

IT PAYS TO DISCOVER:
HOW DISCOVERY
BUYS YOU CROSS-EXAMINATION

Complex Litigation Seminar

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Introduction

This outline discusses various strategies for breaking-out of the discovery doldrums created in Federal Courts. These techniques can help lead you to effective cross-examinations of the affiants on search and wire warrants as well as every witness. They touch upon new developments and then suggest several ways to expand federal discovery outside of the strict confines of *Brady* and the Federal Rules of Criminal Procedure.

My sincere thanks to Senior Litigator Steven Kalar of the Federal Public Defender's Office, N.D. Cal whose energy, creativity and tenacity, as well as his outright words, serve in large part as the basis of this outline. He thanks (and so do I) Chief Assistant Carol Brooks of the Chicago Federal Public Defender's office, whose original outlines remain the definitive source on discovery in federal court. Many of the insights (& words) within are thanks to Steve and Carol; I am grateful for their insights.

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I. You Don't Need A Line of Credit For This¹

A. Federal Discovery: The Statutory Right

There are the “basics” of federal discovery that you likely already know. There is, of course, a statutory right to discovery in Federal Rule of Criminal Procedure 16 but unlike constitutional discovery obligations, Rule 16 disclosure is **only** triggered by defense request. Importantly, the defense request must be specific, and requests under Federal Rule of Criminal Procedure 16(a)(1)(C) require a showing of materiality. *See United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984) (“To obtain discovery under Rule 16(a)(1)(C), a defendant must make a prima facie showing of materiality A general description of the materials sought or a conclusory argument as to their materiality is insufficient to satisfy the requirements of Rule 16(a)(1)(C).”) (internal quotations and citations omitted).

A second statutory resource is the *Jencks* Act, codified at 18 USC § 3500 and Federal Rule of Criminal Procedure 26.2. These provisions require disclosure of the relevant portions of the witness's statement *after* direct examination. To qualify for disclosure, *Jencks* material must be:

- Written or memorialized;
- Signed, adopted, or approved by the witness;
- A substantially verbatim transcript made contemporaneously with the oral statement, or
- Grand jury testimony.

Carol A. Brooks, *Federal Discovery* (Outline), 2000.

While a court cannot order disclosure of *Jencks* material before the witness testifies, a court can pressure the government to disclose this information early to avoid unnecessary trial delays. *See, e.g., United States v. Percevault*, 490 F.2d 126, 131 (1974) (“Although his notions of fairness may lead a district judge to encourage disclosure of statements made by co-conspirators who are potential government witnesses, Rule 16(a) simply does not encompass these statements, nor does the *Jencks* Act permit their disclosure over the objection of the government.”)

Think outside of the box when it comes to *Jencks* Act requests. For example, the taped calls of the imprisoned jailhouse informant may well be *Jencks* Act material – and this impeachment treasure trove should be provided to the defense. *See* Barry Tarlow, *Rico Report: Tape-Recorded Informer Conversations*, THE CHAMPION (June 2000), 55; *see also United States v. Ramirez*, 174 F.3d 584, 588 (5th Cir. 1999) (“The tapes were in the possession of the Bureau of Prisons until they were taped over, and therefore they were in the “possession of the United States” as defined by the *Jencks* Act. The district court erred in finding otherwise.”)

B. Federal Discovery: The Constitutional Right

Separate – and perhaps trumping² – the limited Rule 16 disclosure is constitutionally-mandated

¹ Section I is reprinted almost in entirety from, Steven Kalar, *Frozen in the Arctic Ice*, *Federal Discovery*, CJA Seminar 2004

² While it seems obvious that a constitutional obligation would overcome a mere statutory right, there is a split in circuit authority on this premise. *Compare United States v.*

discovery, as articulated in the *Brady* line of authority: *Brady*, *Giglio*, *Bagley*, *Kyles* and *Ruiz*. Grossly oversimplified, these cases stand for the following propositions:

Chart: Federal Discovery – <i>Brady</i>, <i>Giglio</i>, <i>Bagley</i> and <i>Kyles</i>	
Case and Principle	Thoughts
<p><i>Brady</i>: “We now hold that the suppression by the prosecution of evidence favorable to the accused, upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” <i>Brady v. Maryland</i>, 373 U.S. 83, 87 (1963).</p>	<ul style="list-style-type: none"> • THE case on the constitutional right to discovery – primarily concerned with “exculpatory” evidence in the <i>Brady</i> decision, but would include impeachment evidence with <i>Giglio</i>.
<p><i>Giglio</i>: “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the <i>Brady</i> rule] A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury.” <i>Giglio v. United States</i>, 405 U.S. 150, 154 (1972) (internal quotations and citations omitted).</p>	<ul style="list-style-type: none"> • The lead case for impeachment evidence. • Note that <i>Giglio</i> is directly in the <i>Brady</i> line of authority. See also <i>United States v. Bagley</i>, 473 U.S. 667, 676 (1985) (“Impeachment evidence, however, as well as exculpatory evidence, falls within the <i>Brady</i> rule.”) • The Supreme Court in <i>Ruiz</i> suggested that <i>Brady</i> and <i>Giglio</i> materials can be separated for the “timing of disclosure” analysis.

Starusko, 729 F.2d 256, 263 (1984) (“[T]he government was mistaken in ignoring the district court’s *Brady* disclosure order because it believed that the *Jencks* Act was dispositive. Even if the report contained statements by Logan that could be classified properly as *Jencks* Act material, that does not mean that it would be exempted from a pretrial disclosure order based on *Brady*. All *Jencks* Act statements are not necessarily *Brady* material. The *Jencks* Act requires that any statement in the possession of the government – exculpatory or not – that is made by a government witness must be produced by the government during trial at the time specified by the statute. *Brady* material is not limited to statements of witnesses but is defined as exculpatory material; the precise time within which the government must produce such material is not limited by specific statutory language but is governed by existing case law. Definitions of the two types of investigatory reports differ, the timing of production differs, and compliance with the statutory requirements of the *Jencks* Act does not necessarily satisfy the due process concerns of *Brady*.”), with *United States v. Bencs*, 28 F.3d 555, 561 (5th Cir. 1994) (“When *Brady* material sought by a defendant is covered by the *Jencks* Act, 18 U.S.C. § 3500, the terms of that Act govern the timing of the government’s disclosure.”) (footnote omitted).

Importantly, even the Fifth Circuit’s view of *Jencks* supremacy over constitutional requirements may be limited to the *timing* of disclosure.

Chart: Federal Discovery – *Brady, Giglio, Bagley and Kyles*

<p><i>Bagley</i>: “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” <i>United States v. Bagley</i>, 473 U.S. 667, 682 (1985).</p>	<ul style="list-style-type: none"> • Court explains what “materiality” means – note that this remains a standard most useful for <i>appellate</i> review. Gives little guidance for what should be disclosed <i>before</i> appellate review – in the pretrial proceeding. • Same standard whether defense makes no request, a general request, or a specific request for material. <i>Id.</i> at 682. <i>But</i>, easier for defense to make materiality standard if it can show it didn’t pursue leads because it relied on the lack of discovery in response to a specific request. <i>Id.</i>
<p><i>Kyles</i>: “On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a <i>Brady</i> violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely new effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” <i>Kyles v. Whitley</i>, 115 S. Ct. 1555, 1567 (1995).</p>	<ul style="list-style-type: none"> • Appellate review after non-disclosure of information is for <i>Bagley</i> error, not harmless error. • To determine whether <i>Bagley</i> error exists, look at the <i>collective</i> impact of the information – not piece by piece. <i>Id.</i> at 1567. • Emphasis on obligation of AUSA to look for <i>Brady</i> material “known to others acting on the government’s behalf.” Expands <i>Brady</i> obligations beyond the prosecutor’s own case file. • Good quote: “This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. <i>See Agurs</i>, 427 U.S. at 108 . . . ([T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.’) This is as it should be.” <i>Id.</i> at 1568.

Another useful resource is the analysis of Judge Dean Pregerson in *United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Ca. 1999). In *Sudikoff*, Judge Pregerson acknowledged that the discovery standards in the *Brady* line of cases were of little use when considering pre-trial discovery; those appellate standards focused on what happened at trial, an “analysis [that] obviously cannot be applied by a trial court facing a pretrial discovery request.” *Id.* at 1199. The district court emphasized that *Brady* violations that do not result in reversible error are nonetheless *improper* in the trial court:

Additionally, the post-trial review determines only whether the improper suppression of evidence violated the defendant’s due process rights. However, that the suppression may not have been sufficient to violate due process does not mean that it was proper. . . . In this light, it is clear that *Brady*’s materiality standard determines prejudice from admittedly improper conduct. It should not be considered as approving all conduct that does not fail its test.

Id. at 1199. For the *pretrial* context, therefore, Judge Pregerson held that “the government is obligated to disclose all evidence relating to guilt or punishment which *might reasonably be considered favorable to the defendant’s case.*” *Id.*

The logic of the *Sudikoff* case is impeccable, its reasoning persuasive. Before litigating disclosure of impeachment information, read this decision first and use it to convince the district court that the higher *Bagley* discovery standard is inappropriate in the pre-trial context.

D. When Do I Get It? The Timing of Discovery Disclosure³

The timing of discovery obligations in federal court is varying degrees of “not early enough.” Rule 16 does not have explicit discovery timing provisions, although the rule itself anticipates “timely” requests and disclosure. *See, e.g., United States v. Von Willie*, 59 F.3d 922, 929 & n.4 (9th Cir. 1995) (“Rule 16(a)(1)(E) requires that the government “disclose to the defendant a written summary of [expert] testimony the government intends to use ... during its case in chief.” Although subsection (a)(1)(E) does not include specific timing requirements, “it is expected that the parties will make their requests and disclosures in a timely fashion.”) Many districts have local rules, or local court orders, that require earlier disclosure of Rule 16 information.

One example of the importance of early disclosure is in the area of 16(a)(1)(E) expert summary disclosure given that Daubert’s ‘gatekeeping’ function applies to both scientific and ‘soft-expert’ testimony. Pretrial challenges to this testimony is available and necessary for the defense. *Kunho Tire Co. V. Carmichael*, 119 S.Ct. 1167 (1999). *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993). *See, The Champion, RICO Report (June 1998)*.

The expert testimony must be both relevant and reliable to be admissible, *Kumho*, 119 S.Ct. At 1174, and the ‘evidentiary rationale underlying Daubert’s ‘gatekeeping determination’ isn’t just listed to “scientific knowledge.” *Id. At 74*.

What does this mean? A pretrial hearing which forces the expert to elucidate his or her methodology and experience. And, for the defense an opportunity to attack the admissibility of those soft experts such as agents who testify that drug traffickers never entrust money or drugs to people ignorant of the criminal activity or that there is no such thing as a ‘blind mule’ or modus operandi ‘expert’ testimony. *See United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997) (“expert testimony” that drug traffickers do not entrust large quantities of drugs to unknown dupes) *United States v. Webb*, 115 F.3d 711, 716 (9th Cir. 1997) (“expert testimony” that defendant must have known gun was in engine compartment because criminals often hide guns there.)

While Daubert’s four factor inquiry (testing, peer review, error-rates and acceptability) is flexible in the context of soft experts, it remains true that the court is not required to admit opinion evidence that is connected to existing data ‘only by the ipse dixit’ of the expert. *Id. At 1179*.

As noted above, the *Jencks* Act does not require disclosure of *Jencks* materials until the witness testifies – although a court can apply pressure for earlier disclosure.

But there is F.R.Cr.P 26.2. The *Jencks* Act, 18 U.S.C. § 3500 (1970), has been superseded by Rule 26.2 of the Federal Rules of Criminal Procedure. Rule 26.2 has no language limiting the production of witness statements until after the witness has testified “at trial”. Compare: Rule 26.2(a), F.R.Cr.P., with 18

³ Carol Brooks’ Discovery outline is the best source for comprehensive authority on the timing of disclosure, and this section borrows heavily from her research.

U.S.C. § 3500(a) [limiting language].

Since Rule 26.2 has no language limiting or precluding disclosure of witness statements prior to trial, production of statements used by a witness to refresh his or her recollection at a pretrial “hearing” should be permitted. See: *United States v. Salsedo*, 477 F.Supp. 1235 (E.D. Cal 1979). Rule 12(i), F.R.CrP., expands pretrial production of government witness’ statements to any law enforcement officer, even if called by the defendant. And, it applies to a detention hearing held under 18 U.S.C. §3144, unless the court for good cause shown, rules otherwise in a particular case.

Early *Brady* disclosure is trickier. *Brady* does not *per se* require disclosure of *Brady* materials pre-trial. See, e.g., *United States v. Knight*, 867 F.2d 1285, 1289 (11th Cir. 1989) (“Appellants received the information during the trial and have failed to demonstrate that the disclosure came so late that it could not be effectively used; and thus they cannot show prejudice. . . .Defense counsel were given the opportunity to decide when they wanted Dennis brought back, and they had ample opportunity while in possession of the grand jury transcripts to prepare for the witness. The jury heard Dennis’ credibility challenged; her lack of truthfulness was stressed in aggressive cross-examination by defense counsel. Even if the disclosure should have come sooner, any possible prejudice was cured during trial.”) (internal citation omitted); *but see United States v. Kendall*, 766 F.2d 1426, 1440 (10th Cir. 1985) (“The Government is generally not required to disclose its witnesses or their testimony before trial. . . .The one significant exception to this rule is exculpatory evidence; the government’s failure to disclose such evidence before trial is a violation of due process.”) (internal quotation omitted).

Courts can, however, order pretrial disclosure. See *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) (“In *Higgs*, this court announced that the district court has general discretionary authority to order the pretrial disclosure of Brady material “to ensure the effective administration of the criminal justice system.”In so doing, the court perpetuated our longstanding policy of encouraging early productionToday, we affirm this court’s longstanding policy and applaud the district court’s effort to ensure prompt compliance with *Brady*. We flatly reject the notion, espoused by the prosecution, that “it is the government, not the district court, that in the first instance is to decide when to turn over *Brady* material.”The district court may dictate by court order when *Brady* material must be disclosed, and absent an abuse of discretion, the government must abide by that order.”) (internal quotations and citations omitted).

The inquiry ultimately focuses on whether the material is disclosed in time for the jury (or the fact-finder) to become aware of it. See *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988) (“*Brady* does not necessarily require that the prosecution turn over exculpatory material before trial. To escape the *Brady* sanction, disclosure must be made at a time when disclosure would be of value to the accused.”) From the “worst case scenario” category, the Fourth Circuit has held that it was not be a *Brady* violation when exculpatory evidence is revealed *during cross-examination* of the government’s first witness. See *United States v. Smith, Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985) (No due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial. . . . In this case, the exculpatory information was put before the jury during cross-examination of the very first trial witness. The information was available for use in the defendant’s cross-examination of all further government witnesses as well as in the defendants’ case in chief. The disclosure of this exculpatory evidence, at trial, does not rise to the level of a constitutional violation.”)

To make matters worse, in a recent, devastating decision the Supreme Court has held that impeachment (*Giglio*) material *need not* be disclosed to the defense before a plea of guilt. *United States v. Ruiz*, 122 S. Ct. 2450, 2453 (2002). The Court reasoned that a defendant can constitutionally “misjudge”

other components of his or her case before a plea; the quality of the government's case, the likely penalties, a change in law regarding punishment, the admissibility of a confession, and potential defenses. There accordingly was no constitutional problem with a plea if the defendant misjudged "the grounds for impeachment of potential witnesses at a possible future trial." *Id.* at 2455. The impact of *Ruiz* on pretrial strategies and discovery litigation will be discussed in greater depth in Section II B, *infra*.

Brady information – and specifically, *Giglio* impeachment information – is obviously of little practical use to the defense if handed to counsel in the midst of a hearing or trial. The first step of an effective cross thus takes place long before the hearing, when defense counsel litigates pre-hearing disclosure of *Brady/Giglio* information. Waiting for this information to fall in one's lap at trial invites a dismissive finding that "it made it before the jury." Moreover, the timing of *Brady/Giglio* disclosure is one of the most important junctures in which to salt the appellate record. When faced with late disclosure, work hard to make a factual proffer of the various ways the defense would have further investigated and used this information, including declarations from investigators describing what they would have done had the information been timely disclosed.

D. The "Bad Faith" Dilemma: "Material Exculpatory" Versus "Potentially Exculpatory" Evidence

Q: Is an officer's subjective intent is important in federal criminal litigation? A: It depends whether the officer's subjective intent helps, or hurts, the defendant.

Anyone who has litigated the legality of a traffic stop is well-familiar with the Supreme Court's devastating decision in *Whren*. See *Whren v. United States*, 517 US 806 (1996). In *Whren*, the Supreme Court held that the subjective intent of an officer is irrelevant – even if a traffic stop is clearly pretextual – as long as the stop itself was legal. *Id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.")

In *discovery* litigation, however, the subjective intent of the officers' is critical. If the evidence destroyed or withheld was not "material exculpatory evidence," the defendant has the gargantuan task of proving that the officers acted in bad faith. See, e.g., *Illinois v. Fisher*, 124 S.Ct 1200, 1202 (2004). In other words, if the evidence is simply "potentially useful evidence," to secure any remedy the defendant has to show bad faith. *Id.* at 1202.

This inconsistency has not gone unnoticed. As Justice Stevens observed in his concurrence in *Fisher*, "*Youngblood*'s focus on the subjective motivation of the police represents a break with our usual understanding that the presence or absence of constitutional error in suppression of evidence cases depends on the character of evidence, not the character of the person who withholds it." *Id.* at 1202 & n.1 (Stevens, J., concurring).

A defendant can *prove* the bad faith of a pretextual traffic stop or *Terry* search, and it matters not a whit to the success of her Fourth Amendment suppression motion. By contrast, in the discovery context important evidence withheld or destroyed gives no rise to any remedy *unless* the defendant shows the bad faith of law enforcement and the prosecution. How did this contradiction evolve (or devolve?)

The roots of the "bad faith" requirement stretch back to one of the first significant limitations on *Brady*: *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). Decided nineteen years after *Brady*, *Valenzuela-Bernal* dealt with a *per se* rule in the Ninth Circuit that acknowledged a due process violation

whenever a material witness was deported before interviewed and deposed by the defense. The Supreme Court's opinion goes to great lengths to emphasize the practical burden that this placed on the government; in the innumerable border cases material witnesses were either deported – resulted in dismissal – or clogged the jails as they awaited their depositions.

Faced with these practical concerns, the Court thus hedged the disclosure requirements set forth in *Brady*. It concluded that “[T]he responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive’s *good-faith* determination that they possess no evidence favorable to the defendant in a criminal prosecution.” *Id.* at 872 (emphasis added).

Four years later, the Court created a split in discovery jurisprudence that gave birth to the full “bad faith” analysis, in its infamous decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Youngblood* set forth two separate approaches depending on the nature of the evidence at issue. Justice Rehnquist, writing for the Court, conceded that *Brady* prohibited “the suppression by the prosecution of evidence favorable to the accused . . . where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*” *Id.* at 55 (emphasis added). Despite that broad rule, however, in *Youngblood* the Court concluded that “unless a criminal defendant can show *bad faith on the part of the police*, failure to preserve *potentially useful evidence* does not constitute a denial of due process of law.” *Id.* at 58 (emphasis added).

Appellate courts have seized on this distinction, and have imported it into all areas of discovery law (often despite contradictory language in Supreme Court decisions). For example, the Ninth Circuit has grafted an almost-insurmountable “bad faith” requirement onto deported material witness challenges. See *United States v. Dring*, 930 F.3d 687, 693 & n.7 (9th Cir. 1991). Remarkably, this requirement is despite the fact that *Valenzuela-Bernal* requires the *good faith* of the prosecution, not proof of the bad faith made by the defendant. In fact, the Ninth Circuit recently conceded that a “well-reasoned” approach would be to *first* determine whether a material witness’ testimony was material, and then proceed to the bad faith inquiry. See *United States v. Carreno*, ___ F.3d ___, 2004 WL 728227, *4 (9th Cir. 2004).⁴ Nonetheless, the Court refused to budge from its earlier “bad faith” requirement that it had grafted onto *Valenzuela-Bernal*. *Id.*⁵

⁴ “Carreno argues that we should analyze this claim differently, first evaluating whether the lost testimony is “material” under *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and *Kyles v. Whitley*, 514 U.S. 419, 436-37, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). If we determine the evidence is “material,” we must reverse the district court under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), regardless of the government’s good or bad faith. Only if we determine the evidence is not “material” does *Dring* apply. Although Carreno’s argument is well-reasoned, it is foreclosed by our decision in *United States v. Velarde-Gavarrete*, 975 F.2d 672 (9th Cir.1992), which clarifies that *Dring* – but not *Brady* or *Bagley* – applies to access-to-evidence claims based on illegal witness deportation.” *Carreno*, ___ F.3d ___, 2004 WL 728227 at *4.

⁵ Notably, other Circuits with significant immigration dockets have not adopted the Ninth Circuit’s requirement of bad faith from *Valenzuela-Bernal*. See, e.g., *United States v. Sierra-Hernandez*, 192 F.3d 501, 503 & n.3 (5th Cir. 1999) (observing that “[t]he Ninth Circuit has gone even further, interpreting Supreme Court precedent as requiring that the defendant also

Another example is one of the latest Supreme Court cases on discovery, *Illinois v. Fisher*, 124 S.Ct. 1200 (2004). In *Fisher*, the defendant was stopped and cocaine (allegedly) was found in his car. *Id.* The defendant filed a motion for discovery and was released on bond – then remained a fugitive for over ten years. *Id.* He was eventually arrested and brought to trial on the cocaine charges. *Id.* In the interim fugitive period, the police had destroyed the “cocaine” that had been seized. *Id.*

The Illinois court of appeals reversed in light of what it viewed as a due process violation. *Id.* The court held that where the defense requested material in a discovery motion, and it was later destroyed, the defendant need make no additional showing that the evidence had exculpatory value – no showing of bad faith is necessary. *Id.*

The Supreme Court reversed in a *per curiam* decision. It set forth in one paragraph the crux of the “exculpatory” versus “potentially exculpatory” distinction and the ramifications for bad faith showing required of the defense:

We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In *Youngblood*, by contrast, we recognized that the Due Process Clause “requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” 488 U.S., at 57, 109 S.Ct. 333. We concluded that the failure to preserve this “potentially useful evidence” does not violate due process “unless a criminal defendant can show bad faith on the part of the police.” *Id.*, at 58, 109 S.Ct. 333 (emphasis added).

Id. at 1202.

At best, explained the Court, this was “potentially exculpatory” evidence and the defendant had not shown bad faith.

The Court in *Fisher* emphasized that the substance had been tested four times before it was destroyed, and had tested positive for cocaine. *Id.* It made no difference that the defense had made a discovery request before the evidence was destroyed: “We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of the police.” *Id.*

The Court was also unsympathetic to the defendant’s claim that this evidence was central to his defense – he had testified, denied ever possessing cocaine, and explained that he had been framed by the police. *Id.*, *see also id.* at 1201. “[T]he applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution’s case or the defendant’s defense, but on the distinction between ‘material exculpatory’ evidence and ‘potentially useful’ evidence.” *Id.* at 1203.

Fisher teaches several sobering lessons. First, a discovery demand is not a proxy for a “bad faith”

show bad faith by the prosecution”); *see also United States v. Romero-Cruz*, 201 F.3d 374, 377 (5th Cir. 2000) (applying *Valenzuela-Bernal* test with no bad-faith showing requirement placed on defense).

showing – if the evidence is only ‘potentially exculpatory,’ there is no avoiding the bad faith hurdle.⁶ Moreover (unlike the *Brady* line) it doesn’t matter how critical the ‘potentially exculpatory’ evidence is: unless it is “material exculpatory evidence” the defense must show the police acted in bad faith.

Perhaps the most important lesson, however, is that the defense should try to avoid the bad faith trap altogether. To do that, it is important *at the trial level* to create a record characterizing the lost evidence as “material exculpatory evidence.” For example, in the *Fisher* case would it have made a difference if the defendant had submitted a declaration affirming that the substance was not cocaine, and that his own expert’s tests would have proved it?

To help guide the practitioner in untangling the bad faith tangle, here is a chart of the “material exculpatory” and “potentially exculpatory” authority:

Chart: “Material Exculpatory” versus “Potentially Exculpatory” Authority

“Material Exculpatory,” no requirement that the defendant show the police acted in bad faith to obtain remedy.	“Potentially Exculpatory,” requires the defendant show that the police acted in bad faith to obtain remedy.
<i>Brady v. Maryland</i> , 373 U.S. 83, 87 (1963). (Note case decided before “bad faith” standard articulated – later cases would limit <i>Brady</i>).	<i>United States v. Valenzuela-Bernal</i> , 458 U.S. 858, 872 (1982). (Not really a “bad faith” case, but later interpreted as part of the bad faith line. <i>See, e.g., United States v. Dring</i> , 930 F.3d 687, 693 & n.7 (9th Cir. 1991)).
<i>Giglio v. United States</i> , 405 U.S. 150, 154 (1972) (Not clear that <i>Giglio</i> impeachment information automatically subjected to “material exculpatory” analysis. Suggested in recent Supreme Court case, however, that “impeaching” information falls into <i>Brady</i> analysis and avoids the bad faith requirement. <i>See Banks v. Dretke</i> , 124 S.Ct. 1256, 1272 (2004)).	<i>California v. Trombetta</i> , 467 U.S. 479 (1984) (a precursor to the true first “bad faith” case, <i>Youngblood</i> . As with many “potentially exculpatory” evidence cases, involved forensic evidence – in this case, lost breath samples in a DUI case).
<i>United States v. Bagley</i> , 473 U.S. 667, 682 (1985) (looks to the “reasonable probability” of whether disclosure of impeachment information would have affected the outcome of the proceeding. Preceded, however, the <i>Youngblood</i> bad faith case, so not clear if impeachment information is immune to the bad faith showing).	<i>Arizona v. Youngblood</i> , 488 U.S. 51 (1988). (First Supreme Court case to squarely divide discovery into two camps, “exculpatory” and “potentially exculpatory.” Held that because lost semen samples were only “potentially exculpatory,” and because there was no showing of bad faith, there was no due process violation.)

⁶ Note, however, that if the defense makes a discovery demand and then relies on the government’s response, it can help boost lost evidence into the desired “materiality” zone. *See, e.g., United States v. Bagley*, 473 U.S. 667, 682 (1985).

<i>Kyles v. Whitley</i> , 115 S. Ct. 1555, 1567 (1995) (applying <i>Brady/Bagley</i> analysis in capital case).	<i>United States v. Dring</i> , 930 F.3d 687, 693 & n.7 (9th Cir. 1991) (Ninth Circuit grafts “bad faith” requirement into deported material witness cases).

II. Banking on Your Credit

Let's hope you have good credit, or alternatively, that you show yourself to be a good credit risk as the discovery rules are cost-effective and cheap and getting discovery on the eve of trial or worse, during trial is of little use to you in defending your client. So, just how do you set out to get early discovery production?

You put yourself in the mind-set of a civil practitioner and you come to the courthouse talking and thinking in their terms. Yes, that's right, you talk about case management issues (endlessly if possible), if you're CJA appointed you talk about the most cost-effective methods, you suggest use of your magistrate to supervise discovery disputes and you urge the Court to urge the government to enter into stipulated discovery orders.

So, just what do you do first?

A. Local Rules

Just because discovery isn't legally compelled does not mean that the government cannot voluntarily provide it. The trick to this approach is to explain why and how it is in the government's interest to do so.

1. Discovery Letters - Ask and Keep Asking.

Paper them to death by the sending of polite (to the extent possible) of letters asking for those things necessary to defend your client. Here are two examples:

Mr./Ms. Assistant United States Attorney
450 Golden Gate Avenue, 11th Floor
San Francisco CA 94102

RE: UNITED STATES v *****, et al.,
CR **-00097 ***

Dear Ms./Mr. AUSA:

I am requesting discovery on behalf of all defendants in the above-captioned case. Realizing that this investigation continued for some time resulting in thousands of pages of discovery consisting of numerous wiretap affidavits, ten-day periodic reports, dozens of search warrants and affidavits, countless law enforcement reports, intercepted telephone calls, consensual recordings, and utilization of undercover agents and confidential informants, we believe that a coordinated effort will be required to limit the expense of litigating this massive investigation.

As such, we are requesting the following items of discovery in the following manner:

1. All discovery to be bates stamped by the government in order to allow easy distribution and referencing by all parties. Where possible, we are requesting both paper copies and the information on computer diskettes in readable formats. The electronic format will save hundreds of hours of work and thousands of dollars in cost and will easily disseminate the information to all parties.

2. With regard to the wiretaps and extensions, please provide all the wiretap tapes, affidavits, applications, orders and all appendices attached to these documents for this and related investigations.

In addition, please provide:

A. All monitoring logs, synopsis reports (if applicable), and ten-day periodic reports.

B. A list of "Coded Words and Phrases" which the government claims refers to drug or money communications.

C. A list of pertinent calls as determined at the time of the interception.

D. A breakdown by named-defendants of all of the telephone calls in which he or she participated.

E. Additionally, please provide all inventory orders, inventories and reports or service thereof. Additionally, for those calls which have been transcribed, please provide the transcripts. With regard to any "consensual recordings", all orders and underlying documentation purport to authorize such consensual recordings pursuant to Attorney General's Order No. 556-74.

F. All sealing orders contained in the miscellaneous files filed pursuant to title 18 U.S.C. §2518(8)(a). Likewise, we are requesting the unsealing of these files.

G. All of the incident reports, logs, notes or records (for example, DEA 6's and FBI 302's) which memorialize the government's use in this case of "normal investigative procedures" as described in the wiretap affidavits. This request includes, but is not limited to, interviews with cooperating witnesses and informants, all reports of surveillance relating to this case, reports of any efforts to introduce informants or undercover agents into the alleged organizations, reports memorializing the government's attempt to discover the members of this organization and its methods of operation, and reports of all attempts to set up controlled purchases and sales of methamphetamine or other controlled substances.

3. All trap & trace and pen register information in computerized (and readable) format for all telephones intercepted as a result of this investigation. Additionally, we are requesting the applications, affidavits and orders for such interception. Further, we are requesting the unsealing of the miscellaneous court files which contain these documents.

4. All search warrant affidavits, warrants and returns issued in these investigations, and in the related state investigations. Likewise, we are requesting the unsealing of these files.

5. Copies of any relevant written or recorded statements made by the defendants, and the substance of any oral statement made by the defendants which the government intends to offer in evidence at the trial 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 attorneys for the Government.

6. The defendants request the Government to furnish to the defendants such copies of defendants' criminal records, and corresponding police incident reports, if any, 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 attorneys for the government.

7. The defendants request the government to permit the defendants to inspect and copy books, papers, documents, photographs, and tangible objects which are within the possession, custody or control of the government, and which are material to the preparation of their defense or, which are intended for use by the government.

8. The defendants request the government to permit the defendants to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are 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, and which are material to the preparation of the defense, or which are intended for use by the government as evidence at trial.

The defendants further request that the government provide them with the following information:

1. The date, time and place of every occasion on which any surveillance, mail cover, search and/or seizure, whether electronic, photographic, videotape, mechanical, visual, aural, or any other type, was made of any defendant, their residences, any person or entity associated with them, together with all documents, photographs, recordings or other material resulting from, or reflecting, or relating to, such occasion, including but not limited to affidavits and warrants utilized in connection therewith.

2. Any statement as to whether or not, during the course of the investigation of this matter, the defendants' photograph, likeness or image was exhibited to anyone. This request includes a list of the date(s), time(s) and place(s) of each such occurrence, and the name(s) of the person(s), including counsel, who were present.

3. Any and all evidence of criminal conduct, state or federal, on the part of any person whom the prosecution intends to call as a witness at trial.

4. Any and all statements formal or informal, oral or written, by the federal or state government, its agents and representatives, to any person (including counsel for such person) whom the prosecution intends to call as witness at trial, pertaining in any way to the possibility, likelihood, course or outcome of any government action, state or federal, civil or criminal, including immigration matters, against the witness, or anyone associated in business with the witness, or any corporation, partnership, joint venture or other association employing the witness or in which the witness has an interest.

5. Any statements or documents, including but not limited to grand jury testimony, and federal, state and local tax returns made, or executed by, any potential government witness at the trial in this action which the government knows, or through reasonable diligence, should have reason to know is false.

6. Any and all statements reflecting, or referring to, any discussion or conversation which any agent or representative of the state or federal government suggesting that any individual might possibly be afforded more favorable treatment in any regard in the event such individual offered evidence against any defendant. This list includes a list of the date(s), time(s) and place(s) of each such occurrence and the name(s) of the person(s), including counsel, who were present.

7. A list of all judicial proceedings in any criminal cases involving any person who is, or may be, a potential government witness at the trial in this action.

8. Any and all actions, promises or efforts, formal or informal, on the part of the government, its agents and representative to aid, assess or obtain benefits of any kind for any person whom the government considers a potential witness at trial, or a member of the immediate family of such witness. This request includes, but is not limited to: (a) letters informing the recipient of the witness' cooperation; (b) recommendations concerning federal aid or benefits; (c) promises to take affirmative action to help the status of the witness in a profession, business or employment or promises not to jeopardize such status; (d) aid or efforts in securing or maintaining the business or employment of a witness; (e) aid or efforts concerning a new identity for the witness and his or her family, together with all other actions incidental thereto; (f) direct payments of money or subsidies to the witness; or (g) any other activities, efforts or promises similar in kind or related to the items listed in (a) through (f) above.

9. A list of all documents used, obtained or written in connection with the investigation preceding the indictment in this case that the government destroyed, for whatever reason, including but not limited to, rough notes of interviews, reports, memoranda, subpoenaed documents and other documents.

10. Any and all evidence that any person who is a government witness or prospective government witness in this case is or was suffering from any physical or mental disability or emotional disturbance, drug addiction or alcohol addiction at anytime during the period of the indictment to the present.

11. In addition to the information and material requested above, any documents, books, papers, photographs, scientific tests or experiments, tangible objects, written or recorded statements of anyone, reports, grand jury transcripts and oral statements of anyone, reports, memoranda, names and addresses of persons, or other evidence or information which either tends to exculpate the defendant or tends to be favorable or useful to the defense as to either guilt or punishment, or tends to effect the credibility of a potential government witness or the weight of his or her testimony or which will lead to evidence favorable to or exculpatory of the defendant. This request includes disclosure to the defendant of all exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1962) and their progeny.

12. The names and addresses of all persons whom the prosecution, its agents and representative believe to have relevant knowledge and/or information with reference to the charges contained in the indictment but whom the prosecution does not propose to call as witnesses at trial, along with all statements of such persons made to government agents or the grand jury which pertain to the defendant or the allegations in the indictment against the defendant.

13. A written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of its case-in-chief, together with any criminal record or evidence of prior convictions of any such witnesses.

14. A written list of the names, addresses and qualifications of all experts the government intends to call as witnesses at trial, together with all reports made by such experts or, if reports have not been made, a brief description of the opinion and subject matter to which each is to testify.

15. A statements as to whether or not the government intends to offer evidence pursuant to Rule 404(b) of the Federal Rules of Evidence against any defendant. If yes, provide a specific factual statement

describing the evidence.

16. A statement as to whether the government intends to utilize accomplice or co-conspirator statements or testimony at trial.

17. All exhibits which the government intends to introduce at trial in the case-in-chief.

The defendant further requests all information to which he is entitled pursuant to 18 U.S.C. §3500 or Rule 26.2 of the Federal Rules of Criminal Procedure.

This request for discovery may be supplemented when the defendants know more about the case and are in the position to specify other areas of discovery. By separate letter, we are requesting the database used by the government in this case.

If you wish, in order to facilitate the above requests and the efficient flow and progress of this case, I, and my co-counsel are available to meet with you to discuss these requests.

Thank you in advance for your anticipated cooperation.

Very truly yours,

GAIL SHIFMAN

grs/tbs

cc: All Defense Counsel

Sample no. 2

VIA FACSIMILE NO. **& U.S. MAIL

Mr./Ms. Assistant United States Attorney
450 Golden Gate Avenue, 11th Floor
San Francisco CA 94102

RE: UNITED STATES v *****, et al.,
CR **-000097 ***

Dear Mr./Ms AUSA:

This letter shall serve as the defense request for the DEA database utilized in this case. The government has obviously chosen to compile the information relating to intercepted conversations into a database because of the enormity of the information which needs to be organized, indexed, searched and analyzed. Such a database, for instance, eases the ability to produce the "Pertinent Call" List, for instance.

Likewise, the defense has the same need for efficient access to this information. If the government's database for the storage of the wiretap information in this case is not received, then we will have to take the hard-copy information that you have given us and compile a database on our own. As you know, a

substantial number of the counsel in this case have been appointed under the provisions of the Criminal Justice Act, and as such, the cost to the government of such an undertaking will be enormous (as well as painstakingly time consuming).

We are not requesting any privileged information. Nor are we seeking the government's entire database, or work-product. Instead, we seek the information which you already have in a useable format. Of course, the information contained on the database, such as the information on the monitoring logs, the ten-day periodic reports, the list of coded words and phrases, a breakdown by named-defendants of all of the telephone calls in which he or she participated, will have to be turned over to the defense in paper format. In other words, we are seeking a "subset" of that information referring to each intercepted conversation which will be provided to the defense. My understanding of database programs, is that they offer the ability to receive selected fields of information from each record contained in the database. This process can be done in a few hours as compared to the months that would be required to reconstruct a database from the logs.

In another vein, the government has not yet provided to the defense the pen register information or the trap and trace information. Once again, the only way that the defense can sort and search this information will be in database format. Boxes and boxes of paper will make this information virtually useless, yet the information is imperative to the defense, especially since the government chose to utilize this form of surveillance for approximately one year. As is the case of the database of intercepted conversations, a subset of the government's database (containing no work-product or privileged information) is all that we are requesting.

Last, it is anticipated that the government will be producing transcripts of intercepted conversations. In order to avoid the unnecessary expense of copying and the expense (and time) of having to re-type them, we would request electronic copies of these transcripts as word-processing files on diskettes (as well as paper copies) which I will be glad to provide.

It is hoped that we can work together to make sure that the information is transferred in a format that can be efficiently used. In order to accomplish this, we would need to know if the government has used a commercially available database manager to compile these databases. If some proprietary database application was used, then it is crucial to discuss the format of the file to be provided to the defense, so that we can plan to convert these files to a format useable by the database manager we select. Similarly, with respect to word processing files (transcripts of intercepted conversations) copies of formatted files (i.e., WordPerfect or Microsoft Word) might be best.

This request is obviously being made on behalf of counsel for all defendants. We look forward to discussing this with you. Since obviously, numerous areas exist which will require us to litigate, it is hoped that we can coordinate the technical aspects of this case. And, because we are not requesting any information that the government hasn't provided in similar cases, we anticipate an easy resolution to these requests.

Thank you for your anticipated cooperation.

Very truly yours,

2. The Local Rules

Another way to standardize discovery outside of the confines of federal caselaw is by local rule. In

the Northern District of California, the Court has adopted a local rule that standardizes the meet and confer process regarding discovery. The parties are directed to meet and confer within ten days of the not guilty plea and the parties are encouraged to stipulate to a discovery production order.

N.D. Cal. Local Rule 16-1. Procedures for Disclosure and Discovery in Criminal Actions.

(a) Meeting of Counsel. Within 10 days after a defendant's plea of not guilty, the attorney for the government and the defendant's attorney shall confer with respect to a schedule for disclosure of the information as required by FRCrimP 16 or any other applicable rule, statute or case authority. The date for holding the conference can be extended to a day within 20 days after entry of plea upon stipulation of the parties. Any further stipulated delay requires the agreement of the assigned Judge pursuant to Civil L.R. 7-12.

(b) Order Setting Date for Disclosure. In the absence of a stipulation by the parties, a schedule for disclosure of information as required by FRCrimP 16 or any other applicable rule, statute or case authority may be set sua sponte by the assigned Judge or Magistrate Judge. If a party has conferred with opposing counsel as required by Crim. L.R. 16-1(a), the party may make an motion pursuant to Crim. L.R. 47-4 to impose a schedule for such disclosure.

(c) Supplemental Disclosure. In addition to the information required by FRCrimP 16, in order to expedite the trial of the case, in accordance with a schedule established by the parties at the conference held pursuant to Crim. L.R. 16-1(a) or by the assigned Judge pursuant to Crim L.R. 16-1(b), the government shall disclose the following:

(1) Electronic Surveillance. A statement of the existence or non-existence of any evidence obtained as a result of electronic surveillance;

(2) Informers. A statement of the government's intent to use as a witness an informant, i.e., a person who has or will receive some benefit from assisting the government;

(3) Evidence of Other Crimes, Wrongs or Acts. A summary of any evidence of other crimes, wrongs or acts which the government intends to offer under FREvid 404(b), and which is supported by documentary evidence or witness statements in sufficient detail that the Court may rule on the admissibility of the proffered evidence; and Criminal Local Rules

(4) Co-conspirator's Statements. A summary of any statement the government intends to offer under FREvid 801(d)(2)(E) in sufficient detail that the Court may rule on the admissibility of the statement.

Again, the process begins with the sending of a letter request to the government for a 'meet & confer.'

B. Meanwhile, Back At The Ranch - Remember Money Talks

While all of this friendly and hopefully productive discussion regarding discovery is occurring, defense counsel should also do whatever is possible to have a dialogue with the Court regarding the progress of lack thereof of discovery production, the complexity of the case, possible theories of the defense, even problems of proof in the government's case. Just how does one have this dialogue with the Court? It is done through the filing of documents under seal whether they be for subpoena requests, CJA funding issues or whatever creative idea you might have.

Here is an example of extensive ‘talking’ with the Court about the issues in a case while seeking CJA funding authorization:

Gail Shifman
ShifmanGroup, Attorneys
214 Duboce Avenue
San Francisco, CA 94103
Telephone: (415) 551-1500
Facsimile: (415) 255-8631

Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR-*****

Plaintiff,

vs.

**EX PARTE MOTION OF DEFENDANTS
FOR AUTHORIZATION FOR INVESTIGATORS
AND OTHER EXPERTS
TO ASSIST IN THE PREPARATION AND
THE AND THE PRESENTATION OF THE
DEFENSE.⁷**

***** et al,

Defendants.

[TO BE FILED UNDER SEAL]

_____/

INTRODUCTION

This motion is a request for the Court to authorize the defense to investigate, prepare, and present evidence that is necessary to rebut the charges facing the defendants. All funding requests made herein reflect defense counsel’s efforts to utilize resources in a expeditious and reasonable manner.

The government has alleged that, between October 1997 to July 2002, Defendants were involved in the organized criminal enterprise known as the “***** criminal street gang.” Alleged hallmarks of the criminal enterprise include the group’s formation into a formal urban street gang, its maintenance an exclusive drug turf, and its protection of this turf by acts of violence during the relevant time period. To support its theory, the government intends to (1) introduce in its case-in-chief, evidence of 64 Overt Acts (each of which constitutes a separate criminal case) and more than __ incidents of FRE Rule 404(b)

⁷This motion is made on behalf of defendants with the exception of defendant ***** who is represented by the federal public defender’s office.

evidence. (As of February 2, 2005, the government has produced 118,115 pages of discovery which represents literally hundreds of criminal acts alleged to have been performed by the defendants and their 41 unindicted co-conspirators.); (2) present testimony of over 20 cooperating witnesses; and (3) present “expert” testimony by three San Francisco Police Department officers who will potentially attest that each Overt Act or 404(b) incident was ultimately related to the charged narcotic conspiracy.

The breadth of the government’s allegations require an extraordinary investigation by the defense to be prepared for trial which is set to begin May 16, 2005. Defense anticipates that each Overt Act and Rule 404(b) incident will require a “mini trial” by itself. Furthermore, based on the evidence available to the defense, the government’s allegations are unsustainable, most notably, the alleged criminal enterprise does not have any indicia of formal organization, conspiracy, gang membership, and criminal intent.

Given the capacious scope of the charges and the high stakes in this case, the following sections set forth the defense’s investigation and funding requests for case and witness preparation, research of potentially exculpatory evidence, and retention of experts who are knowledgeable about urban street gangs, ballistics and firearms, DNA, forensic criminology, police practices, and narcotics. Defense believes that these requests are necessary to conduct reasonable investigation and efficient preparation of the defendants’ case.

I. INVESTIGATION.

A. Prior Authorizations

As the Court may remember, CJA counsel in this case have previously requested authorization to expend funds for investigation. Following the filing of the Second Superseding Indictment which increased the number of defendants to seven defendants and after conferring with defense counsel on CJA issues, on or about August 2003, the Court authorized the expenditure of CJA funds in the amount of \$***** each for two investigators (***** and *****t).⁸

⁸ Mr. ***** had been appointed previously to do investigative work on behalf of defendant ***** when he was the only defendant charged in this case.

Given the number of investigative tasks that are necessary to be completed in order for counsel to be effectively prepared to represent the defendants, defend the dozens of overt acts and 404(b) allegations, interview witnesses, investigate the numerous criminal activities of the ***** cooperating witnesses and other cooperating witnesses as detailed within, it is anticipated that more than two investigators will be required if counsel are going to be able to attempt to be ready for trial as scheduled. Even with additional investigators, the reasonably required tasks necessary for effective representation will take a significant amount of time to complete.

B. *** Cooperators.**

The government has identified at least fourteen cooperating witnesses from the ***** prosecution who will testify at the trial of the this case. To date, the defense has perused more than 100,000 pages of *****discovery to identify criminal acts performed by each cooperator; obtain information concerning each cooperator's criminal history to the extent disclosed therein; to identify each cooperators close associates, family, friends, and enemies; and obtain other background information necessary to conduct a full investigation. Such a review, the defense believed, was necessary prior to sending investigators into the field in order to be fully prepared and to avoid duplicating information found in ***** discovery.

For each cooperator, the defense must conduct court searches and obtain the complete file for each arrest; identify and locate potential witnesses to be interviewed who have knowledge of those and other criminal acts performed by each cooperator, his character for truthfulness, evidence of drug and/or alcohol use; a history of emotional or psychological problems; and other matters which bear upon the witnesses' credibility.

As examples of the breadth of the investigative tasks which are necessary to effective preparation, attached as Exhibit A are the RAP sheets for five of the fourteen ***** cooperating witnesses. As their RAP sheets disclose, there are dozens of arrests for each witness covering all aspects of criminality that will be utilized to impeach the credibility of these witnesses. Attached as Exhibits B and C are excerpts

from the Criminal Complaint filed on August 29, 2001 in support of the arrests of the defendants charged in *United States v. ******, CR 01-*****.

As these exhibits demonstrate, in addition to the arrests listed in RAP sheets, there are shootings, drug and weapon crimes, and other violent incidents. Although these incidents are not listed in the RAP sheets, they must be investigated in order for the defense to determine whether it is appropriate to impeach the credibility of any witness for motive, bias, and veracity. Defense counsel believe that such investigation is necessary because preliminary investigation has revealed that there is a discrepancy between the criminal activity that many of the witnesses disclosed in their debriefings and the actual criminal activity that the witnesses engaged in as established by wiretaps and prior government allegations against the individuals before they became witnesses.

The community in which the cooperators reside is small, close-knit, and highly suspicious of outsiders and is the site where a large number of criminal acts, both charged and uncharged, committed by the Big Block cooperators alleged occurred. Defense therefore anticipates that the necessary investigation will be a difficult and time consuming project. The defense estimates this investigation will take 50 hours per cooperating witness for a total of 700 hours. The investigator's rate is \$** per hour for a total of \$***** plus reasonable expenses for these tasks.

C. Other Cooperating Witnesses.

The defense has identified eight non-***** cooperating witnesses. These include witnesses *****

***** . These cooperators will testify primarily to acts of violence including:

1. The shooting ***** on October 10, 1997;
2. The shooting of ***** on September 25, 1999;
3. The shooting of ***** and ***** on April 7, 2000;
4. The *****shooting on April 9, 2000;

5. The "***** shooting on August 31, 2000;
6. The shooting of ***** and murder of ***** on September 5, 2000;
7. The ***** shooting on September 15, 2000;
8. The shooting of ***** in February 2001;
9. The shooting of ***** on May 1, 2001;
10. The shooting of ***** on May 27, 2001;
11. The shooting of ***** on August 23, 2001; and
12. The ***** shooting on August 23, 2001.

The defense estimates it will take an average of ** hours per witness to investigate the eight additional cooperating witnesses for a total of *** hours at the investigators hourly rate of \$** per hour. This investigation will cost \$*****.

D. Civilian Witnesses.

The defense believes that there are a number of civilians who witnessed approximately 30 Overt Acts and 21 of the 404(b) acts that the government intends to introduce at the trial of the case. For example, the ***** shooting occurred at a neighborhood party where there were literally hundreds of people present. The ***** shooting occurred at rap concert where numerous individuals were present. Resources are necessary to locate and interview these individuals to determine if they have material information related to defendants' case. The defense estimates that it will require 40 hours (per incident) to investigate civilian witnesses who may have material information. Based on an estimate of a total of ***** hours, and the investigator's hourly rate of \$** an hour, the cost of this investigation will be \$*****00.

E. Community investigation.

The government contends that ***** is a criminal street gang that maintains an exclusive drug turf that it protects by violence will. Based on preliminary investigation, defense counsel will rebut this assertion by showing that many of the defendants, and their immediate and extended families, have resided

in the *****t area throughout their lives. What the government sees as organized gang activity is merely the daily occurrences in the lives of residents in the African-American low-income housing projects in this area of San Francisco.

The life experiences of most, if not all jurors, will not in any way be similar to the lives which the defendants have lived. It is therefore critical that an expert analyzes and communicates these facts to the jury.

The defendants grew up and live in an environment where drugs, guns, and violence are common place in the small community in which they reside. The San Francisco Police Department often operates as a “occupying force” in this community. Harassment of ***** residents by the same police officers who roll through the community on a daily basis is common. Young African-American men are routinely stopped and frisked. If contraband is found, a justification for the stop is created.

Law Enforcement has a vested interest in characterizing these young men as a “criminal street gang.” Once labeled, greater police powers are bestowed by the STEP Program and additional funds flow to Gang Task Forces.

However, expert testimony can establish that young men hanging out on their neighborhood streets wearing “gangster” clothes is part of life in a community plagued by chronic unemployment and few social services. The jury must be educated that the “gangster image” is a cultural phenomena that exists in this segment of society, that mirroring the imaging is not indicative of actual membership in a criminal street gang, that clothing, “gang” signs, and language are not the exclusive province of criminal street gangs, and that when traditional gang indicia is displayed by many young men in urban environments, the signs are essentially meaningless in identifying who is involved in organized criminal activity. An expert is necessary to assist the defense in identifying the literature and data to establish these facts at trial. This information will be used to cross-examine both the government “San Francisco Police Department expert witnesses” and the police officers who may testify as to indicia of gang membership they observed during the course a particular investigation.

The government has taken isolated events, ripped them out of context, and then reconstructed and reorganized them to portray falsely unconnected events to allege a furtherance of the drug conspiracy by a single entity, *****. In truth and in fact, as the initial defense investigation shows, the events upon which the government seeks to base its Indictment were unrelated to each other or the rap group known as *****.

With adequate basic resources for investigation, the defense can prove that the government's theory of the case is based on a fabricated illegal street gang, a fictitious relationship between separate incidents, and a false portrayal of the criminal activity of rap groups and gangs that bears little if any correspondence with reality. The defense case is based on a full and accurate understanding of rap groups and gang activity and their functioning in ***** community in San Francisco. The defense estimates this investigation will take *** hours at \$*** an hour for a total for \$*****.

F. Relationship between Rap Groups and Gangs.

Contrary to the government's charges, the rap group, "*****" is not part of an illegal street gang which operates an exclusive drug turf. ***** is a rap group that was started in the early 1990s by *****, his brothers and various rap artists. The ***** brothers grew up in the ***** housing projects, which later became the exclusive turf of the ***** gang under the leadership of *****. ***** enjoyed some musical success and the ***** family was able to move out to the ***** area in approximately 1995. Several albums were released and are still on the market and ***** is a legitimate rap music group that has gone through various personnel changes over the years. The brother of defendant *****, *****, is a member of ***** and is the head of a legitimate, entirely legal, musical production company, *****, and still has control over the ***** music label.

The goals of rap groups are simple: producing music, poetry, and dance. The genre of rap music reflects perceptions, emotions, interactions, and day to day life in local communities as and draws on common experience and knowledge. Although rap groups frequently chronicle the chaotic, shifting

alliances of gangs and the multitude of external and internal pressures and events of gang life, it is distinct from and independent of its subject matter. Membership in rap groups is dynamic and diverse and changes frequently. Relationships within rap groups change over time, but the goal remains constant: artistic expression, not criminal enterprise.

Therefore, it is critical that the defense investigates, prepares, and presents accurate information about the meaning of the constant turnover in younger people in the rap groups, rap groups' relationship to gangs, and gang dynamics.

II. IDENTIFYING AND OBTAINING RECORDS OF ALL ARRESTS WITHIN THE *** DRUG TURF FROM JANUARY 1997 THROUGH DECEMBER 31, 2003.**

The second superceding indictment charges in Counts One and Sixteen that the defendants, as members of the ***** gang, had an exclusive drug turf area in the ***** that they controlled. As alleged in the Second Bill of Particulars filed by the government, the conspiracy members and associates of the ***** gang claimed the ***** area as their exclusive turf and market for crack cocaine trafficking. As alleged by the government, only members and associates within the ***** gang could traffic such narcotics within the ***** area during the period of the charged conspiracy. The government has provided the defense with a map that describes the alleged drug turf and with a list of the alleged ***** members involved in the conspiracies.

The government's allegations would be substantially undermined, if not outright disproved, in the event that the identified geographic area was not the exclusive turf of the ***** gang during the alleged conspiracy. If it is shown that other gang members or unaffiliated individuals were trafficking in crack cocaine in the area during the relevant time period, Defendants would establish a strong defense against the charges they face.

To obtain this information, Defendants requested a Rule 17(c) subpoena of the arrest records of all of the adults arrested for possession for sale or sale of crack cocaine in the specific geographic area and time period of the alleged conspiracy. On July 28, 2004, the court denied this request.

Since the denial of the subpoena, the defense has contacted the legal department of the San Francisco Police Department (“SFPD”) to request its assistance in providing this information. The SFPD maintains a computerized database (known as “Crime MAPS”) of all arrests that occur in San Francisco and maintains records of the date and time, the geographic location, the specific offense, and the incident number of each arrest. The SFPD allows the general public access to this information for all arrests that occurred in the past 90 days. The defense has contacted individuals at the legal department of the SFPD and has sent a written request for all crack-related arrests that occurred in the precise geographic area and exact time of the alleged conspiracy. The SFPD has indicated that it will be able to complete this request by the end of the week for February 11, 2004.

If the requested Crime MAPS records exist, the defense will have all crack-related arrests that occurred in the time and place of the alleged conspiracy. The defense accordingly will renew its Rule 17(c) subpoena to request the specific police reports identified by this newly developed information. Once the reports are obtained, all offenses occurring within the ***** drug turf that did not have as a defendant a ***** co-conspirator, would be identified and the file copied. Because the defense does not know how many arrests occurred in the time and place of the alleged conspiracy, the defense presently is unable to provide the Court with a good faith estimate of the time involved in completing this phase of the project.

In the event that the defense will not be able to receive the requested Crime MAPS information, the defense has explored an alternative four-step process by which to obtain this information. First, in room 101 of 850 Bryant Street, the public has access to binders that contain all of the computerized printouts of arrests that have occurred in San Francisco. These binders contain approximately 7,592 pages and are organized by the last name of the individual who has been arrested. The records include the case number, date of arrest, the outcome of the charges, and the general category of the charge. (Unlike the information contained in the Crime MAPs program, the binders do not specify which narcotic was involved in a particular arrest and where the arrest occurred.) Based on the work of two different individuals who examined these binders, the defense estimates that approximately *** hours of paralegal work will be

necessary to identify all narcotic-related arrests for trafficking offenses that occurred in the time period of the conspiracy. Second, to narrow the information to the exact geographic and crack-related arrest, the defense will request the Court's assistance in granting access to the police reports to obtain this information. Third, an additional number of paralegal hours will be necessary to exclude from the data base all arrests not relating to trafficking in crack cocaine and all arrests that did not occur in the alleged ***** gang turf. Because the exact number of arrest records is unknown at this point, the defense is unable to provide good-faith estimate of the number of hours that this phase will take. Fourth, as mentioned above, the defense will identify and file copy all arrests that do not involve a ***** co-conspirator.

Locating the information relevant to this aspect of the defense will be a labor intensive and time consuming process. As set forth above, if the requested information is available through the SFPD computerized database, substantial time and effort will be saved during this part of the investigation.

III. GANG EXPERT.

The government has identified three police officers who will provide expert testify that the ***** gang is an operating criminal street gang and that the defendants and unindicted co-conspirators are members of this gang. It therefore is necessary for the defense to retain a "gang expert" to assist in the preparation of cross-examination of the government witnesses and to be prepared to testify on behalf of the defense in its case.

The expert will assist defense counsel in identifying characteristics of criminal street gangs (particularly as they exist in San Francisco's urban housing projects) and in identifying which characteristics customarily found in such gangs are absent from those who are alleged to belong to the ***** gang. The expert also will assist in identifying materials to be relied upon to support the expert's conclusion and/or to impeach the government experts on cross-examination. The defense estimates that an initial consultation and review of relevant discovery will take 30 hours at an estimated cost of \$*** an hour for a total cost of \$*****.

IV. BALLISTICS AND FIREARMS EXPERT.

The government contends that the same weapons were used in more than a single shooting. An expert therefore is necessary in order to conduct an independent examination of all alleged similarities between ammunition and/or weapons alleged to be used in these incidents and undertake an investigation into the similarities between ballistic evidence found at the site of any shooting and the weapons seized during the execution of a search warrant at ***** The government intends to introduce evidence that on May 1, 2000, defendants ***** were in possession of two weapons seized from an automobile. This incident is charged both as an Overt Act to the weapons conspiracy charged in Count One and as a substantive act against both defendants. The weapons were destroyed by the San Francisco Police Department. The defense needs to retain the services of a firearms expert to view all information relating to the incident and to the destruction of the weapons in order to assist the defense in identifying areas in which it has been prejudiced in its investigation by the destruction of the weapons. This information will be used in a motion to exclude evidence relating to this incident and will allow the defense to prepare its cross-examination of the government's weapons expert at the trial of the case.

The defense has contacted *****, who was the ***** from 1995 until his retirement of 2004. Mr. ***** has agreed to assist the defense in this case. Mr. *****' resume is attached to as Exhibit B. Mr.***** charges \$*****an hour and estimates 25 hours for initial work in this case for a total cost of \$*****.

V. DNA CONSULTANT.

The prosecution in this case has already conducted extensive DNA testing and has made it clear that its investigation is ongoing. The government is in possession of DNA samples from defendants *****, and at least two conspirators not included in the present indictment, *****. At this point the government has focused on physical evidence seized during the course of alleged overt acts involving violence and/or weapon possession, DNA evidence has been submitted by the government for analysis with regard to acts of alleged

weapon possession by ***** on April 9, 2000 and January 31, 2001, and for evidence found during the execution of the search warrant on February 25, 2001, *****Testable DNA has been recovered from many of the items of physical evidence and there have been comparisons conducted as to the known samples, except for DNA from ***** that was only recently obtained.

To date, the vast majority of the DNA comparisons conducted by the government in the case have been inconclusive or exculpatory as to the charged defendants, and there have been significant inculpatory findings as to the uncharged co-conspirators. There have been four sets of DNA reports that have been forwarded from both the Forensic Analytical and Cellmark laboratories, and the backup documentation is only now starting to be produced.

A DNA consultant/expert is required by the defense to conduct an independent examination of the government's DNA collection, investigation, testing and comparisons, and possibly later to conduct independent examinations and/or retesting. The initial steps would be to review the reports and supporting materials provided by the government, and possibly the physical evidence itself, to determine whether the methodology used was correct and the conclusions reliable. The defense will need advice in terms of cross examining government witnesses and case preparation and potentially to decide whether to call government experts in the defense case.

The defense has contacted *****, whose resume is attached as Exhibit B, who has agreed to assist in this case. Mr. ****'s rate is \$*****an hour and he estimates a minimum of 40 hours to conduct initial analysis of the government's extensive DNA investigation, for a total of \$*****. It is important to emphasize that this request for funding authorization is preliminary, and future further requests may be necessary based on future governmental testing, findings, conclusions and results, the nature and quality of the discovery which is received, and the potential need for independent testing.

VI. FORENSIC CRIMINOLOGIST, CRIME SCENE INVESTIGATOR AND RECONSTRUCTION EXPERT(S).

Spread throughout the ***** area and spanning over several years, there are at least ten shooting incidents that the government will attempt to prove at the trial of this matter. Each of the

incidents was investigated at some level by members of the San Francisco Police Department, most with the assistance of the Crime Scene Investigation unit. Some of these incidents involved death or injury and many involve evidence of multiple weapons and multiple participants. Often these shootings were in highly populated residential areas. From the information the defense knows so far, beyond the variance in the nature of the various incidents, the crime scene investigations varied greatly in response time, personnel, thoroughness, method and technique of evidence collection, witness availability and cooperation, and basic environment. Many of the shooting incidents were never prosecuted in state court, were closed by state investigators for one reason or another, or are only now being explained or described at some level by government cooperators based on their supposed personal knowledge.

Crime scene investigation and reconstruction is a specialized form of investigation, requiring specific knowledge and training in evidence recognition and collection techniques. Defense counsel seek authorization to consult with experts to conduct an analysis of the crime scene evidence, including, but not limited to: basic evidence collection and gathering; line of vision by witnesses, ambient lighting and atmospheric conditions, blood splatter analysis; bullet trajectory analysis; documentation , preservation and photography of the particular incident, and a review of the actual crime scene evidence for each of these incidents. Along with analysis of whether the crime scene investigation was properly conducted, experts will also be asked to determine whether the description of the shooting given by the cooperating witnesses are consistent with the physical and scientific evidence in the case.

The full complement of crime scene investigation evidence is just now being turned over by the government for the ever expanding set of incidents which the government is intending to prove at the trial of this matter. For this reason, it is premature to evaluate the full scope of information that will have to be investigated by any expert(s) and counsel are still attempting to identify and locate prospective available experts. Because of the large number of incidents involved, the amount of review, consultation and investigation by any expert will be substantial.

VII. POLICE PRACTICES EXPERT.

Beyond the shooting incidents described above, with a few exceptions each of the alleged overt acts and 404(b) incidents that are part of this case occurred in the jurisdiction of the SFPD and are now being prosecuted and investigated by federal authorities in conjunction with members of the SFPD. Many of the charged incidents were previously prosecuted by the San Francisco District Attorney's Office, many of the cases were never prosecuted or were closed, and many of the incidents are only coming to light based on information provided by cooperating witnesses. Although many of the incidents were investigated by members of the Gang Task Force unit of the SFPD, none of the incidents were ever previously prosecuted under state gang statutes.

A wide variety of police personnel and investigators, including the Gang Task Force noted above, have investigated the various incidents that were brought to their attention near the time of the alleged incident. This same array of individuals also investigated the alleged rival neighborhood force, the ***** , during their spree of criminal activity which eventually lead to an authorized federal wiretap. More than a dozen of these ***** gang members are now cooperating with state and federal authorities, although all information indicates that these individuals have not been given immunity for prior acts of violence. Although the ***** has long been suspected of multiple homicides, not one of those homicides is presently being prosecuted.

Investigating crime and police conduct in the ***** area has historically been a very controversial, heated issue for the SFPD. The SFPD has long been criticized for a myriad reasons including their inability to adequately investigate and prosecute criminal activity in the neighborhood and the numerous allegations of heavy-handed and/or illegal conduct by members of the SFPD working in the area. In the SFPD's defense, others suggest that the community's lack of cooperation significantly contributes to the criminal element's ability to elude prosecution and maintain a stronghold in the area.

The defense in this case is actively pursuing *Pitchess* and *Henthorn* material on the law enforcement officers involved in this case. Beyond, and combined with, the products of that litigation, the defense seeks authorization of funds for an expert on police practices relating to the incidents, individuals and allegations

involved in this case.

Examples of the particular practices of the SFPD and any relevant federal investigators that are potentially at issue are: training, communication, relationships with the community, staffing, discipline, chain of command, coordination, funding, and evidence gathering technique and method. Also of particular interest will be police practices by the SFPD and federal authorities relating to the recruitment, use, investigation and monitoring of confidential informants and/or cooperators. This case now involves almost twenty different cooperators who are expected to testify, each of whom has their own legacy of criminal activity and motivation, and some of whom have been cooperators or informants for a number of years but have only recently reported or described criminal activity by the defendants in this case. How these informants, as well as other informants during the time of the charged conspiracy, were utilized by the government presents a critical area of research and evaluation by defense counsel. Furthermore, the entire nature of the police practices needs to be examined by experts in the field.

The defense has not located or identified an expert on police practices at this point. Because of the large number of incidents involved, the number of law enforcement officers defendants, co-conspirators, witnesses and cooperators involved, and the time span of the conspiracy, the examination and review of the police practices utilized will be a massive project. The defense is slowly narrowing the field of outstanding discovery in the case, but the *Pitchess* and *Henthorn* investigation is less developed and will take a while to gather and pursue. A specific funding authorization on the issue of police practices will be made in the future once an expert is located and the scope of the review and consultation is known.

VIII. FINGERPRINT EXPERT.

The government maintains that, on May 1, 2000, *****'s fingerprints were found on a cassette located in the vehicle which contained two weapons, and that *****'s fingerprints were found on one of the weapons. Additionally, the government maintains that *****'s fingerprints were located on a weapon located under a sofa cushion on August 19, 2001 which form the basis of an Overt Act in Count 1 and a substantive count in the SSI. This fingerprint evidence will be relied upon the

government in part to establish these defendants' possessory interest in the automobile and weapons found.

The defense therefore requires the services of a fingerprint expert to review the report and underlying data of the government's fingerprint expert; to conduct a fingerprint investigation of his own and to be prepared to testify at the trial of the case. The defense has contacted *****, his resume is attached hereto as Exhibit C, Mr. ***** was a fingerprint expert for the ***** Department for a number of years. His hourly rate is \$*** an hour and he estimates 20 hours to conduct the initial investigation for a total of \$*****.

IX. NARCOTICS EXPERT.

The government will introduce evidence of incidents in which various defendants were found in possession of crack cocaine. In several of these incidents the quantities of cocaine involved, as well as the packaging of the cocaine may be consistent with possession for personal use and not for distribution. An expert will also assist in identifying indications that the drugs are not from a common source (differences in the quality and packaging of drugs) and the absence of a "gang" style distribution scheme (not wearing "gang colors"; absence of pagers, cell phones and other means of communication; no weapons found in connection with a drug transaction; no pay and owe sheets; and no "team" in which one member handled the money and another handled the drugs).

The services of a narcotics expert is necessary to assist the defense in identifying all characteristics of each incident which would support an argument that the drugs were possessed for personal use and therefore are not relevant to and/or furtherance of the drug trafficking conspiracy or that the transaction did not bear the syndication of a drug gang related transaction. The expert would also be prepared to testify on behalf of the defense if appropriate.

Defense estimates that the above services will take ** hours at \$*** an hour for a total of \$*.

X. CONCLUSION.

For the foregoing reasons defendants respectfully requests, the Court authorize the following ancillary expenses to assist in the preparation of his defense:

C. Back to The Local Rules

Yes, while you're talking to the Court on case management issues, find a local discovery rule that allows you to litigate the discovery issues in a way that might remind the Court of their inherent supervisory powers. Here is N.D. Cal Local Rule 16-2 that directs the process for litigation. The Rule expands Federal Rule of Criminal Procedure 16 discovery – it also contemplates disclosure of notice of electronic surveillance, statement of the government's intent to use informants, FRE 404(b) evidence, and notice of co-conspirator's statements.

Few courts or USAO are willing to dramatically expand the discovery requirements found in the Rules of Criminal Procedure or in federal caselaw. By local rule and local protocol, however, the structure and timing of discovery can be standardized – often resulting in much broader disclosure than actually required by law, statute, or the Constitution.

N.D. Cal. Local Rule 16-2. Motion to Compel Discovery.

(a) Content of Motion. A motion to compel disclosure or discovery shall be accompanied by a declaration by counsel which shall set forth:

- (1) The date of the conference held pursuant to Crim. L.R. 16-1(a);
- (2) The name of the attorney for the government and defense counsel present at the conference;
- (3) The matters which were agreed upon; and
- (4) The matters which are in dispute and which require the determination of the Court.

Not surprisingly, the government hasn't turned over the discovery you seek and they haven't agreed to a stipulated discovery production order, so your next step is to litigate. Note that this pleading is procedurally related and makes no mention of the law on discovery. It speaks in terms of case management, procedure and ease.

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San Francisco, California 94103
Telephone (415) 551-1500

Attorney for Defendant
DAVID GEORGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Case No. CR-01-0149 MJJ

Plaintiff,

**NOTICE OF MOTION AND MOTION
FOR DISCLOSURE SCHEDULE PURSUANT
TO Crim. L.R. 16-1(b)& (c)**

vs.

DAVID GEORGE, et al.,

Defendants.

Date: August 8, 2003

Time: 1:30 p.m.

Ctrm: Hon. Martin J. Jenkins

TO: KEVIN V. RYAN, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; GEORGE L. BEVAN, JR., ASSISTANT UNITED STATES ATTORNEY; AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS GIVEN that on August 8, 2003, at 1:30 p.m., or as soon thereafter as the matter may be heard, defendant DAVID GEORGE will move, and hereby does move, for an order imposing a schedule and order for disclosure of discovery pursuant to Crim. L.R. 16-1(b) and (c) in accordance with the practice established in other multi-defendant cases in the district. This motion is made pursuant to the fair trial and effective representation clauses of the Fifth and Sixth Amendments to the United States Constitution.

Dated: July 30, 2003

GAIL SHIFMAN
Attorney for Defendant
DAVID GEORGE

**GAIL SHIFMAN
Attorney at Law
214 Duboce Avenue
San Francisco, California 94103
Telephone (415) 551-1500**

**Attorney for Defendant
DAVID GEORGE**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID GEORGE, et al.,

Case No. CR-01-0149 MJJ

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR DISCLOSURE SCHEDULE PURSUANT
TO Crim. L.R. 16-1(b)& (c)**

Defendants.

Pursuant to the Court's suggestion at the last hearing and following procedures long established in other multi-defendant prosecutions in the Northern District, defense counsel have attempted to schedule a meet and confer pursuant to Crim. L.R. 16-1(a) with the government. Defense counsel suggested a discovery conference in an effort to avoid unnecessary litigation and to expedite the trial in this matter. Though at least four letters have been sent (Exhibit A) the government has failed to respond to the defense request to meet and confer⁹ amounting at this point to a refusal to comply with the local rules and abide by the practice in other complicated prosecutions.

As the rules recognize, stipulated orders for discovery production provide for the expeditious, efficient and economical administration of justice. It is the intent of the rule to avoid the unnecessary allocation of Criminal Justice Act (CJA) resources by ordering the parties to work together as closely as possible regarding discovery production. Moreover, the rule codifies the long standing practice in this district in multi-defendant cases.

This prosecution resulted from an investigation conducted by a joint task force utilizing local, state and federal agencies. The investigation spins off, if you will, from a lengthier investigation of the reputed 'Big Block' gang. The government alleges that charged conduct occurred in retaliation for acts or assaults committed against various charged and uncharged co-conspirators by members of "Big Block.". There are numerous percipient witnesses, victims, and informants as well as a number of unindicted co-conspirators. All of this information is relevant discovery that will need to be disclosed in a timely, efficient and organized manner.

The defense seeks an order for disclosure similar to the stipulated Order re:Discovery in *United States v. Stepney*, CR 01-0344 MHP, agreed upon, ironically, by George Bevan and Andy Scoble, AUSAs.

⁹ The defense has had an opportunity to view physical evidence and the government has advised that it will provide some discovery regarding the September 5, 2000 shooting although the nature of the disclosure is unknown.

Exhibit B. Other multi-defendant cases have produced stipulated discovery orders such as in *United States v. Lacy*. The complex Nuestra Familia prosecution with its allegations of violence and murders produced extensive informal agreements regarding the production of discovery including production of materials involving sensitive witnesses.

The defense urges the Court to adopt a disclosure schedule similar to that agreed upon in these other cases. Alternatively, the defense asks the Court to order the government to participate in a meet and confer to establish a stipulation regarding disclosure as we believe this will prevent the unnecessary litigation of discovery issues.

Dated: July 30, 2003

GAIL SHIFMAN
Attorney for Defendant
DAVID GEORGE

D. Lobby For Case Management - Become a Hero To the Bench

So now, you're litigating a procedural matter on discovery, 'talking' to the Court about the intricacies of your case ex-parte and you're still not receiving discovery. Is there anything else to be done. Yes, you've still got to convince the government that there is some benefit to them by providing expanded and early discovery.

A classic example is the complex case; multi-defendant wiretaps, drug conspiracies, and RICO counts. In such cases, the evidence is often overwhelming. It is in the court's interest (we maintain) to get as much discovery to defense counsel, as quickly as possible, and in the most easily-digestible format. This will allow counsel to evaluate the case, advice the clients, and negotiate the often-inevitable disposition. From an objective standpoint, early and complete discovery is an advantage to the government and to the Court because full-information often leads to quicker case resolution.

An enlightened United States Attorney's Office in the Northern District of California has agreed to just such an approach. Led by a Magistrate and CJA Panel Administrator, representatives from the local CJA Panel and the Federal Public Defender's Office met to draft a proposed protocol for discovery in complex cases. The protocol drew heavily from a previous protocol adopted in a specific case, and from various stipulated discovery orders that had been adopted in the district.

The defense bar then met with representatives from the USAO in a series of conferences moderated by the Magistrate and CJA Administrator. After some heated debate, the parties eventually agreed to the protocol and suggested practices agreement. The protocol suggests that pleadings and transcripts (such as from a wire) be provided in electronic format. It sets up a procedure for producing typical Rule 16 discovery – such as FBI 302's, DEA 6's, police reports, etc. – in electronic format. And it formalizes a procedure to archive stipulated discovery orders with the CJA Administrator – providing some institutional memory that is now missing in complex case litigation.

The discovery protocol and suggested practices have been approved by the USAO and the defense representatives, and the Court adopted these procedures. They are located on the NDCA Court's website, www.cand.uscourts.gov and are reprinted here for ease.

PROTOCOL REGARDING DISCOVERY IN COMPLEX CASES

Based on meetings with representatives from the Court, the United States Attorney's office, and the CJA Committee for the Northern District, the following is a protocol regarding discovery in wiretap and other complex, document-intensive cases. This document is not intended to expand the parties' discovery obligations under Federal Rule of Criminal Procedure 16, the Jencks Act, or other federal statutes or rules.

1. **Pertinent Call Tapes:** Audio versions of all wiretap pertinent tape-recorded conversations (defined as those included in the 10-day reports) will be provided on CDs or in other digital format, separately identified by call, except in the unusual case where unforeseen circumstances make production in digital format impractical. One copy of the original media will be provided to the discovery coordinator.
2. **Pleading Documents:** All pleading documents will be provided in hard copy and on electronic disk, including wiretap applications, periodic reports, search warrant affidavits, complaint affidavits, and sealing affidavits. (Exhibits, inventory, and attachments will be provided in hard copy only.) (Caveat: Electronic versions of some documents may have been changed after they were submitted to the court and thus may not exactly match the paper form.) The U.S. Attorney's office requires assurances that the drafts will not be used for purposes of cross-examination.
3. **Non-Pertinent Calls:** Audio versions of all non-pertinent calls will be provided on audio tape or in digital format. One copy of the original media will be provided to the discovery coordinator.
4. **Investigative Reports:** Investigative reports, including FBI 302, DEA 6, BNE and other local agency reports, will be provided in Bates-numbered hard copy. (All agencies do not have their reports in electronic format. Further discussions are required with agencies to promote electronic format in the future.) Per U.S. Attorney, subject to a reciprocal discovery agreement or when government believes early disclosure is appropriate.
5. **Pen Register Data:** Pen register data, including penlink data (agency notations would be deleted), when used by the agency, will be provided in electronic format.
6. **Monitoring Logs:** Monitoring logs are currently provided in hard copy. The U.S. Attorney's Office will provide the electronic format of the data base if the agency excises its work-product notes.
7. **Translations and Transcriptions:** Translations of pertinent calls (side by side English/Foreign Language Format when possible) will be produced in hard copy and on electronic disk. At the request of the AUSA, the defense will stipulate to not use errors in early-disclosed draft transcripts in later proceedings.
8. **Consensual and Surveillance Tapes and Videos:** Consensual tapes and videos will be provided on audio/video tape. Will provide any transcriptions when available.

SUGGESTED PRACTICES REGARDING DISCOVERY IN COMPLEX CASES

Based on meetings with representatives from the Court, the United States Attorney's Office, and the CJA Committee for the Northern District of California, the following is a protocol of suggested practices regarding discovery in wiretap and other complex, document-intensive cases. This document is not intended to expand the parties' discovery obligations under Federal Rule of Criminal Procedure 16, the Jencks Act, or other federal statutes or rules. Paragraphs 1 through 8 of the suggested practices correspond to paragraphs 1 through 8 of the "Second Agreement Regarding Discovery in Complex Cases."

1. Pertinent Call Tapes:

- a. The parties are encouraged to use digital media for audio files because digital files may be easier to review and less expensive to reproduce for a multi-defendant case.
- b. Generally, it is preferable that the naming conventions for the audio files, the monitoring logs, and the transcripts be consistent so that it is easy to cross-reference the audio calls with the corresponding monitoring logs and transcripts. If at the outset of a case, a naming convention has not yet been established, the prosecution and defense should meet and confer regarding a naming convention before the files are produced.

2. Pleading Documents:

Pleading documents should be Bates stamped in chronological order using the Bates sequence used for disclosure of other discovery in the case. The parties are encouraged to consider printing all Title III pleadings (including affidavits) into Adobe .pdf format and disclosing the .pdf format simultaneously with the hard copies.

3. Non-Pertinent Calls:

- a. As with pertinent calls, the parties are encouraged to use digital media for audio files because digital files may be easier to review and less expensive to reproduce for a multi-defendant case.
- b. As with pertinent calls, generally it is preferable that the naming conventions of audio files, monitoring logs, and transcripts be consistent. If at the outset of a case, a naming convention has not established, the parties should meet and refer regarding a naming convention.

4. Investigative Reports:

- a. The parties should meet and confer at the outset of a case as to whether both parties want to convert investigative reports into an electronic .pdf format with an OCR (optical character recognition) overlay.
- b. If both parties want the investigative reports in electronic format, then the parties should meet and confer about whether they can divide the costs for this process between the parties.

5. Pen Register Data:

The United States Attorney's Office will ask the investigative agencies to ask the telephone companies to provide pen register data in electronic format so that it can be disclosed in this format.

6. Monitoring Logs:

- a. In wiretap cases, the AUSA will ask federal agencies to use an electronic format for monitoring logs and monitoring data.
- b. The AUSA is encouraged to disclose the data in ASCII tab or comma-delimited format. To the extent that fields or information are excluded from this digital information, the AUSA will notify the defense that data was omitted.

7. Translations and Transcriptions:

- a. If possible, the parties should provide electronic version of transcripts or translations in Wordperfect or Rich Text Format (RTF), and also in ASCII format.
- b. As discussed above, generally it is preferable that the naming conventions for the audio files, the monitoring logs, and the transcripts be consistent so that it is easy to cross-reference the audio calls with the corresponding monitoring logs and transcripts. If at the outset of a case, a naming convention has not yet been established, the prosecution and defense should meet and confer regarding a naming convention for the translations and transcripts that corresponds to the titles of audio and monitoring files.

8. Consensual and Surveillance Tapes and Videos:

The parties are encouraged to use digital media for tapes and videos because digital files may be easier to review and less expensive to reproduce for a multi-defendant case.

9. Indices:

On a case-by-case basis, the parties are encouraged to discuss the joint production of indices that will be mutually beneficial to both parties, and will result in cost-savings to both parties.

10. Disclosure of Hard Copies of Discovery:

- a. In situations where discovery is available initially only as a hard copy (as opposed to electronically), the parties should provide a complete Bates-numbered hard copy set to the discovery coordinator or to the discovery/copying vendor.
- b. As with the production of investigative reports, and in situations where discovery is available initially only as a hard copy, the parties should meet and confer as to whether both parties want to convert the discovery to an electronic .pdf format with an OCR (optical character recognition) overlay.
- c. If both parties want the discovery in electronic format, then the parties should meet and confer at the outset of the case about whether they can divide the costs for this process between the parties.
- d. A recommended procedure for the conversion is as follows. The hard copy of the discovery should be scanned into a high-quality .pdf format (using Adobe .pdf software) with an optical character recognition (OCR) overlay. The vendor should be asked to simultaneously produce a set of .tif (image) files. (This can usually be done at no additional cost.)

11. Computer/Digital Discovery:

Discovery in computer cases will be dealt with on a case-by-case basis. The parties should meet and confer at the outset of the case about what should be provided in discovery. The defense will be responsible for purchasing and providing a blank hard drive or blank medium upon which a copy can be made of the computer media that will be disclosed.

12. Complex Case Discovery Orders:

Copies of stipulated discovery orders in complex cases will be provided to the Northern District CJA Supervising Attorney. The parties are encouraged to review these orders at the outset of new complex cases in order to expedite arriving at new agreements and to expedite the disclosure of discovery.

E. Why Do You Do All Of This.

Remember, you've been attacking the discovery conundrum on all fronts and everyone thinks you're nuts for going at it so hard but surprise, surprise you just won - - a discovery production order that no one will believe.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

--o0o--

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ACIE MATHEWS, et al.,

Defendants.

_____ /

Case No. CR-01-0149 MJJ

**[PROPOSED] STIPULATED
ORDER REGARDING DISCOVERY**

Following the hearings on this matter held on August 8, 2003 and , and based on stipulation of the parties and good cause appearing, IT IS HEREBY ORDERED that the following discovery schedule be adopted in the above-entitled case:

Definitions

1 . Reports:” As used in this discovery order and pertaining to West Mob members and/or it’s associates, the phrase “reports” shall include any federal, state, or local report of investigation, notes, chronos, memoranda, gang member lists, “Alpha” files, “Associate” files, field notes, tape recordings,

timelines, forensic reports and testing and organization charts and photographs. Material defined as “reports” refers to any reports relating to the current investigation, as defined below, and includes reports by cross-designated state and local investigative personnel and/or any joint state and federal investigation.

2. **“Current Investigation:”** As used in this order, the phrase “current investigation” refers to the investigation leading to the allegations contained in the superseding indictment including all investigations related to gang affiliation.

3. **“Otherwise related to this investigation:”** As used in this discovery order, the phrase, “otherwise related to this investigation,” relates to defendants presently involved in this case, and includes information related to the allegations of West Mob gang activity or otherwise relating to the current indictment and includes any other federal investigation (such as by Housing and Urban Development (“HUD”), Alcohol, Tobacco, and Firearms (“ATF”), the Drug Enforcement Agency (“DEA”), the Federal Bureau of Investigation (“FBI”), or the Internal Revenue Service (“IRS”); and any investigation cross-designating state and local investigative personnel and/or any joint state and federal investigation.

Discovery

1. **Consensual Audio Tapes:** The government represents that there are no consensual audio tapes in this case. To the extent that such tapes not involving a confidential informant exist, they shall be disclosed by January 31, 2004;
2. **Financial Investigation Reports:** To the extent that there are any materials from financial investigations in this case, the government will disclose the financial records relevant to any of the defendants by January 31, 2004.
3. **Criminal History Printouts (“Rap” sheets):** The government represents that by October 31, 2003, it will have produced all outstanding criminal history printouts (“RAP” sheets) to the defense for each defendant now before the Court.

4. **Electronic Surveillance:** The government represents that it did not conduct or capture evidence via electronic or video surveillance on any of the defendants in this case. To the extent that the government conducted any electronic surveillance, it shall disclose materials relating to that surveillance by January 31, 2004;
5. **Previously Sealed Documents:** The government represents that by January 31, 2004, it will have disclosed all previously sealed documents except those relating to confidential informants or on-going investigations. With these two exceptions, the government will seek permission to disclose and will disclose any previously sealed documents as soon as they can be obtained;
6. **Audio Tapes:** By January 31, 2004, the government will provide defendants with copies of all police communication and audio tapes pertaining to the defendants now before the Court including information related to the allegations of West Mob gang activity or otherwise relating to the current indictment and includes any other federal investigation (such as by Housing and Urban Development (“HUD”), Alcohol, Tobacco, and Firearms (“ATF”), the Drug Enforcement Agency (“DEA”), the Federal Bureau of Investigation (“FBI”), or the Internal Revenue Service (“IRS”); and any investigation cross-designating state and local investigative personnel and/or any joint state and federal investigation. The government will also provide discovery of any police communication tapes not covered above which were reviewed as part of this investigation.
7. **Search Warrants:** By January 31, 2004, the government will provide defendants with copies of all federal search warrants and returns pertaining to the defendants or alleged Westmob/RBL associates. With regard to state search warrants, the government will provide defendants with copies of search warrants and returns conducted or otherwise used by any joint state and federal task force or investigation including any cross-designated state and local investigative personnel from 1998-present.
8. **Evidence Seized During Service of Search Warrants and Arrests:** By January 31, 2004, the government will provide defendants with copies of all evidence envelopes in which physical evidence is

maintained. The defense has requested that the government provide in a single document a list of all tangible evidence seized in every federal and state search warrant and arrest executed in the current investigation, or from events otherwise related to these investigations pertaining to any of the defendants now before the Court. The parties shall continue to meet and confer regarding this request. The government has made available for each defendant all tangible evidence seized during the execution of any search warrant in this investigation. The government shall also provide each defendant with copies of all documentary evidence seized during the execution of search warrants in this case, and shall clearly identify the origin of this documentary evidence, (*e.g.*, the date, location, and participating officers of the search warrant executed).

9. **Government Reports and Memoranda:** By January 31, 2004, the government shall provide each defendant with all investigative reports and subpoenas relating to the current investigation and otherwise related to this investigation as defined in paragraph 3.

10. **Preservation of Rough Notes and Evidence:** Regarding the matters charged in this case and the investigation giving rise to the charges, the government will instruct the following agencies to preserve rough notes relating to defendants now before the Court; Housing and Urban Development (“HUD”), Alcohol, Tobacco, and Firearms (“ATF”), the Drug Enforcement Agency (“DEA”), the Federal Bureau of Investigation (“FBI”), San Francisco Police Department. For purposes of this ORDER, the evidence the government and each of the above-listed agencies shall preserve includes but is not limited to:

- a. All physical evidence seized, acquired, impounded, reviewed, evaluated, examined, or tested in any matter involving the defendants herein or any co-conspirators, alleged victims of, or witnesses to incidents involving the defendants or co-conspirators member or associates of West Mob, including but not limited to any tangible objects, suspected contraband, biological material, biological samples, trace evidence, fingerprint evidence, process scientific evidence or impounded scientific evidence;
- b. Attorney notes prepared contemporaneously during interviews of prospective witnesses in this case, and all government agents’ (including those of federal task force officers and local or state officers

investigating charges contained in the instant indictment) notes of interviews and evidence reviews; reports; memoranda not to include work product; records gathered during the course of the investigation; and, audio or video tape recordings pertaining to the investigation of this case, including the defendants herein, any targets of the investigation, any potential witness and any victims of any offense;

c. San Francisco police department files, evidence, notes, photographs and tapes of interviews on any cases involving defendants herein and any crimes in which any cooperating Big Block members were suspects, as well as any files identifying anyone other than defendants as suspects in any of the crimes with which defendants are charged in the indictment (or that will be introduced as overt acts or Rule 404(b) evidence).

d. San Francisco Police Department gang intelligence files for 1997 through the present, concerning the defendants or alleged members or associates of West Mob/RBL and Big Block.

11. **Federal Rule of Evidence 404(b):** The government will disclose all information and/or evidence that it intends to introduce pursuant to Rule 404(b) of the Federal Rules of Evidence 60 days before the pretrial conference.

12. **Photographs And Videotapes:** By January 31, 2004, the government shall provide to the defense any outstanding photograph and/or videotape relating to this case, including but not limited to those taken during the execution of search warrants or displays of seized items, surveillance photographs, "mug shots," or identification photographs, and photo line-ups used in the current investigation, or otherwise related to this investigation.

13. **Jencks Act Materials:** Without waiving its rights under the *Jencks* Act or Fed. R. Crim. P. 26.2, the government agrees to the production of *Jencks* material for all government witness (except to the extent the safety of a confidential informant would be compromised, in which case disclosure shall be governed by paragraph 16, infra), and such material shall be disclosed 30 days before the pretrial conference.

14. **Lists of Related Cases:** The defense has requested that the government identify to the defense the individuals that it believes are or were associated with the alleged “West Mob” or “West Point” group. The government shall produce such information by January 31, 2004, and as it becomes available thereafter.

General Procedures Relating to Disclosure

15. **Newly-Discovered Materials:** After supplying the above-referenced materials and information, the government shall have the right to supplement discovery with newly-discovered materials and information. The government must provide any such supplemental discovery to defendants as soon as possible upon determining its existence or relevance.

16. **Cooperating Witnesses:** The government shall disclose information relating to cooperating witnesses by December 1, 2003, including the name, address, all reports and statements relating to the cooperating witnesses’ criminal activity, any reports or documents relating to promises or inducements that the witness may have received, all reports and documents (including handwritten notes) by any agents or officers during any interview or debriefing. If the government intends to withhold any of this information about a cooperating witness, it must do the following:

- a. If the government withholds information relating to a cooperating witness, the government shall notify the defense. That notification shall identify the number of reports or materials withheld in relation to a specific cooperating witness, and shall give the general nature of the materials withheld (for example, FBI 302, SFPD Police Report, etc.)
- b. The government shall provide the notification given to the defense to the Court, and shall also provide to the Court unredacted copies of all materials withheld. These materials may be filed under seal.
- c. The Court will review these materials *in camera*, and will then issue a tentative order regarding disclosure of confidential informants and materials related to the cooperating witnesses. Both parties shall retain their rights to challenge this order, and to seek further disclosure or greater withholding of cooperating witness information.

d. As to confidential informants, the Court shall set a date by which the government shall disclose to the defense the identity and reports and other related information. If the government intends not to disclose to the defense information concerning the confidential informants the government shall follow the procedure listed in subparagraphs a - c herein.

17. **Ongoing Investigations:** The government's responsibility to comply with this discovery order and all other statutory and case law regarding discovery shall be ongoing and shall include production of documents and materials from the following federal agencies: Housing and Urban Development ("HUD"), Alcohol, Tobacco, and Firearms ("ATF"), the Drug Enforcement Agency ("DEA"), the Federal Bureau of Investigation ("FBI"), or the Internal Revenue Service ("IRS"), and the San Francisco Police Department and its subdivisions, including but not limited to the San Francisco County Gang Task Force, CRUSH, POSSE, and the San Francisco County Police Department Homicide Division. If the government or any agency withholds any otherwise discoverable evidence on the basis that it also relates to an ongoing investigation, the government shall notify the Court no later than sixty (60) days before the pretrial that it has withheld documents and materials from the defense so that the defense may be able to address the Court on any issue arising therefrom. .

18. **Brady Material:** In light of the role of local and state officers in investigating the events that form the basis for the indictment in this matter, the government is responsible for obtaining and producing to the defense any evidence favorable to an accused, where the evidence is material either to guilt or to punishment, irrespective of whether the evidence has previously been solely in the possession of local or state officers, agents or attorneys. This paragraphs pertains to information that has been produced in connection with or is otherwise used in any joint investigation relating to charges in the superseding indictment and/or allegations of Westmob/RBL association. The government's obligations under *Brady v. Maryland* shall not depend on whether the relevant material is currently in the possession of local or state officers, agents or attorneys.

19. **Witness List:** The government shall provide to the defense a witness list no later than January 31,

2004.

20. **Reciprocal Discovery:** Each defendant will provide all reciprocal discovery called for by Federal Rule of Criminal Procedure 16 (b) and Fed. R. Crim. P. 26.2 within thirty days of the discovery of such evidence, but in no event later than five days before the pretrial conference.

IT IS SO STIPULATED.

DATED

GEORGE L. BEVAN JR.
Assistant United States Attorney

DATED

GAIL SHIFMAN

IT IS SO ORDERED.

DATED

MARTIN J. JENKINS
United States District Court Judge
Northern District of California

Orders similar to this have been issued in other cases such as *United States v. Zapata, et al.* in the District of Alaska, Case no. A-02-103 CR (HRH), *United States v. Stepney et al.* in the N.D. Cal (CR 01-0344 MHP) and others.

1. So, Ask and Ye Shall Receive

The world is now available to the government at their fingertips and while the FBI continues to have some difficulty with their computer systems here are a sampling of those systems that are working and available for them to use and you to mine in your requests.

Cyberspace can make them ROBOCOPS

You need to know that law enforcement possesses the world at their fingertips.

I. DATA BASES-GOVERNMENT LAW ENFORCEMENT

NOTE: Government law enforcement data bases include, but are not necessarily limited to the following listings.

A. BUREAU OF ALCOHOL, TOBACCO & FIREARMS (BATF)

1. Liquor, firearms, and explosives licensing information
 - a. Manufacturers
 - b. Wholesalers

- c. Distributors
 - d. Retailers
 - 2. Registered firearms information
 - a. Machine guns
 - b. Sawed-off shotguns, etc.
- B. DRUG ENFORCEMENT ADMINISTRATION (DEA)**
1. CASE STATUS SUBSYSTEM (CAST)
 - a. Identification information on case agents' names
 - b. Case number and level
 - c. Date the case was opened
 - d. Date the case is due for review
 - e. Office managing the case
 - f. Status of the case
 2. COMPUTERIZED ASSET PROGRAM SYSTEM (CAPS)
 - a. Information on seizures
 - b. Describes assets seized, when, and from where
 - c. Identifies seizing officers
 - d. Describes the ultimate disposition of the assets
 3. CONTROLLED SUBSTANCES ACT FILE (CSA)
 - a. Registrants authorized to handle controlled substances
 4. CONTROLLED SUBSTANCES INFORMATION SYSTEM (CSIS)
 - a. Generic/technical data on controlled substances
 - b. Physical properties of drugs
 - c. Hazards (direct and side effects of listed drugs)
 - d. Street names for drugs
 - e. Information on clandestine labs
 5. EL PASO INTELLIGENCE CENTER (EPIC)
 - a. Provides access to Treasury Enforcement Communication System (TECS)
 - b. Compilation of data from other law enforcement data bases
 - c. Federal, state and local inquiries cross index
 - d. Information from other agencies on subjects being investigated
 - e. Silent hit program for suspect vehicles entering the U.S.
 6. EVENTS SYSTEM
 - a. Provides an analytical data base for agent/analyst use
 - b. Permits entry of large numbers of documents
 - c. Sorts documents
 - d. Collates documents
 - e. Performs arithmetic calculations on documents
 - f. Analyzes documents
 - g. Determines relationships between documents
 7. NADDIS
 - a. Relevant case data
 - b. Identification information on individuals & companies related to cases
 - c. Known assets
 - d. Business/financial information related to cases
 8. PRECURSOR CHEMICAL INFORMATION SYSTEM (PCIS)
 - a. Information on chemicals necessary for the illicit manufacture of controlled drugs
 - b. Documents the purchase, sale and shipment of chemicals

- c. Documents the theft or loss of chemicals
- 9. TOLLS SYSTEM
 - a. Provides an analytical data base (similar to the Events System) for the analysis of telephone number information
- C. FINANCIAL CRIMES ENFORCEMENT NETWORK (FinCEN)
 - 1. Provides analytical research services
 - a. Searches data bases for evidence or leads to relationships between subjects and other persons or entities
 - b. Provides link analysis to show connections
 - c. Provides interpretations of results
 - d. Provides organization charts based upon research
 - 2. Provides limited credit information
 - a. Names, addresses, spouse's first names
 - 3. Provides telephone subscription information, including:
 - a. Nationwide telephone searches
 - b. Criss Cross or Haines Directory information
 - c. Postal Service address change information
 - 4. Provides business data, including:
 - a. Initial incorporators
 - b. Key officers
 - c. Gross receipts and net income
 - d. Creditors
 - e. Principle products
 - 5. Provides public records information, including:
 - a. County court records
 - b. Secretary of State information
 - c. Auto tag/license information
 - 6. Provides access to government financial data bases
 - a. Currency Transaction Reports, Forms 4789 (CTRs)
 - b. Report of International Transportation of Currency or Monetary Instruments, Forms 4790 (CMIRs)
 - c. Report of Foreign Bank and Financial Accounts, Forms 90-22.1 (FBARs)
 - d. Report of Cash Payments Over \$10,000 Received in a Trade of Business, Forms 8300
 - e. Currency Transaction Reports by Casinos, Forms 8362
 - 7. Provides information to federal law enforcement and virtually all state and local law enforcement
 - 8. FinCEN suggests agencies access their own data bases prior to making requests of FinCEN
- D. INTERNAL REVENUE SERVICE (IRS)
 - 1. Currency & Banking Retrieval System
 - a. CTRs, Casino CTRs, FBARs & Forms 8300
 - 2. Suspicious Transaction Reports
 - a. Provided by California and Hawaii financial institutions
 - 3. Criminal Investigation Management Information System (CIMIS)
 - a. Open and closed criminal cases
 - 4. Seizure & Forfeiture Database
 - a. Index of Title 31 seizures and forfeitures
- E. INTERPOL

1. Provides access to international network of criminal activity files
 2. Query by name or business name
 3. Request intelligence check to get complete file
- F. NATIONAL CRIME INFORMATION CENTER (NCIC) (FBI system)
1. Interstate Identification Index File\
 - a. Criminal histories
 - b. Rap sheets
 - c. Fingerprints
 2. Files on stolen articles
 - a. Vehicles
 - b. License plates
 - c. Securities
 - d. Boats
 - e. Guns
 - f. Other stolen articles
 3. Wanted persons (foreign & domestic)
 4. Unidentified persons file
- G. NATIONAL LAW ENFORCEMENT TELECOMMUNICATIONS SYSTEM (NLETS)
1. Links system users with law enforcement agencies nation-wide
 2. Registry of auto tags
 - a. Owner's name
 - b. Vehicle identification number (VIN)
 - c. Physical description of listed automobiles
 3. Information on driver's licenses
 - a. Driver's name, date of birth (DOB), physical description and address
 - b. License renewal date, and the type of license issued
 4. Lists similar information for boat licenses, and snowmobile license
 5. Certain criminal history records
 6. Acts as a nation-wide law enforcement message center
- H. TREASURY ENFORCEMENT COMMUNICATIONS SYSTEM (TECS II)
1. U.S. Customs Service intelligence files
 2. Links federal law enforcement agencies including INTERPOL
 3. Customs lookout and suspect information on persons, vehicles, aircraft, businesses and vessels
 4. Federal Aviation Administration (FAA) information, including pilot information and flight plans
 5. Restricted information on currency reports (CTRs, CMIRs, FBARs, & Forms 8300)
 6. Has an archives function that tracks individuals entering the U.S. via commercial airlines
 7. BATF criminal information files
 8. Links users to NLETS and NCIC
- I. U.S CUSTOMS SERVICE (USCS)
1. Links users to TECS II
 2. Contains Customs Artificial Intelligence System (CAIS)
 - a. Tactical investigative leads
 - b. Uses financial data base source information

3. Automated Commercial System (ACS)
 - a. Information on imports into the U.S.
4. Financial data query
 - a. CTRs, CMIRs, FBARs, Casino CTRs, & Forms 8300
 - b. Has a unique retrieval capability
5. Fraud Data Retrieval System
 - a. Index to formal consumption and warehouse entries filed with USCS
6. Bank Secrecy Act audit results (non-automated)
 - a. Treasury Department quarterly reports on BSA violations
 - b. Bank names are listed in TECS II
7. Bank Criminal Referral Forms (non-automated)
 - a. Referrals on criminal activities
 - b. Information is entered into USCS in-house data base
8. Phony banks (non-automated)
 - a. Lists phony, unofficial, or non-recognized domestic & foreign financial institutions
 - b. Bank names are listed in TECS II

And, don't forget the FBI's "I" Drive. This shared drive allows FBI agents to place their FBI 302s and other documents into their computer system in a sense to 'hold' these reports. These reports may not necessarily end up in the FBI's official case files for a number of reasons though all seem suspect. The official statement of the FBI is that this is where the agents place the reports prior to their supervisor's approval. Each field office maintains this drive. Imagine, a report concerning an informant or a cooperator or a witness that doesn't necessarily fit the government's theory of the case. Hmmm, seems that such a report though not in the official file would be discoverable if it was material to the defense or exculpatory.

4. GO Crazy.

A. Cash Rewards & Incentive Programs

Federal law enforcement officers, inspectors, and agents don't necessarily just receive their salaries for a job well done. As an incentive for, inter alia, narcotics seizures, they can receive bonuses, benefits and cash rewards ranging from a certificate of achievement to an increase in their grade level. An increase in a grade level, say from a GS 9 to a GS 10, could mean an annual increase in salary of \$5,000. Let's say the agent is 34 years old when he receives the reward. When he retires from the Service at the age of 57, that reward in reality was worth \$115,000. That's not a bad bounty for making an arrest or seizure. It's certainly worth discovering as it goes to the motivation and bias of the agent.

The United States Customs Service has such a program in effect, and has since as early as 1978. In determining whether to give law enforcement personnel these rewards, "Customs considers (1) the amount of drugs seized, (2) whether seizure led to further law enforcement activity and (3) whether the smuggler was employing an unusual concealment method." Buritica v. United States, et. al., 1998 WL 320990 *4 (N.D.Cal.)

Whether such cash incentive programs actually motivate the actions of law enforcement,

[i]t appears to the court that the very existence of this program may very well run afoul of the Fourth Amendment. Specifically, such a program creates perverse law enforcement incentives that have an unduly dangerous propensity to encourage unreasonable searches and detentions.

.....

The Supreme Court has recognized the dangers of such programs in similar...situations....

.....

The cash incentive program in effect at Customs strikes an ominous historical chord as well. At least as far as it concerns rewards for drug interdiction, ... the cash incentive policy bears striking resemblance to British colonial practices that helped to spark the American Revolution and led to the adoption of the Fourth Amendment.

Buritica v. United States, et. al., 1998 WL 320990 (N.D.Cal.)

B. ADMISSIONS OF PARTY OPPONENTS

Certain documents and statements of the prosecution at an earlier proceeding are admissible in a later hearing or trial against the prosecution as admissions of a party-opponent under Rule 801(a)(2) of the Federal Rules of Evidence. Generally, prior pleadings are admissible as party-admissions, *Andrews v. Metro-North*, 882 F.2d 705 (2d Cir. 1989). Similarly, prior opening statements in criminal trials may be admissions on the ground that “the function of trials as truth-seeking proceedings...cannot be affirmed if parties are free, wholly without explanation, to make fundamental changes in the version of facts within their personal knowledge between trials and to conceal these changes from the final trier of fact, *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984). And, affidavits requesting authorization for wiretapping and subsequent search may constitute an admission of a party opponent, *United States v. Ramirez*, 894 F.2d 565 (2d Cir. 1990), “when the government advances a statement of its agent in a judicial proceeding...the government has adopted the content of the statement...” *Id.* at 570.

These rulings were noted when the Second Circuit reversed the convictions in *United States v. GAF*, 928 F.2d 1253 (2d Cir. 1991) by concluding that despite the fact that a bill of particulars is not evidence in and of itself, it is a statement of what the government will or will not claim in its prosecution, *United States v. Murray*, 297 F.2d 812, 819 (2d Cir. 1962), making it admissible at trial.

III. It Pays to Discover – Still Wondering Why You’re Doing This?

Even when it seems that you just can’t afford to continue doing what you’re doing, it is always possible to blast one’s way out with discovery protocols, local rules, stipulated discovery orders towards rethinking discovery demands.

As examples of what can happen when the discovery production is expanded, read *United States v. Pius Ailemen*, 986 F.Supp. 228 where a six month wiretap was suppressed based on lack of requisite necessity. In its 86 pages, the Court details the facts which allowed us on the defense to show why there was no need for the wiretap through misrepresentations and omissions in the wiretap affidavits. Also, review the attached Report & Recommendation, Release on Grounds of Due Process again in the Ailemen case, CR -94-003 VRW (WDB) where the defendant was released pending trial in spite of the charges of CCE, Money Laundering, etc. because of the delays caused through creative motions work, ‘talking’ with the Court through CJA filings, and the government’s lengthy discovery production process.

