FBI Reform

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,	**No. CR 10-475-KI**
Plaintiff,	**REPLY TO THE GOVERNMENT'S RESPONSE TO DEFENDANT'S FIRST MOTION TO COMPEL DISCOVERY AND DEFENDANT'S REQUEST FOR DISCOVERY**
v.	
MOHAMED OSMAN MOHAMUD,	
Defendant.	

The government's response mischaracterizes the discovery issues: the defense seeks information required under Rule 16 and *Brady v. Maryland*, 373 U.S. 83 (1963), not "open file" discovery; and the defense does not assert that potential entrapment involves different rules of

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discovery, but asserts that the unique facts of this particular case, and the constitutional right to present a defense, require production of a broad range of potentially exculpatory material relevant to entrapment. The necessity for the orders to compel requested by the defense are apparent from the government's arguments. Given the government's claim that it does not understand the exculpatory significance of the Bill Smith emails, this Court can have no confidence that the government has an adequate sense of what might be exculpatory in this case. Beyond the Bill Smith emails, the government questions whether there has been a showing regarding predisposition, inducement, and vulnerability sufficient to trigger any concerns. Again, the government demonstrates that it cannot accurately assess what constitutes exculpatory evidence in the context of this case. The *ex parte* statement regarding the potential defense answers the claim that the defense has asserted only "speculative and ambiguous theories that do not meet the threshold of materiality" (Resp. at 10). Under the unique circumstances of this case, each of the requested areas of discovery should be ordered produced.

A. The Bill Smith Discovery Violation And The Government's Narrow View Of What Constitutes Exculpatory Material Demonstrate The Need For An Order To Compel The Government To Meet Its Discovery Obligations.

In the motion to compel, the defense asserted that the government had failed to reveal contact by a government agent – Bill Smith – that began in November 2009. Mem. Mot. to Compel at 7-8. In response, the government claims that its agent's email contact with Mohamed is not "related to the case." Resp. at 20. On the contrary, the correspondence between Bill Smith and Mohamed demonstrates that Smith was acting as an agent provocateur, attempting to encourage Mohamed to engage in violent activity in this country. Just as in *Jacobson v. United States*, 503 U.S. 540 (1992), where the activities of the postal service in sending emails encouraging trafficking in illegal

pornography led to a finding of entrapment, the activities of the government agents here reveal an early and coordinated effort to encourage violence in the United States. The Bill Smith email exchange is relevant and exculpatory based on three principles of entrapment law: predisposition is measured from the first contact with the government agent, which we now know to be at least November 9, 2009, not the June 25, 2010, date previously disclosed by the government; the government agent initiated discussions regarding violent activity in the United States; and Mohamed did not take any action based on the provocative initiatives of the government agent.

The failure to produce evidence that Bill Smith is a government agent violated this Court's discovery order. The government recognizes that it has an obligation under *Brady* to provide discovery, Resp. at 3, and the discovery deadline was February 15. The discovery provided up to that date and after included no indication that Bill Smith was a government agent. The government must possess the paperwork and reports that are necessarily generated by a government agent who contacts a citizen for such investigative purposes. If not for fortunate defense work, this exculpatory fact would have continued to be suppressed. It was only by backtracking through voluminous emails, and clearing out hundreds of lines of distracting code, that the defense was able to understand Bill Smith's apparent connection to the government. Once confronted with the defense conclusions, the government admitted Bill Smith acted as a government agent. However, the conscious determination by the agency that Bill Smith should not be disclosed to the defense as an agent, purportedly because the government does not believe the information is helpful to the defense, establishes that the government alone should not be permitted to determine what is exculpatory without this Court's supervision and instruction. As in *Alderman v. United States*, 394 U.S. 165, 182 (1969), the defense perspective is necessary to determine what constitutes exculpatory evidence. The

government still has provided no information regarding Bill Smith and his training, instructions, and activities regarding his email exchange with Mohamed.

To this date, the government continues to claim the Bill Smith information is not useful to the defense. The government has not explained why the exculpatory value to the defense, as explained in the motion to compel, does not apply, simply relying on a conclusory claim of irrelevance. *Compare* Mem. Mot. to Compel at 7-8 *with* Resp. at 20. Rather than a simple oversight, the failure to provide exculpatory material is a product of the government's restrictive view of its obligation to provide information that may be helpful to an entrapment defense. Moreover, this restrictive view is not limited to the Bill Smith emails, but rather affects much of the government's analysis of specific discovery requests. While conceding that "entrapment may alter the Court's assessment regarding what constitutes relevant evidence," and correctly citing the predisposition factors and standard for inducement, Resp. at 11-13, the government wholly fails to apply that law to the facts of this case and the current discovery issues.

Even in its section entitled "Entrapment and Discovery," the government ignores its own discussion of entrapment law when responding to Mohamed's discovery request, instead relying on inapplicable non-entrapment cases. In arguing that the defense is not entitled to material in the government's possession regarding Mohamed's behavior that is inconsistent with predisposition to commit the crime charged, the government fails to mention any of the entrapment factors it cites in the previous paragraph, such as the relevance of the "character and reputation of the defendant" or the "nature of the government's inducement." Resp. at 12-13. This is despite its earlier citation to *United States v. Poehlman*, in which the government used its knowledge of the defendant's character and non-criminal interests to induce him to commit a crime. 217 F.3d 692, 702-05 (9th Cir. 2000).

Instead, the government sets up the straw man claim that Mohamed's discovery request presupposes that "criminals must do evil every waking moment of the day." Resp. at 13. Then, the government proceeds to argue against that straw man with a lengthy discussion of two cases that do not involve entrapment: *United States v. Scarpa*, 897 F.2d 63 (2d Cir. 1990) (rejecting discovery of government surveillance of defendant's innocuous activities on relevancy grounds in a non-entrapment case); and *United States v. Hedgcorth*, 873 F.2d 1307 (9th Cir. 1989) (defendant barred from offering evidence of his legitimate work for the government where offered as character evidence in a non-entrapment case). The government's response consistently ignores applicable entrapment law in its specific discovery responses. The following discussion briefly expands on some of Mohamed's specific requests.

1. Statements Of Defendant

The government argues that Mohamed is not entitled to all written or recorded statements of the defendant in its possession. Resp. at 17. Instead, the government claims that it will decide the relevance of material in its possession and that it has already provided significant irrelevant material to the defense. Resp. at 17. It further states that, as a "courtesy," it has provided material from an "unrelated matter" in November 2009 that resulted in the creation of a mirror image of Mohamed's computer, a search of his cell phone, and a police interview. Resp. at 17-18. These arguments further highlight the deficiency in the government's understanding of relevance in this case.

From the defense's perspective, very little of the discovery provided to date has been irrelevant to assessing such entrapment factors as the defendant's characteristics and the government's conduct. Further, what the government knew about Mohamed – and how it eventually

used that knowledge – is highly relevant to inducement. *See, e.g., Poehlman*, 217 F.3d at 702. The government's view that it can properly assess the relevance of certain material is belied by its incorrect claim that "much" of the material provided has been irrelevant.

With respect to the November 2009 incident, the government again misses the relevancy mark by describing it as an "unrelated matter." Resp. 17. Because the FBI was involved from the outset, what the agents learned and how they used that knowledge are relevant to analyzing predisposition and inducement. Further, the search and seizure activity is directly relevant – and essential – to litigating motions to suppress based on the police intrusions into zones of privacy. Based on the discovery provided to date, it appears that the FBI became involved within one day of the incident, observed and potentially assisted in a police interview, received significant data from Mohamed's cell phone, and received a mirror copy of his computer. Then, within a week, the first known government agent—Bill Smith—contacted Mohamed attempting to engage him in violent acts.

2. Material Related To Government Monitoring

Although the defense does not know the precise date, the FBI apparently was already physically monitoring Mohamed at least a month prior to the November 2009 incident discussed above. Well before that, agents were monitoring Mohamed's online activities. The defense's discovery request for material related to such monitoring is specific, and not "broad, vague and unclear." Resp. at 19. Further, it is highly relevant to assessing government conduct in terms of predisposition and inducement because the undercover agents clearly used information from surveillance activities in approaching Mohamed. One obvious example is that agent Bill Smith attempted to ingratiate himself with Mohamed by recommending an online publication based on the

government's belief that Mohamed had connections to the publication. In addition to potential trial evidence, disclosure of information related to monitoring is the necessary predicate to this Court's pretrial determinations regarding the legality and fruits of surveillance.

3. Material Related To Government Contact With Defendant

The defense requests material related to any government contact with Mohamed, which is clearly related to any analysis of entrapment factors. The government responds that it will withhold material "to the extent such contact has nothing to do with the case or defendant's predisposition." Resp. at 19. Immediately thereafter, however, the government again reveals that it cannot be relied upon to accurately assess relevance, because it claims that it has already, "[a]s a courtesy," provided material related to two government agents who contacted Mohamed while at the same time claiming that the government contact did not "relate to the case or defendant's predisposition." Resp. at 20. Those two contacts were Bill Smith, who actively attempted to engage Mohamed in violent activities in the United States, and another unnamed agent who attempted to engage Mohamed on an online forum. Given that predisposition is measured from the first governmental contact (*Jacobson*, 503 U.S. at 549 n.2; *Poehlman*, 217 F.3d at 698), and given that the undercover agents were not the first attempt on the part of the government to engage Mohamed in unlawful activities, it is flatly incorrect for the government to claim these earlier contacts are irrelevant to an entrapment defense.

4. Training And Background Information Of The Undercover Agents

In order to assess the predisposition and inducement, it is critical to understand the training and background of the undercover agents. The discovery provided to date reveals that the agents were well versed in certain psychological techniques aimed at ensuring compliance. The greater training, experience, and expertise of the agents, the stronger the case for government inducement,

especially where the target is a vulnerable and immature teenager. The government has not asserted that it has searched for and determined the existence of training and background information. However, the existence and availability of such information is obvious. For example, in recent litigation in Los Angeles, a former undercover operative who was hired to infiltrate the Muslim community described extensive government training and instruction that, if similar training and instruction are present in this case, would be highly relevant to the assessment of government inducement activities. *See Monteilh v. FBI*, SA CV 10-00102-JVS, Civil Complaint, at 5-8 (C.D. Cal. filed Jan. 22, 2010).

5. *Pre And Post-Meeting Recordings, Access To Recording Device, And Notes Of Meetings Of The Undercover Agents*

The transcripts of the meetings between government agents and Mohamed show that the agents had a specific approach to Mohamed and planned what issues they wanted to discuss with him. Recorded information before and after the meetings would allow the defense to analyze the nature of the government's inducement and the manner in which agents deliberately targeted certain of the defendant's vulnerabilities. The government's assurances that the recordings do not contain exculpatory material cannot be relied upon, especially given its narrow understanding of relevance under applicable entrapment law.

With regard to analyzing the recording device that allegedly failed to engage in the critical first meeting, the defense cannot be expected to rely simply on the government's assurance that the batteries in the device failed. Elementary defense work involves obtaining an expert to guide cross-examination and to provide potential rebuttal evidence. *See Ake v. Oklahoma*, 470 U.S. 68, 80-82 & n.7 (1985). Specific forensic analysis must be conducted to test the relevant devices and to obtain

expert assistance for cross-examination and affirmative evidence regarding the failure to record the critical July 30th meeting.

Finally, with regard to agents' notes of the July 30th meeting, the defense has serious concerns about the reliability of documentation regarding this critical event, as reflected in the separate motion to sequester witnesses and to preserve evidence. The defense has good faith reasons to believe the actual words of this conversation are useful to the defense.

B. The Specific Facts Of This Case Establish That The Government Possesses And Has Not Disclosed Exculpatory Material.

The government's claims that the defense seeks a special discovery rule for generic entrapment entirely misses the point. As illustrated by the early protestations by government officials, even prior to the first appearance, entrapment has been and will be a major issue in the case. The specific facts, even from the skewed account in the complaint, show a teenager with no prior criminal convictions being contacted by seasoned government agents pretending to belong to an organization that has specially chosen him. As set out in the sealed and *ex parte* information provided to the Court, the discovery already provided, as well as defense investigation, has established facts more than sufficient to require full discovery of all issues that support an entrapment defense.

The government makes several arguments that ignore the different standards for ordering pre-trial discovery and for reversal of a conviction after trial. The government misreads *United States v. Bagley*, 473 U.S. 667 (1985), and *United States v. Agurs*, 427 U.S. 97 (1976), as standing for the proposition that it must only disclose evidence if "its suppression undermines confidence in the outcome of the trial" or if it "is of sufficient significance to result in the denial of the defendant's

right to a fair trial." Resp. at 9-10. Thus, the government argues, the "mere possibility that an item of information might help the defense or might affect the outcome of the trial" does not meet the standard for pre-trial discovery. *Id.* However, the government's claim has been rejected by the Ninth Circuit as confusing the standard for reversal with the standard for discovery. In *United States v. Price*, the court explicitly noted the prosecution's error in relying on the standard for appellate review of *Brady* issues rather than the pretrial discovery standard:

> [T]he 'materiality' standard usually associated with *Brady* . . . should not be applied to pretrial discovery of exculpatory materials . . . [J]ust because a prosecutor's failure to disclose evidence does not violate a defendant's due process rights does not mean that the failure to disclose is proper . . . [T]he absence of prejudice to the defendant does not *condone* the prosecutor's suppression of exculpatory evidence [*ex ante*] . . . [Rather,] the proper test for pretrial disclosure of exculpatory evidence should be an evaluation of whether the evidence is favorable to the defense, i.e., whether it is evidence that helps bolster the defense case or impeach the prosecutor's witnesses . . . [I]f doubt exists, it should be resolved in favor of the defendant and full disclosure made . . . [T]he government [should therefore] disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case, even if the evidence is not admissible so long as it is reasonably likely to lead to admissible evidence.

566 F.3d 900, 913 n.14 (9th Cir. 2009) (alterations in original) (quoting *United States v. Acosta*, 357 F. Supp. 2d 1228, 1239-40 (D. Nev. 2005)).

The government also appears to hold an inappropriately narrow view of its duty to inquire about *Brady* material from other agencies. Resp. at 5 (generally limiting inquiry to agencies comprising "the prosecution team"). As highlighted earlier with the Bill Smith emails, this Court should order the government to affirmatively seek out exculpatory information – as broadly defined – to be produced by all agencies having any involvement with this case. *See* Def. Mem. Mot. to Compel at 8-9. To date, reports regarding Bill Smith have still not been produced. The Court's supervision in this area is critical because some government agencies have not been forthcoming in

providing material necessary to comply with disclosure obligations. *See, e.g., Islamic Shura Council of S. Cal. v. FBI*, ___ F. Supp. 2d ___, 2011 WL 1576476, *1 (C.D. Cal. Apr. 27, 2011) (the government "provided false and misleading information" to the court regarding the existence of documents, then asserted the "untenable" position that misleading the court was permissible "to avoid compromising national security"); Stuart Tomlinson, *Federal Judge Michael Mosman Calls U.S. Bureau of Prisons' Actions In Assault Trial "Abysmal," "Sloppy," And "Unjustifiable,"* The Oregonian, Mar. 18, 2011; Mark Freeman, *Seda's Prosecutors Failed To Disclose FBI Payments To Key Witness' Husband*, Ashland Tidings, Jan. 12, 2011.

Finally, the Court should reject the repeated government mantra that it will provide *Brady* information in a timely manner prior to trial. Resp. at 32 (witness interviews and impeachment material); 33 (physical evidence exculpating Mohamed or impeaching government witnesses); 34 (mitigation evidence); 34 (witness identification). Rule 16 and constitutionally-required discovery was due on February 15th. Contrary to its claims of compliance, the government has not met its obligation under *Brady*, has indicated little notion of what is exculpatory on the facts of this case, and should be ordered to comply immediately with its obligations under *Brady*, which should have been fulfilled over two months ago.

C. The Court Should Order Discovery Of Classified And Unclassified Material Both For Trial Purposes And To Assess The Lawfulness Of Electronic And Other Surveillance By Pretrial Motions.

The government opposes providing some of the material Mohamed seeks on the ground that it is classified, going so far as to argue that the fact of classification, in itself, can limit a defendant's right to discovery. Resp. at 2. We disagree. The fact that some of the information sought through discovery is classified in no manner limits the government's obligations under the Due Process

Clause and Federal Rules of Criminal Procedure. Mohamed is entitled to all the material he needs for his defense. As stated in *United States v. George*, 786 F. Supp. 11, 13 (D.D.C. 1991), "Although the classified nature of many of the documents affects this court's assessment of defendant's request, the basic rule governing discovery of documents in the hands of the prosecution by a defendant is Federal Rule of Criminal Procedure 16(a)(1)(C)...." *See also United States v. Pickard*, 236 F.Supp. 2d 1204, 1209 (D. Kan. 2002); *United States v. Spanjol*, 720 F. Supp. 55, 57 (E.D. Pa. 1989). The same applies to constitutionally-required discovery under *Brady* pursuant to the relevant statutes. The defense should receive discovery, regardless of classification, because the material sought is essential to a fair trial and because disclosure of the underlying Foreign Intelligence Surveillance Act applications, orders, and investigative activities is necessary for pretrial review of the governmental activity.

With respect to Mohamed's specific request for FISA-related discovery, the defense seeks two categories of information: (1) material related to the application for, and acquisition of, any FISA warrants; and (2) material derived from any surveillance conducted under FISA. The defense agrees with the government that the former category can appropriately be addressed in the forthcoming defense motion to suppress, as contemplated by the applicable statute. 50 U.S.C. § 1806(f) & (g). However, with respect to any material derived from FISA warrants, the government is obligated to produce it "to the extent that due process requires." 50 U.S.C. § 1806(g). As discussed above, the government's narrow view of what constitutes exculpatory evidence in the context of the entrapment issues in this case suggests that significant discoverable material has yet to be produced. To the extent that the government provides any such material to the Court for

review, the defense should have an opportunity not only to inspect it, but also to brief the Court about whether it is exculpatory based on the defense theory of the case.

The Court can fashion appropriate protective orders and other procedures to ensure no harm to national security ensues from the disclosure of classified information, as has already been done regarding the discovery to date. Fed. R. Crim. P. 16(d). In addition to the authority set out in the Federal Rules of Criminal Procedure, Congress has provided guidance in the Classified Information Procedures Act. 18 U.S.C. App. 3. The Act provides guidance on discovery of classified information. When a defendant should be in possession of classified information, the defense is entitled to full access to the material and to its use under appropriate protective orders. *See Armstrong v. Exec. Office of the President*, 830 F. Supp. 19, 22 (D.D.C. 1993) (the purpose of CIPA is "to harmonize a criminal defendant's right to exculpatory material with the Government's right to protect classified information").

D. The Remaining Specific Discovery Issues Should Generate Orders For Immediate Production Of The Requested Material.

With respect to the specific discovery disputes, Mohamed has either responded above or intends to rely on the authority cited and arguments made in his previous filings. In the interest of fully apprising the Court of the current discovery situation, however, several more clarifications are necessary.

1. Phone Logs And Summaries

Mohamed has requested any logs and summaries of the voluminous phone calls intercepted and recorded by the government to mitigate the arduous task of finding a relevant needle in the proverbial haystack of almost 800 calls. Such an index has been produced in other cases. *See, e.g.,*

United States v. Orozco, 108 F.R.D. 313, 318 (S.D. Cal. 1985) (bill of particulars denied where FBI produced "summaries of all phone calls"); *United States v. White*, No. CR 109-073, 2009 WL 3486057, at *1 (S.D. Ga. Oct. 27, 2009) (defendant's discovery request moot where government provided summaries of phone calls). The government notes that it has "produced a chart of all the phone calls" with "call identification number and the date and start time for each of the calls." Resp. at 18. However, the two pieces of information in that index either provide little useful information or are fraught with inaccuracies.

The "call identification number" represents nothing more than the computer file name for a given phone call. It does not, for example, identify the participants of the phone call or signify whether the call is relevant. The "date and start time," which theoretically would provide some useful guidance, appear to be almost entirely incorrect in terms of the starting times of the phone calls. Where the defense has been able to establish the true time of a call based on other documentation, the index is consistently wrong by four, seven, or eight hours. For example, when the Oregon State Police contacted Mohamed to confirm a 1:00 p.m. meeting on November 2, 2009, the government's index claims the call happened at 5:51 p.m. on November 2nd. Depending on the time of day, the effect of such errors cause a call to be mistakenly attributed to the wrong date.

2. *Materials Related To Search And Seizure Of Computer, Redactions, And Polygraph Exam*

As noted above, the government seeks to characterize a November 2009 interaction with Mohamed as "an unrelated matter." Resp. at 17. While the direct contact with Mohamed appeared to involve only the Oregon State Police (OSP), the FBI was clearly involved behind the scene. As the government has only provided minimal discovery related to the FBI's involvement, with much

of it redacted, Mohamed cannot assess the extent of the information the FBI gathered and subsequently used in crafting its sting operation.

What the discovery does show is that the OSP immediately notified the FBI upon receiving a complaint about Mohamed, despite the fact that the substance of the report would ordinarily not result in FBI involvement. Although the redactions in the FBI report prevent the defense from understanding the full scope of the FBI's role, it appears that agents met with OSP officers prior to contact with Mohamed and were involved with the subsequent interview. OSP then requested consent to image Mohamed's computer, which was provided to an FBI analyst within hours. Seven days later, agent Bill Smith began contacting Mohamed and soliciting his participation in violence against the West. A short time later, the FBI analyst copied specific information from Mohamed's computer and provided it to a fellow agent. The analyst did not write a report of his actions until a year later.

As the above discussion shows, the FBI was intimately involved in the November 2009 incident. The FBI used the opportunity to generate specific information about Mohamed, searched his computer and phone, and took part in the preparation of – and then observed – investigation and interview activities. Given entrapment law and the factors relevant to predisposition and inducement, this information is critical to mounting an effective defense, both at trial and for pretrial motions, and should be produced under *Brady*.

Conclusion

For each of the foregoing reasons, as well as the grounds stated in the Request For Discovery and Memorandum In Support Of First Motion To Compel Discovery, the defense respectfully requests the Court to order the production of the requested material.

Dated this 6th day of May, 2011.

/s/ Stephen R. Sady
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/s/ Steven T. Wax
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/s/ Ruben Iñiguez
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Notice For People Writing To
Multnomah County Correctional Facilities Inmates

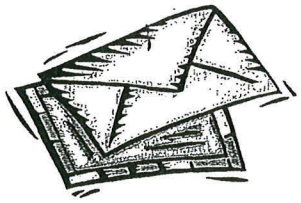
1. Address the envelope as shown here: MOHAMED MOHAMUD
~~John Smith,~~ ID# 751574
1120 SW 3rd Ave.
Portland, OR 97204

Put the name of the person you are writing to here.

Put the address of the facility housing the inmate.

Put the SWIS ID# of the person you are writing here.

2. **Do not** place any **stickers, address labels** or **other attachments** to either the outside of the envelope or on any page inside the letter.
3. POSTAGE STAMPS attached to the outside of the envelope are okay.
4. **Do not** place any foreign substance on the envelope or pages of the letter, including glue, tape, lipstick, perfume or any body fluids.
5. You **may not** send in any personal property such as books, magazines, leaflets, newspaper clippings, magazine pages, pens, candy, bus pass, stickers, calling (phone) card, motivational cards, bibles, etc.
6. **Incoming letters must have a return address. Letters without return address that are rejected will be sent to the dead letter office.**



Amazon
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The following is from the inmate manual and explains rules to be followed for incoming mail.

- Unacceptable items include:

o Weapons, or any plans or materials to make weapons.
o Explosives, or any materials to make explosives.
o Escape plans.
o Drugs or Drug paraphernalia.
o Flammable materials.
o POLAROID PHOTOS.
o Pictures, photos and greeting cards with stiff backing.
o Pictures, photos (including posters) and greeting cards larger than 5x7 inches in width or length.
o Plastic, wood, stone, or metal items.
o Any foreign substance.
o Personal checks.
o Stamps (or STAMPED ENVELOPES).
o Envelopes (unless official self addressed).
o Material containing portrayals of sexual activity or nudity (material displaying uncovered genitalia or female breasts); this includes nude baby photos.
o Inflammatory material if it constitutes a direct threat to the security and safety of the facility (as defined in Corrections Branch procedures).
o Books.
o Any device capable of storing electronic media (videotapes, cassettes, CD ROMS and computer disks).

- Funds sent by mail can be money order, cashier check, payroll check, attorney check, government check, and are all subject to verification.
- **Personal checks or Cash are not accepted and are returned to sender.**

→If Any Item Of The Mail Is Found To Be Unacceptable,
The Entire Letter Will Be Returned To Sender←

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,	**No. CR 10-475-KI**
Plaintiff,	**DEFENDANT'S REQUEST FOR DISCOVERY**
v.	
MOHAMED OSMAN MOHAMUD,	
Defendant.	

The defendant, Mohamed Osman Mohamud, through counsel, requests the government to produce discovery in accordance with Federal Rule of Criminal Procedure 16 and the Constitution.

Introduction

This motion is to formalize the defendant's request that the government meet its obligation to provide basic discovery under the Constitution and Rule 16 beyond the discovery provided to date. The parties have met and substantial discovery has been provided, including recordings of conversations, draft transcripts, and investigation reports. The parties continue to meet and to confer regarding general discovery obligations. The defense requests that the government produce discovery, consistent with the general provisions of Rule 16 and the obligations to provide exculpatory evidence, beyond what has been provided to date. Specific areas that are disputed and need resolution will be addressed in separate motions, including a first motion to compel discovery filed contemporaneously with this request.

REQUESTS FOR DISCOVERY

1. The substance of all oral statements made by Mr. Mohamud to any government agent. F.R.Cr.P. 16(a)(1)(A). *United States v. Camargo-Vergara*, 57 F.3d 993, 998-999 (11th Cir. 1995) (reversible error to fail to disclose defendant's post-arrest statement where defense strategy affected); *United States v. Alex*, 788 F. Supp. 1013, 1016 (N.D. Ill. 1992). Rule 16(a)(1)(A) governs the government's obligation to disclose to Mr. Mohamud "the substance of any relevant oral statement" made to a government agent. The Rule specifically provides:

> **(A) Defendant's Oral Statement.** Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

The UCEs conducted at least seven face-to-face meetings with Mr. Mohamud between July 30 and November 26, 2010. According to the government, every meeting was recorded on audio and/or

video tape, with the exception of the first face-to-face meeting with UCE1 on July 30, 2010. Further, any statement to a government actor obtained by email, telephone, text messaging, or any other means must be produced.

2. All written or recorded statements of Mr. Mohamud (including, but not limited to, grand jury testimony, telephone calls, transcripts, depositions, etc.). *See* F.R.Cr.P. 16(a)(1)(B); *United States v. Bailleaux*, 685 F.2d 1105, 1114 (9th Cir. 1982) ("[g]overnment should disclose any statement made by the defendant that may be relevant"), *receded from on other grounds by United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989); *Alex*, 788 F. Supp. at 1016 (where government "offered no compelling explanation" for non-disclosure of statements of co-defendant, court exercises discretion to order disclosure). Rule 16(a)(1)(B) governs the government's obligation to disclose all written or recorded statements made by Mr. Mohamud. The Rule provides, in relevant part, as follows:

> **(B) Defendant's Written or Recorded Statement.** Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:
>
> (I) any relevant written or recorded statement made by the defendant if:
> • the statement is within the government's possession, custody, or control; and
> • the attorney for the government knows–or through the due diligence could know–that the statement exists;
>
> (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent . . . .

For the same reasons set forth in item 1 above, the government should disclose complete and un-redacted copies of all written or recorded statements made by Mr. Mohamud, including but not limited to statements made via telephone, e-mail, or during face-to-face meetings.

3. All books, papers, documents, tangible objects, photographs, buildings or places which are "material to preparing the defense." F.R.Cr.P. 16(a)(1)(E)(I). *United States v. Cedano-Arellano*, 332 F.3d 568, 571 (9th Cir. 2003) (where reasonable suspicion was based on the alert of a narcotics detection dog, the dog's training and certification records were material and discoverable); *United States v. Bergonzi*, 216 F.R.D. 487, 501 (N.D.Cal. 2003) (in securities fraud prosecution, the company's internal report and interview memoranda were material to the defense because the documents were prepared with an eye toward discovering who was culpable for the crime). Rule 16(a)(1)(E) governs the government's obligation to disclose documents and objects upon the defendant's request. The Rule specifically provides:

> **(E) Documents and Objects.** Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> (I) the item is material to preparing the defense;
> (ii) the government intends to use the item in its case-in-chief at trial; or
> (iii) the item was obtained from or belongs to the defendant.

In light of the particular circumstances of this case, the government should be required to disclose all training manuals, procedures, policies, protocols, books, papers, records, and other materials used by the government to train its agents or employees to perform undercover operations, particularly in cases involving attempted use of weapons of mass destruction. Any materials that address or concern training or instruction of government agents, employees, contractors, or volunteers regarding the issue of entrapment are especially relevant and should be disclosed. The documents, materials, and information sought by Mr. Mohamud are material to the preparation of his defense as serious questions exist about his vulnerability, predisposition, and inducement. In order to effectively cross-

examine the undercover officers, defense counsel must be apprised of their qualifications and competency as demonstrated by whatever certifications or training documentation may exist.

4. All reports, local, state, or federal, relating to the circumstances of any search involving Mr. Mohamud or his property, or any other search related to this case, listing the items seized and the information obtained as a result of these searches. This information is necessary to enable Mr. Mohamud to prepare motions to suppress evidence. F.R.Cr.P. 16(a)(1); 12(b)(4)(B); 41(h).

5. Any agent's underlying rough notes of the statements requested in items 1 and 2, above. *See United States v. Harris*, 543 F.2d 1247, 1253 (9th Cir. 1976) (rough notes of interviews, especially with the accused, are discoverable and must be preserved); *United States v. Layton*, 564 F. Supp. 1391, 1395 (D. Or. 1983) (court exercises discretion under Rule 16 to order disclosure of notes of interview with defendant). This request includes all entries in officers' field notebooks or equivalent. *United States v. Harris*, 543 F.2d 1247, 1253 (9th Cir.1976) ("the original interview notes, especially relating to an FBI agent's interview with the accused, must be preserved" because potentially discoverable); *United States v. Boshell*, 952 F.2d 1101, 1105 (9th Cir. 1991) (defendant's "confirmation of the facts in the notes before they were dictated on tape makes the notes and the tape producible under Jencks"); *United States v. Wicktor*, 403 F. Supp. 2d 964, 967 (D. Ariz. 2005) (officer who testifies at a preliminary hearing based on written reports of other detectives adopts those detectives' reports as his "statements" for Jencks Act purposes); *United States v. Riley*, 189 F.3d 802, 803 (9th Cir. 1999) (reversible error to destroy notes from interview when there "was no substitute for the notes except the recollections of the agent and the witness, which differed in several respects"); *United States v. Alvarez*, 86 F.3d 901, 904 n.2 (9th Cir. 1996) ("Under the Jencks

Act, witness statements, including reports prepared by testifying officers, must be turned over to the defense; *Goldberg v. United States*, 425 U.S. 94, 98 (1976) ("a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been 'signed or otherwise adopted or approved' by the Government witness is producible under the Jencks Act"); *United States v. Well*, 572 F.2d 1383, 1384 (9th Cir. 1978) (tape recordings of interviews). Although an officer's 'rough notes' need not be disclosed pursuant to the Jencks Act as witness statements, they must be disclosed pursuant to *Brady* if they contain material and exculpatory information. *See United States v. Andersson*, 813 F.2d 1450, 1459 (9th Cir.1987).

6. A copy of Mr. Mohamud's record of prior convictions and the FBI rap sheet. Rule 16(a)(1)(D); *see United States v. Audelo-Sanchez*, 923 F.2d 129, 130 (9th Cir. 1991) (*per curiam*). Both national and local criminal records should be searched. *See United States v. Perdomo*, 929 F.2d 967, 970 (3rd Cir. 1991); *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1998) (prosecution "deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation").

7. All items in request 6 above which "belong[] to" Mr. Mohamud. Rule 16(a)(1)(E)(iii).

8. All items in request 6, above, which were "obtained from" Mr. Mohamud. Rule 16(a)(1)(E)(iii).

9. Any evidence, including, but not limited to, the items in request 6, above, which are intended for use by the government as evidence in its case-in-chief. Rule 16(a)(1); *see* Rule 12(b)(4)(B); *United States v. De La Cruz-Paulino*, 61 F.3d 986, 992-995 (1st Cir. 1995)

(government's failure to designate evidence was violation of Rule 12(d)(2) which "creates a notice requirement").

10. Any and all results or reports of physical or mental examinations and of scientific tests or experiments, including, but not limited to, chemical analysis, fingerprints, polygraph exams, voice prints, and handwriting. Rule 16(a)(1)(F). The request for mental examination includes any review of information relating to Mr. Mohamud by any cultural, religious, psychological, behavior sciences or other such expert, including but not limited to consultations prior to and after attempted or completed contact with Mr. Mohamud through electronic media and face-to-face.

11. A written summary of all expert-witness testimony the government intends to offer in its case-in-chief, whether or not the expert has prepared a written report, describing "the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications." Rule 16(a)(1)(G); *United States v. Barrett*, 703 F.2d 1076, 1081 (9th Cir. 1983) ("fairness requires that adequate notice be given to the defense to check the findings and conclusions of the government's experts"); *see United States v. Edwardo-Franco*, 885 F.2d 1002, 1009 (2d Cir. 1989) (defendants could not hire their own expert "until they were informed of the adverse report of the government expert"); *United States v. Richmond*, 153 F.R.D. 7, 8 (D. Mass. 1994) (disclosure of existing summaries of experts must occur "forthwith").

12. A description of any prior conviction or prior "similar act" the government will seek to introduce at trial. Fed. R. Evid. 404(b) (requiring "reasonable notice in advance of trial . . . of the general nature of any such evidence"); *United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc) ("[t]rial by ambush" is "counterproductive in terms of judicial economy"), *overruled in part on other grounds by Luce v. United States*, 469 U.S. 38 (1984).

13. The personnel files of each and every law enforcement agent who will testify in the case. The Assistant U.S. Attorney should direct that such files be examined for evidence of any allegation that any officer has ever made a false statement or has a reputation for dishonesty. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf"); *United States v. Henthorn*, 931 F.2d 29, 30-31 (9th Cir. 1991); *see United States v. Calise*, 996 F.2d 1019, 1021 (9th Cir. 1993) (error not to disclose magistrate's characterization of agent's testimony as "absolutely incredible," which was in personnel file); *United States v. Kiszewski*, 877 F.2d 210, 216 (2nd Cir. 1989) (court must conduct in camera review of agent's personnel file to determine if impeachment matter [allegations that agent accepted bribes] should be disclosed).

14. Reports and records relating to any eavesdropping, wiretapping, or electronic recording of any kind relating to this case. *See* 18 U.S.C. §§ 2511- 2522. This request includes unredacted transcripts, applications for monitoring, and writings regarding the execution of such monitoring.

15. All notes or other writings or documents used by a prospective government witness before the grand jury. *United States v. Wallace*, 848 F.2d 1464, 1470-71 (9th Cir. 1988) (by referring to and using the notes during testimony before the grand jury, witness "adopt[ed] or approv[ed] of the statements as her own).

16. The names and addresses of all percipient witnesses interviewed by the government whom it does not intend to call at the trial. *United States v. Cadet*, 727 F.2d 1453, 1469 (9th Cir. 1984). This request includes all contacts with persons claiming to know Mr. Mohamud and the reports of the conversations, as potentially exculpatory. The request also relates to any writings

regarding investigation that indicated that statements from potential or claimed witnesses were incorrect, incomplete, or otherwise unreliable.

17. The arrest and conviction record of each and every prospective government witness. *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (criminal records of witnesses must be disclosed even if contained in witness's probation file); *United States v. Auten*, 632 F.2d 478, 481-82 (5th Cir. 1980). The government is required to search both national and local criminal record files. *See United States v. Perdomo*, 929 F.2d 967, 970 (3rd Cir. 1991); *United States v. Alvarez*, 358 F.3d 1194, 1207-08 (9th Cir. 2004) (entitled to disclosure of *Brady* material in presentence reports); *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (when star witness had long criminal record, it was "the state's obligation to turn over all information bearing on that witness's credibility").

18. Any evidence that a criminal case recently has been dismissed against any prospective government witness. *See United States v. Smith*, 77 F.3d 511, 514-15 (D.C. Cir. 1996) (dismissal of two felony cases pending against prosecution witness were material to impeachment and should have been disclosed pursuant to *Brady*); *United States v. Anderson*, 881 F.2d 1128, 1138-39 (D.C. Cir. 1989); *see also Giglio v. United States*, 405 U.S. 150 (1972) (credibility of witness).

19. Any evidence that any prospective government witness has any criminal charge pending against him or her. *United States v. Fried*, 486 F.2d 201, 203 (2d Cir. 1973); *United States v. Maynard*, 476 F.2d 1170, 1174 (D.C. Cir. 1973) (pending indictment can be relevant to bias and motive of witness).

20. Any evidence that any prospective government witness is under investigation by any federal or state authority. *United States v. Chitty*, 760 F.2d 425, 428 (2d Cir. 1985).

21. Reports, records, or memoranda of federal or state agencies which describe, refer to, or otherwise comment upon their relationship with any informant or undercover agent involved in this case. *Roviaro v. United States*, 353 U.S. 53 (1957); U.S. Const. amend. VI.

22. Any evidence of express or implicit understandings, offers of immunity, special treatment while in custody, or of past, present, or future compensation between the government or any of its agents and any prospective government witness or his agent. *See Giglio v. United States*, 405 U.S. 150, 152-55 (1972) (agreement not to prosecute); *United States v. Shaffer*, 789 F.2d 682, 689 (9th Cir. 1986) (moneys paid for ongoing undercover cooperation in another case); *United States v. Butler*, 567 F.2d 885, 889 (9th Cir. 1978) (prosecutor's "assurances" of future benefits); *United States v. Risken*, 788 F.2d 1361, 1375 (8th Cir. 1986) (implied contingent fees); *United States v. Edwardo-Franco*, 885 F.2d 1002, 1010 (2nd Cir. 1989) (earnings of informant in past cases "highly relevant to the question of his potential bias and interest" (quoting *United States v. Leja*, 568 F.2d 493, 499 (6th Cir. 1977)); *United States v. Partin*, 493 F.2d 750, 759 (5th Cir. 1974) ("protective" custody status, per diem and special privileges); *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir. 1986) (implicit understanding must be disclosed even if no "promise" and even if conditional); *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (reversible error not to disclose favors to cooperating witnesses including use of illegal drugs, regular unsupervised access to female visitors which facilitated sex and drugs in United States Attorney's office, and gifts of money, beer cigarettes, etc.); *United States v. Burnside*, 824 F. Supp. 1215, 1259 (N.D. Ill. 1993) ("defendants . . . [are] entitled to know . . . the government's lenient security measures, the absence of drug testing and the other benefits, all of which pointed to an implicit and illicit deal between the government and its witnesses").

23. Any evidence that any prospective witness has applied for, or requested from the government, any consideration or benefit, including, but not limited to, any plea bargain, dismissal of any charge, sentence reduction or early parole, whether or not the government agreed to such a request. *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989); *Brown v. Dugger*, 831 F.2d 1547, 1558 (11th Cir. 1987).

24. Any evidence of any discussion about, or advice concerning, any plea bargain or requested benefit between the government and any prospective witness. *United States v. Kojayan*, 8 F.3d 1315, 1322 (9th Cir. 1993) (conviction reversed and case remanded to consider dismissal as sanction for government's failure to disclose deal between witness and government, which witness government chose not to call at trial); *Haber v. Wainwright*, 756 F.2d 1520, 1523-24 (11th Cir. 1985) (government "advice" to witness must be disclosed); *Campbell v. Reed*, 594 F.2d 4, 7 (4th Cir. 1979) (agreement between the prosecutor and the witness's attorney, where witness was informed that "everything would be all right," must be disclosed); *DuBose v. Lefevre*, 619 F.2d 973, 978-79 (2d Cir. 1980) (prosecutor's statement to the witness that he would "do the right thing" must be disclosed to the defense even if the witness is unaware of its exact meaning). *United States v. Blanco*, 392 F.3d 382, 392 (9th Cir. 2004) ("special immigration treatment by the INS and the DEA was highly relevant impeachment material"); *Silva v. Brown*, 416 F.3d 980, 986 (9th Cir. 2005) (government should have disclosed "the full extent of the prosecution's deal" with the witness); *Horton v. Mayle*, 408 F.3d 570, 578-79 (9th Cir. 2005) (failure to disclose leniency deal with witness was material).

25. The full scope of any witness's past cooperation with the government, including, but not limited to, all monies, benefits, and promises received in exchange for cooperation and

investigative assistance, the names of the person investigated (and case numbers of any cases filed), the full extent of the witness's assets, and the status of the witness's present and past income tax liability. *United States v. Blanco*, 392 F.3d 382, 392 (9th Cir. 2004) (special immigration treatment from INS and DEA); *Singh v. Prunty*, 142 F.3d 1157, 1161-62 (9th Cir. 1998) (prosecutor's failure to disclose cooperation agreement with key witness against defendant); *United States v. Edwardo-Franco*, 885 F.2d 1002, 1009-10 (2nd Cir. 1989) (evidence of past services highly relevant to bias and interest); *United States v. Shaffer*, 789 F.2d 682, 688-89 & n.7 (9th Cir. 1986); *Bagley v. Lumpkin*, 798 F.2d 1297, 1302 (9th Cir. 1986) (reversible error to fail to disclose contracts that would give impeachment evidence against key witnesses who were hired by government to investigate the defendant).

26. All statements of any prospective witness relevant to his testimony or relevant to impeachment or bias, including but not limited to any potential personal, financial, or political interest in the furthering of this type of presentation. *See Kyles v. Whitley*, 514 U.S. 419, 454 (1995) (reversible error not to disclose evidence of misidentification by crucial witness); *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1463-64 (9th Cir. 1993) (informant's recantation of earlier statement to DEA had to be disclosed under the Jencks Act, 18 U.S.C. § 3500 (2000), as it bore on credibility); *United States v. Tincher*, 907 F.2d 600, 602 (6th Cir. 1990) (reversible error for prosecutor to withhold grand jury testimony of witness that could contradict his trial testimony); *United States v. Riley*, 189 F.3d 802, 803 (9th Cir. 1999) (reversible error to destroy notes from interview when there "was no substitute for the notes except the recollections of the agent and the witness, which differed in several respects"); *United States v. Service Deli Inc.*, 151 F.3d 938, 942-43 (9th Cir. 1998) (summary of interview notes not appropriate when it fails to disclose material

information in the notes); *United States v. Steinberg*, 99 F.3d 1486, 1491 (9th Cir. 1996) (requiring disclosure that witness was involved in ongoing criminal activities while working as government informant and that witness owed defendant money), *disapproved of on other grounds by United States v. Foster*, 165 F.3d 689, 692 n.5 (9th Cir. 1999); *see generally United States v. Abel*, 469 U.S. 45, 52 (1984) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.").

27. Any evidence that any prospective witness has made an inconsistent statement to the government or any of its agents with respect to his or her proposed testimony. *See Kyles v. Whitley*, 514 U.S. 419, 454 (1995) (reversible error not to disclose evidence of misidentification by crucial witness); *United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996) (reversible error not to disclose evidence that prosecution witness had lied under oath in a previous court proceeding involving same drug conspiracy); *United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992) (although dismissal of indictment was not warranted, the court found "intolerable" misconduct where prosecutor to failed to disclose prior grand jury testimony of witness which was inconsistent with his trial testimony; *McDowell v. Dixon*, 858 F.2d 945, 949 (4th Cir. 1988) (reversible error to withhold victim's prior inconsistent statement to police about description of attacker); *Lindsey v. King*, 769 F.2d 1034, 1041-43 (5th Cir. 1985) (reversible error to withhold eyewitness's original statement to police that he could not identify assailant); *Chavis v. North Carolina*, 637 F.2d 213, 223 (4th Cir. 1980) (contradictory statements of witness must be disclosed); *Powell v. Wiman*, 287 F.2d 275, 279-80 (5th Cir. 1961) (same). *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1202 (C.D. Cal. 1999) ("any

variations in an accomplice witness's proposed testimony could be considered favorable to the defense and the existence of such differences should be disclosed under *Brady*").

28. Any evidence that any prospective government witness has made a statement that is inconsistent with, or contradictory to, any statement by any other person, whether or not a prospective witness. *See United States v. Minsky*, 963 F.2d 870, 874-76 (6th Cir. 1992) (witness's statement to FBI contradicted by third party); *Hudson v. Blackburn*, 601 F.2d 785, 789 (5th Cir. 1979) (statement of police officer refuting witness's statement that he identified defendant at lineup); *Hudson v. Whitley*, 979 F.2d 1058, 1064 (5th Cir. 1992) (statement of witness identifying another person as killer); *United States v. Galvis-Valderamma*, 841 F. Supp. 600, 607-10 (D.N.J. 1994) (new trial granted where statements made by arresting officer to FBI agent that bag of heroin found in car not in plain view should have been disclosed); *United States v. Hibler*, 463 F.2d 455, 460 (9th Cir. 1972) (information may be material even if it speaks only to defendant's credibility).

29. Any evidence that any government witness has threatened another government or any other witness in an attempt to influence his testimony. *United States v. O'Conner*, 64 F.3d 355, 359-60 (8th Cir. 1995).

30. Any evidence that a witness has engaged in crimes even though he or she has not been convicted of those crimes. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (evidence that witnesses might not be credible is material); *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991) (prosecutor "using a witness with an impeachable past has a constitutionally derived duty to search for and produce impeachment information requested regarding the witness"); *Powell v. Wiman*, 287 F.2d 275, 280-81 (5th Cir. 1961) (admission of witness to prosecutor that he engaged in several crimes should have been disclosed); *United States v. Boffa*, 513 F. Supp. 444, 500 (D. Del.

1980) (prior bad acts of witness discoverable); *United States v. Burnside*, 824 F. Supp. 1215, 1271-72 (N.D. Ill. 1993) (reversible error not to disclose ongoing illegal drug use by cooperating witnesses).

31. Any evidence that any prospective government witness has ever made any false statement to law enforcement authorities. *United States v. Bernal-Obeso*, 989 F.2d 331, 336-37 (9th 1993) (informant's lie to DEA about his criminal record); *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1993) (DEA agent's opinion of informant credibility); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (probation file listing instances of the witness lying to authorities); *United States v. Minsky*, 963 F.2d 870, 875 (6th Cir. 1992) (error not to disclose witness's false statements to FBI); *see Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002) (failure to disclose evidence that key witness had previously falsely accused defendant of murder); *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (when star witness had long criminal record, it was "the state's obligation to turn over all information bearing on that witness's credibility").

32. Any evidence that any witness has a tendency to lie or exaggerate his testimony. *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1993) (DEA agent's negative view of informant's credibility); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (must disclose probation file of witness showing tendency to lie or "overcompensate").

33. Any evidence that any prospective witness has consumed alcohol or drugs prior to witnessing or participating in the events that gave rise to his testimony, or at any time prior to testifying in court. *See Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002) ("evidence that [witness] was using drugs during the trial would reflect on his competence and credibility"); *United States v. Burnside*, 824 F. Supp. 1215, 1265 (N.D. Ill. 1993) (reversible error to fail to disclose

witnesses drug use because illegal drug use by the cooperating witness was relevant to the witnesses' abilities to recollect and relate events and "clear inducements from which a fact finder could infer that these witnesses may have wanted to stay on the government prosecutors' good side" and adjusted their testimony accordingly); *Creekmore v. District Court of Eighth Judicial Dist. of State of Mont.*, 745 F.2d 1236, 1238 (9th Cir. 1984) ("[t]he goal of cross-examination is to expose flaws in a witness's memory, perception and narration"); *United States v. Butler*, 481 F.2d 531, 534-35 (D.C. Cir. 1973) (drug use impairs memory judgment and credibility).

34. Any medical, psychological or psychiatric evidence tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired. *See Bailey v. Rae*, 339 F.3d 1107, 1114-15 (9th Cir. 2003) (when consent was at issue, government should have disclosed reports that developmentally delayed alleged victim knew the difference between appropriate and inappropriate touching); *United States v. Lindstrom*, 698 F.2d 1154, 1163-68 (11th Cir. 1983) (psychiatric records relevant to credibility); *Chavis v. North Carolina*, 637 F.2d 213, 224 (4th Cir. 1980) (psychiatric records reflecting on the competency or credibility of witness); *United States v. McFarland*, 371 F.2d 701, 705 (2d Cir. 1966) (prior hospitalizations of witness for mental illness); *Powell v. Wiman*, 287 F.2d 275, 279 (5th Cir. 1961) (same).

35. Any evidence that a prospective government witness is biased or prejudiced against Mr. Mohamud or has a motive to lie, exaggerate, falsify, or distort his or her testimony. *See United States v. Bagley*, 473 U.S. 667, 683 (1985) (failure to disclose that witnesses might have been biased against defendant); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (motive to inform discoverable).

36. Any impeaching or bad character evidence relating to any government witness, especially informants. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (evidence affecting credibility of witnesses is material); *Carriger v. Stewart*, 132 F.3d 463, 497-80 (9th Cir. 1997) ("[t]he prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf"); *United States v. Bernal-Obeso*, 989 F. 2d 331, 335 (9th Cir. 1993) ("it is essential that relevant evidence bearing on the credibility of an informant-witness be timely revealed . . . to defense counsel as required by *Giglio*").

37. Any evidence that a prospective government witness or agent who had contact with Mr. Mohamud has not passed a polygraph examination or had inconclusive results. *United States v. Lynn*, 856 F.2d 430, 432-34 (1st Cir. 1988); *Carter v. Rafferty*, 826 F.2d 1299, 1305-09 (3rd Cir. 1987) (oral reports of polygraph examination).

38. Any evidence that the government or any of its agents has ever viewed a prospective government witness as not truthful. *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1993).

39. The name of any person, whether or not he or she will be a witness, who could not identify Mr. Mohamud or was unsure of his identity or participation in the crime charged, and the content of any such statement. *See Kyles v. Whitley*, 514 U.S. 419, 454 (1995) (reversible error not to disclose evidence of misidentification by crucial witness); *Jones v. Jago*, 575 F.2d 1164, 1168 (6th Cir. 1978) (statement of eyewitness to crime which did not mention defendant must be disclosed); *Jackson v. Wainwright*, 390 F.2d 288, 298 (5th Cir. 1968) (prosecution must disclose statement of witness casting doubt on defendant's identity); *United States v. Wilkins*, 326 F.2d 135, 138 (2nd Cir.

1964) (reversible error to fail to disclose names of two witnesses who said that the defendant was not the bank robber after viewing him at police station).

40. Any physical evidence tending to exculpate Mr. Mohamud, in whole or in part, tending to mitigate punishment, or tending to impeach a government witness. *See Miller v. Pate*, 386 U.S. 1, 6 (1967) (reversible error not to disclose evidence that clothing was covered with paint, not blood); *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (government had duty to disclose results of company research which would have been useful in impeaching government witnesses); *see Paradis v. Arave*, 240 F.3d 1169, 1173 (9th Cir. 2001) (*Brady* obligates prosecutor turning over notes taken during interview when government witness gave exculpatory information for defendant); *United States v. Alzate*, 47 F.3d 1103, 1109-10 (11th Cir. 1995) (new trial granted where prosecutor failed to correct his misstatement of fact which prejudiced defendant); *Ballinger v. Kerby*, 3 F.3d 1371, 1376 (10th Cir. 1993) (due process violated by failure to produce possibly impeaching photos of crime scene which would have buttressed defense that witness could not have seen out of windows in order to identify defendant); *United States v. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992) (psychiatric report raising question as to defendant's sanity and competence); *Walker v. Lockhart*, 763 F.2d 942, 955 (8th Cir. 1985) (en banc) (transcript of prisoner conversation in which he arguably admitted crime for which defendant on trial); *United States v. Poole*, 379 F.2d 645, 648 (7th Cir. 1967) (medical exam showing no evidence of sexual assault); *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 845 (4th Cir. 1964) (ballistics report showing gun in evidence was not the assault weapon); *Ashley v. Texas*, 319 F.2d 80, 85 (5th Cir. 1963) (psychologist's report that defendant was incompetent to stand trial); *United States v. Weintraub*, 871 F.2d 1257, 1264 (5th Cir.

1989) (sentence vacated where prosecutor failed to disclose testimony of coconspirator which lessened amount of drugs attributable to the defendant).

41. Any evidence mitigating the punishment of Mr. Mohamud. *Brady v. Maryland*, 373 U.S. 83, 85 (1963) (accomplice statement that he, not defendant, was actual shooter mitigates punishment of defendant); *Blazak v. Ricketts*, 1 F.3d 891, 897 (9th Cir. 1993) (due process violated where psychiatric reports questioning defendant's competence to stand trial were not properly considered by trial court); *United States v. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992) (psychiatric report raising question as to defendant's sanity and competence); *United States v. Weintraub*, 871 F.2d 1257, 1264 (5th Cir. 1989) (sentence vacated where prosecutor failed to disclose testimony of co-conspirator which lessened amount of drugs attributable to defendant); *Lewis v. Lane*, 832 F.2d 1446, 1459 (7th Cir. 1987) (evidence that defendant did not have valid prior conviction which made him death eligible).

42. The commencement and termination date of the grand jury that indicted Mr. Mohamud. *In re Grand Jury Investigation*, 903 F.2d 180, 182 (3d Cir. 1990); *see also* 28 U.S.C. § 1867(a) ("the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury"); Fed. R. Crim. P. 6(b)(2) ("[a] party may move to dismiss the indictment based on an objection to the grand jury").

43. The number (not names) of grand jurors attending each session of the grand jury and the number of grand jurors (not names) voting to indict Mr. Mohamud. *See United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645 (9th Cir. 1980) (prerequisites to valid indictment are that "every grand jury session was attended by at least 16 jurors" and that "at least 12 jurors voted

to indict"); *United States v. Alter*, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973) (ministerial matters like court's legal instructions to grand jury must be disclosed).

44. The name of every prospective government witness to be called at trial. *See Arizona v. Manypenny*, 672 F.2d 761, 765 (9th Cir. 1982) (court has inherent authority to order discovery of names of witnesses); *United States v. Armstrong*, 621 F.2d 951, 954-55 (9th Cir. 1980) (same); *United States v. Tucker*, 716 F.2d 576, 583 (9th Cir. 1983) (ineffective assistance of counsel to fail to interview government witnesses before trial); *Callahan v. United States*, 371 F.2d 658, 660 (9th Cir. 1967) ("[b]oth sides have the right to interview witnesses before trial").

Conclusion

For each of the foregoing reasons, Mr. Mohamud respectfully requests that the government produce the materials requested above to protect and to enforce Mr. Mohamud's exercise of his Fifth and Sixth Amendment rights to a fair trial.

Dated this 7th day of March, 2011.

/s/ Stephen R. Sady
Stephen R. Sady
Chief Deputy Federal Public Defender

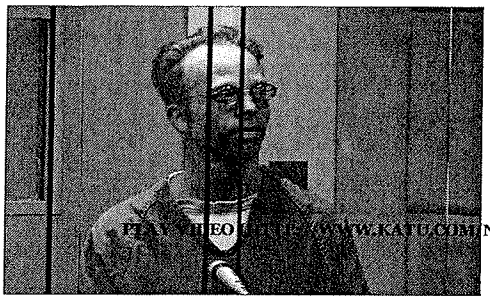
/s/ Steven T. Wax
Steven T. Wax
Federal Public Defender

/s/ Ruben Iñiquez
Ruben Iñiquez
Assistant Federal Public Defender

murder of
x
J. Larson
x

Details emerge about Larson murder, suspect's past

By *Meghan Kalkstein KATU News and KATU.com Staff* | Published: Jan 3, 2013 at 11:20 PM PST (2013-01-4T7:20:16Z) | Last Updated: Jan 5, 2013 at 12:11 AM PST (2013-01-5T8:11:47Z)



Michael Kirkland appears in court Friday.

PORTLAND, Ore. – A 37-year-old Southwest Portland man was charged Friday with three counts of aggravated murder of a 33-year-old woman who was found dead in her Southwest Portland apartment Christmas Day.

Michael James Kirkland was stoic as he faced a Multnomah County judge for the first time during his arraignment for the murder of Jaime Lyn Larson.

The three aggravated murder counts relate to three different aggravating factors: rape, sodomy and burglary, according to prosecutors.

Portland police said some of the forensic evidence they had gathered in the case eventually led them to Kirkland. He was arrested Thursday at his home on Southwest Clay Street.


Jaime Larson/Family Photo

The murder allegedly occurred after Larson invited him back to her apartment sometime prior to Christmas. The two were casual acquaintances, sources say.

Her body was discovered Christmas night and sources said Kirkland killed Larson before the holiday.

After Kirkland's arraignment, Larson's loved ones hugged each other tightly.

New details emerged Friday about the alleged killer's past.

In 2003, police found Kirkland atop a construction crane 160 feet in the air at 10th and Couch, according to Portland police records. He was despondent and refused to come down.

According to sources, he was upset because his girlfriend had rolled over in her sleep, accidentally killing their 4-month-old child.

He eventually came down from off the crane and sought help from a doctor. No charges were filed.

His only criminal history includes a 2004 assault conviction. It was dismissed.

Kirkland's neighbors told KATU News Friday he was pretty reserved.

Larson's family said that everyone's support has been heartfelt and greatly appreciated. The family issued a statement, thanking the Portland police and the U.S. Marshals Service.

"All involved did a fantastic job and our heartfelt thanks goes out to all of them," the statement said. "Thank you for the continuing support."

OregonLive.com
Everything Oregon

Man accused of killing Jaime Larson in the course of a sexual assault, burglary, according to court documents

By Maxine Bernstein, The Oregonian

on January 04, 2013 at 2:34 PM, updated January 04, 2013 at 6:25 PM

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Portland detectives investigate the suspicious death of a woman whose body was found in apartments on Southwest Park.
Dave Killen/The Oregonian

A man who lived in downtown Portland is accused of killing a 33-year-old woman in the course of a sexual assault and burglary at her Southwest Portland apartment on Christmas Day, according to court documents.

Michael James Kirkland, 37, made his first appearance in Multnomah County Circuit Court Friday afternoon.

He was arraigned on three allegations of aggravated murder.

The allegations accuse Kirkland of killing Jaime Lyn Larson in the course of first-degree rape, first-degree sodomy and burglary.

Larson, 33, was found dead about 10 p.m. Dec. 25 at her apartment at 2073 S.W. Park Ave.

She died of asphyxia, according to the state medical examiner's office.

Kirkland was arrested Thursday night, at the Hamilton West Apartments in the 1200 block of Southwest Clay Street.

Matthew Hughes, who also lives in Hamilton West Apartments, said he watched Thursday afternoon as members of the U.S. Marshals Fugitive Task Force arrested Kirkland outside the building.

Michael James Kirkland
Multnomah County Sheriff

"He was just hanging out outside, drinking his Rockstar energy drink when they came up," said Hughes, who was across the street, walking home. "They had him handcuffed on the ground."

Kirkland, who lived in a seventh floor unit, was formally arrested at 9:56 p.m. Thursday and booked into the Multnomah County Detention Center at 10:51 p.m. on a single allegation of aggravated murder, jail records show.

Portland homicide detectives worked with the Oregon State Police Crime Lab to gather forensic evidence from the crime scene, which helped identify Kirkland, according to Sgt. Pete Simpson, spokesman for the Portland Police

Bureau.

They then sought the aid of the marshal's task force to find and arrest him. Investigators also searched Kirkland's apartment Thursday, neighbors said.

Authorities described Kirkland as an acquaintance of Larson's through a brief encounter but have provided no further details.

The arrest came about eight hours after relatives and friends held a memorial service for Larson at Wilhelm's Memorial in Southeast Portland.

More

Continuing coverage of Jaime Lyn Larson's case.

Jaime Lyn Larson
Portland Police Bureau

Josh Monahan, Larson's cousin who traveled from South Dakota to Portland to attend Larson's Thursday memorial, said he was pleased to learn of an arrest in the case. "It's bittersweet. But you've got to be grateful for stuff like that," Monahan said. "It gives a little bit of closure on something so terrible."

Larson most recently worked for Affiliated Computer Services in Tigard and had attended Mt. Hood Communiity College. She moved to Oregon as a teenager after growing up in South Dakota, relatives said.

Monahan said he didn't know how Larson knew Kirkland but thanked the police for working to make an arrest.

Kirkland has a past criminal record.

He was convicted of fourth-degree assault in Multnomah County in 2002 and later violated probation in connection with that case.

In 2004, he was convicted of fourth-degree assault in Washington County. As part of that case, he was ordered to undergo anger-control treatment, participate in a batterer intervention program and domestic violence counseling, according to court records.

Tim Hower, a spokesman for the Larson family, issued this statement: "The family would like to thank the Portland Police Bureau and the detectives involved in the finding the person who took Jamie from our lives." The family also thanked the U.S. Marshal's office and the state police forensic lab.

"All involved did a fantastic job and our heartfelt thanks goes out to all of them," Hower wrote, on the family's behalf.

Detectives still hope to hear from anyone with information about Larson's killing or suspect Kirkland.

Four Portland homicide detectives who worked on the case attended the arraignment. At 8:05 p.m. Thursday, Kirkland waived his right to have a judge evaluate whether there's probable cause to hold him, court documents

show.

Kirkland is due back in court Jan. 14. The case will now be heard by a grand jury.

Police ask that anyone with information about the case contact Detective Molly Daul at 503-823-0991 or Molly.Daul@PortlandOregon.gov.

– Maxine Bernstein

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Portland man accused in Jaime Lyn Larson death to be arraigned today

Police announce suspect's arrest in SW Portland woman's slaying on Christmas

Autopsy: Woman found dead near PSU ruled a homicide

Reported by: Brent Weisberg

Email: bweisberg@koin.com

Reported by: Faris Tanyos

Published: 12/26/2012 4:20 am

Portland police: Woman's Christmas Day death 'suspicious'

PORTLAND, Ore. -- An autopsy has determined that a woman whose body was found in an apartment near Portland State University was the victim of homicidal violence.

The Multnomah County Medical Examiner's Office confirmed the victim is 33-year-old Jaime Larson.

Sgt. Pete Simpson, spokesperson for the Portland Police Bureau, said Larson's body was found just before 10 p.m. Christmas Day, inside a unit at Portland Collective Housing, located at 2073 SW Park Ave.

Larson was a resident of the complex, Portland police disclosed. No arrests have been made in the case. Simpson would not release specifics about the investigation.

Officers were dispatched to the complex following a 911 call to report a deceased woman. The first officer who arrived on scene confirmed Larson was dead. Officers initially checked the apartment to ensure there were no other victims inside, and then left to wait for homicide detectives and criminalists. Officers were seen looking through a trash can that was wrapped with crime scene tape.

Detectives would not reveal who made the emergency call.

Collective used to be known as the Park Terrace Apartments, according to neighbors.

Tabitha McMurphy, who said she moved into the apartment complex three days ago, spoke with reporters as she and her boyfriend left for work Wednesday morning. McMurphy said she gave a statement to detectives after claiming she saw someone leave the apartment just prior to the victim's body being found.

"We were taking our dog for a walk," McMurphy said.

"I looked up, and saw someone walk out of the apartment, and then 20 minutes later, the police and everyone came by."

McMurphy said detectives would not give her any information.

"They're telling us they don't know if it was a murder or not," McMurphy said.

She said the man did not seem to be in a rush, and was wearing a hooded sweatshirt.

"It was weird," McMurphy said.

Anyone with information on the case is asked to contact Portland police detectives at 503-823-0991.

-- Brent Weisberg and Faris Tanyos contributed to this report.

Top Photo Galleries

SW Portland Woman Murdered In Her Apartment

The woman who was found dead inside her Southwest Portland apartment late on Christmas night was murdered. She's identified as 33-year-old Jaime Larson.

Police found her body at the Park Terrace Apartments on Park Avenue near PSU. They have not said if the autopsy found how she was killed.

Larson's Facebook page revealed she had a boyfriend, Tim Rupple. Court records show the two had a history with restraining orders against each other.

Jaime Larson

Tags: murder, homicide, Death, dead, autopsy, SW Portland, killed, victim, suspicious, Park Terrace Apartments, Jaime Larson

Moore-Love, Karla

From: mary rose lenore eng [maryeng1@gmail.com]
Sent: Monday, January 21, 2013 10:24 AM
To: Moore-Love, Karla; Commissioner Fritz; Portland Copwatch
Subject: City Council February speaking Subject

Dear Karla, i was registered to speak at City Council in February on Fluoride, i would like to change the subject to

"FBI Whistleblowing, FBI Gender Equity, Islamophobia, and JTTF Intelligence in the USA v. Mohamed Mohamud Era"

Super-Duper thank you, if i can get this changed before the first topic hits the Press!

look forward to my Update on the #FBITrapTrial

Gratefully,

Mary Eng

email confirmation will be best.

Also, can we have a representative of the Portland Human Rights Commission in Attendance at the Trial?

i believe the date is Feb. 6

100

Request of Mary Eng to address Council regarding FBI whistleblowing, FBI Gender Equity, Islamophobia and JTTF intelligence in the U.S.A. v. Mohamed Mohamud era (Communication)

FEB 06 2013

PLACED ON FILE

Filed FEB 01 2013

LaVonne Griffin-Valade
Auditor of the City of Portland

By _____

COMMISSIONERS VOTED AS FOLLOWS:		
	YEAS	NAYS
1. Fritz		
2. Fish		
3. Saltzman		
4. Novick		
Hales		