

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA,</b>	:	
	:	
v.	:	<b>No. 1:21-cr-00447-CJN-03</b>
	:	
<b>JOSHUA DOOLIN,</b>	:	
<b>Defendant.</b>	:	

**MOTION TO EXCLUDE INTRODUCTION OF A  
CERTAIN CROWD CONTROL SPRAY GUN AND TO  
DISMISS COUNT 16 WITH INCORPORATED MEMORANDUM OF LAW**

Defendant Joshua Doolin respectfully requests that this Court exclude introduction of a certain crowd control spray gun (“spray gun”) gas canister, and to dismiss Count 16, under Fed. R. Crim. P. 16 (“Rule 16”), Local Rule 5(f) and Fed. R. Evid. 104) (“Rule 104”).

This device is alleged in Count 16 of the Indictment [116] to have been stolen by Mr. Doolin while being in a federal enclave.

The spray gun was in the government’s possession and it is material to the preparation of Mr. Doolin’s defense. The government violated its Rule 16(a) duty to disclose the spray gun for pretrial inspection by failing to make it available upon a July 19, 2021, request by defense counsel. The proper sanction under Rule 16(d) is prohibiting the government from introducing the undisclosed canister. Furthermore, the spray gun is inadmissible because the government prematurely released the spray gun into active Metropolitan Police Department (“MPD”) use. As

such, the government can no longer prove that the spray gun is the same device allegedly acquired by Mr. Doolin.

### **FACTUAL BACKGROUND**

Defense counsel sent a letter to AUSA on July 19, 2021, requesting discovery pursuant to Fed. R. Crim. P. 16. (This letter was filed on the docket at ECF 30) Discovery would have included a police report on a seizure of a gas canister and the spray gun itself. Defense counsel did not receive any such discovery.

During an interview with the Federal Bureau of Investigation (“FBI”), Mr. Jacob Ford recalled the spray gun allegedly acquired by Mr. Doolin in a federal enclave was confiscated by police officers.

On February 23, 2023, defense counsel sent an e-mail to AUSA Benet Kearney:

“I am reviewing the 302 for Jacob Ford. (attached). On page 4 it is indicated by Ford that officers took from Doolin possession of flex cuff and gas canister. I am asking for production of any law enforcement reports concerning this contact with Mr. Doolin, including all BWC of this contact any officer, and an opportunity to examine these items taken by officers. I am also asking for the identify of any of these officers, whether US Park Police or MPD Officers or any other law enforcement agency.”

To which AUSA Kearney responded the same day:

“We’re not aware of any of those materials.”

During an afternoon trial recess on March 7, 2023, the government disclosed to defense counsel that it has the spray gun which it claims is the subject device as

alleged in Count 16. At that time (and for the first time) the government made it available for inspection – in the common hallway of the United States Courthouse. Defense counsel was instructed by the government to not touch device and, moreover, the government represented it does not have any police reports, chain of custody logs, etc., as to how the device was recovered and maintained by law enforcement.

On March 8, 2023 at approximately 7:48 a.m. defense counsel received the following e-mail from AUSA Benet Kearney:

“I talked to Sgt Bogner this morning. Here are my notes:

After meeting on 2/27, Sgt Bogner called Tara Tindall to ask if #111 was in MPD’s possession. She said it was, sent him pictures. He then went to look at it. It was mostly empty; the rest of the contents were emptied to bring to court on 3/7. Sgt Bogner’s conclusion is that it had been mostly empty since Jan 6, b/c he can’t think of another event where MK 46s were used since then, but there is no log reflecting when the cannisters are filled.”

## **I. DISCUSSION**

### **1. The Spray Gun Is Material Evidence That Mr. Doolin Requested and the Government Failed to Disclose When Requested.**

Federal Rule of Criminal Procedure 16(a)(1)(E) states that the government must “permit the defendant to inspect... tangible objects... if the item is within the government's possession, custody, or control and: (i) the item is material to prepare the defense.” Fed. R. Crim. P. 16(a)(1)(E). Evidence in the possession of the police is within the government's custody or control for purposes of [Rule 16](#). *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Evidence is material to preparing a defense “as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.” *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) (quoting *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993)). Material evidence “is not limited to evidence that is favorable or helpful to the defense and does not immunize inculpatory evidence from disclosure.” *United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005). A defendant's burden to demonstrate materiality is not a “heavy” one, *see United States v. Slough*, 22 F. Supp. 3d 1, 4 (D.D.C. 2014), and the government “cannot take a narrow reading of the term ‘material’ in making its decisions on what to disclose under Rule 16,” *United States v. Safavian*, 233 F.R.D. at 15. Indeed, “Rule 16 is intended to provide a criminal defendant ‘the widest possible opportunity to inspect and receive such materials in the possession of the Government as may aid him in presenting his side of the case.’” *Id.* (quoting *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989))

Here, defense counsel sent the government a written to inspect all physical evidence pursuant to Rule 16 on July 21, 2021 (“the July letter”). The spray gun is undoubtedly physical evidence within the meaning of the July 2021 “discovery request” letter and Rule 16. However, the government did not produce the device for inspection until the afternoon of March 7, 2023 – during an afternoon recess while in trial. The government related it recently discovered the spray gun in a MPD property room, which is in government possession, custody, and control within the meaning of Rule 16. And, the e-mail on March 8, 2023 (7:48 a.m.) from AUSA Benet

Kearney to defense counsel with newly disclosed information confirming that the spray gun has been in possession of the government. At the very least, the prosecution should have clearly notified defense counsel on February 27, 2023, that it had the spray gun – and also then make it available inspection. Notwithstanding Rule 16, *Brady*, and Local Rule 5(f), when government received the discovery request” letter on July 19, 2021, it had a duty to

The spray gun meets the threshold of materiality. The government alleges that the painted numbers on the gas canister is evidence that it is the same canister acquired by Mr. Doolin on January 6, 2021. However, the government’s late production of the device prevents the defense from an full opportunity to inspect the device and to offer rebuttal expert witness testimony. Additionally, it was related to the defense that the spray gun has been in circulation/active MPD for the past period of time, this preventing the defense from inspecting the canister for the absence of Mr. Doolin’s fingerprints or other forensic analysis. As such, the government failed in its duty to preserve evidence sought by the defense.

## **2. Exclusion of the Spray Gun Is the Proper Remedy.**

Federal Rule of Criminal Procedure 16, states that “[i]f a party fails to comply with this rule, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances. Fed. R. Crim. P. 16(d). Federal Rule 16 generally requires “efficient and expeditious discovery.” *United States v. Dixon*, 355 F. Supp. 3d 1, 8 (D.D.C.



2019). “Local Criminal Rule 5.1(a), for instance, requires the Government to ‘make good-faith efforts’ to disclose information that could be favorable to the accused ‘as soon as reasonably possible after its existence is known, so as to enable the defense to make effective use of the disclosed information in the preparation of its case.’” *Id.* “Similarly, Federal Rule of Criminal Procedure 16(d) grants the Court considerable discretion to regulate discovery.” *Id.*

Here, the proper sanction is prohibiting the government from introducing the undisclosed spray gun and to dismiss Count 16. The government only offers the device now that the trial is underway. And, granting a trial continuance in order to conduct a full and proper expert analysis of the device at this late juncture would be prejudicial to Mr. Doolin’s right to speedy trial.

### **3. Federal Rule of Evidence Rule 104**

Federal Rule of Evidence 104(b) also counsels toward a prohibition. The rule states “When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.” Fed. R. Evid. 104(b).

Here, the relevance of the gas canister depends on whether the painted number proves that it is the same gas canister allegedly acquired by Mr. Doolin. The government will not be able to introduce proof sufficient to support a finding that the painted numbering was not added (intentionally or unintentionally) to a gas canister among the many the MPD uses. Over two years have passed since the events of January 6th. There are no police reports about the recovery of the spray gun and chain of custody logs are nonexistent. Therefore, in addition to Rule 16

counseling towards exclusion, Federal Rule of Evidence 104 counsels towards an order of exclusion.

One and one-half years have passed. Chain of custody is nonexistent. Therefore, in addition to Rule 16(d) counseling towards prohibition, Federal Rule of Evidence 104(b) counsels toward prohibition.

Federal Rule of Evidence 104 also counsels toward an exclusion of the spray gun, and to dismiss Count 16. The rule states “When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.” Fed. R. Evid. 104(b).

### **CONCLUSION**

**WHEREFORE**, for all the reasons set forth above, and for such other reasons which may appear just and proper, Defendant Joshua C. Doolin respectfully requests that the Court prohibit introduction of the crowd control spray gun and to dismiss Count 16.

Respectfully submitted,

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