

# **PRE-TRIAL MOTIONS DISCOVERY**

TENNESSEE ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS

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Always negotiate and litigate from a position of strength. Pretrial motions, at best, can derail the prosecution and, at worst, provide favorable conditions for the conduct of trial.<sup>1</sup> For example, a number of pretrial motions are used to obtain knowledge about the prosecution case. In addition, alternative means of discovery should be used to obtain advantage for purposes of trying or settling the case.

## **INDICTMENT**

### **GRAND JURY COMPOSITION**

Defendants have an unqualified right to inspect all records or papers used or relied upon by the jury commission or clerk in connection with the selection process of the grand juries and petit juries, pursuant to 28 U.S.C. §§ 1861 & 1867 (f) and *Test v. United States*, 420 U.S. 28, 30 (1975); *Government of the Canal Zone v. Davis*, 592 F. 2d 887, 889 (5th Cir. 1979) in order to adequately prepare and present claims that their juries are not composed of persons selected in accordance with the Constitution and laws of the United States, and which fairly represents a random cross-section of the community in which the Defendants will be tried. 28 U.S.C. § 1867 (a), (b) or (c). The motion for inspection of these records must be sworn.

### **EXCULPATORY EVIDENCE**

Defendants are entitled to discover Grand jury testimony that is exculpatory, mitigating or favorable. *Brady v. Maryland*, 373 U.S. 83 (1963). In fact, Defendants are entitled to such evidence whether or not it would be admissible at trial. *Giles v. Maryland*, 386 U.S. 66, 74 (1967); *United States v. Gleason*, 264 F. Supp. 850 (S.D. N. Y. 1976).

Exculpatory evidence is not the equivalent of evidence which would result in the Defendants' acquittal. The majority in *Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995), disavowed any difference between exculpatory and impeachment differences for *Brady* purposes" and held that suppression of such favorable evidence should result in reversal "irrespective of the good faith or bad faith of the prosecution".

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<sup>1</sup>Obviously, one of the most important pre-trial matters to consider is whether the Defendant has grounds to suppress evidence. Such matters are addressed more appropriately and extensively in a presentation on search and seizure and/or confessions.

*Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995).

“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” *Kyles v. Whitley*, 115 S.Ct. 1555, 1566 (1995).

Disclosure of such evidence must be made in sufficient time to allow the defense to use it effectively in the preparation and presentation of its case, thus disclosure may be required pre-trial. *See, e.g., United States v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970); *United States v. Deutsch*, 373 F. Supp, 289, 290-91 (S.D.N.Y. 1974).

Moreover, *Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995), recognizes the Government’s duty to “volunteer exculpatory evidence never requested, or requested in only a general way.”

The prosecution team meets to discuss the progress of their investigation and to share information the Government obtains through the grand jury. Thus, the Government is in the position to provide exculpatory evidence from grand jury testimony. The Defendants should request that the Government inquire of all members of the prosecution team exculpatory matter presented to grand juries.

Federal Rule of Criminal Procedure 6(e)(3)(E)(i).

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made-

(i) When so directed by a court preliminarily to or in connection with a judicial proceeding...."

Despite the fact that the Supreme Court has held that prosecutors need not present exculpatory matter to grand juries, it is likely that such evidence was presented. The U.S. Attorney's manual recommends the practice. Section 9-11.233 of the manual provides in pertinent part:

## "Presentation of Exculpatory Evidence

...[W]hen a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." U.S. Attorney's Manual 9-11.233.

Request the transcription of grand jury testimony and also that the government inquire of the participants in its investigation regarding the presentation of exculpatory evidence before any Grand Jury.

## **DISMISSAL**

### **INTERFERENCE WITH RIGHT TO COUNSEL**

Move to dismiss the Indictment on the grounds that the government contacted and interviewed represented, without the benefit, presence, advice, or assistance of their retained counsel of choice.

#### Violation of Ethical Code and Rules of Court

To compel such represented witnesses before the prosecutor for the purpose of disparaging their counsel outside that lawyer's presence, violates the Code of Professional Responsibility and the Rules of Court.

Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility, expressly provides that:

"During the course of his representation of a client a lawyer shall not: Communicate or cause another to communicate on the subject of that representation by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Similarly, Rule 4.2 of the ABA Model Rules of Professional Conduct specifically states that:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

More specifically, the Rules of Professional Conduct of the State of Texas provide in rule 4.02 that:

"(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person ... the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer had the consent of the other lawyer or is authorized by law to do so."

### **Ethical Standards Incorporated into Local Federal Court Rules**

The Local Rules for the United States District Courts of the Western District of Texas, expressly provide that lawyers practicing before these Courts must abide by the ethical rule forbidding contact with represented individuals. Rule AT-4 of the Local Rules for the United States District Court for the Western District of Texas mandates that an attorney's conduct before the courts of the Western District of Texas is governed by the Rules of Professional Conduct of the State Bar of Texas and Code of Professional Responsibility of the American Bar Association.

"Every member of the bar of this Court and any attorney permitted to practice in this Court under Local Rule AT-1 hereof shall familiarize oneself with and comply with the standards of professional conduct required by member of the State Bar of Texas and contained in the Texas Disciplinary Rules of Professional Conduct, V.T.C.A. Government Code, Title 2, Subtitle G-Appendix and the decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct of this Court. This specification shall not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the Code of Professional Responsibility of the American Bar Association shall be noted. No attorney permitted to practice before this Court shall engage in any conduct which degrades

or impugns the integrity of the Court or in any manner interferes with the administration of justice therein." See Local Rule AT-4 for the Western District of Texas.

Thus, the rules governing the conduct of attorneys practicing before the District Court for the Western District of Texas, as do most local court rules, expressly incorporate as the "Standards of Professional Conduct" before these Courts the Rules of Professional Conduct of the State Bar of Texas which in strict, mandatory terms provide that a lawyer "shall not communicate... with a person ... the lawyer knows to be represented by another lawyer ... unless the lawyer had the consent of the other lawyer [Rules of Professional Conduct of the State Bar of Texas 4.02, expressly incorporated as the "Standards of Professional Conduct" before the District Court. What this means is that once a targeted individual is represented by an attorney, the government may not communicate with that defendant unless his or her attorney is notified and gives prior consent. See *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), cert. denied, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973). The Fifth Circuit has recognized that conduct which violates this canon of ethics is reprehensible and that suppression may be the appropriate sanction. *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), cert. denied sub nom; *Brunk v. United States*, 451 U.S. 1021, 101 S.Ct. 3010, 69 L.Ed.2d 394 (1981).

"We agree that the conduct which occurred in this case was highly improper and unethical. ...The action that was taken in this case is truly reprehensible and taints the dignity of the offices of the U.S. Attorney, the D.E.A. and the F.B.I." *United States*, 639 F.2d 206, 210 (5th Cir.), cert. denied sub nom; *Brunk v. United States*, 451 U.S. 1021, 101 S.Ct. 3010, 69 L.Ed.2d 394 (1981).

### **The Ethical Rules Are Not a "One-way Street"**

Neither side is free to unilaterally ignore nor determine that such rules are too burdensome. These standards for conduct are rules by which both sides are to play.

The 105<sup>th</sup> Congress passed the McDade/Murtha Bill, which applies Rule 4.2 of the ABA Model Rules to Department of Justice lawyers.

“Sec. 801 Ethical Standards for Federal Prosecutors

(a) In General-Chapter 31 of Title 28, United States Code, is amended by adding at the end the following:

‘Section 530B. Ethical Standards for Attorneys for the Government

‘(a) An attorney for the Government shall be subject to state laws and rules, and local Federal Court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.’”

The McDade-Murtha Bill was enacted in 1998 to reaffirm the traditional role of the states in this area. The McDade-Murtha Bill, codified at 28 U.S.C. § 530A, clarifies that federal prosecutors, like all other lawyers, are subject to state ethical rules governing attorney conduct.

Courts have been quick to impose sanctions whether the violation was occasioned by a prosecutor, *see United States v. Hammad*, 858 F.2d 834, 839-842 (2d Cir. 1988),<sup>2</sup> or defender, *see United States v. Grieg*, 967 F.2d 1018, 1023 (5th Cir. 1992), where the Fifth Circuit recently reiterated:

"[Defense Counsel's] alleged conduct was highly unethical and clearly violated the Model Code of Professional Responsibility as well as the American Bar Association's Model Rules of Professional Conduct.

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<sup>2</sup> In *Hammad*, the Second Circuit discussed the appropriateness of imposing sanctions upon a prosecutor who violated that Cannon, interfering with a represented parties attorney-client relationship:

"On appeal, the government...claims that even if there was a violation of the disciplinary rule, exclusion is inappropriate to remedy an ethical breach. We have not heretofore decided whether suppression is warranted for a DR 7-104(A)(1) violation....We now hold that, in light of the underlying purposes of the Professional Responsibility Code and the exclusionary rule, suppression may be ordered in the district court's discretion....

"Accordingly, we reject the government's effort to remove suppression from the arsenal of remedies available to district judges confronted with ethical violations." *United States v. Hammad*, 858 F.2d 834, 842 (2d Cir. 1988).

“Greig's [defense] counsel was in clear violation of both the American Bar Association's Model Rules of Professional Conduct and the Model Code of Professional Responsibility.” Rule 4.2 of the Model Code provides:

**“RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law. The Model Code's Disciplinary Rule 7-104(A)(1) is substantially identical." *United States v. Grieg*, 967 F.2d 1018, 1023 (5th Cir. 1992).

**Dismissal Is the Appropriate Remedy Where Prosecutor's Interference with Citizen's Right to Representation Causes the Accused to Lose His Lawyer**

In *United States v. Lopez*, 765 F. Supp. 1453 (N.D. Cal. 1991) the District Court for the Northern District of California was confronted with a prosecutor whose contact and communication with a represented accused resulted in that individual losing his lawyer.

"It is thus no exaggeration to say that the conduct of the government in this case cost the defendant his lawyer. The record makes it clear that Lopez retained Tarlow and wished to be represented by him if his case proceeded to trial. The government made that impossible." *United States v. Lopez*, 765 F. Supp. 1432, 1456 (N.D. Cal. 1991).

“Just as the government misconduct in this case must be characterized as egregious and flagrant, the court has no difficulty in finding that defendant Lopez was substantially prejudiced by that misconduct. As the court has already indicated, the prosecutor's conduct ultimately served to deprive Lopez of his chosen counsel. The record indicates that Lopez, who retained Barry Tarlow because of his skills as a trial attorney, went to great lengths to avoid just this result." *United States v. Lopez*, 765 F. Supp. 1433, 1461 (N.D. Cal. 1991).

In *United States v. Lopez*, 765 F. Supp. 1433, 1461 (N.D. Cal. 1991), even though the Defendant's new lawyer was eminently competent<sup>3</sup>, the District Court found that dismissal was the only appropriate remedy where the prosecutor's communication with a represented individual resulted in that citizen's loss of his or her counsel of choice. The Ninth Circuit noted that it may be the appropriate remedy but was not in that particular case. *See United States v. Lopez*, 4 F.3d 1455 (9<sup>th</sup> Cir. 1993).

“We have recognized that exercise of supervisory powers is an appropriate means of policeing ethical misconduct by prosecutors...we have also expressly recognized the authority of the District Court to dismiss actions where government attorneys have ‘willfully deceived the court,’ thereby interfering with ‘the orderly administration of justice.’ ... [W]e question the prudence of remedying [Lyons] misconduct through dismissal of a valid indictment. To justify such an extreme remedy, the government’s conduct must have caused substantial prejudice to the defendant and been flagrant in its disregard for the limits of appropriate professional conduct.” *Unites States v. Lopez*, 4 F.3d 1455 (9<sup>th</sup> Cir. 1993). *See also United States v. Acosta*, 526 F.2d 670, 674 (5<sup>th</sup> Cir.), *cert. denied*, 426 U.S. 920 (1976).

A worse case is made out where the government contact is through abuse of its non-reciprocal, compulsory power to separate represented citizens from their counsel in order to achieve those results.

The courts who have considered the issue have concluded that "the ethical prohibition of the State Bar...should be applied pre-indictment" as well as post-indictment to prohibit such hostile communication with represented parties. *United States v. Lopez*, 765 F. Supp. 1433, 1451 (N.D.Cal. 1991). As the Second Circuit reiterated in *Hammad*:

"The applicability of DR 7-104(A)(1) to the investigatory stages of a criminal prosecution presents a closer question. The government asserts

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<sup>3</sup>"There is no question that Lopez's new counsel is very able and will provide him with outstanding representation....", *United States v. Lopez*, 765 F. Supp. 1433, 1461 (N.D. Cal. 1991).

the rule is coextensive with the sixth amendment, and hence, that is remains inoperative until the onset of adversarial proceedings. The appellee responds that several courts have enforced DR 7-104(A)91) prior to attachment of sixth amendment protections. We find no principled basis in the rule to constrain its reach as the government proposes.... ...The sixth amendment and the disciplinary rule serve separate, albeit congruent purposes. ...[T]he Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise. The Model Code of Professional Responsibility, on the other hand, encompasses the attorney's duty 'to maintain the highest standards of ethical conduct.' ... Hence, the Code secures protections not contemplated by the Constitution.

Moreover, we resist binding the Code's applicability to the moment of indictment. The timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances." *United States v. Hammad*, 858 F.2d 834, 838-839 (2d Cir. 1988).<sup>4</sup>

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<sup>4</sup>It does not matter whether the individual or opposing counsel initiated the contact or interview.

"Nor is the prosecutor's conduct excused by the fact that the defendant initiated contact with the government. Courts have consistently ruled that the ethical prohibition bars a prosecutor from communicating with a represented individual without his or her counsel even if it is the individual who makes the first contact. ...The Discussion text following Rule 2-100 explicitly states that it is irrelevant whether an attorney is contacted by the opposing party. In addition, the Committee on Professional Ethics of the ABA has unanimously ruled that the ethical prohibition is violated even when the defendant initiates contact with the government. ... Moreover, as the ethical prohibition applies to attorneys and is designed in part to protect their effectiveness, a represented party may not waive it." *United States v. Lopez*, 765 F. Supp. 1433, 1451-2 (N.D. Cal. 1991).

Last term, the Supreme Court recounted the over one hundred and fifty year history of the federal courts' inherent power to regulate the conduct of attorneys who appear before them and noted that the "power reaches both conduct before the court and that beyond the court's confines...." *Chambers v. Nasco, Inc.*, 115 L.Ed. 2d 27, 44 (1991).

In a brief filed with the Supreme Court of the United States, this same Government argued that "Because of the special status of lawyers in the judicial system, we [Department of Justice] believe that state and ethical codes may constitutionally regulate attorneys" [Brief for the United States as Amicus Curiae, at p. 4, *Gentile v. State Bar of Nevada*].

"A lawyer is not in the same position as private citizen with respect to the judicial system. Rather, the lawyer has a 'fiduciary obligation to the courts.' ...[C]ourts have for centuries possessed authority 'over members of the bar, incident to their broad responsibility for keeping the administration of justice and the standards of professional conduct unsullied.... [L]awyers must operate as assistants to the court in search of a just solution to disputes." [Brief of the United States as Amicus Curiae, at p. 6, filed in *Gentile v. State Bar of Nevada*, November 1990.

The Supreme Court also reiterated the need "to have counsel present" before the prosecution seeks waiver of an accused's asserted Fifth Amendment right to counsel, even before indictment or any formal charges have been lodged. *Minnick v. Mississippi*, 498 U.S. \_\_\_, 112 L.Ed.2d 489, 111 S.Ct. \_\_\_ (1990).

In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Supreme Court held that the right to counsel secured by the Sixth Amendment and the right to counsel protected by *Miranda v. Arizona*, 384 U.S. 436 (1966), are separate and distinct, such that invoking one does not implicitly invoke the other. However, Justice Scalia, in *McNeil v. Wisconsin*, noted that the Fifth Amendment gives the Defendant as much protection as the 6<sup>th</sup> amendment right to counsel.

In *Montejo v. Louisiana*, the Supreme Court in a 5-4 decision overturned *Michigan v. Jackson*, and rolled back on the protection of the defendant which guaranteed the defendant the advice of counsel before speaking with police at critical stages of a prosecution. Under *Michigan v. Jackson*, when a suspect has invoked his

right to counsel, police may not initiate interrogation until counsel has been made available to the suspect. At issue in *Montejo* was the continued interrogation of a murder suspect who had invoked his right to counsel.

The *Michigan v. Jackson* decision was viewed as a core protection for criminal defendants that extended the Court’s Fifth Amendment ruling in *Edwards v. Arizona* to the Sixth Amendment context.

In his dissent, Justice Stevens shows how the majority misrepresented the importance and necessity of the *Jackson case*:

“The majority’s analysis flagrantly misrepresents *Jackson*’s underlying rationale and the constitutional interests the decision sought to protect. While it is true that the rule adopted in *Jackson* was patterned after the rule in *Edwards*, 451 U. S., at 484–485, the *Jackson* opinion does not even mention the anti-badgering considerations that provide the basis for the Court’s decision today. Instead, *Jackson* relied primarily on cases discussing the broad protections guaranteed by the Sixth Amendment right to counsel—not its Fifth Amendment counterpart. *Jackson* emphasized that the purpose of the Sixth Amendment is to “ ‘protec[t] the unaided layman at critical confrontations with his adversary,’ ” 475 U. S., at 631 (quoting *United States v. Gouveia*, 467 U. S. 180, 189 (1984) ), by giving him “ ‘the right to rely on counsel as a ‘medium’ between him[self] and the State,’ ” 475 U. S., at 632 (quoting *Maine v. Moulton*, 474 U. S. 159, 176 (1985) ).

Underscoring that the commencement of criminal proceedings is a decisive event that transforms a suspect into an accused within the meaning of the Sixth Amendment , we concluded that arraigned defendants are entitled to “at least as much protection” during interrogation as the Fifth Amendment affords unindicted suspects. See, e.g., 475 U. S., at 632 (“[T]he difference between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances” (emphasis added)).

Therefore, where the government intentionally injects itself into the relationship between an attorney and his client knowing that there would be a

"...substantial risk... that the basic trust between counsel and client, which is the cornerstone of the adversary system, would be undercut," *Wilson v. Mintzes*, 761 F.2d 275, 285 (6th Cir. 1985), quoting *Linton v. Perini*, 656 F.2d 207, 208 (6th Cir. 1981), cert. denied, 454 U.S. 1162, the defense should ask the Court to utilize its inherent power to dismiss the indictment pursuant to its supervisory powers. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974); *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir.), cert. denied, 434 U.S. 825 (1977). As the Third Circuit aptly noted in *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979):

"[W]hile in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.

We suspect that dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the grand jury process." *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979).

The United States District Court for New Mexico took action against a prosecutor for violating this very Canon by communicating with a represented individual, *In the Matter of Doe, Esq.*, \_\_\_ F. Supp\_\_\_, 1992 W.L. 196880 (D. New Mexico, August 4, 1992):

"[T]he profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious.

Law evolves with the collective experience of a society's efforts to peaceably resolve human conflict. Hence, law is not stagnant. Lawyers, in our adversary system, breathe life into its words. As they zealously

advocate a client's interest, the law advances and, as they employ reason, they direct its movement. But, the law in this social order is not self-executing--the necessary instrument is the lawyer.

Today, it is beyond argument that one of the lawyer's most noble responsibilities is to protect the individual against Government excesses. Indeed, a lawyer's role is so essential to such vague concepts as 'due process' and "equal protection of laws" that we guarantee the indigent a right to a lawyer. And although these concepts, so central to justice, are ultimately defined by the courts, they are first given substance by the lawyer.

When we hear the complaint, 'it's not the law,' the cry, 'they're not following the law,' or the clarion call, 'there ought to be a law,' we are jarred to the reality that our nation is a legal polity. Within this polity there is an increasingly palpable perception that the public is no longer empowered and that the legislature and executive are no longer responsive to its needs. It is not surprising, then, that the public turns to the remaining independent branch of Government--the judiciary--to vindicate its rights under the law. Again, it entreats the lawyer.

Acknowledging the crucial role of the lawyer in our nation's fabric, we must understand ethical standards are not merely a guide for the lawyer's conduct, but are an integral part of the administration of justice. Recognizing a Government lawyer's role as a shepherd of justice, we must not forget that the authority of the Government lawyer does not arise from any right of the Government, but from power entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power.

For this reason, some observe that our system of law is a 'tripartite entity'; that the process requires contending lawyers and a neutral trier;

that if any of these three supports is missing, the process fails; and, that if any to leg is disproportionately weak, the structure as a whole is weakened." *In the Matter of Doe, Esq.*, \_\_\_\_ F. Supp. \_\_\_\_, 1992 W.L. 196880 (D. New Mexico August 4, 1992).

Under such circumstances, the Court should be asked to exercise its supervisory power to remedy a prosecutor's misuse or abuse of their authority before the grand jury by dismissing the indictment. *Bank of Nova Scotia v. United States*, 108 S.Ct. 2369, 2374 (1988).

### **Failure to State Offense**

Defendants may seek dismissal of various counts of the indictment for vagueness and failure to state an offense pursuant to Rule 7(c)(1) and 12 (b)(2) of the Federal Rules of Criminal Procedure.

Rule 7(c)(1) requires an indictment to contain “for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.”

A court evaluates the sufficiency of an indictment by considering (1) whether the count contains statutory language accompanying the criminal code section number, (2) whether a jury can be properly charged regarding the scienter elements of the offense; (3) whether the count contains an assessment of the offense; and (4) whether the court has guidance regarding the elements of the offense with which to instruct the jury. See *United States v. Arteaga-Limones*, 529 F.2d 1183 (5th Cir. 1976) (determining sufficiency of the indictment based on these four facts); *see also United States v. Goodman*, 605 F.2d 870, 886 (5<sup>th</sup> Cir. 1979) (relying on *Arteaga-Limones*).

### **Vagueness**

In addition, a count suffers from vagueness if it fails to adequately apprise the Defendants of the offense with which they are charged as is required by Rule 7(c)(1) which states in pertinent part: “[t]he indictment . . . shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”

“[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *See Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 766 (1962). *See also United States v. Goodman*, 605 F.2d 870, 884 (5th Cir. 1979) (noting the general principles to determine the sufficiency of an indictment).

The indictment count may also fail to inform the Defendants sufficiently that this infirmity prevents them from entering a “voluntary and knowing” plea. *Strickland v. Washington*, 466 U.S. 668 (1984).

If the indictment count is “not framed to apprise the defendant[s] “with reasonable certainty, of the nature of the accusation against [them] , [the indictment] is defective, although it may follow the language of the statute.” *United States v. Simmons*, 96 U.S. 360, 362 (1877 ).

### **Duplicity**

The improper charge of multiple offenses in one count requires either dismissal or for the government to elect on which offense it would like to proceed. *United States v. Gordon*, 844 F.2d 1397, 1401-02 (9th Cir. 1988); *United States v. Bowline*, 593 F.2d 944, 947-48 (10th Cir. 1979).

### **Multiplicity**

Counts of an indictment should also be dismissed if they charge the same offense in multiple counts. For example, the bank fraud statute punishes for each execution of a scheme to defraud and not each act in furtherance or execution of the scheme: *United States v. Lemons*, 941 F.2d 309, 318 (5th Cir.):

“The fact that each act in execution of a scheme is a punishable offense under the mail or wire fraud statutes does not allow reading the bank fraud statute to likewise punish each act in execution of a scheme or artifice to defraud. In short, the mail and wire fraud statutes punish each act in furtherance, or execution, of the scheme; but the bank fraud statute imposes punishment only for each execution of the scheme...The

movement of the benefit to [the Defendant], although in several separate stages or acts, was only part of but one performance, one completion, one execution of that scheme.” *United States v. Lemons*, 941 F.2d 309, 318 (5th Cir. 1991).

*See also United States v. Heath*, 970 F.2d 1397, 1402 (5th Cir. 1992)[en banc].

“Although a two-loan scheme may subject an institution to greater risk than a scheme involving only one transaction, it is the execution of the scheme itself that subjects a defendant to criminal liability, not, as we stated in *Lemons*, the execution of each step or transaction in furtherance of the scheme. Because the Defendants’ indictments sought to punish them for execution of the multiple steps involved in the scheme, the counts are multiplicitous.” *United States v. Heath*, 970 F.2d 1397, 1402 (5th Cir. 1992)[en banc].

Multiplicitous counts should therefore be dismissed or the Government must elect which count it will proceed to trial with exclusive of the others. *Cf. United States v. Seda*, 978 F.2d 779, 782 (2d Cir. 1992).

### **Statute of Limitations**

If the Indictment was filed on a date which is over the statute of limitations period after the latest date charged in the Indictment, the prosecution is barred. The general statute of limitations for federal offenses is five years. Title 18 United States Code, section 3282.

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years after such offense shall have been committed.” 18 United States Code, Section 3282.

A ten year statute of limitations is set forth in Title 18 United States Code, section 3293.

“No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate--

(1) section 215, 656, 657, 1005, 1006, 1007, 1008, 1014,  
or 1344;

...unless the indictment is returned or the information is filed within ten years after the commission of the offense.” Title 18 United States Code, section 3293.

The United States Supreme Court requires that statutes of limitation be construed in favor of the defendants.

“Criminal statutes of limitation are to be liberally interpreted in favor of repose.” *United States v. Marion*, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971).

### **Grand Jury Prejudice**

Defendants are entitled to indictment “returned by a legally constituted and unbiased jury.” *Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 409 (1956).

“The fifth amendment provides that ‘no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of the grand jury.’ All that is constitutionally required of an indictment is that it be ‘returned by a legally constituted and unbiased jury.’ *United States v. Heffington*, 682 F.2d 1075, 1080 (5th Cir.1982) (quoting *Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956)).” *United States v. Mitchell*, 777 F.2d 248 (5th Cir.1985).

If a grand juror knows a defendant or is adverse to the institution with which the Defendants have been associated by the Government, the grand jury is biased in violation of the constitution.

“A look at the grand jury through the record reveals that it was composed of people from all walks of life, some of whom were former union members. The judge immediately and in the presence of all of the panel eliminated six prospective grand jurors when indications of prejudice appeared. **No grand juror personally knew petitioner or was shown to be adverse to the institutions with which petitioner is generally identified.**” *Beck v. Washington*, 82 S.Ct. 955, 959, 369 U.S. 541 (1962)[emphasis added].

Therefore, Defendants may seek dismissal of the indictment for grand jury bias.

### **BILL OF PARTICULARS**

The purpose of the Bill of Particulars is to provide the Defendants with details of the alleged offenses which are omitted from the pleading against them and which are necessary to enable Defendants to understand the charges against them (as guaranteed by the Sixth Amendment to the Constitution) and to protect them from double jeopardy (as guaranteed by the Fifth Amendment of the Constitution). Moore's Federal Practice-Criminal Rules § 7.06[1]; *United States v. Leach*, 427 F.2d 1107, 1110 (1st Cir.), cert. denied, 400 U.S. 829 (1970); *United States v. Schenbari*, 884 F.2d 901 (4th Cir. 1973); *United States v. Moore*, 57 F.R.D. 640 (N.D. Ga. 1972). While technically the Bill of Particulars is not a discovery device, *Cooper v. United States*, 282 F.2d 257 (9th Cir. 1960); *United States v. Rosenberg*, 10 F.R.D. 521, 523 (S.D. N.Y. 1950); *United States v. Long*, 440 F.2d 288 (8th Cir. 1971), it has the practical effect of disclosing information to the accused which is unavailable otherwise. This broader discovery function of the Bill of Particulars has been recognized by an increasing number of courts. *United States v. Dolan*, 113 F. Supp. 757, 759 (D.D.C. 1953); *United States v. Rosefield*, 264 F. Supp. 760 (N.D. Ill. 1967); *United States v. Smith*, 16 F.R.D. 372, 374 (W.D.Mo. 1954); *United States v. Addonizio*, 451 F.2d 49, 64, n. 16 (3d Cir. 1972), cert. denied, 465 U.S. 936 (1972); Wright, Federal Practice and Procedure, Criminal, § 129, at p. 281.

The test for granting a Bill of Particulars has been described as whether such information is necessary for defendant to adequately prepare for trial and avoid surprise. *King v. United States*, 402 F.2d 289 (10th Cir. 1968); *United States v. Ahmad*, 53 F.R.D. 194, 199 (M.D. Pa. 1971).

And even if the indictment or information is valid same is no defense to a motion for a Bill of Particulars, *United States v. Foulkner*, 53 F.R.D. 299, 310 (E.D. Wis. 1971), since the underlying purpose of Rule 7(f) is not to cure defects in the Government's pleading but rather to "...furnish the defendant further information respecting the charge stated in the indictment when necessary to the preparation of a defense, and to avoid prejudicial surprise at trial." *United States v. White*, 16 F.R.D. 372, 375 (W.D.Mo. 1954); *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965); *Pipkin v. United States*, 243 F.2d 491 (5th Cir. 1957); *United States v. Bearden*, 423 F.2d 805, 809 (5th Cir. 1970). And, where the information sought is necessary to the preparation of a defense or to prevent surprise, then the "...accused is entitled to this 'as of right'" regardless of whether such disclosure would be

privileged otherwise. *United States v. White*, 16 F.R.D. 372 (W.D. Mo. 1954); Moore's Federal Practice-Criminal Rules, § 7.06[2]; Wright, Federal Practice and Procedure, Criminal, § 129, at pp. 282-283. *See also United States v. Gypsum*, 37 F. Supp. 398, 402 (D.D.C. 1941); *Singer v. United States*, 58 F.2d 74 (3d Cir. 1932); *United States v. Allied Chemical & Dye Corp.*, 42 F. Supp. 425, 428 (S.D.N.Y. 1941); *Fontana v. United States*, 262 Fed. 288 (8th Cir. 1919).

### **DEFENDANTS ARE PRESUMED IGNORANT OF THE FACTS**

This broader discovery function of the Bill of Particulars is necessitated by the "presumption of innocence," since "[B]eing presumed to be innocent, it must be assumed that he is ignorant of the facts on which the pleader founded his charges." *United States v. Smith*, 16 F.R.D. 372, 386 (N.D. Mo. 1954); Wright, Federal Practice and Procedure Criminal, § 129 at pp. 286-287. Furthermore, the more limited discovery allowed in criminal cases warrants a more liberal construction of Rule 7(f). Wright, Federal Practice and Procedure Criminal, § 129, at p. 281. *See also Walsh v. United States*, 371 F.2d 436, 437 (1st Cir. 1967).

The Advisory Committee Notes to Rule 7(f) suggest that a "wise use of [the court's] discretion" under the rule is illustrated in an "opinion by Justice Whittaker written when he was a district judge in *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954)." Judge Whittaker's opinion counsels that:

"[Rule 7(f)'s] proper office 'is to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial,' and when necessary for those purposes, is to be granted even though it requires 'the furnishing of information which in other circumstances would not be required because evidentiary in nature,' and an accused is entitled to this 'as of right.' ...It seems quite clear that 'where charges of an indictment are so general that they do not sufficiently advise defendant of the specific acts with which he is charged, a bill of particulars should be ordered.

This must necessarily be true when we realize that there is no discovery means in criminal cases, such as provided by the civil rules for civil cases, and that the only means open to a defendant, in a criminal case, for the securing of the details of the charge against him is that afforded by Rule 7(f) of the Federal Rules of Criminal Procedure.

'Bills of particulars have grown from very small and technical beginnings into most important instruments of justice... While they are not intended to advise a party of his adversary's evidence or theory, they will be required, even if that is the effect, in cases where justice necessitates it.'

Nor is it any answer to a motion for a bill of particulars for the government to say, 'The defendant knows what he did, and therefore, has all the information necessary.' This argument could be valid only if the defendant be presumed to be guilty. For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charges.' This conclusion seems to me, to be elementary, fundamental and inescapable." *United States v. Smith*, 16 F.R.D. 372, 374-375 (W.D. Mo. 1954)[citations omitted, emphasis in original].

## **SEVERANCE**

### **Court Has Inherent Power to Determine Scope of Trial**

While it is true that “[w]hether offenses or defendant’s are initially joined together for trial is a matter determined by the prosecuting attorney [or, in the case of an indictment, the prosecutor and the grand jury], courts have held that the Government has no “right” to seek severance, once they have joined defendants for trial. See *United States v. Cappello*, 209 F.Supp. 959, 960 (E.D.N.Y. 1962) (noting that the Government “is in a very poor position to request separate trials...without a strong showing of prejudice”); see also 2 LaFave, Criminal Procedure, §17.2.

More importantly, the District Judge maintains the inherent power to determine the scope of the pending trial, and order the defendants and offenses for trial in the manner that will best serve the interests of justice and judicial economy. FED. R. CRIM. P. 50. See *United States v. De Diego*, 511 F.2d 818 (D.C. Cir. 1975) (noting a court has power to order a severance to limit taint); *Link v. Wabash*, 370 U.S. 626 (1962) (stating the court has inherent power and “control...to manage their own affairs”). See e.g., *Schaffer v. United States*, 362 U.S. 511, 516 (1959); *United States v. Gray*, 567 F.2d 916, 919 (9<sup>th</sup> Cir. 1978) (noting the court has “inherent right and

duty to manage its own calendar”); *United States v. Henderson*, 489 F.2d 802, 806 (5<sup>th</sup> Cir. 1973), cert. denied, 417 U.S. 913 (1974); *Jackson v. United States*, 412 F.2d 149 (D.C. Cir. 1969); *United States v. Mack*, 249 F.2d 321 (7<sup>th</sup> Cir. 1957); *United States v. Cianciulli*, 476 F.Supp. 845 (D.C. Pa. 1979); *United States v. Sanders*, 200 F. Supp. 615 (W.D. La. 1967) (stating “in which the court granted severance to two defendants and established an order of trial, expressly reserving the right to change the sequence and to reconsolidate if appropriate”); *United States v. Guterma*, 181 F. Supp. 195 (S.D.N.Y. 1960) (stating the court has inherent power to regulate its criminal trial calendar). Only recently, the District Court for the Eastern District of Texas reordered Defendant for trial after severance ignoring the requests of both defense and prosecution. See Judge William W. Justice’s Order.

As the Fifth Circuit noted:

“The sequence in which trial would be held is in the discretion of the court.” *Byrd v. Wainright*, 428 F.2d 1017, 1022 (5<sup>th</sup> Cir. 1970).

More recently, the Eleventh Circuit reiterated:

“[T]hat both severance and the order of trials for co-defendants are committed to the discretion of the trial court.” *United States v. DiBernardo*, 880 F.2d 1216, 1228 (11<sup>th</sup> Cir. 1989).

The United States Supreme Court has held that severance should be granted under Rule 14 “if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Accord *United States v. Neal*, 27 F.3d 1035, 1045 (5<sup>th</sup> Cir. 1994), cert. denied, 115 S.Ct. 1165 (1995). Rule 14 of the Federal Rules of Criminal Procedure provides that:

“If it appears that a defendant...is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.” FED. R. CRIM. P. 14.

In *United States v. Carrillo-Barraza*, tried in 1987 and affirmed in the Fifth Circuit, *United States v. Carrillo-Barraza*, 853 F.2d 288 (5<sup>th</sup> Cir. 1988), and in *United States v. Hinson*, tried in 1990 in San Antonio, Texas, *United States v. Hinson*, SA,

No. 89 CR 57 (14), the Defendants were severed based upon judicial economy, and fairness to those charged. In the *Carillo-Barraza* and *Hinson* cases, the courts severed “non-drug defendants” [bankers and business owners] from the “drug defendants.”

Given serious “spill over effect” associated with the charges and co-defendants’ characteristics, a joint trial which would compromise the Defendants’ specific trial right and prevent the jury from making a reliable judgment about their guilt should be severed. *See Zafiro v. United States*, 113 S. Ct. 933, 938 (1993).

The Supreme Court has said that a severance should be granted:

“[W]hen evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant.” *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

The Eighth Circuit reversed a trial court’s denial of a severance motion because there was “a serious risk that the joint trial prevented the jury from making a reliable judgment about guilt or innocence.” *United States v. Baker*, 45 F.3d 330 (8th Cir. 1996). The defendant who moved for severance, Baker, was not named as a co-conspirator with a co-defendant, Wheeler. Rather, as in the case at bar, Baker was alleged to have aided and abetted Wheeler. *United States v. Baker*, 45 F.3d 330 (8th Cir. 1996). The Eighth Circuit held that Baker was unfairly prejudiced by the admission of prejudicial and inflammatory evidence against Wheeler that “would not have been admissible against [Baker, if Baker] were tried alone....” *United States v. Baker*, 45 F.3d 330 (8<sup>th</sup> Cir. 1996). The Eighth Circuit reasoned that:

“Even though the issues and evidence were relatively straightforward, the risk of substantial prejudice from the spill-over effect of the conspiracy evidence and the documents was too high to be cured by less drastic measures, such as the limiting instructions given by the district court.” *United States v. Baker*, 45 F.3d 330 (8th Cir. 1996).

In light of the foregoing, and because the court could not find that “the jury was able to compartmentalize the evidence as it related to each defendant,” the court reversed Baker’s conviction. *United States v. Baker*, 45 F.3d 330 (8th Cir. 1996).

In short, the unfairness of a joinder in certain circumstances is manifest. The jury might hear days of evidence that the law forbids them from considering in their

deliberations concerning the charges relating to your client. In the face of such a deluge of irrelevant and highly prejudicial evidence, there is no limiting instruction strong enough to protect his or her right to a fair trial or to permit the jury to make a reliable judgment about their guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *United States v. Baker*, 45 F.3d 330 (8th Cir. 1996).

### **“EXTRAORDINARILY INTRICATE LIMITING INSTRUCTIONS” WOULD RENDER A COURT’S TASK IMPOSSIBLE**

As one court held in granting such a severance to a defendant not intercepted or implicated in “the voluminous tape recordings which are central to the government’s case”, the “admissibility decisions” and requirement of “extraordinarily intricate limiting instructions”, render the Court’s task “virtually impossible”. *United States v. Gallo*, 668 F. Supp. 736, 752 (E.D.N.Y. 1987). More importantly, “[i]t would be wholly unreasonable for a jury to ‘perform the intellectual feat’ in a joint trial,” under such circumstances. *See id.*; *see also Gray v. Maryland*, 118 S. Ct. 1151, 1998 U.S. Lexis 1605 at \*10 (March 9, 1998).

Although the Fifth Circuit has suggested in prior cases that limiting instructions cure any risk of prejudice in the context of an inconsistent defense, *United States v. Stouffer*, 986 F.2d 916, 924 (5th Cir. 1993), as the Supreme Court recently noted in another context,<sup>5</sup> **“despite the limiting instruction there are in some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant that the practical and human limitations of the jury system cannot be ignored.”** *Gray v. Maryland*, 118 S.Ct. 1151, 1998 U.S. Lexis 1605 at \*10 (March 9, 1998).

Recently reversing a case, the Fifth Circuit noted that an instruction would not afford jointly tried defendants a fair trial when much of the evidence introduced at trial was irrelevant to the Defendants and so highly prejudicial to their case as to undermine their right to a fair trial. *See United States v. Cortinas*, No. 96-50512 (5th Cir. May 22, 1998) (reversing the conviction and stating where defendants involved in a marijuana distribution conspiracy were tried with other members of the conspiracy who were also members of a boot camp organization for Bandido Nation Motorcycle Club). A severance should have been granted.

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### **When Joinder Will Prevent the Defendant from Offering**

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<sup>5</sup>In the context of redacted confessions.

## **Exculpatory Evidence Essential to His Defense**

The Supreme Court has said the “a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial.” *Zafiro v. United States*, 506 U.S. 534, 539 (1993) (citing *Tifford v. Wainwright*, 588 F.2d 95 (5th Cir. 1979) (per curiam)). Accord *United States v. Neal*, 27 F.3d 1035, 1046 (5th Cir. 1994). The Fifth Circuit has long recognized that a joinder that precludes a defendant from offering essential exculpatory evidence violates due process. *e.g.*, *Tifford v. Wainwright*, 588 F.2d 95 (5th Cir. 1979) (per curiam); *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970).

Before a severance is granted based on the need for essential co-defendant testimony, the Fifth Circuit requires that a defendant establish “a bona fide need for the co-defendant’s testimony, the substance of testimony, the exculpatory nature and effect of the testimony, and that the co-defendant would in fact testify.” Accord *United States v. Neal*, 27 F.3d 1035, 1047 (5th Cir. 1994); accord *United States v. Dillman*, 15 F.3d 384, 393 (5th Cir.) cert. denied, 115 S.Ct. 183 (1994). When these requirements are met, it is reversible error not to grant a severance. *e.g.*, *United States v. Neal*, 27 F.3d 1035, 1047 (5th Cir. 1994); *United States v. Dennis*, 645 F.2d 517, 521-22 (5th Cir. 1966), cert. denied, 454 U.S. 1034 (1981); *Abbot v. Wainwright*, 616 F.2d 889, 890 (5th Cir. 1980) (per curiam); *Tifford v. Wainwright*, 588 F.2d 954, 956-57 (5<sup>th</sup> Cir. 1979); *Byrd v. Wainwright*, 428 F.2d 1017, 1019-23 (5th Cir. 1970); *United States v. DiBernardo*, 880 F.2d 1216, 1228-29 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986).

## ***BRUTON SEVERANCE***

Federal Rule of Criminal Procedure Rule 14 expressly provides for the discovery of “confessions” or “statement” made by the co-defendant’s which the Government intends to use at trial. FED. R. CRIM. P. 14. Where the Government has interviewed one or more of the co-defendants any statements made by co-defendants, use of such statements may be admissible at trial against the co-defendant who made them under Rule 804(b)(3) of the Federal Rules of Evidence. However, these statements are not admissible against your client. *Bruton v. United States*, 391 U.S. 123 (1968). Since it is anticipated that the co-defendants who made the statements will assert their Fifth Amendment rights not to testify, your clients will be deprived of their right to confront and cross-examine the witnesses against in violation of the Fifth and Sixth Amendments to the United States Constitution.

Redacting your client's name from such statements does not render them admissible. *Lilly v. Virginia*, 1999 WL 373136 (1999).

Importantly, those statements which implicate co-defendants are inherently unreliable, *Lee v. Illinois*, 476 U.S. 530 (1956); *Williamson v. United States*, 129 L.Ed.2d 476 (1994), and become even less probative when an offer of leniency is made in exchange for statements which inculcate another. The minimal probative value which can be accorded these statements is far outweighed by the prejudicial impact described above. Given this, such statements could not be properly confronted nor could their declarants be cross-examined.

“When evidence is offered against one defendant in a joint trial, determination of admissibility against the defendant resolves only the Rule 402 balancing as to the him, i.e., that the probative value of the evidence in his ‘case’ is not substantially outweighed by unfair prejudice to him. But if the evidence creates a significant risk, of prejudice to the co-defendant, a further issue arises as to whether the evidence is admissible in a joint trial, even though limited by cautionary instructions to the ‘case’ of a single defendant. That issue can be considered either as a question of admissibility of evidence or severance. If the justification for a joint trial is outweighed by the prejudice to the co-defendants, the trial court can confront the co-defendants, the trial court can confront the prosecutor with the choice of foregoing either the evidenced or the joint trial.”

*United States v. Figueroa*, 689 F.2d 934 (2d Cir. 1980).

If the government insists upon all of the co-defendants together, it must be denied to offer any of such incriminating statements at a joint trial. The government is not entitled to offer the co-defendants' statements at the expense of jointly tried Defendants' constitutional rights to confrontation and fairness.

## **DISCOVERY**

### **Rule 17(c)**

The rules provide for the return before trial of items subpoenaed. Rule 17(c) provides:

“A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated

therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.”

Defendants may move for an entry of an order under Rule 17 (c) granting leave for subpoenas *duces tecum* *ex parte* and *in camera* to preserve the integrity of the defense investigation, to avoid the revelation, of work product doctrine material and to avoid the revelation of tactical defense decisions in that regard. *See* Rule 501 Federal Rules of Evidence and Rule 26(b) Federal Rules of Civil Procedure.

In order to justify the issuance of the subpoenas, the Defendants must allege the following:

1. Defendants believe that the materials sought herein are in the possession, custody or control of the individual addressed in the subpoena *duces tecum*.

2. Defendants would show the Court that the information sought therein is material and integral to the defense of the Defendant.

3. The requested documents are evidentiary, relevant, and are requested in good faith. The subpoena therefore is specific as to the requested matter. It is anticipated that if all or portions of the matters sought are offered into evidence, they will be found to be admissible; and that counsel have been as specific as possible in the circumstances. *United States v. Nixon*, 418 U.S. 683, 700 (1974).

4. Counsel for Defendants would further show the Court that these material are not available from any other source. *United States v. Eden*, 659 F.2d 1376 (9th Cir. 1981).

After a proper showing, rule 17(C) provides that the material sought should be made available to Defendants’ counsel for inspection prior to trial in order for Defendants to properly prepare for trial. Pre-trial production of the *duces tecum* material will eliminate the possibility of delay at the trial of this matter, and will facilitate and expedite trial. *Gavineon v. United States*, 358 F.2d 761 (5th Cir.), cert. denied, 185 U.S. 823 (1966); *see also United States v. Winkler*, 17 F.R.D. 213 (D.C.R.I. 1955).

## ***EX PARTE* MOTION**

Although *U. S. v. Hart*, 826 F. Supp. 380, 381 (D. Colo. 1993) acknowledged a Defendant's right to prepare for trial without the scrutiny of the prosecutor, in the context of a Rule 17(b) subpoena it left unanswered a more difficult question. How can a defendant (indigent or monied) obtain documents under Rule 17(c)<sup>6</sup> without scrutiny by the prosecutor?

### **WORK PRODUCT ENTITLED TO PROTECTION FROM ONE'S ADVERSARY**

The attorney-client privilege protects the legal advice given by an attorney and the communication by the client to the attorney.

"...[The privilege exists to protect not only the giving of professional advice ... but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn v. United States*, 449 U.S. 383, 390, 66 L.Ed.2d 584, 592 (1981) [citing *Trammel v. United States*, 445 U.S. 40, 63 L.Ed.2d 186(1980)].

Work product immunity is broader and distinct from the attorney-client privilege, it cloaks more than confidential communications with the client, it protects:

"documents and tangible things' that are prepared in anticipation of litigation or trial. Included in this amorphous category are trial preparation documents that contain the fruits of the attorney's investigative endeavors and any compendium of relevant evidence prepared by the attorney. Also protected ... are the attorney's mental impressions, opinions and legal theories." *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977).

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<sup>6</sup>Relevance, specificity, and admissibility regarding the items subpoenaed are discussed below.

## **WORK PRODUCT DOCTRINE PROTECTS ADVERSARY PROCESS ITSELF**

The doctrine focuses upon the integrity of the adversary process itself, safeguarding the vigorous representation of a client's cause by counsel from the debilitating effects of exposure to one's adversary. *Jordan v. United States Dept. of Justice*, 591 F.2d 753 (D.C. Cir. 1978); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980); *Hercules v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977).

As the Supreme Court noted in *United States v. Nobles*, 422 U.S. 225 (1975):

"In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper presentation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course in interview, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyers'. Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *United States v. Nobles*, 422 U.S. 225, 237 (1975).

The delicately balanced adversary process could hardly survive such a hostile environment. Quoting Justice Judson, the Supreme Court in *Upjohn v. United States*, 449 U.S. 383 (1981) noted:

"Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary." *Upjohn v. United States*, 449 U.S. 383, 396 (1981).

Mental impressions of the lawyer are given heightened protection. *Upjohn v. United States*, 449 U.S. 383, 400, 66 L.Ed.2d 584, 598 (1981)[*"Rule 26 accords special protection to work product revealing the attorney's mental processes"*]. Such

work product materials can reveal, by the mere selection of what appears therein, the lawyer's impression about how certain evidence relates to issues. *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985).

The Court in *United States v. Reyes*, 162 F.R.D 468, 470 (S.D.N.Y. 1995), recognized these concerns, among others, and held that 17(c) subpoena procedures could be conducted ex parte.

“There are strong policy reasons in favor of an ex parte procedure. If a source of evidence were to be identified before the issuance of a subpoena, the source or the integrity of the evidence might be imperiled. In addition, a party may have to detail its trial strategy or witness list in order to convince a court that the subpoena satisfies the Nixon standards of specificity, relevance, and admissibility. If a full adversary hearing was required to obtain a subpoena duces tecum, a party would be forced to reveal this information to the opposing side, a result which would occur even if a court declined to issue the subpoena.” *United States v. Reyes*, 162 F.R.D. 468, 470 (S.D.N.Y. 1995).

*United States v. Reyes*, 162 F.R.D. 468, 470 (S.D.N.Y. 1995) rejected the idea that because a court could direct that subpoenaed material be provided to the adverse party the application could not be ex parte.

Although the court in *United States v. Hart*, 826 F. Supp. 380, 381-381 (D. Colo. 1993) disagreed with this interpretation of 17(c)'s discretionary production provision, it recognized that Rule 17(c) was a device for the use of the moving party, citing *United States v. Murray*, 297 F. 2d 812, 821 (2nd Cir. 1961), cert. denied, 369 U. S. 828, 82 S. Ct. 845, 7 L. Ed. 2d 794 (1962) with approval. Thus, *United States v. Hart*, 826 F. Supp. 380 (D. Colo. 1993) skirts the work product doctrine and attorney-client privilege issues raised above. These issues require, here, that the Rule 17(c) application procedure be conducted *ex parte*.

*See also United States v. Jenkins*, 895 F. Supp. 1389, 1397 (D. Hawaii, 1995) [upholding ex parte procedure]. *Cf. United States v. Florack*, 838 F. Supp. 77, 78-79 (W.D.N.Y, 1993) [indigent defendant may obtain a 17(c) subpoena through an *ex parte* procedure with *dicta* that monied defendant may also do so]; *United States v. Edwards*, 142 F.R.D. 177, 178 (M. D. Fla. 1992).

*United States v. Urlacker*, 136 F.R.D. 550 (W.D.N.Y. 1991), *aff'd* on other grounds, 979 F.2d 935 (2d Cir. 1992), is inapposite. The Defendant there sought

pretrial production of documents for a pretrial suppression hearing, not for trial. Also, the Defendant asked the court to make the subpoenaed materials available to both sides, obviating the need for an *ex parte* proceeding.

### **RELEVANCE, ADMISSIBILITY, AND SPECIFICITY**

The Supreme Court set out a four part test for showing a subpoena should issue under Rule 17(c). *United States v. Nixon*, 418 U. S. 683, 699-700, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) requires a showing that:

1. Documents are evidentiary and relevant;
2. That they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
3. That the party cannot properly prepare for trial without such production and inspection in advance of the trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
4. That the application is made in good faith and is not intended as a general ‘fishing expedition.’

“Rule 17(c) is a statutory method of implementation of the Sixth Amendment.” *United States v. Echeleo*, 222 F. 2d 144, 152, cert. denied, 350 U. S. 828, 100 L. Ed. 739, 76 S. Ct. 176, and reh’g denied, 350 U. S. 906, 100 L. Ed. 796, 76 S. Ct. 191.

The Court should permit Defendants to issue subpoenas pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure and an *ex parte* procedure to afford the Defendants their Constitutional rights and to promote the efficient conduct of trial.

### **OPEN AND PUBLIC RECORDS ACT REQUESTS**

Information may also be obtained by use of the Freedom of information act. The request is made pursuant to the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552 et seq. The letter should specifically seek the item or portion of the document desired. It should recognize the time and money expenditure involved. Such requests must be made far in advance of trial.

If the request is denied, in whole or in part, ask that the agency specify which exemption(s) is (are) claimed for each document or portion denied and provide a complete itemized inventory and a detailed factual justification of the total or partial

denial of each document. Also ask the agency to specify the number of pages in each document, and the total number of pages pertaining to this request.

If any material is to be redacted pursuant to a valid FOIA exemption, ask the agency to “black out” the material rather than “white out” or “cut out”. Expect, as provided by FOIA, that the non-exempt portions of all documents requested will be released.

Pursuant to the expedited release provisions of Section 552(a)(6)(E) of Title 5, United States Code, that the request is true and correct to the best of your knowledge.

Pursuant to the Texas Public Information Act, Gov't Code ch. 552, you may request an opportunity to review and copy all files, records, and any other documents in the possession of the a state, county or local entity regarding public records.

For the purposes of your request, the terms "records" and "documents" should be described as including, without limitation, any and all written, typed, printed, recorded, graphic computer generated, or other matter of any kind from which information can be derived, whether produced, reproduced, or stored on paper, cards, tapes, films, electronic facsimiles, computer storage devices or any other medium.

### **DISCOVERY MOTION OR LETTER**

What follows is an example discovery request:

#### **DISCOVERY REQUESTS**

Therefore, Defendant requests, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the "due process" clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), inspection and copying of the following which are known to be or are in the possession of the Government or any of its agents or which are in the possession of the State of Texas, and other states or countries involved with the investigation related to this cause, or any of their agents whether employees of any state, county or city law enforcement organization or domestic or foreign governmental agencies or which through due diligence would become known from the investigating officers, or witnesses or persons having knowledge of this case:

**1. NOTICE OF EVIDENCE SUBJECT TO SUPPRESSION:**

**REQUEST:** NOTICE OF THE GOVERNMENT'S INTENTION TO USE ANY EVIDENCE (IN ITS CASE-IN-CHIEF AT TRIAL) WHICH THE DEFENDANT MAY BE ENTITLED TO SUPPRESS UNDER RULE 4(a), 12 OR 41 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, THE FOURTH, FIFTH OR SIXTH AMENDMENTS OF THE U.S. CONSTITUTION, AND, IF TEXAS STATE AGENTS OR LAREDO POLICE WERE INVOLVED, 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AND ARTICLE 1, §§ 9 AND 10 OF THE TEXAS CONSTITUTION.

**AUTHORITY:**

Rule 12(d) of the Federal Rules of Criminal Procedure provides for notice of evidence "at the arraignment or as soon thereafter as is practicable ...in order to afford an opportunity to move to suppress evidence..." Defendant now requests such notice in order to comply with Rule 12(b)(3), F.R.Cr.P.'s requirement that motions to suppress be raised prior to trial.

**2. PRETRIAL NOTICE OF OTHER CRIMES OR UNCHARGED MISCONDUCT:**

**REQUEST:** ANY AND ALL "OTHER CRIMES" OR UNCHARGED MISCONDUCT WHICH THE GOVERNMENT INTENDS TO OFFER EITHER IN ITS CASE-IN-CHIEF FOR IMPEACHMENT OR IN REBUTTAL.

**AUTHORITY:**

Counsel will be unable to specifically object to the admission of such "other crimes" evidence, and the Court will likewise be unable to rule, on motions in limine, until the Government discloses those "other crimes" or uncharged misconduct it intends to attempt to introduce or insinuate into evidence. The Federal Rules of Evidence mandate pretrial disclosure of "other crimes, wrongs, or acts" and the purpose for which the Government intends to offer the same in the interest of fairness and to avoid surprise. The rule recognizes the importance of resolving issues of admissibility early. *See* notes of Advisory Committee, 1991 Amendment, Federal Rule of Evidence 404.

### **3. DEFENDANT'S STATEMENTS:**

**REQUEST:** ANY AND ALL WRITTEN OR RECORDED STATEMENTS MADE BY OR PURPORTED TO HAVE BEEN MADE BY THE DEFENDANT TOGETHER WITH THE SUBSTANCE OF ANY STATEMENT ATTRIBUTED TO ANY UN-INDICTED CO-DEFENDANT WHETHER OR NOT THE GOVERNMENT INTENDS TO OFFER SAME IN EVIDENCE AT THE TRIAL IN THE ABOVE ENTITLED AND NUMBERED CAUSE, INCLUDING BUT NOT LIMITED TO ANY AND ALL DOCUMENTS, INSTRUMENTS OR FORMS PREPARED BY, SIGNED, REVIEWED, OR OTHERWISE ADOPTED BY THE DEFENDANT AS HIS OWN STATEMENTS AND THE PORTION OF ANY WRITTEN RECORD CONTAINING THE SUBSTANCE OF SUCH STATEMENTS. [RULE 16(a)(1)(A), F.R.Cr.P.].

#### **AUTHORITY:**

#### **WRITTEN AND RECORDED STATEMENTS**

Statements of the Defendant are discoverable pursuant to the express provisions of Rule 16(a)(1)(A), F.R.Cr.P. Disclosure by the Government of the contents of any statement attributable to the Defendant is necessary in order for him to adequately prepare for trial and for counsel to intelligently advise said Defendant whether he should testify or invoke his privilege under the Fifth Amendment to the Constitution. *Johnson v. United States*, 344 F.2d 163 (D.C. Cir. 1964); *Poe v. United States*, 233 F.Supp. 173 (D.C. Cir. 1964), *aff'd.*, 352 F.2d 639 (1965); *Inge v. United States*, 356 F.2d 345 (D.C. Cir. 1966).

So long as the Defendant knew the person doing the questioning was a government agent, he is entitled to his statements. Defendant specifically requests any and all statements he allegedly made to any FBI agent or government agent. Any responses to Miranda warnings comprise the Defendant's statements under Rule 16(a)(1) and must be produced. *United States v. Mc Elroy*, 697 F.2d 459 (2d Cir. 1982).

Discovery of statements or confessions of the Defendant under Rule 16 (a)(1) of the F.R.Cr.P. not only include written or recorded statements made by a defendant to Government or State agencies but to other individuals as well. *United States v. Baker*, 262 F. Supp. 657, 671-2 (D.C. Cir. 1966); *Davis v. United States*, 413 F.2d 1226, 1230-31 (5th Cir. 1969); *United States v. Lubomski*, 277 F. Supp. 713, 719-22 (N.D. Ill. 1967).

Discovery of the Defendant's statements under Rule 16(a)(1) include not only verbatim statements made by the Defendant but also any summaries of Government or State reports setting out the substance of the Defendant's statements or statements attributable to them. Federal Rule of Evidence 16(a)(1)(A) [effective Dec. 1, 1991]. See also *United States v. Federman*, 41 F.R.D. 339 (S.D. N.Y. 1967); *United States v. Scharf*, 267 F.Supp. 19 (S.D. N.Y. 1967); *United States v. Hasidwar*, 299 F. Supp. 1053 (S.D. N.Y. 1969); *United States v. Jefferson*, 445 F.2d 247 (D.C. Cir. 1971) (including notes of names and dates of interviews with alibi witnesses); *United States v. Curry*, 278 F. Supp. 508 (N.D. Ill. 1967); *United States v. Morrison*, 43 F.R.D. 516 (N.D. Ill. 1967); *United States v. Pilnick*, 267 F. Supp. 791, 801 (S.D. N.Y. 1967); *United States v. Reid*, 43 F.R.D. 520 (N.D. Ill. 1967); *United States v. Feinberg*, 371 F. Supp. 1205 (N.D. Ill.), aff'd in part rev.'d in part, 502 F.2d 1180 (7th Cir. 1974), cert denied, 420 U.S. 926 (1975). And the Court, pursuant to Rule 16(e), of the F.R.Cr.P., may enter a protective order requiring a partial disclosure of only those portions of the government reports or summaries which relate to a summary of a defendant's oral statements. Moore's Federal Practice, § 16.03(2); Wright, Federal Practice and Procedure, Criminal, § 253, at p. 506; *United States v. Garrett*, 305 F. Supp. 267 (S.D. N.Y. 1969); ABA Standards, Discovery and Procedure Before Trial, Approved 1970, at p. 62.

These statements must be produced whether or not the government intends to introduce them at trial. See Notes to Rule 16 Federal Rules of Criminal Procedure (1991 Amendment).

The Defendant requests that the government interview all of its agents involved in this case to ascertain whether or not they spoke to the Defendant. Non disclosure of Defendant's statement's pretrial could result in reversal of this case. *United States v. Ible*, 630 F.2d 389, 396 (5th Cir. 1980).

#### **4. "CATCH-ALL" HEARSAY EXCEPTIONS:**

**REQUEST:** THE SUBSTANCE OF ANY HEARSAY STATEMENTS THE GOVERNMENT INTENDS TO OFFER UNDER RULES 803(24) OR 804(b)(5) OF THE FEDERAL RULES OF EVIDENCE.

#### **AUTHORITY:**

Defendant intends to object to the proffer of hearsay testimony offered at his own or a joint trial and intends to move to suppress such testimony at a hearing under Rule 104(a) of the Federal Rules of Evidence. Where the Government seeks to offer

such hearsay testimony under the catch-all "other exceptions" of Rules 803(24) and 804(b)(5) these Rules expressly require notice of same prior to trial.

"A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party SUFFICIENTLY IN ADVANCE OF THE TRIAL OR HEARING to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant." Rules 803(24); 804(b)(5), Federal Rules of Evidence [emphasis added].

Therefore, pursuant to the advance notice requirement of such rules, the Government is required to disclose the substance of any statements it intends to offer and the Defendant hereby makes demand for same.

#### **5. CO-CONSPIRATOR'S HEARSAY EXCEPTIONS:**

**REQUEST:** THE SUBSTANCE OF ANY AND ALL STATEMENTS WHICH THE GOVERNMENT ALLEGES ARE ADMISSIBLE AS STATEMENTS OF A CO-CONSPIRATOR MADE DURING THE COURSE AND IN FURTHERANCE OF THE CONSPIRACY. [RULE 801(d)(2)(E), F.R.Ev.; Rule 16(a)(1)(A), F.R.Cr.P.].

#### **AUTHORITY:**

Statements of co-conspirators made during the course of the conspiracy and in furtherance of the claimed objectives of that conspiracy may be exceptions to the hearsay rule and admissible pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence. The rationale underlying that rule is that each co-conspirator is the "agent" of the other once the conspiracy is shown to exist. See: Advisory Committee's Notes, Rule 801(a)(2)(E). And as a Defendant's agent's statements made by co-conspirators within the scope of that agency and in furtherance of same are said to be impliedly authorized by each Defendant as principal, they are therefore admissions by each Defendant. Given that such co-conspirator's statements are admissible because they are treated as statements of or adopted by the Defendant, then such statements should be discoverable as that Defendant's own pursuant to Rule 16(a)(1)(A) on the same theory. *United States v. Agnello*, 367 F. Supp. 444, 448-9 (E.D. N.Y. 1973); *United States v. Turkish*, 458 F. Supp. 874, 882 (S.D. N.Y. 1978), *aff'd.*, 623 F.2d 769 (2d Cir. 1980) [requiring disclosure of statements where not made by prospective government witness]; *United States v. Fine*, 413 F. Supp. 740, 742-43 (W.D. Wis. 1976); *United States v. Mays*, 40 F. Supp. 573, 573-6 (E.D. Tex. 1978); *United States*

*v. Thevis*, 84 F.R.D. 47 (N.D. Ga. 1979); *United States v. Brighton Building and Maintenance Co.*, 435 F. Supp. 222 (N.D. Ill. 1977), *aff'd.*, 598 F.2d 1011 (7th Cir. 1979); *Cf. United States v. O-Strer*, 481 F. Supp. 407 (S.D. N.Y. 1979); *United States v. Hall*, 424 F. Supp. 508, (D. Okla. 1975), *aff'd.*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 918 (1976).

## **6. BRUTON STATEMENTS**

**REQUEST:** ANY “STATEMENTS” THAT MAY BE ADMISSIBLE AGAINST ANY INDICTED OR UNINDICTED CO-DEFENDANT.

### **AUTHORITY:**

Any statements by alleged co-conspirators or co-defendants that may be admissible against co-defendants, but not admissible against Defendant. In order to effectively exercise his rights to confront and cross examine the witnesses against him under the Sixth and Fourteenth Amendments to the United States Constitution, the Defendant is requesting pretrial disclosure of all statements that may constitute statements. *Bruton v. U. S.*, 391 US 123 (1968). Alternatively, Defendant requests such statements be produced in camera for this Court’s inspection as provided by Federal Rule of Criminal Procedure 14.

## **7. DEFENDANT’S PRIOR RECORDS:**

**REQUEST:** A COPY OF THE DEFENDANT’S PRIOR CRIMINAL RECORDS, IF ANY. [RULE 16(a)(1)(B), F.R.Cr.P.].

### **AUTHORITY:**

Rule 16(a)(1)(B), F.R.Cr.P., authorizes in mandatory terms the production by the Government of Defendant’s prior criminal records.

## **8. DOCUMENTS AND TANGIBLE OBJECTS:**

**REQUEST:** ANY AND ALL INDICTMENTS, TRANSCRIPTS, CASE FILES, MANUALS, BOOKS, NOTEBOOKS, LEDGERS, BANK STATEMENTS, REPORTS, MEMORANDUMS, SUMMARIES, PAPERS, DOCUMENTS, CREDIT CARD RECEIPTS, AUTOMOBILE OR AIR PLANE REGISTRATION, TAPE RECORDINGS, HOTEL/MOTEL REGISTRATIONS, PHOTOGRAPHS, OR OTHER TANGIBLE OBJECTS WHICH THE GOVERNMENT MAY INTEND TO USE AS EVIDENCE IN THEIR CASE-IN-CHIEF AT TRIAL OR WHICH ARE

OBTAINED FROM OR ALLEGED TO BELONG TO OR WERE MADE OF THE DEFENDANT OR WHICH THE GOVERNMENT PLANS TO OFFER IN EVIDENCE IN THIS CASE OR WHICH ARE MATERIAL TO THE PREPARATION OF THE DEFENSE.

**8b. MORTGAGE FRAUD:**

**IN MORTGAGE FRAUD CASES ASK FOR:**

In mortgage fraud cases, the defenses that do not work include the complaints that the bank gave the defendant the money and that the lender included assets in the loan documents that the applicant defendant did not see. The prosecution will produce witnesses that will testify that the defendant read, initialed and signed the loan documents. While there is plenty of blame to go around for the sub-prime mortgage crisis, this also will fail as a defense. Counsel and the defendant must accept and acknowledge that the defendant obtained loan monies and owes them to the bank. The defense best employed in these cases is that there was no intent to defraud. In essence, it amounts to demonstrating in every way possible that the lender was fully aware of your client's financial condition and was complicit in any inaccuracies in the loan documentation.

One starting place is in the lending guidelines from the FDIC which encourages lenders to consider the credit counseling of loan applicants as a favorable factor in granting a loan. These guidelines also provide that an unstable job history should not discourage banks from making a home loan.

Make certain that you obtain all correspondence from the loan officer or broker and the bank's underwriting department. These materials will usually show full knowledge of your client's financial condition at the time of the loan application. Ask for the entire loan file, communications of the bank officers and employees concerning your client's financial statement, net worth or loan. Communications of these individuals with the FBI, FDIC, IRS, DOJ and United States Attorney's office regarding the bank, your client or the loan. Also request the bank's lending and underwriting guidelines, its policies and procedures manual, its Commercial Real Estate Credit Policy and all local and federal regulations and commercial real estate lending compliance guidelines applicable at the time of the loan in question. Also, ask for any Lexis Nexis or Westlaw or other inquiries checking the background of borrowers during the time. Further, ask for the personnel files of the persons involved

in our client's loan, as well as, any communications or documents regarding disciplinary action taken with respect to the loan.

Further, ask for any internal or external analysis or reviews of the loan transaction. And, ask for the bank officers' and employees' compensation packages and letters of reference.

The loss calculation in such cases will also be significant in the sentencing decision. The formula for loss should begin with the loan amount, minus principal paid, minus value of the collateral.

A current appraisal for the property will be relevant for this purpose. But an appraisal of the property, at the time the loan was made, is relevant to show that it formed a basis for lending the money in the first place independent of the defendant's representations. This also may be used in the "credit against loss" at sentencing.

Todd Foster, a lawyer in Tampa, Florida, was able to use news reports at the time of his client's loan that the bank valued the property at an amount higher than face value of the loan. Counsel should argue that the unforeseen fluctuations in the local housing market cannot reasonably be used to calculate loss. Point out that when the housing market recovers, the defendant will not receive a reduction in a sentence. *U.S. v. Ohio*, 429 F.3d 540, 545-46 (5th Cir. 2005)[discussing that a defendant must be directly responsible for the loss]. *See also U.S. v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); Jenness, Loss in the Air Will Not Do, 15 No. 8 Bus. Crimes Bull. 1 (April 2008).

#### **AUTHORITY:**

Rule 16(a)(1)(C), F.R.Cr.P., authorizes the discovery of all books, papers, documents and tangible objects in the possession or control of the Government.

The objects requested are discoverable since any such items upon which the Government relied in obtaining an indictment against the Defendant is of necessity "material" to the cause and the preparation of an adequate defense, *United States v. Pilnick*, 267 F. Supp. 791, 801 (S.D. N.Y. 1967); *United States v. Wolfson*, 294 F. Supp. 267, 277 (D. Del. 1968); *United States v. Reid*, 43 F.R.D. 520, 522 (N.D. Ill. 1967); *United States v. Aadal*, 280 F. Supp. 859, 861 (S.D. N.Y. 1967), *aff'd*, 407 F.2d 381 (2d Cir), cert denied, 395 U.S. 967 (1969); *United States v. Conder*, 423 F.2d 904, 911 (6th Cir.), cert denied sub nom, 400 U.S. 958 (1970) and any that are "intended for use by the Government as evidence in chief at

the trial" or were "obtained from or [will be alleged to] belong to the Defendants" are required to be produced pursuant to the mandatory terms of Rule 16(a)(1)(C), F.R.Cr.P.

Counsel also requests photographic arrays, photo books, newspaper photos and other photographic displays used during witness interviews by government agents, 16(a)(1)(C), F.R.Cr.P.

In *Simmons v. United States*, 19 L.Ed.2d 1247, 1253 (1968), the Supreme Court warned:

"It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is some way emphasized." *Simmons v. United States*, 19 L.Ed.2d 1247, 1253 (1968).

## **9. WITNESS NAMES AND ADDRESSES:**

**REQUEST:** THE NAMES AND ADDRESSES OF PERSONS WHO HAVE KNOWLEDGE PERTAINING TO THIS CASE OR WHO HAVE BEEN CONTACTED BY THE GOVERNMENT OR THEIR AGENTS IN CONNECTION WITH THIS CASE.

### **AUTHORITY:**

The names of persons with knowledge of the facts relevant to the case is the most critical information obtainable for preparation of an adequate defense and to ensure a fair trial. In light of the authority given the Courts under Rule 16(d)(1), F.R.Cr.P. to impose protective orders against any intimidation of Government witnesses, it would appear unconscionable to deny the Defendant the names of persons known to the Government who have knowledge of facts relevant to the case.

Accordingly, the names of Government witnesses, or other persons having knowledge of facts regarding the case, should be discoverable by the defense prior to trial. *United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Ill. 1971); *United States v. Palmisano*, 273 F. Supp. 750, 752 (E.D. Pa. 1967); *United States v. Mocerri*, 359 F. Supp. 431 (N.D. Ohio, 1973); *United States v. Hardy*, Slip Opinion No. CR86969 (D.D.C. 1968); *United States v. Baum*, 482 F.2d 1325 (2d Cir. 1973); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

### **RIGHT TO INTERVIEW KNOWN WITNESSES**

Where witnesses, particularly eye-witnesses are known to the defense they should be made available to both sides. *United States v. Brown*, 555 F.2d 407, 425 (5th Cir. 1977); *United States v. Murray*, 492 F.2d 178, 194 (9th Cir. 1973), cert denied sub nom, *Roberts v. United States*, 419 U.S. 854 (1974); *United States v. Long*, 449 F.2d 288, 295 (8th Cir.), cert denied sub nom, *Tocco v. United States*, 405 U.S. 964 (1972); *United States v. Gregory*, 369 F.2d 185 (D.C. Cir. 1966); *United States v. Walton*, 602 F.2d 1176, 1179-1180 (4th Cir. 1979).

"Witnesses, particularly eye-witnesses to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them." *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

Even when those witnesses are in protective custody. *United States v. Walton*, 602 F.2d 1176 (4th Cir. 1979). In *Walton*, the Fourth Circuit held that even where the government felt "...it necessary to place the witnesses in protective custody", it remains "the duty of the trial court to ensure that counsel for defense has access to the secluded witness under controlled arrangements", at p. 1180 noting:

"A witness is not the exclusive property of either the government or a defendant; a defendant is entitled to have access to any prospective witness, although in the end the witness may refuse to be interviewed." *United States v. Walton*, *Supra*, at pp. 1177-8.

One Court recently even required Government counsel to send each Government witness a letter advising each witness that:

"I suggest, therefore, that it is in your best interests and that of the court to cooperate with the lawyers in the case as they strive to determine the

facts and decide whether your testimony will be required." *See United States v. Rogers*, 642 F. Supp. 934, (D.Colo. 1986).

The Defendant in this cause respectfully requests such an order. And, where the Government has knowledge of individuals whose testimony might be of benefit to the defense, either in exculpation or mitigation, the Government is under a constitutional obligation to disclose the names of such individuals. *See ex rel. Mier v. Wilkins*, 326 F.2d 135 (2d Cir. 1964); *United States v. Houston*, 339 F. Supp. 762 (N.D. Ga. 1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

The names and addresses of individuals who the Government intends to call as witnesses at the trial is necessary in order to afford the Defendant and his counsel effective confrontation and cross-examination of these witnesses as guaranteed by the Sixth Amendment to the Constitution of the United States, *Pointer v. Texas*, 380 U.S. 400 (1965), since effective confrontation and cross-examination requires that a Government witness:

"...be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood ...that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment ...and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased." *Alford v. United States*, 282 U.S. 287 (1931).

It is critical, therefore, in order to effectuate meaningful confrontation and cross-examination that the identity of the witnesses be disclosed well in advance of trial. When "...the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth through cross-examination' must necessarily" begin with the witnesses' name and address. *Smith v. Illinois*, 690 U.S. 129 (1968). It is the "witnesses' name and address [which] open countless avenues of in-court examination and out-of-court investigation". *Smith v. Illinois*, 690 U.S. 129 (1968). And this necessary "out-of-court investigation" cannot be conducted unless the names and addresses of these witnesses are furnished well in advance of trial. Basic due process requires no less where, as here, the Government's investigation, utilized vast personnel, equipment, and financial resources over an extended period.

## WITNESS LIST

Further, if the Government refuses to notify counsel for the Defense who its witnesses are prior to trial, this procedure will necessitate recesses and continuances during trial in order to permit the Defense to investigate any impeachment evidence regarding the witness and the accuracy of the substance of their testimony and to obtain, prepare and present substantive evidence to which such investigation leads.

Although the government is not obligated to provide a list of its witnesses prior to trial, the trial Court may exercise its supervisory power to require same. See Notes of Committee on the Judiciary House Report No. 94-247 B. Committee Action:

“...[T]he Court can require disclosure of the witness lists earlier than three days before trial, or can permit a party not to disclose the identity of a witness before trial.”

Disclosure of Government witness lists before trial in jurisdictions that require it has led to no unusual problems of witness intimidation.

“The Government in one of its statements to this committee indicated that providing the defense with witness lists will cause coerced witness perjury. This does not happen. We receive government witness lists as a matter of course in the Southern District, and it’s a rare occasion when there is any overture by a defense witness or by a defendant to a Government witness. It simply doesn’t happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order.” Notes of Committee on the Judiciary Home Report No. 94-247 to Rule 16, Federal Rules of Criminal Procedure.

**10. STATEMENTS OF GOVERNMENT WITNESSES: THIS REQUEST IS MADE FOR ANY STATEMENTS IN THE GOVERNMENT’S POSSESSION THAT HAVE NOT YET BEEN TURNED OVER TO THE DEFENDANT.**

### **PRETRIAL DISCLOSURE NO LONGER PROHIBITED**

The language of Rule 26.2 provides a right to mandatory disclosure of a witness' statement "after [the] witness has testified on direct examination". Such disclosure is no longer limited, as was the predecessor statute, the *Jencks* Act [18

U.S.C. § 3500], "until [after] said witness has testified on direct examination in the trial of the case," [emphasis supplied], 18 U.S.C. § 3500(a).

Prior decisions interpreting the *Jencks* Act had held that § 3500(a)'s express prohibition against disclosing witness' statements "until said witness has testified on direct... in the trial of the case", precluded pretrial disclosure of such statement. *United States v. Carter*, 621 F.2d 238, 240 (6th Cir. 1980); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1973); *United States v. Campagnerolo*, 592 F.2d 852, 858 (5th Cir. 1979).

However, since Rule 26.2 has no such language precluding disclosure of witness statements prior to trial, courts have applied Rule 26.2 to provide for pretrial discovery of witness' statements at pretrial hearings, even where the statement was made by one other than the testifying witness and such production of prosecution witness' statements has even been required at preliminary hearings and bail detention hearings. *See United States v. Musgrave*, \_\_\_ F.Supp. \_\_\_, No. SA-80-CR-70 (W.D.Tex., July 22, 1985):

"The Government claims that Rule 12(i) of the Federal Rules of Criminal Procedure limits the application of Rule 26.2 to suppression hearings. This Court does not agree. While Rule 12(i) provides that Rule 26.2 shall apply at suppression hearings, it contains no other language that would appear to limit the Rule's application strictly to hearings arising in connection with a motion to suppress... Rule 26.2 contains no indication that the rule is to apply only at suppression hearings or at trial. Compare rule 26.2, Federal Rules of Criminal Procedure with 18 U.S.C. § 3500. Consequently, this Court believes that Rule 26.2 applies to the proceeding at issue and thus believes that the statements read by Special Agent Allen should have been disclosed to the Defendant insofar as they were relevant to his testimony." [emphasis supplied].

#### **11. CRIMINAL RECORDS OF ALL WITNESSES:**

**REQUEST: ANY AND ALL CRIMINAL ARREST AND CONVICTION RECORDS OF ALL PERSONS IN PARAGRAPH 9 THE GOVERNMENT PLANS TO CALL AS WITNESSES.**

## **AUTHORITY:**

The arrest and conviction records, or "rap sheets", of individuals the Government plans to call as witnesses requested in Paragraph 9 herein should be discoverable pursuant to Rule 16(a)(1)(B), F.R.Cr.P.

This information is critically important information for meaningful cross-examination by Defendant's counsel. And Defendant, unlike the Federal Government with its vast data storage and investigative facilities, is at a substantial disadvantage without such information. Wright, Federal Practice and Procedure, Criminal, §254, noting that Defense Counsel is at a "substantial disadvantage" without the criminal records of Government witnesses in advance of trial.

Furthermore, the vast investigatory resources of the United States far outstrip those of this Defendant creating an unfair imbalance of advantage favoring the prosecution. The Supreme Court has reiterated that the Due Process Clause of the Fifth Amendment "...does speak to the balance of forces between the accused and his accuser". *Wardius v. Oregon*, 412 U.S. 470 (1973). These vast investigative resources, if not open to the minimal disclosure herein requested, provide the Government with "non-reciprocal benefits" in preparing this case, and "...when the lack of reciprocity interferes with the Defendant's ability to secure a fair trial" such constitutes a violation of the Defendant's constitutionally protected rights to due process. *Wardius v. Oregon, Supra*.

"[T]he [prosecution's] inherent information gathering advantages suggest that if there is to be imbalance in discovery rights, it should work in the Defendant's favor." *Wardius v. Oregon, Supra*, at p. 475.

Effective confrontation and cross-examination at trial requires that the criminal records of Government witnesses be produced prior to trial. Prior convictions are admissible for impeachment purposes, and these convictions may be proved conclusively only by certified copies of convictions. These documents can be obtained only from the clerk of the court in the jurisdiction where the conviction occurred. And, accordingly, pre-trial access to F.B.I. arrests and conviction records is necessary to provide information upon the basis of which these documents may be obtained in sufficient time to be of use at the trial herein.

This evidence constitutes exculpatory material within the meaning of *Brady v. Maryland, Supra*, and therefore production is required as a matter of due process. The fact that such information would serve to impeach any testimony by

said witnesses is sufficient to bring the statement under the scope of *Brady v. Maryland, Supra*, since the duty imposed upon the Government by *Brady* to disclose evidence it has in its possession applies to any information "...favorable to the accused either as direct or impeaching evidence" [emphasis added] *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968); *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968). Furthermore, the Defendant will be unable to comply with the requirements of Rule 609(b) requiring advance written notice of intent to use certain prior convictions for impeachment purposes, where the Defendant is deprived of access to such records.

## **12. WRITTEN STATEMENTS OF PERSONS NOT CALLED AS WITNESSES:**

**REQUEST:** WRITTEN STATEMENTS OF ALL PERSONS IN PARAGRAPH 9 WHO THE GOVERNMENT DOES NOT PLAN TO CALL AS WITNESSES.

### **AUTHORITY:**

The written statements in the possession of the Government of individuals who the Government does not plan to call as witnesses which have been requested in Paragraph 9 hereof are discoverable under the provisions of Rule 16(A)(1)(C), F.R.Cr.P., as such statements would not be obtainable at any time under the *Jencks* Act or Rule 26.2, F.R.Cr.P., since those statutes provide for discovery only of statements of witnesses who actually testified at trial. Accordingly, pursuant to Rule 16(a)(1)(C), F.R.Cr.P., the Defendant should be given the statements of any such witnesses whom the Government does not intend to call as witnesses at trial. *United States v. Hardy*, Slip Opinion, No. CR869-69 (D.D.C. 1968); *United States v. Gleason*, 265 F. Supp. 880, 887 (S.D. N.Y. 1967); *United States v. Ladd*, 48 F.R.D. 266, (D. Ala. 1969); 8 Moore's Federal Practice, ¶ 16.05(4); Wright, Recent Changes in the Federal Rules of Procedure, 42 F.R.D. 552, 569 (1966).

Since the language of the exemption in Rule 16(a)(2) is based upon the assumption that statements made to Government agents are discoverable at trial under the *Jencks* Act or Rule 26.2 F.R.Cr.P., any "statement" which is not discoverable at trial pursuant to said statute should be discoverable prior to trial under the provisions of Rule 16(a)(2), F.R.Cr.P. *Davis v. United States*, 413 F.2d 1226 (5th Cir. 1969).

### **13. INFORMANTS' NAME, IDENTITY AND WHEREABOUTS:**

**REQUEST:** THE NAME, IDENTITY AND WHEREABOUTS OF ANY INFORMER WHO GAVE INFORMATION LEADING TO DEFENDANT'S ARREST OR INDICTMENT.

#### **AUTHORITY:**

The name, identity and whereabouts of any informer who gave information leading to the arrest and/or indictment of the Defendant, as well as whether said informer was paid by the Government for such information requested herein, is discoverable where said informant is a witness to or has knowledge of facts relevant to the case. *United States v. Barnes*, 486 F.2d 776 (8th Cir. 1973). *See also Rovario v. United States*, 353 U.S. 63, 64 (1967); *United States v. Soloman*, 26 F.R.D. 397 (N.D. Ill. 1967); *Lopez-Hernandez v. United States*, 394 F.2d 820 (9th Cir. 1968); *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978); *United States v. Ayala*, 643 F.2d 244 (5th Cir. 1981).

"The informer's level of involvement with the criminal activity is an important consideration. *Suarez v. U.S.*, 582 F.2d 1007, 1011 (5th Cir. 1978); *Alvarez v. U.S.*, 525 F.2d 980, 982 (5th Cir.), cert. denied, 425 U.S. 995 (1976). The more active the participation, the greater the need for identification. *U.S. v. Gonzalez*, 606 F.2d 70 (5th Cir. 1979)." *United States v. Ayala*, *Supra*, at p. 246.

And even where the "informer was not an integral member of the criminal activity" his identity may be required where he was more than a "passive observer" or "tipster". *United States v. Ayala*, *Supra*, at p. 246 [where female informer "arranged the initial meeting", "acted as an intermediary relaying messages" and was "also present at each meeting"].

Further, the Defendant requests that the Government affirm or deny the existence of the discovery sought herein to avoid confusion regarding whether a document exists and has not been disclosed or that a document exists and has been overlooked.

The Defendant requests that he be allowed to inspect and copy the following:

1. Defendant requests the Government to disclose the identity and whereabouts of confidential Government informants whose testimony the

Government intends to offer at the trial or who were utilized during the instant case investigation.

This request encompasses any informant:

- A. who was an eyewitness to any of the offenses charged in the indictment;
- B. who was a participant in any of the offenses charged in the indictment;
- C. whose testimony is offered in an attempt to establish any wrongful conduct of the Defendant not alleged in the indictment; or
- D. who provided information which resulted in the targeting of the Defendant in the investigation.

Disclosure of the informer's identity is required if the identity of the informant would be relevant or helpful to the defense, or essential to a fair determination of the cause. *Roviaro v. United States*, 353 U.S. 53 (1957). Only the Government has knowledge of the status of a confidential informant within categories A, B, C, and D above. While the disclosure of the identity of such informants can usually not be required in the absence of a special showing by the defendant, that the Defendant needs the testimony of the informant for some purpose, voluntary disclosure by the government should be made in order to achieve for fundamental fairness, and to avoid a deprivation of due process of law to the Defendant. *U. S. v. Opager*, 589 F.2d 799, 804-06 (5th Cir. 1979). Discovery of this information is important to a determination whether issues regarding suppression exist and therefore should be produced pursuant to Federal Rule of Criminal Procedures 12 (d)(2). Moreover, discovery of this information before trial is necessary to allow the Defendant an opportunity to raise any objections he may have to evidence the Government intends to use at trial. See Federal Rule of Criminal Procedure 12(d)(1).

#### **14. REPORTS OR CONCLUSIONS OF SCIENTIFIC TESTS OR ANALYSIS:**

**REQUEST: ANY AND ALL WRITTEN REPORTS OF ANY SCIENTIFIC OR EXPERT ANALYSIS CONDUCTED BY THE GOVERNMENT OR ANY OF ITS AGENTS OR ANYONE AT ITS DIRECTION.**

## **AUTHORITY:**

Discovery of the examinations, tests and experiments requested herein is authorized by Rule 16(a)(1)(D), F.R.Cr.P. While no specific showing of materiality or reasonableness is required under the mandatory provisions of Rule 16(a), *United States v. Hughes*, 413 F.2d 1244, 1250 (5th Cir. 1969); *United States v. White*, 50 F.R.D. 70, 72, (N.D. Ga. 1970), aff'd., 450 F.2d 264 (5th Cir.), cert. denied, 405 U.S. 1072 1972; *United States v. Bryant*, 439 F.2d 642, 649 (D.C. Cir. 1971); *United States v. Isa*, 413 F.2d 244, 246-7 (7th Cir. 1969), the disclosure of such scientific or expert witness material is particularly appropriate for the following reasons:

- (a) Any danger of intimidation of witnesses concerning these matters is so slight as to be for all practical purposes nonexistent,
- (b) Expert testimony cannot be effectively subjected to cross-examination or rebuttal without ample opportunity prior to trial to prepare appropriate material for that purpose,
- (c) Expert testimony generally has, in the eyes of a jury, unusually high probative value, coming as it does from a supposedly disinterested party and concerning matters generally beyond the realm of ordinary lay information.

The defense, therefore, may wish to obtain its own expert witness to conduct appropriate tests and give testimony at the trial, Criminal Justice Act of 1964, 18 U.S.C. 3006(A)(e); F.R.Cr.P. 28(a), and accordingly, such specimens, experiments, tests and scientific reports and comparisons should be discoverable prior to trial. *United States v. Kaminsky*, 275 F. Supp 365 (S.D. N.Y. 1967) (chemical analysis of narcotics); *United States v. Cobb*, 271 F. Supp 159 (S.D. N.Y. 1967); *United States v. Kelly*, 420 F.2d 26 (2d Cir. 1969). Drug test of Government witnesses are discoverable under rule 16(a)(1)(D), *United States v. Eisler*, 567 F.2d 814, 817 (8th Cir. 1977) (finger print or voice comparisons); *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 197), cert. denied, 425 U.S. 905 (1976); and psychiatric examinations of the Defendant or government witnesses. *United States v. Hearst*, 412 F. Supp. 863, 868 (N.D.Cal. 1975). If such reports and tests are not produced sufficiently in advance of trial, the government's witness' testimony may be excluded. *United States v. Barrett*, 703 F.2d 1076, 1081 (9th Cir. 1983).

**15. EXEMPLARS OR TESTS: FINGERPRINTS, PALM PRINTS, HANDWRITING:**

**REQUEST:** ANY AND ALL HANDWRITING EXEMPLARS OR TESTS, OR OTHER MATERIALS OBTAINED BY WHATEVER MEANS OR PROCESS WHICH THE GOVERNMENT INTENDS TO OFFER INTO EVIDENCE OR UTILIZE AT THE TRIAL HEREIN, WHETHER SAME WERE THOSE OF DEFENDANT OR WERE THOSE OF SOME OTHER PERSON OR PERSONS KNOWN OR UNKNOWN, AND ANY AND ALL COMPARISONS OR WRITTEN REPORTS OF TESTS, ANALYSIS OR OTHER EXAMINATIONS CONDUCTED UPON SAME BY THE GOVERNMENT OR ANY OF ITS AGENTS OR ANYONE AT ITS DIRECTION.

*See* Paragraph 14, argument above.

**16. TRANSCRIPT OF GRAND JURY TESTIMONY:**

**REQUEST:** THE TRANSCRIPT OF TESTIMONY GIVEN BY ANY PERSON BEFORE THE GRAND JURIES IN THIS CAUSE AND RELATED CASES, INCLUDING BUT NOT LIMITED TO, THE PRECISE NATURE OF ANY STATEMENTS ATTRIBUTABLE TO THE DEFENDANT.

**AUTHORITY:**

The transcript of testimony of individuals who testified before the Grand Juries in this case and related cases is discoverable pursuant to Rule 16(a)(1)(C), F.R.Cr.P., since such transcripts are "documents" under the rule. *United States v. Hughes*, 413 F.2d 1244, 1255-1257 (5th Cir. 1969), vacated as moot sub nom, *United States v. Gifford-Hill-American*, 90 S.Ct. 817 (1970).

And discovery of recorded testimony of witnesses other than the Defendant may be discoverable pursuant to Rule 6(e), F.R.Cr.P., which expressly provides for pre-trial discovery of such Grand Jury testimony. *Dennis v. United States*, 384 U.S. 855 (1966).

Grand Jury testimony should be disclosed anytime the Government demonstrates no need for secrecy, *Nolan v. United States*, 395 F.2d 283, 286 (5th Cir. 1968), and the defense shows a semblance of need [e.g., where, as here, said Grand Jury witnesses are individuals the Government intends to call at trial], *United States v. Machi*, 324 F. Supp. 153 (D.Wis. 1971); *Allan v. United States*, 390 F.2d

476, 482 (D.C. Cir. 1968); *Gibson v. United States*, 403 F.2d 166,169 (D.C. Cir. 1968); *United States v. Tanner*, 279 F. Supp. 457 (N.D. Ill. 1967); *United States v. National Dairy Prods. Corp.*, 262 F. Supp. 447, 471 (W.D. Mo. 1967), rev'd in part on other grounds, 384 F.2d 457 (8th Cir. 1967).

And where, as here, the Government's case may depend upon oral, unrecorded statements of the Defendant or alleged co-conspirators, then any of the Grand Jury testimony regarding the substance of those statements is necessary to adequately prepare a defense and disclosure should be required prior to trial.

"[W]here the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements." *Dennis v. United States*, 384 U.S. 855, 872-873 (1966).

## **17. DISCLOSURE OF MINISTERIAL INFORMATION REGARDING THE GRAND JURY**

**REQUEST:** DISCLOSURE OF MINISTERIAL ACTS OF THE GRAND JURY IS REQUESTED. COUNSEL ESPECIALLY REQUESTS THE GOVERNMENT CONSENT TO A COURT ORDER RELEASING THE FOLLOWING INFORMATION:

A. The number of grand juries and their location that were involved in the investigation of the instant case, together with the dates of the commencement and expiration of their term, and the dates on which they took evidence relevant to the investigation of this case;

B. Any order authorizing the summons of said grand juries in the Western and Southern Districts of Texas or pertinent grand juries elsewhere;

C. Any order authorizing the extension of these grand juries;

D. Roll sheets reflecting the composition of the grand juries, attendance records of the jurors, and any substitutions, for all relevant grand jurors investigating this case;

E. Any written authorization permitting any special prosecutor to present evidence to any of the grand juries investigating this case;

F. Records setting forth the method by which the grand juries were impaneled;

G. Voting records, related to any decision to extend the life of the grand juries, if there were any such extensions; and

H. All records of disclosure of names of persons receiving information about matters occurring before the grand juries, as defined in Federal Rules of Criminal Procedure 6 (e)(3)(A)(2). *In Re: Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778 (9th Cir. 1982).

### **18. DEMAND FOR EXCULPATORY AND IMPEACHING EVIDENCE:**

**REQUEST:** ANY AND ALL MATERIAL KNOWN TO THE GOVERNMENT OR WHICH MAY BECOME KNOWN, OR WHICH THROUGH DUE DILIGENCE MAY BE LEARNED FROM THE INVESTIGATING OFFICERS OR THE WITNESSES OR PERSONS HAVING KNOWLEDGE OF THIS CASE, WHICH IS EXCULPATORY IN NATURE OR FAVORABLE TO THE ACCUSED OR WHICH MAY LEAD TO EXCULPATORY OR FAVORABLE MATERIAL OR WHICH MIGHT SERVE TO MITIGATE PUNISHMENT, INCLUDING ANY EVIDENCE IMPEACHING OR CONTRADICTING TESTIMONY OF GOVERNMENT WITNESSES IN THIS CAUSE [I.E. PRIOR CONVICTIONS OR PRIOR INCONSISTENT STATEMENTS OR IDENTIFICATIONS MADE BY GOVERNMENT WITNESSES IN THIS CAUSE], OR INSTRUCTIONS TO GOVERNMENT WITNESSES NOT TO SPEAK WITH OR DISCUSS THE FACTS OF THE CASE WITH DEFENSE COUNSEL.

### **AUTHORITY:**

The exculpatory or favorable evidence requested herein is discoverable pursuant to the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution. *Brady v. Maryland*, 373 U.S. 83 (1963).

This right of Defendant to disclosure of "favorable" evidence exists whether such evidence is material to the Defendant's guilt or to mitigation of his punishment, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and regardless of whether such exculpatory evidence would be admissible in Defendant's behalf at trial "...or in obtaining further evidence". *Giles v. Maryland*, 386 U.S. 66, 74 (1967). The evidence

need not be competent evidence or admissible at trial. *United States v. Gleason*, 264 F. Supp. 850, 886 (S.D. N.Y. 1967).

This right to disclosure under *Brady* should include the right to pre-trial discovery by the Defendant. *United States v. Gleason*, 265 F. Supp. 880, 884-885 (S.D. N.Y. 1967); *United States v. Morrison*, 43 F.R.D. 266 (N.D. Ill. 1967); *United States v. Ahmad*, 53 F.R.D. 186, 193-194 (M.D. Pa. 1971); *United States v. Partin*, 320 F. Supp. 275, 284-285 (E.D. La. 1970); *United States ex rel Drew v. Myers*, 327 F.2d 174 (3rd Cir.), cert denied, 379 U.S. 847 (1964); ABA Standards, Discovery and Procedure Before Trial, Approved 1970, §2.1.

Evidence which may serve to impeach the testimony or credibility of a Government witness is discoverable under *Brady* since the duty upon the Government to disclose evidence favorable to a defendant under *Brady* applies to any information "...favorable to the accused either as direct or impeaching evidence". *Williams v. Dutton*, 384 F.2d 886 (5th Cir. 1968)[fact that eye-witness to crime initially failed to identify defendant at lineup][emphasis added]; *Powell v. Wiman*, 287 F.2d 275 (5th Cir. 1961)[mental instability on part of key prosecution witness]; *Giles v. Maryland*, 385 U.S. 66 (1967)[evidence of prior unchastity and mental condition of complaining witness]. Testimony which is inconsistent with other evidence is included in this request. See *Mesarosh v. United States*, 352 U.S. 1 (1956). This includes statements by informer/witness which fail to mention the Defendant. *Jones v. Jago*, 575 F.2d 1164 (6th Cir.), cert. denied, 439 U.S. 883 (1978)[such constitutes potentially powerful exculpation]. Counsel specifically requests the statements of any eye witnesses to any of the offenses charged which makes no reference to the Defendant.

This request includes, without limitation, all matter bearing on any witness' veracity, competence, capacity and opportunity to observe, remember, recall or narrate events, and the existence of any condition of partiality, prejudice, bias, motive, interest or corruption causing or arguably causing the witness to be in favor of the Government or against the Defendant or the defense.

Where exculpatory evidence is obtained in a statement of a Government witness, and the Court decides it is discoverable under Rule 26.2 F.R.Cr.P. only after the witness has testified, then the Rules' "...statutory restrictions must be accommodated to the demands of due process", and the relevant portions of the statement disclosed prior to trial. *United States v. Gleason*, 265 F. Supp. 880, 887 (S.D. N.Y. 1967) [Discussing Rule 26.2's predecessor, the Jenck's Act].

Under *Brady* a particularized request is a practical impossibility since the "due process" requirements of *Brady* require that the Government provide the Defendant with exculpatory, mitigating or favorable evidence not in the possession of the defense. Consequently, if the defense is unaware of such evidence it would be hard pressed to request same with any particularity.

"If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial -- indeed any criminal proceeding -- is not a sporting event." (Fortis, Jr., concurring) *Giles v. Maryland*, 386 U.S. 66 (1967).

The United States Attorney or other agents of the United States or State Governments involved in the investigation and preparation of this case have the possession, custody or control of each of the above requested items and information, or through the exercise of reasonable diligence would be able to obtain such possession or locate the whereabouts of such items or information. Each of these items is material to the preparation of an adequate defense and is reasonable in light of the facts set out herein.

The Defendant is being asked to defend against broad unparticularized conspiracy charges spanning 6 years that the Government will attempt to hold him accountable for and which may include conduct they are not even aware of. See *Pinkerton v. United States*, 90 L.Ed. 1489 (1946).

Fundamental fairness demands that the Defendant be provided exculpatory mitigation and impeaching evidence relating to the entire conspiracy or conspiracies charged by the Government in this indictment. See *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

## **19. SUBSTANCE OF PROMISES OR PLEA BARGAINS BETWEEN WITNESSES AND GOVERNMENT**

**REQUEST:** NOTICE OF ANY PENDING CHARGES, INDICTMENTS, PROBATION, PAROLE, THE EXISTENCE OF OFFENSES KNOWN TO THE GOVERNMENT FOR WHICH THE WITNESS HAS NOT BEEN CHARGED, AS WELL AS THE SUBSTANCE OF ANY AND ALL STATEMENTS OR DISCUSSIONS HAD WITH ANY ALLEGED CO-DEFENDANTS (CHARGED OR UN-CHARGED) HEREIN OR WITH ANY SUCH PERSON'S COUNSEL INDICATING A PROMISE OR A SUGGESTION OF LENIENCY, COMPENSATION, ASSURANCE NOT TO PROSECUTE, AGREEMENT TO PROCEED ON ONLY CERTAIN COUNTS OF AN INDICTMENT,

REPRESENTATIONS WITH RESPECT TO YET UNCHARGED MISCONDUCT, OR ANY BENEFIT ACCRUING TO SAID INDIVIDUALS WHATSOEVER IN EXCHANGE FOR THEIR COOPERATION, ASSISTANCE OR TESTIMONY AT THE TRIAL HEREIN, AS WELL AS ANY PROBATIONS, PAROLES, PENDING CHARGES OR OTHER OFFENSES KNOWN TO THE GOVERNMENT WHICH HAVE NOT BEEN CHARGED, OR ANY HOPE THAT A GOVERNMENT WITNESS MAY HAVE FOR ANY BENEFIT WHATSOEVER AS SAME RELATE TO A GOVERNMENT WITNESS' MOTIVE FOR TESTIFYING ON THEIR BEHALF.

"In *U.S. v. Agurs*, 427 U.S. 97 (1976), however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U.S., at 103-104; second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation." *Kyles v. Whitley*, 115 S.Ct. 1555 (1995).

#### **AUTHORITY:**

Evidence of any plea bargains or other representations of benefit which have been made by the Government or which the Government will make at any future time is discoverable pursuant to the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution, and the withholding of any such evidence constitutes a denial to the Defendant herein of his constitutionally protected rights to due process and fundamental fairness in the criminal proceedings. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland, Supra*. Such evidence is not only exculpatory in the sense that it is legitimate grounds for impeachment of any witnesses the Government may call to testify against the Defendant, *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968) [impeachment evidence is exculpatory evidence discoverable under *Brady*], but also is discoverable by the Defendant in order to show such witnesses' bias or prejudice in testifying at such trial. *Davis v. Alaska*, 415 U.S. 308 (1974).

But it is not only what the Government has promised or said, but what the witness has hanging over his head which might cause him to "curry favor" with the prosecution. Thus, no "agreement" or "deal" for the witness' testimony need be shown. *United States v. Crumley*, 565 F.2d 945 (5th Cir. 1978); *Brown v. Vance*, 637 F.2d 272, 276 (5th Cir. 1981); *United States v. Mayer*, 556 F.2d 245, 249 (5th Cir. 1977); *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980).

"Whether or not a deal existed is not crucial. What is important is whether the witness may be shading his testimony in an effort to please the prosecution. A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception." *Greene v. Wainwright*, 634 F.2d 272, 276 (5th Cir. 1981).

Therefore, such discoverable evidence includes prior arrests or pending indictment against prosecution witness, *United States v. Musgrave*, 483 F.2d 327 (5th Cir.), cert denied, 414 U.S. 1023 (1973); *United States v. Crouchier*, 532 F.2d 1042 (5th Cir. 1976); *United States v. Garrett*, 542 F.2d 23 (6th Cir. 1976); *United States v. DeLeon*, 498 F.2d 1327 (7th Cir. 1974) [no indictment]; *United States v. Garcia*, 531 F.2d 1303 (5th Cir.), cert denied, 429 U.S. 941 (1976); *Hart v. United States*, 585 F.2d 1280 (5th Cir. 1978) ["although the mere existence of an arrest is not admissible to impeach the credibility of a witness, this court has recognized that arrests may be admissible to show that an informer might falsely testify favorably to the Government in order to put his own cases in the best light possible"], cert. denied, 442 U.S. 941 (1979). Pending probation against prosecution witness, *Davis v. Alaska*, 415 U.S. 308 (1974). Such discoverable evidence may also include "deals" to benefit third parties, *United States v. Williams*, 592 F.2d 1277 (5th Cir. 1979), or "deals" for special treatment, *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980).

## **20. ANY AND ALL IMPEACHMENT MATTER**

**REQUEST:** DEFENDANT REQUESTS THAT HE BE ALLOWED TO INSPECT AND COPY THE FOLLOWING:

**A.** All records and information which arguably could be helpful or useful to the Defendant or the defense in contradicting, disproving, impeaching or otherwise detracting from the probative value of the government's evidence or testimony of any Government witness, or which arguably could lead to such records or information.

This request includes, without limitation, all matter bearing on any witness' veracity, competence, capacity and opportunity to observe, remember, recall or narrate events, and the existence of any condition of partiality, prejudice, bias, motive, interest or corruption causing or arguably causing the witness to be in favor of the Government or against the Defendant or the defense.

**AUTHORITY:**

Due Process Clause, Fifth Amendment, United States Constitution; *Napue v. Illinois*, 360 U.S. 264 91959); *Giglio v. United States*, 405 U.S. 150 91972). The duty of disclosure is augmented by the Court's supervisory power to safeguard the correct administration of justice in federal trials; *United States v. Miller*, 411 F.2d 825, 832 (2d cir. 1969); *United States v. Leja*, 568 F.2d 493, 499 (6th Cir. 1977); *United States v. Partin*, 493 F.2d 750, 763 (5th Cir. 1974) (relevant mental condition and hospital records).

**IMPEACHING MATTER-INDUCEMENTS**

**REQUEST:**

**B.** Any and all considerations or promises of consideration given to or on behalf of the witness or expected or hoped for by the witness or documents demonstrating same.

"Consideration" means absolutely anything, whether bargained for or not, and whether extended formally or informally, directly or indirectly, which arguably could be of value or use to a witness or to persons or business entities of concern to the witness, including:

1. leniency, favorable treatment or recommendations or other assistance as to any pending or potential criminal, parole, probation, pardon, clemency, civil, tax court, court of claims, administrative or other dispute with the United States of America or any of its agencies, or with any other state or local governmental authority, or any other parties. By way of example, this category includes but is not limited to, the existence and substance of any promises, agreements, understandings, or arrangements wherein the government has agreed:
  - (a) not to prosecute the witness for any crime or crimes;

- (b) to recommend leniency in sentencing for any state and/or federal crime or crimes for which he/she is convicted or charged;
  - (c) to recommend a particular sentence for any state and/or federal crime or crimes for which he/she is convicted or charged;
  - (d) to dismiss any counts of an indictment pending against a government witness or informant or any member of his or her family<sup>7</sup>; and
  - (e) to compromise or diminish or to recommend to compromise diminution of any federal, state or local taxes which she/he is claimed to owe;
2. criminal, civil or tax immunity grants;
  3. relief from forfeiture;
  4. payments of money, rewards or fees, witness fees, special witness fees, provision of food, clothing, shelter, transportation, legal services or other benefits; other benefits would include contact visits between incarcerated witnesses and family members or friends, furloughs, and other arrangements and/or special treatment for incarcerated witnesses or their families or loved ones which are of benefit to them<sup>8</sup>;
  5. placement in a "witness protection program;"

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<sup>7</sup>And the Defense requests any plea agreements, factual basis documents, 5K1.1 motions, Rule 35 motions, letters from the witness or their lawyers requesting or seeking any benefit or any other such documents pertaining to any individual related to the investigation upon which this indictment is based.

<sup>8</sup> The Defendant requests the Government be ordered to produce the records of any payments made to informants, accomplices or witnesses by the government or anyone acting as an agent on behalf of the Government. The Defendant also requests the personnel records of case and investigative agents, policy statements, review forms, and other written material which prescribes the basis which they are paid (e.g. whether rank and pay is based upon the number of arrests and or convictions they are associated with). The Defendant also requests the grant used to form the task force which conducted this investigation.

6. status of witness as informer; and
7. anything else which arguably could reveal an interest in favor of the prosecution or against the defense or tend to any degree to act as an enticement to testify or to color testimony.

#### **AUTHORITY:**

\_\_\_\_\_ *Giglio v. U. S.*, 405 U.S. 150 (1972) (recognizes the duty of the prosecutor to disclose any and all inducements extended to or hoped for by the witness, the duty is a continuing one, and the ignorance of a particular prosecutor as to inducements made to a government witness by another prosecutor does not excuse the failure to disclose; obligation extends to the total compensation or benefit paid to or expected by the witness); *U. S. v. Leja*, 568 F.2d 493, 497-99 (6th Cir. 1977); *United States v. Partin*, 493 F.2d 750, 757-60 (5th Cir. 1974); *U. S. v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979) (attorney's fees paid by state law enforcement officers cooperating in the investigation); *U. S. v. Wolfson*, 473 F.2d 862, 874-75 (2d Cir. 1970) (beneficial treatment in tax of administrative matters); *Arbill v. Pogue*, 534 F.2d 195, 196 (9th Cir. 1976) (assistance in avoiding prosecution by other authorities and erroneous belief by witness); *U. S. v. Dillard*, 419 F. Supp. 1000 (N.D. Ill. 1976) (immunity grants); *United States v. Garza*, 574 F.2d 298, 301-02 (5th Cir. 1978) (assistance in bonding out of custody); *U. S. v. Librach*, 520 F.2d 550 (8th Cir. 1975) (placement in protective custody); *U. S. v. Mele*, 462 F.2d 918 (2d Cir. 1972) (status as an informer). Additionally, the Government is required to disclose all circumstances of potential financial reward from the federal government, *Wheeler v. U. S.*, 351 F.2d 946 (1st Cir. 1965), or through its efforts. *United States v. McCrane*, 547 F.2d 204 (3d Cir. 1976). Disclosure of hoped for benefit is required even if no promises of consideration or compromise have, in fact, been made because the hope of reward or benefit may induce the witness to testify or color his testimony. *United States v. Mayer*, 556 F.2d 245, 249-50 (5th Cir. 1977).

#### **IMPEACHING MATTER-PRIOR CRIMES**

#### **REQUEST:**

C. All records and information revealing the witness' prior felony convictions, guilty verdicts, pleas of guilty and juvenile adjudications or admissions, including (but not limited to) relevant "rap sheets."

## **AUTHORITY:**

Disclosure of this class of information is plainly necessary. *Beaudine v. U. S.*, 368 F.2d 417, 421-22 (5th Cir. 1966); *U. S. v. Caraday*, 466 F.2d 1191 (9th Cir. 1972) (guilty verdict, though not reduced to judgment, may be used for impeachment); *Davis v. Alaska*, 415 U.S. 308 (1974) (status under juvenile adjudication); *U. S. v. Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977) (prior arrest for drug offense); *U. S. v. Halbert*, 640 F.2d 1000 (9th Cir. 1981) (guilty plea of witness); *U. S. v. DeBacker*, 493 F. Supp. 1073 (W.D. Mich. 1980) (state police reports not excluded from discovery).

## **IMPEACHING MATTER-BAD ACTS**

### **REQUEST:**

**D.** All records and information revealing prior criminal conduct or bad acts not resulting in criminal conviction, and the existence of pending criminal charges or investigation against the witness or any business entity with which the witness is connected or concerned.

### **AUTHORITY**

Rule 608(b), Federal Rules of Evidence, permits cross-examination of a witness as to specific instances of misconduct or "bad acts" regarding the character of the witness for veracity. *Carter v. Hewitt*, 617 F.2d 961 (3d Cir. 1980) (civil witness impeached by letter he admitted writing); *U. S. v. Ramirez*, 622 F.2d 898 (5th Cir. 1980) (existence of arrest or indictment may be admissible to demonstrate informant's potential for giving false testimony).

## **IMPEACHING MATTER-THREATS**

### **REQUEST:**

**E.** All threats, expressed or implied, direct or indirect, or other coercion made or directed against the witness, criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against the witness; any probationary, parole, deferred prosecution or custodial status of the witness; and any civil, tax court, court of claims, administrative or other pending or potential legal disputes or transactions with the federal government, or over which the federal government has any real, apparent or perceived influence (including all involvements between the witness and any state or local government).

This request encompasses threats, expressed or implied, direct or indirect, as above-described, against any person standing in family or other close relations to the witness, or any business entity in which the witness has any concern or interest.

This request includes (but is not restricted to) any kind of threat made to any person subpoenaed or appearing before any Federal Grand Jury conducting any investigation of any aspect of the present prosecution.

## **AUTHORITY**

The existence of any threat, explicit or implicit, to the person or property of the witness, or circumstances of vulnerability to prosecution, or a threat of reprisal by any party or third party, obviously tends to show possible motivations of the witness to testify favorably to the government, or to reveal bias and prejudice against the defense. *United States v. Sutton*, F.2d 1239 (4th Cir. 1976) (threat by FBI agent to prosecute witness intended to induce witness' cooperation); *United States v. Bonanno*, 430 F.2d 1060 (2d Cir. 1970) (nondisclosure by government of outstanding indictment of witness); *United States v. Padgent*, 432 F.2d 701 (2d Cir. 1970) (witness' vulnerability to future indictment for bail-jumping); *United States v. Gerard*, 491 F.2d 1300, 1304 (9th Cir. 1974) (promise of probation on guilty plea and refraining from prosecution on other offense); *United States v. Uramoto*, 638 F.2d 84 (9th Cir. 1980) (threats to witness or others); *Davis v. Alaska*, 415 U.S. 308 (1974) (vulnerability revocation of probation on juvenile adjudication); *United States v. Haderlein*, 118 F. Supp. 346 (N.D. Ill. 1953) (threat to deport witness); *Alford v. United States*, 282 U.S. 687, 693 (1931) (status of witness as prisoner giving rise to fear or favor by reason of his detention).

## **IMPEACHING MATTER-PRIOR TESTIMONY**

### **REQUEST:**

**F.** The existence and identification of each occasion on which the witness has testified before any Court, Grand Jury or other tribunal body, or otherwise made any officially reported or recorded statement of narration respecting the defendant, the investigation, or the facts of this prosecution.

## **AUTHORITY**

Rule 801(d)(1), Federal Rules of Evidence, provides that a prior statement by a witness given under oath at trial, hearing, other proceeding or deposition, which is inconsistent with the witness' present testimony is not hearsay. Such prior statements

are admissible for substantive as well as impeaching evidence. *United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976). The Defendant is entitled to discover the existence of witness' statements which may be obtained from sources other than the Government, and outside the strictures of the *Jencks* Act (18 U.S.C. § 3500). For example, Bureau of Prisons tapes of prisoners constitutes *Jencks* material. *United States v. Ramirez*, 97-11208 (5th Cir. May 3, 1999).

**REQUEST:**

**G.** The existence and identification of each occasion on which each witness who was or is an informer, accomplice, co-conspirator, or expert has testified before any Court, Grand Jury, or other tribunal body, whether or not such testimony is in any way related to the present prosecution.

**AUTHORITY:**

The status of a witness as informer, accomplice, co-conspirator or expert, poses crucial necessity for cross-examination, as discussed in *United States v. Mayer*, 556 F.2d 245, 24-8-49 (5th Cir. 1977) and *United States v. Alvarez-Lopez*, 559 F.2d 1155, 1160 (9th Cir. 1977). Such witnesses are subject to impeachment on the basis of testimony in other proceedings though such proceedings are wholly unrelated to the present case; *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975) (defendant denied due process at state trial in Iowa when precluded from proving a paid informer-witness has lied and tried to frame a defendant in another drug trial in Michigan); *McConnell v. United States*, 393 F.2d 404 (5th Cir. 1968) (defendant entitled to impeach handwriting expert by showing expert's mistaken identification at another, though related, trial).

**IMPEACHING MATTER-WITNESS' FILES**

**REQUEST:**

**H.** As to each witness who was or is a law enforcement officer, and each informant-witness, Defendant requests production of all personnel files or confidential files relating to or connected with each such witness, whether contained in Federal, State or domestic, foreign or local governmental files. For example, impeaching matter from investigating agents' personnel files with the FBI, any task force and any other law enforcement agency or other Government agency with which they have been employed. Also, Defendant requests an order compelling the government to produce the personnel records, case and investigative agents, and any

policy statements, review forms or other written material which prescribes the basis which they are paid (*e.g.* if a law enforcement officer receives an increase in pay based in any part on the arrest and/or conviction he or she is involved in). Defendant also requests a copy of the grant which funds the task force which conducted this investigation.

## **AUTHORITY**

Defendant is entitled to discover impeaching information in the personnel file of a witness who is a government employee. *United States v. Deutsch*, 475 F.2d 55, 57-58 (5th Cir. 1973); *United States v. Austin*, 492 F. Supp. 502, 505-06 (N.D. III, 1980); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). Such information includes interview notes of an attorney for the Government or investigative agents if they constitute *Jencks* or *Brady* material. Such material is not shielded by the work product doctrine. *Goldberg v. United States*, 425 U.S. 94, 101-08 (1976); *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975) and the prosecutor is under a duty to review the personnel files upon the request of a the defendant. *United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984). The Defendant need not show materiality. *United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984). If the Government has any question about materiality it should submit the file to the Court for in camera review. *United States v. Cadet*, 727 F. 2d at 1467-8. A defendant is also entitled to access to impeaching information in the confidential file of an informant-witness. *United States v. Morrell*, 524 F.2d 550, 552-55 (2d Cir. 1975); *United States v. Garrett*, 542 F.2d 23 (6th Cir. 1976) (drug conviction reversed where defendant denied access to disciplinary records of police officer suspended from duty for refusing to take urine test for drug usage, and for restriction in cross-examination of officer as to reason for his suspension); *United States v. Hitchmon*, 609 F.2d 1098 (5th Cir. 1979) (conviction reversed where defendant not allowed to cross-examine government witness about internal DEA investigation into possibility that two agents gave perjured testimony in effort to obtain a conviction).

## **IMPEACHING MATTER-GENERAL**

### **REQUEST:**

I. All other records of information which arguably could be helpful or useful to the defense in impeaching, contradicting or otherwise detracting from the probative force of the Government's evidence, or which arguably could lead to such records or information.

This request encompasses all records or information tending in any degree to impeach the witness' competency and his capacity and opportunity to observe, remember, recall and narrate events, as well as his character for veracity and his partiality, prejudice, bias, motive, interest or corruption. The request includes (but is not limited to) witness' histories of physical impairment and/or emotional or mental disorders at a material time or at the time of trial, witness' use of alcohol or drugs; witness' personal bias against the defendant or the defense; witness' history of subjection to veracity tests (polygraph test, psychological stress evaluation test, "truth serum," or any form or lie detection technique); and witness' subjection to hypnosis.

### **AUTHORITY**

*Wiman v. Powell*, 293 F.2d 605, 6060 (5th Cir. 1961) (disclosure of basic mental trouble of witness at any material time); *Emmet v. Ricketts*, 397 F. Supp. 1025, 1040-41 (N.D. Ga. 1975); *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969) (hypnosis in preparation of witness); *United States v. Butler*, 567 F.2d 753 (9th Cir. 1978); *U. S. v. Knowles*, 594 F.2d 753 (9th Cir. 1979) (prior perjury of witness); *U.S. v. Fowler*, 465 F.2d 664, 666 (D.C. Cir. 1972) (witness' use of narcotics or alcohol at relevant time or during trial); *United States v. Haggett*, 438 F.2d 396 (2d Cir. 1969) (prosecuting witness suborning perjury of other witnesses to frame defendant); *Chipman v. Mercer*, 628 F.2d 528 (9th Cir. 1980) (animosity toward defendant's aunt). The circumstances that a witness has been subjected to a veracity test of any kind may have a profound effect on the witness' testimony whatever the results of the test may have been, as to which expert analysis of the impact of the witness may be desired.

### **IMPEACHING MATTER-NON-WITNESS DECLARANT**

#### **REQUEST:**

**J.** As to any and all non-witness declarant whose statements are offered in evidence, Defendant requests the same records and information requested in letters "A" through "I" above. The Defendant specifically seeks all such information for any codefendant or unindicted co-conspirators through whom the government will offer co-conspirator statements of the Defendant.

#### **AUTHORITY**

Rule 806, Federal Rules of Evidence, provides that the credibility of the declarant of a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D)

or (E), may be attacked by any evidence admissible for such purpose if declarant had testified as a witness; evidence or a prior inconsistent statement by the declarant is not subject to the requirement that the declarant had been afforded an opportunity to deny or explain. Illustrative cases are *United States v. Lechoco*, 542 F.2d 85 (D.C. Cir. 1976) (psychiatrists testified on the basis of defendant's statements to them, prosecution allowed to attack credibility of statements, and defendant [non-witness] entitled to support declarant's reputation for truth and veracity); *U. S. v. Driscoll*, 445 F. Supp. 864 (D.N.J. 1978) (grand jury testimony of unavailable witness open to attack); *United States v. Glenn*, 473 F.2d 191, 195 at n.1 (D.C. Cir. 1972) (suggesting excited utterance could be attacked by proof of high percentage of alcohol in declarant's blood at time of utterance).

## **20. GOVERNMENT COMMUNICATIONS TO DEFENDANT**

### **REQUEST:**

The Defendant requests disclosure of whether any government agent, informer or anyone else acting at the direction of the Government has communicated with the Defendant since the commencement of adversarial proceeding against the Defendant, the identification of such individuals and the details surrounding the circumstances of such communication as well as the statement made by the Defendant and the Government agents. *See generally, Maine v. Moulton*, 474 U.S. 1597 (1985); *United States v. Henry*, 447 U.S. 264 (1980).

### **TIMING IS EVERYTHING**

**21.** Title 18 of the United States Code provides that "[a]ny aggrieved person in any trial, hearing, or proceeding in or before any court...may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter or evidence denied therefrom..." 18 U.S.C. 2518(10)(a).

This section goes on to require that such motion "...shall be made before trial, hearing or other proceeding..." Since it is necessary for Defendant to make such timely motion, it is essential that the Government be required to supply the following discovery at the earliest possible date.

**TITLE III REQUIRES THE PRODUCTION OF  
BOTH THE CONTENTS AND DOCUMENTS RELATING  
TO AN INTERCEPTION**

**22.** According to the aforementioned authority:

"The judge, upon the filing of a motion, may... make available to...person or his counsel for inspection such portions of the intercepted communications, applications and orders..." 18 U.S.C. 2518(8)(d).

Title III further mandates production of documents related to the interception before the contents may be used at any hearing:

"The contents of any wire, oral, or electronic communication intercepted...shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding...unless each party...has been furnished with a copy of the court order and accompanying application under which the interception was authorized..." 18 U.S.C. 2518(9).

**23. Government has had secret unilateral discovery:**

The Government has achieved unilateral secret discovery for its own benefit by the Title III interception and consensual recordings. Liberal discovery of these matters by the Defendant will help create reciprocity, would enable the Defendant to raise minimization, duration and termination objections with necessary specificity, and would place the burden upon the Defendant to object to use of the recorded evidence at trial or otherwise. Pretrial discovery of wiretap matters is necessary to afford the Defendant an adversary hearing on any motion to suppress same.<sup>9</sup>

Liberal discovery is also consistent with the inventory requirement in Federal Rule of Criminal Procedure 41 (c). More importantly, taking a person's conversations, if any, without telling him what has been taken violates due process, particularly in view of the Supreme Court's disfavor with secret searches. *See*

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<sup>9</sup>Let me remind you that I am also requesting pursuant to Federal Rule of Criminal Procedure 12 (i) the statement of any witness the Government calls to testify at any suppression hearing as is prescribed by Rule 26.2 (a) of the Federal Rules of Criminal Procedure. This is also my request for any writing or report any Government witness uses to refresh his or her recollection at such hearing. *See* Federal Rule of Evidence 613.

*Goulded v. United States*, 255 U.S. 3,5-6, 41 S.Ct. 261, 263-64, 65 L.Ed. 647, 651 (1921). It also violates the confrontation clause. *United States v. Grier*, 866 F.2d 908, 916-18 (7th Cir. 1989).

Additionally, liberal discovery will promote efficient resolution of disputes regarding the transcripts, content and authenticity of recordings.

Moreover, if the Defendant has been intercepted, he is entitled to his statements however they are recorded. He is entitled to his statements whether they are contained on a tape recording, an intercept log, a progress report, or an of the other matters requested above. *See* Federal Rule of Criminal Procedure 16 (a)(1)(A).

"Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements by the defendant, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government."

The Defendant is also entitled to books, papers, documents and tangible objects which are material to his preparation of a defense, which the government intends to use at trial, or which were obtained from or belong to the Defendant. Federal Rule of Criminal Procedure 16(a)(1)(C). Defendant hereby requests such matters which relate to intercepted telephone and other conversations.

Additionally, Defendant requests, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(D), reports regarding the tape recordings in this case, including but not limited to reports concerning authenticity of recordings or whether they have been altered or tampered with.

**24. Defendant's need to know is substantial:**

Defendant's need to discover the fruits of the Government's ex parte discovery is substantial. *e.g. United States v. Feinberg*, 371 F. Supp. 1205, 1214 (N.D. Ill.), modified, 502 F.2d 1180 (7th Cir. 1974), cert. denied, 420 U.S. 976 (1975); *United States v. Rosenberg*, 299 F. Supp. 1241, 1245 (S.D. N.Y. 1969).

**25. Cassette tapes and related documents requested:**

Therefore, the Defendant requests the fruits of the Title III, pen register, all video surveillance logs, reports and tapes and consensual recordings contained in, but

not limited to, cassette audio and video tapes of recordings, interception logs, transcripts of recordings (including drafts)<sup>10</sup>, malfunction reports, any and all memorandums of intercepted but non-recorded conversations due to mechanical breakdown, daily reports, ten day progress reports, pen register tapes, pen link reports, city link reports and applications, and affidavits asking for extensions of Title III interceptions.

The Defendant also requests matters which demonstrate authority and compliance with proper procedure for the Title III interception including, but not limited to, original application, affidavit, all orders, letters of authorization, minimization instructions, all monitoring agents schedules, schedule logs, or sign-in sheets, independent contractor sign in sheets (and their contracts), motions to seal, sealing orders, motions to unseal, and unsealing orders.

#### **26. Computer programs upon which the Government will rely:**

The Defendant also requests the computer software for the pen link and city link programs. A Defendant is entitled to receive a copy of computer programs used by the Government to generate exhibits.

"We fully agree that the defendants were entitled to know what operations the computer had been instructed to perform and to have the precise instruction that had been given. It is quite incomprehensible that the prosecution should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross examination if desired. We place the government on the clearest possible notice of its obligation to do this and also of the great desirability of making the program and other materials needed for cross examination of computer witnesses, such as flow charts used in the preparation of programs, available to the defense a reasonable time before trial." *United States v. Dioguardi*, 428 F.2d 1033 (2d Cir. 1970).

And the Defendant is entitled to computer information if the Government intends to introduce computerized data or expert opinions based upon that data.

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<sup>10</sup>The government's practice is to prepare transcripts of recordings at the time they are initially recorded.

"It is essential that the underlying data used in the analyses, programs and programming method and all relevant computer inputs and outputs be made available to the opposing party far in advance of trial. This procedure is required in the interest of fairness and should facilitate the introduction of admissible computer evidence. Such procedure provides the adverse party and the court with an opportunity to test and examine the inputs, the program and all outputs prior to trial. *United States v. Russo*, 480 F.2d 1228, 1241 (6th Cir. 1973), cert. denied, 414 U.S. 1157 (1974).

*See also United States v. Liebert*, 519 F.2d 542 (3d Cir. 1975)[defense entitled to impeach reliability of computer evidence]; *United States v. Oshatz*, 912 F.2d 534, 543 (2d Cir. 1990)[computer program ordered produced]. See generally 8 Wright and Miller, Federal Practice and Procedure, §2218.

### **Violation of VCCR**

#### **WHEN DEFENDANT IS DENIED HIS FEDERAL RIGHT TO CONTACT MEXICAN REPRESENTATIVES BY THE FAILURE TO BE ADVISED OF THE RIGHT TO DO SO AS GUARANTEED BY THE VIENNA CONVENTION ON CONSULAR RELATIONS.**

**A. The Importance of the Vienna Convention on Consular Relations (VCCR).** The VCCR plays a vital role in the protection and fair treatment of foreign nationals present in another state by requiring, among other things, that arresting authorities promptly notify a foreign national of his or her right to contact a consular official. *Faulder v. Johnson*, 81 F.3d 515, 520 (5<sup>th</sup> Cir. 1996). The right to contact a consular official is a critical one, as the United States has repeatedly recognized in actions and statements by the Departments of State and Justice. In fact, the United States is one of the most vociferous advocates of the Convention and insists upon strict compliance with it when an American is detained abroad. Thus, when Iran seized American hostages in 1979, the United States "invok[ed] the very same 1963 Vienna Convention .... When Iran failed to comply with the court's order, President Carter rightly accused Iran of showing 'contempt, not only for international law, but for the entire international structure for securing the peaceful resolution of differences among nations.'" Philippe Sands, "An Execution Heard Round the World," *Los Angeles Times*, April 16, 1998, B9.

The viability of the Vienna Convention obviously depends on compliance by signatory states. Failure to comply imperils the entire structure established by the

Convention. By failing to inform arrested foreign nationals of their rights, the Customs and Border Patrol Officers imperil the continuing viability of the Vienna Convention. The Vienna Convention has been described as "the single most important event in the history of the entire consular institution." (See Luke T. Lee, *Consular Law and Practice*, 26 (2d ed. 1991). Failing to abide by it, despite repeated attempts by the U.S. State Department in its advisories to notify local law enforcement agencies of their obligations, is nothing less than the flouting of federal law.

**B. Obligations under the VCCR.** Both the United States and Mexico were signatories to the Vienna Convention on Consular Relations. Through ratification of the Treaty, all U.S. authorities, including local law enforcement units such as Customs and the Border Patrol, are obligated to inform all detained foreign nationals of their consular rights, regardless of their nationality. In the periodic advisory notices which the State Department sends out to U.S. law enforcement agencies on Article 36 obligations, there is a listing for Mexico consular officials to be contacted when their citizens are arrested. It says they should be informed without delay of their right to have the nearest office of the Consul, the official entity representing Mexico's interests in the United States, notified. (See, the complete State Department Advisory, pp. 4 and 7.)

Notification is simply telling the arrested individual that he or she may contact their local national representative. It could not be easier because the State Dept. publication not only gives the advice in a number of languages including Spanish (see, p. 38), but it also gives the local phone number of the arrestee's national representative.

**C. Result of Failure to Comply.** In *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979), the Court employed a two-part test, under which aliens must demonstrate that the violation of the VCCR warrants court relief: 1) they would have availed themselves of consular assistance, and 2) that the violation prejudiced their interests protected.

In 2008, in *Medellin v. Texas*, 129 S.Ct. 360 (Tex. 2008), the U.S. Supreme Court ruled that the International Court of Justice ("ICJ") decision in *Avena* was not directly enforceable in the United States as domestic law, and that the President lacked the power to direct state courts to implement *Avena*. In *Medellin v. Texas*, the Supreme Court held that the stay of sentence imposed by the Texas state courts was

not warranted based on the remote possibility that either Congress or the state legislature might determine that the actions of the ICJ should be given controlling weight on the question of whether the denial to petitioner of his right of consular access, in violation of the VCCR, was grounds for vacating the petitioner's sentence.

**1. Defendant Must State that He Would Have Availed Himself of The Opportunity to Call the Consul's office.**

**2. Failure to Allow the Defendant to Avail Himself of His VCCR Right to Contact the Local Consul Was Prejudicial.**

This fact is demonstrable as well. This is because consular notification is not simply for merely informational purposes. Rather, upon learning of the detention of a national, a consul can provide a wide array of assistance that the individual would not otherwise receive. Among other functions, the consul may address arresting authorities on behalf of the accused, assist in obtaining legal representation, monitor proceedings, come to see the incarcerated national to ensure fairness and compliance with international standards, and advise the national concerning the criminal justice system and the similarities to and differences from the criminal justice system in their own nation.

The Vienna Convention itself lists this type of assistance as a consular function: "Consular functions consist in . . . representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." VCCR, Art. 5; see also Article 36(1)(c).

Several states require their consuls to provide a detained national with a list of local lawyers who can provide competent representation. For example, the State Department's consular instructions require a consul to provide a detained American with a list of attorneys that is tailored to the needs of the detained person by listing only those attorneys who are familiar with the type of law relevant to the detainee's case and by removing the names of "dishonest, incompetent, or inattentive" attorneys. Lee, *supra*, at 166 (quoting United States Dept. of State, Consular Instruction 413.3).

The Government may argue that whether Defendant would have refused to speak to anyone after being advised of his rights by the Consul is speculative. But any speculation is only a result of the violation of the VCCR by the law enforcement officers. The Government cannot argue that prejudice from the violation cannot be established when it set in motion the very forces which make that calculus more difficult. *See United States v. Georgia-Pacific Company*, 421 F.2d 92 (9th Cir. 1970), where the federal government was estopped by its silence to assert its rights: "Many kinds of activities -- or inactivity -- on the part of a defendant may permit the defense of equitable estoppel to be asserted against him.... A party's silence, for example, will work an estoppel if, under the circumstances, he has a duty to speak." *United States v. Georgia-Pacific Company*, 421 F.2d 92,97 (9th Cir. 1970).

When there is a violation of federal rights such as the VCCR, there must be a remedy to vindicate that right. *See United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980)(reversing an 8 U.S.C. §1326 conviction for illegal re-entry into the U.S. after deportation where the deportation was voided for violation of the Treaty). The "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives any injury. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163(1803). For every wrong there is a remedy.

The Supreme Court has held that suppression is not the proper remedy. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669 (2006), the Supreme Court held that the suppression remedy was not implicitly authorized by the VCCR. The *Sanchez-Llamas* Court also held that the Supreme Court lacked supervisory authority to impose upon state courts the remedy of suppression of evidence for state police officers' violations of VCCR, and that post-conviction VCCR arguments are subject to the same state procedural-default rules as other federal-law claims, and that

When there is a violation of federal rights, there must be a remedy to vindicate that right. The "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives any injury". *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

## MOTION TO EXCLUDE

### **Inadmissibility of out-of-court statements:**

The Confrontation Clause, providing that the accused has the right to confront and cross-examine witnesses against him or her, applies not only to in-court testimony, but also to out-of-court statements introduced at trial, regardless of the admissibility of those statements under the rules of evidence. Out-of-court statements by witnesses that are testimonial are barred under the Confrontation Clause, unless the witnesses are unavailable and defendant had a prior opportunity to cross-examine those witnesses, regardless of whether such statements are deemed reliable by the court. Out-of-court statements that qualify as testimonial for these purposes include at a minimum prior testimony at a preliminary hearing, before a grand jury, or at a former trial, as well as statements elicited during police interrogations. Of course, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his or her prior out-of-court testimonial statements. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

Recently, in *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_ (June 25, 2009), the U.S. Supreme Court held that certificates of forensic analysis are "testimonial" evidence, and therefore subject to the demands of the Confrontation Clause as set forth in *Crawford*. *Melendez-Diaz*, 129 S. Ct. at 2529. In a prosecution for drug trafficking, the state in *Melendez-Diaz* submitted three "certificates of analysis" showing the results of forensic testing performed on substances seized from the defendant. *Id* at 2531. The analyst or analysts who prepared the certificates did not testify at trial. *See id*.

Writing for the 5-4 majority, Justice Scalia indicated:

"This case involves little more than the application of our holding in *Crawford v. Washington*, 541 U. S. 36. The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against *Melendez-Diaz* was error. We therefore reverse the judgment of the Appeals Court of Massachusetts and remand the case...."

In *Melendez-Diaz*, the Supreme Court resolved that the Confrontation Clause proscription of testimonial hearsay requires that when a state presents a forensic lab report as evidence in a criminal trial it must make the analyst who prepared the report available for defense cross-examination. By granting certiorari in *Briscoe, et al., v. Virginia* (07-11191), the court set on its 2010 term the question of whether the state can "avoid" this obligation "by providing ... the accused ... a right to call the analyst as his own witness" at trial. *Briscoe, et al., v. Virginia* (07-11191).

## MOTIONS TO SUPPRESS

In an opinion that was later withdrawn because the issue was not properly preserved in the trial court, *See U.S. v. Pope*, 467 F.3d 912, 915-16 (5<sup>th</sup> Cir. 2006), the United States Supreme Court of Appeals for the Fifth Circuit made clear that the "good faith" exception to the exclusionary rule does not apply where an officer omits the true purpose for seeking that warrant. *U.S. v. Pope*, 452 F.3d 338 (5<sup>th</sup> Cir. 2006) [a case involving local Texas law enforcement officers]. The Court there emphasized that the "good faith exception 'is not an excuse if the police are not frank with the magistrate in the proceedings to obtain a warrant,'" noting that a "reasonably well trained officer in Baird's (the San Antonio, Texas police officer) exact circumstances would have known that the search was illegal....because the attesting officer obtained the warrant by way of ... a deliberate omission of material fact, i.e., ....the actual purpose of the search." *U.S. v. Pope*, 452 F.3d, at p. 345.

"This is precisely the type of case in which suppression must be granted to serve the deterrent<sup>11</sup> purpose of the exclusionary rule: Exclusion of the evidence here should ensure that all future 'Officer Bairds' will disclose fully and truthfully all the pertinent information that they are duty-bound to supply judicial officers when seeking warrants." *U.S. v. Pope*, 452 F.3d, at p. 345.

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<sup>11</sup> Almost predicting the Supreme Court's recent analysis in *U.S. v. Herring*, 129 S.Ct. 695 (2009), [See: Discussion hereafter].

## RECENT SUPREME COURT AUTHORITY

On January 14, 2009, the United States Supreme Court clarified its rulings in *U.S. v. Leon*, 468 U.S. 897 (1984) [establishing what was described as the “good faith” exception to the exclusionary rule] and *Franks v. Delaware*, 438 U.S. 154 (1978) [dealing with misstatements in warrants], noting that the Court’s use of the term “good faith reliance” upon the warrant was “perhaps confusing.”

“We (perhaps confusingly) called this objectively reasonable reliance ‘good faith.’” *U.S. v. Herring*, 129 S.Ct. 695 (2009).

The Court then goes on to hold that in order to trigger exclusion, police conduct must be sufficiently “deliberate” that exclusion might be expected to meaningfully deter such conduct, and sufficiently “culpable” that deterrence is worth the price of exclusion. The theory being that where “isolated negligence” is attenuated from the search or arrest, exclusion of the evidence will not deter police misconduct.

However, the Court took considerable pains to point out that in order to warrant imposition of the Federal Exclusionary Rule, the police actions need not necessarily be actually intentional or “deliberate.” In fact, conduct that is “reckless,” or merely “grossly negligent,” or in some circumstances, even “recurring...negligence” will suffice.

“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” *U.S. v. Herring*, 129 S.Ct. 695 (2009).

The Court in *Herring* noted that just as officers can benefit from the “collective knowledge” to establish probable cause in a warrantless search, they are bound by the same concept, and must accept responsibility for any knowledge of facts undermining probable cause, or misrepresentations of fellow officers, even though not the Affiant.

“In analyzing the applicability of the rule, *Leon* admonished that we must consider the actions of all the police officers involved.” 468 U.S., at 923, n. 24 (‘It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination’).” *U.S. v. Herring*, 129 S.Ct. 695 (2009).

### **GROSS, RECURRING, SYSTEMIC NEGLIGENCE IS SUFFICIENT TO WARRANT EXCLUSION**

Again, the Supreme Court in *Herring* held that evidence is subject to exclusion if it is the consequence of sufficiently culpable police conduct, “including grossly negligent” or “recurring” negligent conduct. In *Herring*, the conduct was a mere clerical mistake made by a police employee in another jurisdiction and that bookkeeping error was attenuated and unrelated to the arrest.

Recently, the Supreme Court harkened back to ancient complaints that “because the constable blundered, the criminal should not go free.” This was the complaint of Justice Cardozo over 80 years ago. But if, as some modern jurists say, police officers are professionals, we should expect them to be and hold them to the standard of a reasonably well trained officer. The courts should not accept the lowest common denominator, a blundering constabulary. If law enforcement officials fail to conduct themselves as reasonably well trained officers, Judges should suppress such evidence.

If the Fourth Amendment is to mean what it says, the exclusionary rule must be equal to its violation. In the few short months since the *Herring* and *Gant* cases have come out, trial lawyers have seen an increase in clerical errors and auto inventory searches. Law enforcement responds to High Court pronouncements. And the manner in which they are doing so, demonstrates that law enforcement still requires deterrence from unlawful conduct.

## SEARCH INCIDENT TO ARREST

In *Chimel v. California*, 395 U.S. 752 (1969), the Court held that a search incident to arrest must be justified by officer safety or preserving evidence.

In *New York v. Belton*, 453 U.S. 454 (1981), the Court allowed a search of a vehicle incident to arrest for officer safety, stating that it would not engage in nice distinctions about the reach of the officer's arm. The Court extended this warrant exception to circumstances when the vehicle stop might reasonably produce evidence of the crime for which the vehicle was stopped. *Thornton v. United States*, 541 U.S. 615 (Scalia, J., concurring in judgment).

In *Arizona v. Gant*, 129 S. Ct. 1710 (2009), the high court eliminated this "Bright Line Rule" and invalidated searches conducted for the officers' safety when the subject was in custody and unable to access the vehicle. However, the Court did not eliminate the possibility of conducting searches of the vehicle for evidence of the crime for which the vehicle was stopped. One cannot determine for what offense the officer actually stopped the vehicle without making an inquiry into the subjective purpose, and whether it differs from the post stop reason asserted.

It is in this context that a reasonableness evaluation is made. In *Maryland v. Pringle*, 124 S.Ct. 795 (2003), a police officer stopped a car for speeding, searched the car, seizing money and cocaine from behind the backseat armrest, and then proceeded to arrest all three of the car's occupants after they denied ownership of the drugs and money. The Court held that it was uncontested that the officer, upon recovering the suspected cocaine, had probable cause to believe a felony had been committed, and thus, the sole question turned to whether the officer had probable cause to believe Pringle, the front-seat passenger in the car, had committed the crime.

In *Brendlin v. California*, 127 S. Ct. 2400 (2007), Brendlin was a passenger in a vehicle driven by another that was subjected to a traffic stop. A search of Brendlin revealed his possession of drug paraphernalia. Brendlin moved to suppress, but the California Supreme Court held that suppression was unwarranted, and ultimately that a passenger in a vehicle stopped by police is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he was the subject of an officer's investigation or show of authority. The U.S.

Supreme Court then granted certiorari to review the question of whether a passenger in a vehicle subject to a traffic stop is thereby “detained” for purposes of the Fourth Amendment, thereby allowing the passenger to contest the legality of the traffic stop. The Supreme Court ruled unanimously that a passenger in a vehicle, like the driver, has been seized within the meaning of the Fourth Amendment when the police make a traffic stop of the vehicle. The passenger may therefore challenge the stop’s constitutionality. The Court noted that the relevant inquiry was whether a reasonable person would feel free to terminate the encounter.

In *Brendlin*, the Supreme Court rejected the reasoning that the police only intended to investigate the driver of the vehicle, not the passenger, noting that for Fourth Amendment analysis, the subjective intent of the police is irrelevant, and that instead, the relevant objective inquiry was the understanding of a reasonable passenger.

In *Arizona v. Johnson*, 129 S.Ct. 781 (2009), the Court questioned whether in the context of a vehicular stop for a minor traffic infraction, an officer may conduct a pat-down search of a passenger, when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but where the officer has no reason to believe the passenger is committing, or has committed, a criminal offense. The Supreme Court held that although a pat-down search of this type may satisfy the conditions set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), the police must harbor reasonable suspicion that the particular person, or individual passenger of the vehicle, who is subjected to the frisk is armed and dangerous.

In *Scott v. Harris*, 127 S. Ct. 1769 (2007), an officer ended a nine-minute high-speed car chase by push-bumping the suspect’s vehicle, causing it to crash into a ditch, injuring and paralyzing the suspect. The Eleventh Circuit concluded that the officer’s actions could constitute “deadly force,” that the use of such force in this context would violate a suspect’s constitutional right to be free from excessive force during a seizure, and that a reasonable jury could so find.

The Supreme Court in *Scott* reversed, holding that because the car chase initiated by the suspect posed a substantial and immediate risk of serious physical injury to others, the officer’s attempt to terminate the chase was reasonable. It is important to note that the record in this case includes a videotape capturing the events

in question. Where, as in *Scott*, a videotaped record contradicts the suspect's versions of events so that no reasonable jury could believe it, the court will not adopt such a version of facts for purposes of ruling on a summary judgment motion. And in viewing the facts in the light depicted by the videotape, the *Scott* Court found it clear that the officer did not violate the Fourth Amendment. Here, in determining the seizure's reasonableness, the Court balanced the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests allegedly justifying the intrusion. The Court ruled that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.