer forensic report provided to the defense, the FBI, in fact, had located on one of the three hard drives nine (9) video clips of military conflicts in the Middle East. Doc.250 at p.20-22. The videos included depictions of an Improvised Explosive Device ("IED") blowing up a military tank and an IED destroying a large bridge, as well as numerous depictions of military-sized Qassam rockets. Doc.223, 226, 229. Some of the videos also included Arabic chanting and songs extolling the virtues of the bombs and rockets and their effects. *Id.*

3. The Indictment and Pretrial Proceedings

Mr. Megahed was indicted in the Middle District of Florida on August 29, 2007, and charged in a single count with the unlicensed interstate transportation of explosive materials. Doc.1. He appeared in the Middle District on September 11, 2007, and was arraigned on October 3, 2007.[7] Docs.12, 39. The case was set for trial on the December 2007 trial term and a discovery deadline of November 7, 2007, was

[7]Mr. Megahed contested the issue of detention. Although initially granted conditions of pre-trial release by the magistrate judge, Mr. Megahed was detained following appeal to the district court. Doc.24; Doc.34 at pp.67-68; Doc.61.

imposed upon the government. Doc.59. The government had physical custody of all the evidence since shortly after Mr. Megahed's arrest on August 4, 2007. Doc.263 at pp.9-10.

On November 30, 2007, a hearing was held before the magistrate court regarding the status of discovery and the rescheduling of the trial, which was to commence on December 3, 2007. Doc.72. At this hearing, it became clear to the court that the government had already violated the trial court's pretrial discovery order. Doc.263 at 10. The magistrate judge and the government had the following exchange:

> THE COURT: Mr. Hoffer, what's the status of discovery, and what's the government's position with respect to [Mr. Mohamed's] motion to continue?[8]
>
> MR. HOFFER: To answer your first question. . . I've been trying to get the discovery expedited, but we're still not there, in my view, as far as fulfilling our requirements. I know there's- - part of the problem is, a lot of the evidence in the case is up at the FBI laboratory at Quantico, and they have still not finished all their testing and their- - prepared reports.
>
> I am told [by the FBI] that hopefully by the middle or end of December, or beginning of January, everything will be finished; the reports will be done,

[8]Mr. Megahed's co-defendant requested a continuance of the December 2007 trial date. However, Mr. Megahed advised the court, based on the discovery provided at that time, he was prepared for the December 2007 trial date. Doc.263 at 6.

> and the evidence will be returned back to Tampa and will be here.
>
> *　　*　　*
>
> But that is the latest on the discovery. There is a lot of computer data to be turned over. There's a lot of documentary evidence. There's some disc– there's another disc on the video that I'm going to be turning over hopefully today- - problem getting a hold of that. But we're trying to get it done, but we're not complete. . . . That is unfortunate but it is my responsibility and that is where we stand in the matter.

Doc.263 at p.4.

The government advised the court that the delay in producing the discovery was due to the fact "that the FBI does what they do in their own time despite my efforts to expedite them." Doc.263 at p.6.

The court asked:

THE COURT: Why shouldn't this court impose a deadline for the government to turn over all the Rule 16 evidence? In effect, we already have a deadline that has fallen by the wayside in the pretrial discovery order.

I mean, why should we wait for the dribs and drabs to come in on discovery, or, to put it another way, the slow drip of discovery?

MR. HOFFER: Well, the court has its power in that regard, your Honor. I'm only– I'm suggesting simply there have been other issues that have, during that same time period, stayed the speedy trial clock and, of course,

had to be resolved. . . .

THE COURT: But that hasn't involved the FBI.

MR. HOFFER: I understand, I understand. And I understand the court's frustration, and I apologize; I take responsibility for it. Obviously, I'm responsible.

I've been trying to get everything out as I get it, but I have to get it from the FBI. That's my problem. I'm not trying to pass the buck. It's my responsibility, and the court is right, it should have been done already. I have tried to get as much as I can as quickly as I can. What else can I say? Unfortunately, that's really all I can say on that question.

Doc. 263 at pp.10-11.

The government then reluctantly conceded that it was not ready for trial because the bulk of the discovery was still in the FBI's possession and the government had not met the November 7, 2007, discovery deadline. Doc.263 at pp.4-5. The court offered to enter an Order compelling the FBI to expedite discovery, but the government declined the court's offer. Doc.263 at p.6.

The government went on to advise the court that it anticipated all discovery obligations could and would be fulfilled no later than January 1, 2008, and they would be ready for trial at "any point thereafter." *Id.* at pp.6, 9. With the government's consent, the court imposed a new discovery deadline of January 9, 2008. Docs.263 at pp.17, 23. The court additionally reset the trial from December 2007 to March 2008.

Id.[9]

At a subsequent hearing before the magistrate court on January 9, 2008, it once again became clear that the government had still failed to comply with its discovery obligations. Doc.81; Doc.85 at p.25. When questioned by the court why all discovery had not been provided to the defense, the government assured the court that it was aware of the court's January 9, 2008, amended discovery deadline, that the government had met with the FBI and obtained all of the evidence and reports, that the government would turn over all evidence immediately after the hearing and that the discovery "process should be completed" following this imminent production. Doc.263 at pp.25-26. The court then warned the government that if all discovery was not turned over by close of business on January 9, 2008, the court would "anticipate a motion for sanctions" from the defense. Doc.262 at p.26.

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[9]At the hearing, Mr. Megahed's counsel made clear that he would not require significant time to be ready for trial because all of the computer evidence provided by the government related to Mr. Mohamed's laptop computer and Count I of the Indictment, in which Mr. Megahed was not charged. Doc.263. The government did not express any disagreement with this assessment. *Id.*

On February 27, 2008, a status hearing was held before the district court with reference to the impending trial, which was set to commence on March 3, 2008. Docs.145, 270. At said hearing, the government stated it would be ready for trial whenever "the court sets it." *Id*. at p.5. The district court was concerned because there were still several defense motions outstanding. *Id*. at p.4. The court also inquired whether the government anticipated any change in the contents of the pending indict ment. *Id*. at pp.6- 8. The government was non-committal but advised, "never say never." *Id*. Mr. Mohamed's counsel requested a sixty-day continuance of the trial. *Id*. at p.15. Mr. Megahed did not join in the request for a continuance. In contrast, Mr. Megahed requested that the court either grant the pending Motion to Sever and allow him to proceed to trial, or release him from custody as suggested by his Motion to Reconsider Detention, if the court were inclined to grant Mr. Mohamed's request to move the trial. Doc.270 at p.17. At the conclusion of the status hearing, the district court rescheduled the trial from March 3, 2008, to April 28, 2008. Doc.145. The court did not release Mr. Megahed from custody at that time. *Id*.

On March 5, 2008, another hearing was held before the district court in reference to pending motions and scheduling. Doc.156. Mr. Megahed again expressed his belief that nothing of significance or evidentiary value was found on his family's computers in relation to either Count I of the Indictment, in which he was not charged,

or Count II of the Indictment, which referred to the substances located in the trunk of the vehicle. Doc.276 at p.10. Once again, the government did not correct this stated belief and did not put forth any information to the contrary, notwithstanding that, by this time, for nearly two months, the FBI had in its possession sixteen (16) discs' worth of information of potential relevance to the government. *Id.* On March 6, 2008, the district court entered an order granting Mr. Megahed's Motion to Reconsider Severance of Counts I and II, scheduled the trial on Count I for May 12, 2008, and reiterated that the trial on Count II, the only count in which Mr. Megahed was charged, would commence April 28, 2008. Doc.162.

On April 15, 2008, the government sought and obtained a Superceding Indictment against Mr. Megahed. Doc.198.[10] Pursuant to the Superceding Indictment, Mr. Megahed now faced, in addition to the original transportation of explosive materials charge, a charge of possessing an unregistered destructive device. *Id*. The alleged "destructive device" he possessed related to the same items found in the trunk of the vehicle on August 4, 2007. Doc.278 at p.24.

Mr. Megahed was arraigned on the new indictment on April 21, 2008. Doc.207.

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[10] The superceding indictment consisted of seven separate counts. The original two counts were included, albeit in different order. The superceding indictment added five additional counts against Mr. Mohamed alone, and only one additional count against Mr. Megahed. Doc.198.

Immediately following the arraignment, a hearing was held before the district court. Doc.205. At this hearing, Mr. Mohamed requested a continuance of both previously-scheduled trials. Doc.278 at p.9. The government did not oppose Mr. Mohamed's request and asked the court for its own continuance of two to three weeks. *Id.* at p.20. In contrast, Mr. Megahed not only declined to join in Mr. Mohamed's request for a continuance, he vigorously asserted that he wanted his trial as scheduled, noted his prolonged detention, and requested a speedy trial. *Id*. at p.30.

At no time during the hearing did the government assert or suggest that any additional evidence had been discovered, prompting the new charges, or that any additional discovery needed to be provided to justify a continuance. Doc.278. Rather, the government's stated need for a continuance was to allow the government time to respond to Mr. Megahed's motions in limine to exclude evidence, including but not limited to the Middle Eastern military conflict videos found on Mr. Mohamed's laptop computer and Mr. Mohamed's instructional video. *Id* at p.21. The government further requested that the district court hold a pre-trial hearing on the motions. *Id*.

When specifically asked by the district court whether or not the United States was stating that they were not prepared for trial as scheduled on April 28, 2008, the government responded, "I did not say that, I am saying that we are requesting a continuance of that for a couple of weeks…dealing with these motions and dealing

with this extra aspect we have to talk about. We have been working diligently on that."*Id*. at p.22. The district court scheduled Mr. Megahed's trial on both charges in the superceding indictment to commence May 5, 2008, and Mr. Mohamed's trial on all counts to commence July 7, 2008. Doc.207.

On April 23, 2008, only seven (7) business days prior to the start of trial, counsel for Mr. Megahed contacted the government to discuss proposed jury instructions. *See* Doc.250 at pp.4-5. During this conversation the government, for the first time, indicated to counsel that there may be some information contained on the Megahed family computers that would be relevant to the case and that it intended to introduce at trial. *Id.*

Counsel for Mr. Megahed was completely caught off guard by the government's revelation. *See* Doc.250 at p.5. Following the January 9, 2008, amended deadline for production of all Rule 16 discovery and a review of the laboratory and forensic analysis reports provided by the government, as well as a review of all the physical evidence made available for the defense at the FBI headquarters, the defense understood that there was nothing of relevance or significance located on the Megahed family computers that would be introduced by the government at trial. *See* Doc.250 at p.5-12. This understanding was never corrected by the government in the record on the numerous occasions put forth by the

defense at the various hearings, both prior to and after the discovery deadline, in this cause. Doc.54 at pp.54, 61; Doc.262 at p.16; Doc.276 at p. 10.

Additionally, on January 4, 2008, five (5) days before the final deadline for the exchange of discovery, Mr. Megahed sent a letter to the trial prosecutor requesting confirmation of the fact that the government had no intent to introduce at trial any evidence obtained from the Megahed family computers. Doc.217, Exhibit 3. Finally, as required by the Code of Federal Regulations and the defense discovery rule obligations, the government was made aware on March 27, 2008, of Mr. Megahed's intent to call the FBI analyst who had forensically examined the Megahed computers and authored the sole report provided to the defense. *See* Doc.250 at pp.11-12. This FBI analyst would be called by the defense for the purpose of establishing that, in contrast to Mr. Mohamed's computer, nothing incriminating or of significance was located on the Megahed family computers. *Id.*

4. The Government's Late Disclosure

On April 23, 2008, the government produced multiple computer discs including a "gold-colored" disc which contained nine (9) videos of military scenes from the Middle East. Doc.250 at p.16. In response to the government's late disclosure, the defense filed a motion to exclude the nine (9) videos as a discovery rule sanction, to suppress the videos under the Fourth Amendment, and to exclude their admissibility

pursuant to Fed.R.Evid. 401 and 403. Docs.216, 217, 219. The district court promptly issued an Order to Show Cause to the government and set the matter for a hearing on May 1, 2008. Doc.220. At the hearing, which spanned two days, the court addressed the motion for sanctions, the motion to exclude the Megahed family computer videos, as well as the motion to exclude the introduction of the videos found on Mr. Mohamed's laptop computer.[11] Doc.232.

After hearing a proffer of evidence from the government, reviewing the nine (9) videos from the Megahed family computers, the defense expert's videos of testing upon the items in the trunk, and the FBI laboratory testing reports, the court entered an oral order limiting the introduction of the argumentative evidence found off both the Megahed family computers and Mr. Mohamed's laptop computer, unless the government was able to establish a proper predicate that Mr. Megahed had actually viewed the videos, and the government was able to show that viewing the videos established some evidence of Mr. Megahed's knowledge of the questioned items in the trunk of the vehicle. Doc.251 at pp.66-67. Specifically, the court stated in

[11]Based on the court's rulings excluding the Megahed family computer evidence as a discovery violation sanction and under Fed.R.Evid. 401/403, the court found the motion to suppress under the Fourth Amendment moot. Doc.232.

reference to the Mohamed laptop computer videos:

> As I gaze upon the matters we've talked about this morning, it seems to me that, to the extent that the predicate is established that the defendant accessed the material essentially simultaneously or immanently preceding the episode in South Carolina, that the material of his then current viewing is not excludable on a basis that I perceive now. And it seems to me that to the extent that something about the contents of that which I have not seen is so congruous or essentially connected with the contraband or pertinent substance in the trunk of the car as to suggest that the defendant knowing one would know of the other or knowing the attributes of one would- - or understanding the contents would understand the attributes of the other.
>
> It seems to me that [that] makes the knowledge of the contents more likely to an extent that outweighs any concomitant prejudice. That very much depends upon as I said, the predicate, which is actual access and the contents being logically proximate. That may or may not be the case.

Doc. 251at pp. 66-67

Applying the same rationale, the district court also excluded the introduction of Mr. Mohamed's instructional video on how to make a detonator out of a remote-controlled toy car, as well as the nine (9) videos found on the Megahed family computers. Doc.251 at pp.66-68, 78-79. In excluding the Megahed family computer evidence under Fed.R.Evid 401/403, the district court found that the videos were not at the "heart of the government's case," had very little "probative" value, and were "sharply" prejudicial. Doc.251 at p.68. Similarly, in excluding Mr. Mohamed's instructional video on how to convert a toy vehicle into a detonator device, the district court relied upon its prior severance ruling in which the court had found that there

existed no credible evidence proffered or presented by the government connecting Mr. Megahed to the video as part of a common scheme or plan with Mr. Mohamed. Doc. 233; Doc.276 at pp.49-50. As such, Mr. Megahed's case was not the right trial for the presentation of this prejudicial evidence. Doc.251, p.59. In addition to excluding the Megahed family computer videos under Fed.R.Evid. 401/403, the district court also excluded the videos as a discovery violation sanction. Doc.251 at pp.79-80.

As to the discovery sanction, the district court found that the delay in production of the Megahed family computer evidence was a result of a lack of "due diligence" on the part of the government and its agents, who elected to wait until after the district court had denied the government's request for a continuance to exert any efforts to produce the computer video clips in question. Doc.251 at pp.53-54. The district court further found that, if the videos were admissible, which the court ultimately deemed they were not, the potential for prejudice to the defense was significant and the feasibility of a brief continuance curing the prejudice to the defense was low in light of the court's calendar, Mr. Megahed's prolonged detention and the time it would take for the defense to mount a defense to the untimely disclosed evidence. Doc.251, pp.64-65.

The Court's ruling limiting or excluding the government's proffered forensic computer evidence occurred on Friday, May 2, 2008. Doc.232. The trial was set to

commence on the following Monday, May 5, 2008. On the Friday evening before Monday's trial, the government filed a Notice of Appeal. Doc.247. Mr. Megahed's Monday trial was stayed, and the district court vacated its detention order. Doc.233. Mr. Megahed was ultimately granted restricted conditions of pretrial release. Doc.233, 248. Mr. Megahed is currently on pretrial supervision, subject to said conditions of release.

C. STANDARD OF REVIEW

I. This Court reviews for abuse of discretion the district court's evidentiary rulings. *United States v. Jernigan*, 342 F.3d 1273, 1284-1185 (11th Cir. 2003). A district court's Fed.R.Evid. 403 determinations are reviewed for a "clear abuse of discretion." *United States v. Tinoco*, 304 F.3d 1088, 1120 (11th Cir. 2002). This Court is "loathe to disturb" on appeal a district court's Fed.R.Evid. 403 determinations. *Jernigan*, 341 F.3d at 1185. Inherent in the abuse of discretion standard "is the firm recognition that there are difficult evidentiary rulings that turn on matters uniquely within the purview of the district court" and the district court is "uniquely situated to make nuanced judgments on questions that require the careful balance of fact specific concepts like probativeness and prejudice." *Id.*

II. This Court reviews for abuse of discretion the district court's discovery rulings, including discovery violation sanctions. *United States v. Smalley*, 754 F.2d

944 (11th Cir. 1985). Additionally, a district court has "broad discretion" in remedying a discovery violation. *United States v. Sarcinelli*, 667 F.2d 5 (5th Cir. Unit B. 1982).

SUMMARY OF THE ARGUMENT

I. The district court did not clearly abuse its discretion in excluding or limiting pursuant to Fed.R.Evid. 401/403 markedly and "sharply" prejudicial forensically-recovered videos of the Middle Eastern military conflict and an instructional video on how to convert a remote-control toy vehicle into a detonator device, absent a proper foundation. The district court correctly found that such highly prejudicial evidence should only be admissible upon the government's ability to establish that Mr. Megahed had viewed the videos and that knowledge of the videos would tend to establish that a person had knowledge of the questioned small plastic PVC pipe items found in the trunk of the vehicle.

The district court's evidentiary ruling was based upon its visual inspection of the computer videos in question. Such inspection revealed that the items in the trunk were substantially dissimilar to the items depicted in the computer videos in that the items in the videos depicted military scenes from the Middle East with tanks and bridges exploding, as well as military-sized rockets being launched into the air. In contrast, the FBI and defense expert testing of the small plastic PVC pipe items in the trunk revealed that the items did not explode or cause destruction of property or person when ignited, but, instead, harmlessly expelled smoke, expelled smoke and gas or did nothing at all.

II. The district court did not abuse its discretion when it excluded the Megahed family computer videos as a discovery violation sanction in addition to excluding the forensically-recovered computer evidence of the Middle Eastern conflicts under Fed.R.Evid. 403. By electing to wait to disclose the videos until eight (8) months after the prosecution was initiated, three-and-a-half months after the videos were recovered from the computer hard drives, three (3) months after the extended discovery deadline had elapsed, and only seven (7) business days prior to trial, a discovery violation occurred. Such violation was compounded by the government's previous misleading communications to the defense that there was nothing of evidentiary value found on the computer hard drives.

The district court's decision to exclude the videos as a discovery violation sanction was not a "severe" sanction nor an abuse of discretion, in light of the fact that the videos had minimal probative value, the videos were also being excluded under Fed.R.Evid. 403, the government had previously been warned about the "slow drip" of discovery, and the court advised that it would expect a motion for sanctions if the government failed to provide timely discovery to the defense.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT DID NOT CLEARLY ABUSE ITS BROAD DISCRETION IN EXCLUDING HIGHLY PREJUDICIAL FORENSIC COMPUTER EVIDENCE WHICH WAS ONLY MINIMALLY PROBATIVE TO ISSUES OF KNOWLEDGE OR INTENT. [APPELLANT'S ISSUES II AND III]

The district court did not abuse its discretion when it limited or excluded, pursuant to Fed.R.Evid. 401 and 403, the introduction of "markedly" and "sharply" prejudicial forensic computer video evidence of Middle Eastern military conflicts and an instructional video on how to convert a remote-controlled toy car into a detonator device. On appeal, a district court's evidentiary rulings are reviewed for an abuse of discretion and, in making Fed.R.Evid. 403 determinations, the district court is accorded "broad discretion" which is only reviewed for "clear abuse." *See United States v. Cole*, 670 F.2d 35,3 6 (5th Cir. Unit B 1982). Indeed, a trial court's decision to exclude evidence under these rules may not be reversed unless it is "arbitrary and irrational." *Bhaya v. Westinghouse Electric Corp.*, 922 F.2d 184, 187 (3rd Cir. 1990), *cert denied*, 501 U.S. 1217, 111 S.Ct. 2827, 115 L.Ed.2d 997(1991). The district court did nothing which could even remotely be considered "arbitrary" or "irrational."

To the contrary, as correctly observed by the district court, Mr. Megahed is

charged with two very simple criminal offenses[12]: (1) the unlicensed interstate transporting of explosive materials; and (2) possession of a destructive device. Docs.1, 198.

Contrary to appellant's innuendo, as further correctly noted by the district court, Mr. Megahed's case "is not a terrorism case." Doc.270 at p.26. As the district court advised the parties, "We've got to remember what this case is about. It's about crossing the state line, in effect, with an explosive, allegedly. Where someone was going and why is not an element of that offense." Doc.276 at p.30. Furthermore, the government repeatedly acknowledged in the presence of the district court that it had no evidence of intent or plan on the part of Mr. Megahed. Doc.34 at pp.52-53; Doc. 276 at p.30. As stated by the government's trial counsel, "the United States has never articulated [ ] or said to any Court, postulated or hypothesized or speculated about ['objects', 'a purpose', 'use', or 'intent or plan']" . Doc.276 at p.30.

Well-versed in the facts, the district court further correctly observed that, for

[12]As the district court observed, "this is a real simple charge, a simple straightforward charge, a short indictment." Doc.270 at p.25.

the most part, the facts of the case are not disputed.[13] Doc.162;Doc.276 at p.49.

Those undisputed facts are that Mr. Megahed was present as a front-seat passenger in a vehicle traveling from Tampa, Florida, to Goose Creek, South Carolina, in which law enforcement found in the trunk of the vehicle three small four-inch plastic PVC pipes (containing potassium nitrate, sugar, and cat litter),[14] safety fuses and a half-empty, five-gallon red plastic gasoline container. Docs.64, 69, 71, 74.

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[13]At the time the district court made it's evidentiary admissibility determination, not only was the government given an opportunity over two days to present the district court with any and all information necessary to make a fully-informed decision, but the district court had before it, either first-hand or through the record in the case, detailed information concerning the evidence to be presented at trial as well as the positions of both parties as to the theories to be put forth at trial. *See* Docs.36, 54, 61, 64, 69, 71, 74, 76, 80, 85, 87, 95, 97, 109, 146, 159, 152, 171, 172, 173, 195, 202, 216, 217, 219, 218, 223, 226, 229, 230, 263, 270, 276, and 278.

[14]FBI testing revealed that this mixture of substance was "pyrotechnic mixture compound" of potassium nitrate and sugar. According to FBI experts, examples of "pyrotechnic mixtures" include "fireworks, black powder, and road flares."

Attachment A.

While the parties dispute whether these items legally constitute "explosive materials" or a "destructive device," there is no dispute between the government and the defense regarding the specific items found in the truck of the vehicle and Mr. Megahed's presence as a front-seat passenger of the vehicle.[15] Doc.95 at p.49. Notwithstanding these simple uncontested facts, the government gave notice of its intent to introduce at trial highly prejudicial and inflammatory computer forensic evidence of videos depicting scenes from the Middle Eastern military conflicts, as well as an instructional video on how to convert a remote-controlled toy car into a detonator device.

Prior to excluding or limiting the introduction of the Middle Eastern military conflict videos, the district court viewed these videos from the Megahed family computer, the FBI laboratory testing of the plastic PVC pipe items found in the trunk of the vehicle, as well as a defense expert's video replicating the results of igniting the small plastic PVC pipe items used in the FBI laboratory testing. Docs.267, 283; Doc.250 at pp.3-4, 48-49. The forensic computer videos depicted "Qassam rockets . . . used by Palestinian militants in the Gaza [strip]," rockets, which are "two-meter long

[15]Additionally, there is no dispute that the small plastic PVC pipes traveled interstate and that neither Mr. Mohamed or Mr. Megahed were licensed to transport explosive materials.

steel weapons filled with explosives." Doc.226 at p.17, n.7. Additionally, some of the videos showed military tanks being exploded by IED's, a bridge exploding by way of a large explosion and most of the videos included Arabic chanting songs exploiting the virtues of the bombs, weapons, and their violent destructive effects. *Id.* Contrary to the government's assertions, a review of the videos in question makes patently clear that the computer military conflict videos do not even remotely depict the results of igniting the harmless, small PVC pipe items found in the trunk. In contrast, as the district court found, the computer videos are "sharply prejudicial."

In contrast, the FBI testing of the small plastic PVC pipe items found in the trunk of the vehicle revealed that, when the items were ignited, they either did nothing at all, expelled smoke, or expelled smoke and gas. Doc.95, Exhibit 2, p.15 (included herein as "Attachment B"). The FBI testing further clearly revealed that, when the small plastic PVC items were ignited, they did not explode or cause any form of destruction. *Id.* Similarly, the defense expert's video-taped recreation of the FBI testing revealed that the small plastic PVC items, when ignited, were completely dissimilar in nature and effect as the items depicted in the computer videos.[16] The small plastic PVC items simply did not explode; they were not weapons, bombs, IEDs, or two-meter steel rockets filled with explosives, or even remotely similar to the

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[16]See Defense Video Exhibit #1 for identification.

items depicted in the computer video clips. The small plastic PVC items, when ignited, did not cause damage and destruction, but, at most, propelled small pieces of the PVC pipe harmlessly several feet into the air, landing softly to the ground. In reaching its ultimate decision, the district court relied heavily upon viewing of the military conflict videos, the FBI testing results, as well as the defense expert's testing videos in determining the possible relevance as well as prejudice. Doc. 251 at pp. 3-4, 52.

Having reviewed and compared the government's proposed video evidence in contrast with the items actually found in the trunk of the vehicle, the district court then undertook a detailed analysis of the admissibility of the forensic computer videos of the Middle Eastern military conflict, providing the government with a full opportunity to establish the admissibility and relevance of the "markedly" and "sharply" prejudicial and inflammatory video clips. Docs.250, 251.

After determining that the computer video evidence did not meet the predicate for admission, the district court entered an oral order precluding its admission. Specifically, the court found that for admission, the evidence must establish not only that Mr. Megahed actually accessed the material, but also that it was "so congruous or essentially connected with the contraband in the trunk of the car as to suggest that the defendant, knowing one would know of the other or knowing the attributes of one

would -- or understanding the contents would understand the attributes of the other." Doc.251 at pp.66-67.

Notwithstanding the well-reasoned analysis by the district court, the government contends that the district court abused its discretion by excluding the "sharply" prejudicial videos because they were highly relevant to establish that Mr. Megahed had knowledge of the small plastic PVC items found in the trunk of the car. *See* Appellant Brief at p.26. Additionally, the government incredulously asserts that the videos forensically recovered from the Megahed family computers establish that Mr. Megahed "intended to build an incendiary-type device and not a firecracker or firework[s]."[17] *See* Appellant Brief at pp.35-36.

Although the government conceded before the district court that it has no information concerning, nor did it tend to speculate about, what, if anything, Mr. Megahed and/or Mr. Mohamed intended to do with the items retrieved from the trunk, the government now, on appeal, attempts to argue that its purpose in introducing the videos of the Middle Eastern conflicts is to "show what Megahed and Mohamed intended to do with their 'explosives'." *See* Appellant Brief at p.37.

[17]Mr. Mohammed repeatedly informed law enforcement, during his detention at the scene on August 4, 2007, that he had manufactured the items located in the trunk based on instructions he obtained on the internet for the manufacture of 'sugar rockets' or home-made fireworks, and not with the intent to create an explosive but merely a propellant. See Docs. 129, 125 (Government Exhibit List), Exhibit 1.

The government is correct that, in order to convict Mr. Megahed of possessing a destructive device, they will have to prove both his intent to assemble the innocent items into a destructive device and his intent to use the items as a weapon. Further, in order to convict him of both the destructive device charge and the transportation of explosive materials charge, the government must also prove that Mr. Megahed had knowledge of the items in the trunk. *See* Appellant Brief at p.34.

However, the government's arguments are misplaced. The videos of the Middle Eastern conflict are not relevant to the issue of Mr. Megahed's alleged intent to build "an incendiary-type device" or to his knowledge of the small PVC pipe items in the trunk of the vehicle. The videos are clearly and substantially prejudicial in that they will have the effect of causing the jury to potentially return a verdict not based on evidence of guilt but that Mr. Megahed must be a bad person if he is even remotely linked to the inflammatory videos. *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983) *quoting United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979) (the major function of Rule 403 is to exclude "matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect").

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action [in question] more probable or less probable than it would be without the evidence.

Fed.R.Evid. 401. Implicit in that definition are two distinct requirements: "(1) the evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action." *United States v. Hall,* 653 F.2d 1002, 1005 (5th Cir. 1981). Rule 403, on the other hand, permits exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. *Schafer v. Time, Inc.*, 142 F.3d 1361 (11th Cir. 1998) (Fed.R.Evid. 401 sets out the standard for determining whether evidence is relevant to an issue before the court; Fed.R.Evid. 403 governs the decision to exclude relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice").

Once again, a review of the government's proffered computer videos fails to depict any items remotely similar to an "incendiary destructive device."[18] The weapons and bombs depicted in the computer videos, which are causing mass destruction by way of an explosion, are not "incendiary devices," do not involve small plastic PVC pipe items that do not explode when ignited, and fail to depict anything remotely similar to the items found in the trunk of the car. However, such videos, which show mass destruction, have Arabic chanting, and show harm to United States

[18]An incendiary device is a device which functions by igniting or burning combustible materials as opposed to an explosive device which functions by way of explosion.

military troops, are substantially prejudicial. Thus, such videos are, at best, minimally relevant and certainly highly prejudicial. As correctly, noted by the district court:

> As I sit here, and as I evaluate the evidence, I can't imagine that– certainly to some extent the videos, the nine, are cumulative and secondary, and remote from the defendant and the offense comparatively so. How could they be that probative.

Doc.251 at p.78.

A review by this Court of the videos in question, along with the FBI analysis of the items in the trunk and the defense expert's video of that analysis, as the district court viewed prior to ruling, would make it abundantly clear that the district court did not abuse its discretion. The videos depict "Qassam rockets...used by Palestinian militants in the Gaza [strip]" and are "two-meter long steel weapons filled with explosives." Doc.226 at p.17. Additionally, they include "Arabic chanting...extolling the virtues of..." the activity depicted and, specifically, their use against the United States. *Id.* The rockets depicted in the videos can clearly be ignited from a great distance and then fly through the air, causing a mass explosion upon contact with the intended target. In contrast, the items found in the trunk were four-inch long small, plastic PVC pipes which, when ignited, expelled smoke, expelled smoke and gas or did nothing at all. Attachment B.

Finally, unable to establish that a probative connection exists between the computer videos and the small PVC pipe items found in the trunk, the government

alleges that the district court abused its discretion in failing to reserve ruling on the admissibility of the evidence until trial. *See* Appellant Brief at pp.28-29. Ironically, the government makes this argument notwithstanding the fact that it was the government who, pre-trial, requested that the court continue the trial so that the government could respond to the defense motions in limine and so the district court could conduct a pre-trial hearing on the motions. Doc.278 at p.21. The government's flawed argument is also weakened by the fact the district court did, in fact, advise the government that if it could establish the requisite predicate for admissibility, the court would reconsider its holding and admit the evidence. Doc.251 at p.67.

In fact, the district court did allow the government to attempt to introduce at trial a similar "forty-minute video" which related to the "armed struggle in the Middle East" and the "use of Qassam rockets in the Middle East" and which was found on the Mohamed laptop computer, noting that this video was more probative than the videos found on the Megahed family computers. *Id*. at pp76, 78. What the district court did not allow was the introduction of repetitive, cumulative, and highly prejudicial videos which were less probative than the "40-minute video" the court had conditionally allowed the government to introduce. Doc.251 at p.68.

Therefore, contrary to the government's assertions, the district court did not act "irrationally" or "arbitrarily" in limiting or excluding under a 401/403 analysis the

highly prejudicial and minimally relevant computer videos located on the Megahed family computers and on Mr. Mohamed's laptop computer. Instead, the district court properly limited or excluded "sharply" prejudicial evidence which had "scant" or "cumulative" probative forces which the government was attempting to drag into evidence for the sake of its prejudicial effect. As such, Mr. Megahed respectfully maintains that the ruling of the district court should be affirmed.

II. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION IN EXCLUDING EVIDENCE AS A DISCOVERY VIOLATION SANCTION WHERE EVIDENCE WAS NOT DISCLOSED TO DEFENSE UNTIL EIGHT MONTHS AFTER INITIATION OF PROSECUTION, THREE AND A HALF MONTHS AFTER THE DISCOVERY DEADLINE AND ONLY SEVEN BUSINESS DAYS PRIOR TO TRIAL (APPELLANT'S ISSUE I)

Contrary to appellant's assertions, a discovery violation existed and it was not an abuse of the district court's discretion to exclude, as a discovery violation sanction, the introduction of nine (9) videos which were not disclosed to the defense until seven (7) business days prior to the commencement of Mr. Megahed's long-awaited trial. The discovery violation sanction excluded evidence consisting of the nine (9) videos depicting scenes from the Middle Eastern military conflict, which this district court also excluded under Fed.R.Evid. 403[19]. *See* Appellee's Issue I.

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[19] Since the evidence excluded as a discovery sanction consisted of the same computer forensically-recovered videos obtained from the Megahed family computers, which the district court also excluded under Fed.R.Evid. 403(Appellee Issue I), if this Court affirms the district court's evidentiary exclusion, it is not necessary for this Court to address whether the district court's sanction of exclusion was an abuse of the

district court's discretion. *See Harris v. Ivan Corp*., 182 F.3d 799 (11th Cir. 1999).

The district court was well within its power to exclude the untimely disclosed video evidence as a discovery violation sanction. The law is clear that, if at any time during the course of the proceedings, a party has failed to comply with the requirements of Rule 16(a)(1), the court may either: (1) order the disclosure of the evidence; (2) prohibit the party from introducing the evidence; or (3) grant a continuance to allow the opposing party time to assess and defend against such evidence. *United States v. Smalley*, 754 F.2d 944 (11th Cir. 1985); Fed.R.Cr.P. 16(d)(2). A trial court has "broad discretion" in remedying a discovery violation. *United States v. Sarcinelli*, 667 F.2d 5 (5th Cir. Unit B 1982).[20]

A. THE GOVERNMENT COMMITTED A DISCOVERY VIOLATION

The government initially argues that there was no discovery violation and, thus, the district court was without authority to impose a discovery sanction. *See* Appellant Brief at pp.17-20. The record patently refutes the government's position. The record clearly establishes that the government admittedly violated the first November 7, 2007, discovery deadline. Doc.263 at p.10. The initial discovery order was violated because the FBI failed to timely produce discovery. Doc. 263 at pp.10-11. In order to

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[20] *Stein v. Reynolds*, 667 F.2d 33, 34 (11th Cir. 1982)(decisions of the 5th Cir. Unit B, after September 30, 1982, are binding in the 11th Circuit).

avoid the "slow drip" of discovery, with the government's consent, the court set a firm government discovery production deadline of January 9, 2008. Doc.263 at pp.10, 17. When it became clear on January 9, 2008, that the government still had not fulfilled it's discovery obligations, the court issued a stern warning to the government that if did not produce all discovery by the close of business on January 9, 2008, the court would expect a motion for sanctions from the defense. Doc.85 at pp.25-26.

Notwithstanding this clear warning, after the government identified sixteen (16) computer discs of pertinent and relevant information gleaned from the Megahed family computers on January 17, 2008, the government elected to wait over three months subsequent to the amended discovery deadline and just seven (7) business days prior to trial to advise the defense that they intended to introduce this evidence from the Megahed family computers at trial. Although having admittedly violated at least one of the court's discovery orders, according to the government, its compliance with the court's discovery order and Rule 16 was accomplished when the defense was provided "mirror-image" copies of the Megahed family computer hard-drives on November 15, 2007. *See* Appellant Brief at p.19. In so doing, the government ignores two important facts.

First, the sixteen (16) discs of pertinent information, segregated from the "1,000 complete sets of the Encyclopedia Britanica"-worth of information on the hard

drive, were not provided to the defense until April 24, 2008, despite the fact that as early as January 17, 2008, the sixteen (16) discs had been placed within the "FBI 1b evidence folder," along with the other evidence the government intended to introduce at trial. Doc.250 at pp.20-21. This fact was not relayed to the defense, as required by the rules, until over three (3) months later and only seven (7) business days prior to trial. *See* Fed.R.Crim.P. 16(c) (a party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party).

As the district court observed:

> It is difficult entirely to understand the delay co-existing with due diligence and the odd coincidence of the discovery on the same day as the denial of [a government] continuance request....
>
> I guess another way to say it is the reason it wasn't found is it wasn't looked for timely. And maybe there were and maybe there weren't flags that should have suggested that inquiry. But when time got short and energy increased, they were found promptly.

Doc.251 at pp.53-54.

It is clear that once again, the government had violated the district court's order because the government's agents had elected to "do what they do in their own time," despite deadlines and court orders. As the government conceded when it violated the court's first discovery order, such conduct by the agents falls at the feet of the government and it bears full responsibility. Doc.263 at p.4.

Notwithstanding the trial prosecutor's admitted failure to produce evidence in a timely fashion, the government maintains on appeal that no discovery violation occurred because the defense already had the evidence in question on the hard drives, which were timely produced. In support of its flawed position, the government cites to this Court's opinion in *United States v. White*, 846 F.2d 678, 692 (11th Cir. 1988) (holding that a Rule 16 violation does not occur when the government fails to provide the defense with material that the defendant "could have obtained as easily as the Government.") However, *White* is inapplicable to the present case. In *White*, the material not disclosed consisted of a transcript of the defendant's testimony during a prior proceeding, which the defendant not only was aware existed, but the transcript was available as a public record. *Id.*

In contrast, the material at issue here, according to the government, was only accessible after the FBI ran a forensic tool kit search of the hard drives, the information was segregated and categorized, reviewed by "a good number of agents" over a period of "many weeks," "tagged and book-marked as pertinent", and ultimately accessed through the use of an "alternative computer methodology." Doc.250 at pp.22-23.

Second, the government's argument fails because it ignores the fact that the government's actions caused the defense not to review the hard drives. Doc.250 at

pp.7-12. The government repeatedly failed to advise the defense in response to specific questions as to whether there were items of evidentiary value on the Megahed computers; the government repeatedly remained silent at numerous pre-trial proceedings when the defense advised that it had located nothing of evidentiary value found on the Megahed computers; and, the government only produced in discovery a single FBI forensic computer report which attested that nothing of an incriminating value was found on the Megahed computers. Doc.251 at pp.11-12.

Given the extensive efforts necessary to discover the material in question, coupled with the government's failure to apprise the defense of the need to undertake such an effort, it cannot be said, as was the case in *White*, that the defense could have discovered the material just "as easily" as the government did and, therefore, the government was not at fault. Here, not only was the government at fault, but it compounded the issue by failing to correct the repeated assertions by the defense that there was no need to undertake an apparent frivolous and extensive expert analysis of the hard-drives, since the discovery that was provided to the defense supported the position that nothing of evidentiary value was contained therein.

The government now contends that this "misunderstanding" between the government and the defense does not constitute a failure to "provide discoverable items" and claims that it was not aware of this information at the time; therefore, its

failure to correct the "misunderstanding" does not amount to a violation of the rules. *See* Appellant Brief at p.20. However, under the rules, the government has an ongoing obligation to make available to the defense any "newly discovered" information subject to disclosure. *See* Fed.R.Crim.P. 16(c). The evidence in dispute was discovered on the hard drives and placed on sixteen (16) discs on January 17, 2008. Doc.250 at p.22. However, despite the government's continuing discovery obligations, this "pertinent" and "relevant" information was not disclosed to the defense until April 24, 2008, three months after discovery and just seven (7) days prior to trial.

The government asks this Court to believe that, despite the actions leading up to the January 17, 2008, creation of discs containing distinct information found to be pertinent to the case and the placing of these discs into an FBI evidence folder, it was "unaware" of the "evidentiary value" of the contents on these discs until April 2008. *See* Appellant Brief at p.20. However, it is abundantly clear that the evidence in question was disclosed at the last second and on the eve of trial because, as apparent from the government's proffer, the FBI, once again, elected to do "what they do in their own time."[21] Doc.263 at p.6. This despite the court's setting a firm discovery

[21] As the Government conceded on numerous occasions to the court, the ultimate responsibility to make sure that both the rules of criminal procedure and the court's orders are followed lies with the prosecutor. Doc.263 at pp.10-11. Additionally, it is

deadline of January 9, 2008, to avoid the "slow drip" of discovery and after a stern warning on January 9, 2008, that if the government did not comply with its discovery obligations in the allotted time, it could expect a motion for sanctions. As the district court expressed in apparent frustration:

> It's not clear to me why something that was – to the extent that some full court press is put on at the last minute to come up with whatever you can, why didn't that happen in the days before the discovery deadline? And if they weren't, who pays...? You use the word "extreme" [in relation to the sanction]. I don't know what "extreme" means in any particular context but this is a difficult situation, a difficult situation, where a case pends for months and months, twice scheduled for trial, three times set for trial, and at the last minute just when people are lowering their heads to hit the finish line, so to speak, here comes some new stuff.

Doc.251at p.78.

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well established that the "Government" is held accountable for the knowledge of all of its "agents." *United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir. 2003).

Meanwhile, as the government sat for months on the "pertinent and relevant" forensic computer information,[22] the defense, completely unaware of the government's possession of the sixteen (16) discs-worth of alleged "pertinent and relevant" material, proceeded forward towards trial. This Court has previously found that such failures by the government and its agents constitutes a clear discovery violation and to be "contumacious by any standard." *United States v. Sarcinelli*, 667 F.2d 5, 6 (5th Cir. Unit B 1982) (government's failure to provide timely discovery to the defense as a result of inability to obtain evidence from agents held to be sanctionable discovery violation).

B. EXCLUSION IS AN APPROPRIATE SANCTION

Contrary to the government's assertions, the district court did not abuse its discretion by excluding the evidence as a discovery violation sanction, in addition to excluding the forensic computer evidence under Fed.R.Evid 401/403. A district court's decision to impose a Rule 16(d)(2) sanction for the violation of a discovery order, and thus, its choice of sanction, is a matter committed to the court's "sound

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[22]The government, neither before the district court nor in its Initial Brief, has provided an explanation as to why there was no apparent review of the sixteen segregated discs from January 17, 2008, when they were created, until April 21, 2008, when investigators allegedly discovered for the first time that the videos "previously brought to their attention," and "previously found to be relevant and pertinent," thus "tagged," were not reviewed and disclosed.

discretion." *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1311 (11th Cir. 1985). Absent an abuse of discretion, the court's decision will not be disturbed on appeal. *Id*. at 1312, *citing United States v. Burkhalter*, 735 F.2d 1327, 1329 (11th Cir. 1984).

In exercising its discretion, the district court must weigh: "the reasons for the government's delay; the extent of prejudice, if any; and the feasibility of curing such prejudice by granting a continuance, among others." *Id*. As this Court has noted, the presence of a clear violation of a discovery order does not excuse a trial judge from weighing the necessary factors and imposing the "least severe," yet "effective sanction." *Id*. However, once the district court considers the appropriate facts leading up to the violation as well as the options available to provide an adequate cure, the court then has the discretion to enter such order "it deems just under the circumstances." *Sarcinelli*, 667 F.2d at 6.

In considering the appropriate sanction to be imposed upon a violation, the court must decide what sanction "accomplishes the desired result, compliance," as well as deterring further disregard with the court's orders. *Bradley v. United States*, 866 F.2d 120, 127 n. 11 (5th Cir. 1989) (A continuance and not exclusion is the "preferred" means of dealing with a discovery violation where the continuance is "coupled with appropriate sanctions" in order to allow the court to "punish and deter"

conduct that is in violation of the rules); *E.E.O.C. v. General Dynamics Corp.*, 999 F.2d 113, 117 (5th Cir. 1993) (Sanctions less severe than exclusion are preferred when exclusion would in effect result in a "complete dismissal of a claim").

However, exclusion is appropriate as long as the district court expressly considered alternative sanctions and determined that anything else would not be sufficient. *Callip v. Harris County Child Welfare Department*, 757 F.2d 1513, 1521 (5th Cir. 1985); *see also United States v. Smalley,* 754 F.2d 944 (11th Cir. 1985) (exclusion as discovery sanction affirmed where government failed to disclose audio tapes of defendant and informant conversation, until twenty-nine (29) days after discovery request and two weeks prior to trial).

In the present case, the record is clear that the district court did not abuse its discretion because it did consider the appropriate facts which caused the violation, the options of exclusion versus granting a continuance, and determined that the appropriate way to cure the violation was exclusion of the evidence. Doc.251 at pp.63-65. Specifically, the district court stated:

> We have the spirit of the speedy trial rule and I have evidence which appears to me not to be at the heart of the government's case but appears to me to be as I've said before somewhat cumulative and secondary in a case where somebody is – well, in a case with very specific charges with

> very few elements, its hard to see why we shouldn't say enough is enough and go with what we have.

Doc.251 at pp.78-79.

As noted by the district court, exclusion did not result in a complete dismissal of the charges and the evidence excluded was not "at the heart" of the government's case. *Id*. Additionally, contrary to the government's assertions, exclusion as a sanction was not a "severe" sanction because the evidence excluded was minimally probative and was also excluded under Fed.R.Evid. 403.

Notwithstanding the minimal probative nature of the excluded evidence and the fact that the evidence was also excluded under Fed.R.Evid. 403 , the government asserts that the district court abused its discretion in excluding the untimely disclosed evidence in lieu of just continuing the trial to allow the defense adequate time to prepare. *See* Appellant Brief at p.24. The government additionally argues that the defense has now had sufficient time to prepare because of the lengthy period of time it has taken them to brief this appeal. *Id*. Why the district court would need to grant a continuance to allow the defense to review evidence that was also excluded from trial under Fed.R.Evid 403 is nonsensical and completely unaddressed by the government.

While exclusion is not the favored sanction by this Court, exclusion will only constitute an abuse of discretion in factual situations markedly different than those in

the present case. For example, the violation in *Burkhalter* involved the government's late disclosure of two witnesses as co-conspirators. *Burkhalter*, 735 F.2d at 1328. This Court overturned the district court's decision, requiring the government to choose between either calling the witnesses yet not arguing that they were co-conspirators, or not calling the witnesses but making the argument. *Id*. In finding an abuse of discretion, this Court opined that since the violation could be cured by granting a "few days" for the defense to interview the witnesses, exclusion was too severe a sanction. *Id*.

Additionally, in *Euceda-Hernandez*, this Court held that exclusion of defendant's statements not provided within the requisite discovery deadline was not justified when a "brief continuance" would allow "complete discovery" and the fact that the additional investigation prompted by the late disclosure might be completed "in a matter of hours." *Euceda-Hernandez*, 768 F.2d at 1312.

In contrast to *Euceda-Hernandez* and *Burkhalter*, the district court in the present case clearly considered whether or not a short continuance would remedy the situation created by the government's failure to comply with the discovery rules. Doc.251 at p.65. As noted by the district court, the likelihood of curing the violation by a brief continuance was "low". Doc.251 at p.65. Of note to that consideration were the facts in the record as to the extent of the information which the defense would

have to review, as well as the fact that the evidence was being excluded on evidentiary grounds dissipating the need for a continuance. Doc.251 at p.64. Inapposite to a brief or short delay in the trial, a continuance at that point to allow the defense time to properly prepare to respond to the forensic computer evidence and to address the defense's recently filed motion to suppress challenging the search of the computers, would have indefinitely precluded Mr. Megahed's right to speedy trial. As noted by the district court:

> I have someone, a young man, detained by my hand, charges that are serious and we have the spirit and the intent of a speedy trial rule and I have evidence which appears to me not to be at the heart of the government's case and appears to me to be as I've said before somewhat cumulative and secondary in a case where someone is, well, in a case with very specific charges with very few elements, it is hard to see why we shouldn't say enough is enough and go with what we have.

Doc.251 at pp.78-79.

In addition to the factual reality that a short continuance would not have cured the violation, another factor this Court has looked to in evaluating the appropriateness of an exclusion sanction is the evidentiary significance of the evidence excluded. As this Court has held, an abuse of discretion in excluding lately disclosed evidence may occur when the evidence excluded is the "most probative and incriminating evidence available to [the government] in the case." *Scarcinelli*, 667 F.2d at 6 (exclusion would have affect of dismissing indictment or precluding conviction at trial); *General*

Dynamics Corp., 999 F.2d at 117 (exclusion was "tantamount to a dismissal" due to evidence being "so vital" to the proponent's case).

In contrast to *Scarcinelli* and *General Dynamics Corp.*, here the court found that the excluded evidence had minimal probative value and did not go "to the heart of the government's case." Doc.251 at p.78. The United States had obtained not one, but two separate federal indictments, presumably, without offering this evidence to the grand jury. Docs.1, 198. The videos in question were not "discovered" until eight (8) months after the initiation of this prosecution, after the case had been scheduled for trial four (4) separate times, and after the government had repeatedly informed the court that it was ready for trial at each occasion the trial was re-set. As such, it is abundantly evident that the computer forensic evidence in question was clearly not "vital" to the government's case. Furthermore, government trial counsel conceded that the government's case did not depend on the video evidence. Doc.251 at p.74.

Although cited by the government as persuasive authority, this Court's opinion in *United States v. Perez*, 960 F.2d 1569, 1571-1572 (11th Cir. 1992) is inapplicable. In *Perez*, the government had notified the defense, in a timely fashion, of its intent to introduce conversations involving the defendant. *Id*. When the defense objected and moved for a discovery sanction based on the government's late notice of an intent to introduce a portion of the previously-disclosed conversations, the defense moved for

exclusion. *Id*. at 1571-1572. This Court found that the district court did not abuse its discretion in not excluding the evidence. *Id*. at 1573. As this Court noted, the substantial rights of the defendant were not prejudiced because the government failed to specifically disclose its intention to introduce "routine and foreseeably relevant portions" of the same conversations previously disclosed. *Id*. at 1572.

In contrast to *Perez*, in the present case, the evidence sought to be introduced by the government is not merely a portion of evidence which was already revealed would be admitted, but, to the contrary, something the defense was specifically led to believe by the government would not be introduced. Under these circumstances, in which the government misleads the defense into believing that evidence will not be introduced by the government, the notion espoused by the government that Mr. Megahed was not prejudiced because the material not disclosed should have been discovered by him assumes that the defense should not trust the government's representations..

The government's reliance upon this Court's holding in *United States v. Chestang*, 849 F.2d 528(11th Cir. 1988) is equally misplaced. In *Chestang*, this Court found that a discovery violation occurred when the government failed to produce a letter which established that a government witness had received favorable treatment. *Chestang*, 849 F.2d at 532. However, notwithstanding this discovery violation, this Court ruled that violation did not mean that the indictment should be dismissed. *Id*.

This Court noted that when a discovery violation occurs, a district court may impose discovery sanctions short of dismissal and, further, that the prejudice from the violation was minimal in light of the fact that the prosecution had previously verbally advised the defense of the witness' favorable government treatment. *Id.* In contrast to *Chestang*, in the present case, the government not only failed to advise the defense of the sixteen (16) discs which it possessed for over three (3) months after the discovery deadline, but actually mislead the defense to believe that no evidence off the Megahed computers would be introduced at trial.

Finally, the government asserts that the untimely disclosed evidence should not have been excluded because the defense suffered no prejudice from the government's untimely disclosure and, ultimately, if the defense did suffer any prejudice, such prejudice has been cured by the lengthy delay in trial caused by this appeal. The government's argument fails to acknowledge that, at the time of exclusion, Mr. Megahed had been detained for over eight (8) months, he was facing a relatively minimal sentence if convicted, and he had been advising the court that he was ready for trial as early as December 2007. Mr. Megahed certainly wanted his trial, which has been reset on multiple occasions and never at his own request.

Additionally, the government's theory that its lengthy appeal has now cured any prejudice to the defense and, thus, its untimely disclosed evidence should be admitted

to trial, should be rejected by this Court. The government's theory would, in essence, grant the government *carte blanche* to ignore its discovery obligations, discovery deadlines, and discovery order of the district court since the government would know that it can always avoid exclusion of any untimely disclosed evidence by simply taking an interlocutory appeal to cure their own self-inflicted prejudice. Such a policy would basically judicially re-write Rule of Criminal Procedure 16(d)(2)(D) by removing exclusion as a discovery violation sanction.

Finally, the government's flawed argument ignores this Court's precedent which has established that, where the untimely disclosed evidence is not "critical to the government's case" or even where there is no prejudice to the defense from the untimely disclosure, a district court still retains the discretion to exclude the evidence. *United States v. Campagnuolo*, 592 F.2d 852 (11th Cir. 1979) ("We find no abuse of discretion, where, as here, district judge for prophylactic purposes suppresses evidence that, under a valid discovery order, the government should have disclosed earlier, even if non-disclosure did not prejudice the defense.").

In short, this Court should be "loath to interfere" with the well-reasoned and thoughtful enforcement by the district court of its order, especially where the court additionally excluded the videos, irregardless of any discovery violation, under Fed.R.Evid. 401/403. Therefore, this Court should sustain the district court's ruling

excluding the minimally relevant, highly prejudicial, untimely disclosed evidence, especially because the failure to timely disclose the evidence was a result of the government and its agent's failure to respect the court's firm discovery deadlines and stern warning that "sanctions" would be forthcoming for failure to comply.

CONCLUSION

This Court should find that the district court did not abuse its discretion in its evidentiary rulings and should affirm the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set fort in FRAP 32(a)(7)(B0. This brief contains ______ words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Youssef Samir Megahed, was furnished by hand delivery to the Office of the United States Attorney, Assistant United States Attorney David P. Rhodes, 400 North Tampa Street, Suite 3200, Tampa, Florida, 33602; and by United States mail to Defendant-Appellee Youssef Samir Megahed, 4959 Anniston Circle, Tampa, Florida, 33647; this ____ day of October, 2008.

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