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7  
8 IN THE UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

10  
11 UNITED STATES OF AMERICA,  
12 Plaintiff,  
13 v.  
14 RYAN MCGOWAN, et al.,  
15 Defendant.

CASE NO. 2:12-CR-207 LKK

GOVERNMENT'S OPPOSITION TO  
DEFENDANT EARLY'S MOTION TO COMPEL  
DISCOVERY

Date: April 9, 2013  
Time: 2:00 p.m.  
Ctmm: Honorable Edmund F. Brennan  
U.S. Magistrate Judge

16  
17 **I. INTRODUCTION**

18 The United States of America through its attorneys of record, Benjamin B. Wagner,  
19 United States Attorney for the Eastern District of California, and William S. Wong and Michael D.  
20 Anderson, Assistant U.S. Attorneys, hereby submits this response to defendant Early's motion to compel  
21 discovery.

22 For ease of understanding, the government will provide a short response to each of the  
23 defendant's 46 discovery requests as set forth in his "Outline of Outstanding Discovery Requests in  
24 Support of Defendant Early's Motion to Compel Discovery" which was filed on February 12, 2013 (Doc.  
25 65). The government has also included a more detailed discussion of the legal issues relating to the  
26 discovery requests by the defendant in section III of this response. Due to the haphazard manner in  
27 which the defendant has made his discovery requests (by letter, e-mail, and motion) an orderly response  
28 to his numerous requests was made difficult.

1                   **II.        DEFENDANT EARLY'S DISCOVERY REQUESTS 1-46**

2                   **1.        Statements made by defendant.**

3                   The government has no opposition to this request. The government has provided statements  
4 made by the defendant. Additionally, the government will check its file to determine whether or not any  
5 additional statements made by the defendant has not been provided and will so provide those statements.

6                   **2.        References to defendant's statements.**

7                   This request is ambiguous and vague. The government has no objection to providing the  
8 defendant's statements as set forth in request number 1. However, the defendant needs clarify what is  
9 meant by "references to the defendant's statement." Pursuant to Rule 16 (a) (1) (A), the defendant is  
10 entitled to any relevant oral statement made before or after arrest in response to interrogation by a  
11 person the defendant knew was a government agent if the government intends to use the statement at  
12 trial. The government has no objection to providing defendant's oral statement that is within the  
13 purview of Rule 16 (a) (1) (A).

14                   **3.        Not applicable or no dispute to this request.**

15                   **4.        Defendant's oral statements.**

16                   See response to request number 2.

17                   **5.        Defendant's criminal history.**

18                   The government has provided and has no objection to providing defendant's criminal history.  
19 However, it does not appear that the defendant has any criminal history to provide.

20                   **6.        Demand to inspect physical evidence.**

21                   The government has no objection to the defendant's request to inspect any physical evidence in  
22 this case. Counsel for the defendant has provided April 10 and April 12 as dates for the inspection. The  
23 government will notify defendant's counsel at least 7 days in advance of the date for inspection.

24                   **7.        Material the government intends to use in its case- in- chief.**

25                   Excluding Jencks Act material, the government has provided discovery in this case and will  
26 continue to provide additional discovery when the government receives it. In summary, the government  
27 has no objection to providing the defendant all Rule 16 discovery unless otherwise noted.

1                   **8.       Inspection of materials seized from the defendant.**

2           This request is covered by request number 6.

3                   **9.       Not applicable or no dispute to this request.**

4                   **10.      Not applicable or no dispute to this request.**

5                   **11.      Brady/Giglio material.**

6           The government acknowledges its responsibility pursuant to Brady v. Maryland, 373 U.S. 83  
7 (1963) as interpreted in United States v. Agurs, 427 U.S. 97 (1976) to provide exculpatory evidence  
8 known to the prosecution. The government further acknowledges that this responsibility also extends to  
9 information in its possession which would relate to the credibility of government witnesses, although  
10 such evidence need not be disclosed prior to direct examination of such witnesses. United States v.  
11 Rinn, 586 F.2d 113, 119 (9th Cir.1978).

12           The government is not aware of any exculpatory evidence in its possession, however, the  
13 government will provide any information of an exculpatory nature that comes into its possession.  
14 Further, should a doubt exists as to the discoverability of any items, the government will provide those  
15 items to the court for an in camera inspection and submit to the court the decision as to their  
16 discoverability.

17                   **12.      Policy statement and material relevant to confidential informants,**  
18                   **unindicted co-conspirators.**

19           The government objects to this request on numerous grounds. First, this request is vague,  
20 ambiguous, and overbroad; second, the defendant has failed to make a sufficient prima facie showing of  
21 relevance and materiality to obtain discovery under Rule 16; and third, the defendant's request for policy  
22 statements of the United States Attorney's Office relating to confidential informants or unindicted co-  
23 conspirators is not discoverable under Rule 16(a) (2) which provides that: "Except as Rule 16 (a) (1)  
24 provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or  
25 other internal government documents made by an attorney for the government or other government  
26 agents in connection with investigating or prosecuting the case." Additionally, discovery of policy  
27 statements and internal memoranda of the government is protected and prohibited under privilege and  
28 work product considerations.

1                   **13.           Jencks Act material.**

2           Under the Jencks Act, the statements of prospective government witnesses, their statements, and  
3 any information which may identify the witnesses are not discoverable until after their testimony on  
4 direct examination. Fed. R. Crim. P. 16(a)(2); 18 U.S.C. § 3500. The Ninth Circuit has long held that  
5 the statements of government witnesses are discoverable only in accordance with the Jencks Act.  
6 United States v. Spagnuolo, 515 F.2d 818, 821 (9th Cir. 1970). Even when such statements contain  
7 exculpatory evidence within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), the timing of the  
8 disclosure is controlled by the Jencks Act. See, United States v. Jones, 612 F.2d 453, 455 (9th Cir.  
9 1979).

10  
11           Just as the statements of perspective government witnesses are protected from pre-trial  
12 discovery, so are the names and addresses. United States v. Sukumolachan, 610 F.2d 685 (9th Cir.  
13 1980); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979); United States v. Baldwin, 607 F.2d  
14 1295, 1298 n.2 (9th Cir. 1974); United States v. Glass, 421 F.2d 832 (9th Cir. 1969); United States v.  
15 Rosenzweig, 412 F.2d 844, 855 (9th Cir. 1969). The Supreme Court has specifically held that Brady v.  
16 Maryland, does not require the government to reveal before trial the names of all witnesses who will  
17 testify against the defendant, since there is no general constitutional right to discovery in a criminal case.  
18 Weatherford v. Bursey, 429 U.S. 545, 559 (1976). In fact, Congress rejected a proposed amendment to  
19 Rule 16 which would have required that both the prosecution and defense furnish witness lists prior to  
20 trial. United States v. Clardui, 540 F.2d 439, 442 (9th Cir. 1976); United States v. Hearst, 412 F.Supp  
21 863 (N.D. Cal. 1975). In view of the foregoing, defendant's request for names, statements, and other  
22 information that would reveal the identity of government witnesses should be denied.  
23  
24

25           It is the government's intent to abide strictly to the provisions of the Jencks Act which require  
26 disclosure of the material sought by the defendant after said witness has testified on direct examination  
27 in the trial of the case. See 18 U.S.C. § 3500(a). The government will reevaluate whether it intends to  
28 provide early Jencks Act material as the case proceeds to a more definite and firm trial date. Should the

1 court desire, the government is prepared to advise the court, in camera, as to the reasons for strict  
2 compliance with the Jencks Act in this case. To be absolutely clear, the government is aware and will  
3 fulfill its obligation under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, to disclose evidence  
4 that is "material either to guilt or punishment..." id. at 87, in a timely manner so that the information can  
5 be used by the defendant at trial. By this response, the government does not acknowledge that any of  
6 the items listed in the defendant's motion exists or is in the custody of the government, but rather, if  
7 those requested items do exist and are in the government's custody, they will be provided as governed  
8 by the Jencks Act.

9  
10 The defendant argues that the material requested is relevant for a potential pretrial motion  
11 regarding outrageous government conduct, the date the prosecution and/or selective prosecution. The  
12 government has addressed this issue herein on pages 9-12.

13  
14 **14. Statements by prior straw purchasers previously interviewed by  
Special Agent Lewis.**

15 The defendant requests copies of all written, recorded, transcribed or summarized statements  
16 made by "straw purchasers" previously interviewed by Special Agent Lewis which she referred to on  
17 page 63 of her affidavit in support of search warrant in this case. The defendant argues that the  
18 definition of "straw purchase" and whether defendant Early had a reasonable understanding of that term  
19 and whether Early reasonably relied upon the sworn peace officer (presumably and unindicted co-  
20 conspirator) and FFL to know the definition of what constitutes a "straw purchase" is relevant to Early's  
21 defense of good faith and/or entrapment by estoppel. (See Def. Mot. p. 4).

22 The government objects to this request on the grounds that the defendant has failed to show  
23 relevance and materiality as required by Rule 16. First, the defendant has failed to make a prima facie  
24 showing that the "sworn peace officer" or the "FFL" (federal firearms licensee) which he referred to in  
25 his motion was acting as a government agent which is required under his defense theory of good faith  
26 and/or entrapment by estoppel. The defendant's failure to make this prima facie showing makes this  
27 evidence irrelevant and immaterial to the defendant's proffered defense. The "sworn peace officer"  
28

1 referred to by the defendant is an unindicted co-conspirator and was not acting as a government agent.  
2 The "FFL" referred to by the defendant is an indicted co-conspirator and was not acting as a government  
3 agent. The defendant has failed to provide any statutory or case decisional law, which compels the  
4 requested discovery by the government. Additionally, this request is unduly burdensome and onerous.

5 **15. Request for all materials relevant to Special Agent Lewis's training  
6 regarding straw purchase investigations.**

7 For much of the same reasons stated in the Government's response to request number 14, the  
8 government objects to this request. The defendant has failed to show the relevance and materiality of  
9 how Special Agent Lewis's training regarding straw purchase investigations is discoverable under Rule  
10 16 or relevant to this case. The jury will be instructed as to the legal definition of what constitutes a  
11 "straw purchase" by the District Court at trial. Defendant Early's or anyone else's definition of a "straw  
12 purchase" is simply not relevant or material. Lastly, the defendant has failed to provide any legal  
13 authority for the discovery of this material.

14 **16. Request for the names and contact information of those "more  
15 experienced" investigators referred to in Special Agent Lewis's affidavit.**

16 For the same reasons stated in the Government's response to request number 14 and 15, the  
17 government objects to this request.

18 **17. Not applicable nor in dispute.**

19 **18. Request for statements made by unindicted co-conspirator identified  
20 as "C. K."**

21 This request constitutes a request for Jencks Act material which the government objects to  
22 for the reasons stated in its response to request number 13.

23 **19-21. The government and the defendant agree that these requests are duplicitous  
24 and are covered by other requests.**

25 **22. Request made in August 21, 2012 letter to AUSA regarding press releases.**

26 The government objects to this request for the reasons stated herein on page 12 of this  
27 response.

28 **23-26. The government and the defendant agree that these requests are duplicitous  
and are covered by other requests.**

**27. Request made in January 9, 2013 e-mail to AUSA regarding Grand Jury**

1 **records.**

2 The government objects to this request for the reasons stated herein on pages 12-13 of this  
3 response.

4 **28-29. Not applicable or not in dispute.**

5 **30. Request for inspection.**

6 This request is covered by the Government's response in request number 6.

7 **31-32. Not applicable or not in dispute.**

8 **33-36. Requests for all communication by the United States Attorney's Office and  
9 other government agencies.**

10 The government objects to these requests for the reasons stated herein on page 13 of this  
11 response.

12 **37-38. Request for all the phone records and text messages.**

13 The government objects to these requests for the reasons stated herein on page \_\_\_\_\_ of  
14 this response.

15 **39. Request for the names and case numbers of every indictment filed by the  
16 United States Attorney's Office for the past 5 years in connection with  
17 Project Safe Neighborhood.**

18 The government objects to this request for the reasons that it is irrelevant, immaterial,  
19 onerous, burdensome, and unsupported by any legal authority. The defendant has failed to show a prima  
20 facie case that the request is relevant and material as required by Rule 16. The fact that the U.S.  
21 Attorney's website, press releases, and a color brochure contains information promoting cooperation  
22 among local, state, and federal law enforcement agencies to target gun crime and violence street gangs  
23 cannot possibly be relevant and material to the issues in this case.

24 **40. Requests for statements of 3rd parties who are not prospective witnesses.**

25  
26 The government objects to this request for the reasons stated herein on pages 13-14 of this  
27 response.

28 **41. Request for statements of co-conspirators and codefendants.**

1 The government objects to this request for the reasons stated in its response to request  
2 number 13.

3 **42. Not applicable or in dispute.**

4 **43. Criminal records of all codefendants and all government witnesses.**

5 This request requires the government to identify its witnesses prior to trial. For that reason,  
6 the government objects to this request for the reasons stated in its response to request number 13. The  
7 government is mindful of its obligations under Brady/Giglio. The defendant's request is overly broad as  
8 it includes codefendants and witnesses not relevant to the counts to which the defendant has been  
9 charged. Furthermore, the government objects to this request for the reasons stated in his response to  
10 request number 27.

11 **44-45. Records of a firearm transactions.**

12 The government does not oppose this request as to all paperwork relating to firearm  
13 transactions contained in 6 of the Indictment filed on May 31, 2012. The government has provided  
14 records in his custody to the defendant and will continue to provide additional discovery should it exist.  
15

16 **46. Request made in January 30, 2013 e-mail relating to the Administrative  
17 Procedures Act.**

18 The government objects to this request for the reasons stated herein on pages 14-15 of this  
19 response.  
20

21  
22 **III. ANALYSIS OF DEFENDANT'S DISCOVERY REQUESTS**

23 **A. Defendant's Discovery Requests Ignore the Materiality Requirement**

24 Under Rule 16(a)(1)(E), a criminal defendant is entitled to discovery of materials "within the  
25 possession, custody, or control of the government," which are "material to preparing the [defendant's]  
26 defense." Fed. R. Crim. P. 16(a)(1)(E).<sup>1</sup> Defendants are entitled to only those materials that are relevant  
27

28 <sup>1</sup> Rule 16(a)(1)(E) provides:

1 to the defendants' response to the government's case in chief. United States v. Armstrong, 517 U.S.  
 2 456, 462 (1996) (“[W]e conclude that in the context of Rule 16 ‘the defendant’s defense’ means the  
 3 defendant’s response to the Government’s case in chief.”); accord United States v. Chon, 210 F.3d 990,  
 4 995 (9th Cir. 2000) (quoting Armstrong, 517 U.S. at 462).<sup>2</sup>

5 To obtain discovery under Rule 16, a defendant must make a *prima facie* showing of materiality.  
 6 United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990) (citing United States v. Little, 753 F.2d  
 7 1420, 1445 (9th Cir. 1984); United States v. Cadet, 727 F.2d 1453, 1468 (9th Cir. 1984)). “Neither a  
 8 general description of the information sought nor conclusory allegations of materiality suffice; a  
 9 defendant must present facts which would tend to show that the Government is in possession of  
 10 information helpful to the defense.” Mandel, 914 F.2d at 1219 (citing Little, 753 F.2d at 1445; Cadet,  
 11 727 F.2d at 1466-68).

12 The “materiality” requirement of Rule 16 means “the defendant must demonstrate that the  
 13 requested evidence bears some abstract logical relationship to the issues in the case.” United States v.  
 14 Lloyd, 992 F.2d 348, 350-51 (D.C. Cir. 1993). More specifically, “There must be some indication that  
 15 the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the  
 16 quantum of proof in his favor.” *Id.* (quoting United States v. Caicedo-Llanos, 960 F.2d 158, 164 n. 4  
 17 (D.C. Cir. 1992)).

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20 Upon a defendant’s request, the government must permit the defendant to inspect and to copy or  
 21 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:

- 22 (i) the item is material to preparing the defense;
- 23 (ii) the government intends to use the item in its  
 24 case-in-chief at trial; or
- 25 (iii) the item was obtained from or belongs to the  
 defendant.

26 <sup>2</sup> At the time of Armstrong and Chon, that provision was numbered 16(a)(1)(C). Rule 16 was  
 27 renumbered in 2002.

1        **B. The Defendant Has Failed to Make the Showing Necessary in Order to Obtain Any**  
 2        **Discovery For His Potential Pretrial Motions.**

3        In some cases, the defendant seeks discovery for potential pre-trial motions for alleged vindictive  
 4 prosecution, selective prosecution and outrageous government conduct. Defendant's Memorandum at  
 5 15-16 and Defendant's Requests Nos. 27, 33-43. In general, these requests are overbroad and fail to  
 6 explain the relevance of the requested items to the potential motions, and the materiality of the items to  
 7 the defense.

8        There is, however, an even more fundamental problem with the defendant's discovery requests  
 9 based on potential motions. Before discovery can be ordered for the purpose of the defendant's pretrial  
 10 motions, the defendant must make a substantial showing as to each element of his claims. United States  
 11 v. One 1985 Mercedes, 917 F.2d 415, 421 (9th Cir. 1990); United States v. Armstrong, 517 U.S. 456,  
 12 469 (1996); United States v. Thorpe, 471 F.3d 652 (6th Cir. 2006). In each case, he fails to do so.

13                    **1. Vindictive Prosecution**

14        A claim of vindictive prosecution arises when a prosecutor uses criminal charges to punish a  
 15 defendant for exercising a statutory, procedural or due process right. United States v. Goodwin, 434  
 16 U.S. 357 (1978). Pre-trial modifications of charges do not give rise to a presumption of vindictiveness.  
 17 *Id.* at 381-84. Similarly, the filing or threat of filing more serious charges as a consequence of failed  
 18 plea negotiations does not in itself offend due process. Bordenkircher v. Hayes, 434 U.S. 357 (1978).  
 19 In the "'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long  
 20 as the accused is free to accept or reject the prosecution's offer." Bordenkircher v. Hayes, 434 U.S. 357,  
 21 363 (1978); see also United States v. Segal, 495 F.3d 826, 833 (7th Cir. 2007) ("It remains a fact that a  
 22 pretrial claim of vindictive prosecution is extraordinarily difficult to prove"). The "link of  
 23 vindictiveness cannot be inferred simply because the prosecutor's actions followed the exercise of a  
 24 right, or because they would not have been taken but for exercise of a defense right." United States v.  
 25 Gallegos-Curiel, 681 F.2d 1164, 1168-69 (9th Cir. 1982).

26        In the present case, assuming arguendo that defendant's recitation of the facts is correct,<sup>1</sup> the

27 \_\_\_\_\_  
 28 <sup>1</sup> The government will reserve argument regarding the specific facts of the case for the hearing  
 on the substantive motions if any are ever filed.

1 defendant still cannot make the showing necessary to compel discovery. First, he has completely failed  
2 to identify, and therefore explain, which right he exercised leading to his claims. To the extent that  
3 defendant implies that it was his right against self-incrimination, he has failed to address the effect of a  
4 subpoena and compelled grant of immunity.

5 Second, he has failed to show any vindictive purpose on the part of the government. In the  
6 defendant's version, he was offered an opportunity to testify with a grant of immunity. He then  
7 attempted to negotiate additional immunity from state charges, which the government did not do. The  
8 defendant, not cooperating with the government's investigation, became a target of the investigation and  
9 was charged for a crime he committed. As in Bordenkircher, the government here is allowed latitude to  
10 engage in the pretrial prosecution of its case. The defendant was under no obligation to cooperate with  
11 the investigation, and the government was under no obligation to refrain from charging him. Therefore,  
12 the defendant has failed to make the substantial showing necessary in order to compel discovery.

### 13 **2. Selective Prosecution**

14 Likewise, in order to establish a claim for selective prosecution, the defendant must establish  
15 three elements: other similarly situated persons were not prosecuted; the defendant was deliberately  
16 singled out; and the discriminatory selection was based on an unlawful consideration. United States v.  
17 Armstrong, 517 U.S. 456, 464-65 (1996).

18 As with the vindictive prosecution claim, the defendant has failed to meet his burden here,  
19 relying instead on a cursory statement that the discovery indicates other people also engaged in straw  
20 purchases. Def.'s Memorandum at 10. This is insufficient to establish the required elements. In any  
21 event, the defendant's brief statement fails to establish that the others were truly similarly situated  
22 because it does not address the defendant's true position. As defense counsel is aware, the government  
23 has records showing the defendant actively and persuasively solicited the participation of a peace officer  
24 in a straw purchase transaction.

### 25 **3. Outrageous Government Conduct**

26 Finally, outrageous government conduct occurs when the government's conduct in securing an  
27 indictment is so grossly shocking and outrageous as to violate the universal sense of justice. United  
28 States v. Montoya, 45 F.3d 1286 (9th Cir. 1995). This is "an extremely high standard." United States v.

1 Smith, 924 F.2d 889, 897 (9th Cir.1991).

2 The defendant fails to explain the basis of this potential motion. The entire explanation appears  
3 to be in paragraph 35 on page 15 of his discovery memorandum. In addition, the defendant lists facts on  
4 pages 9 and 10 of his memorandum that may be related to his claim, but fails to state or explain the  
5 factual or legal connection. Moreover, the defendant's recitation of the facts is not borne out by his own  
6 exhibit which shows the defendant actively soliciting assistance with his case from an officer who is not  
7 a participant in the investigation and prosecution of this case. Because the defendant has not shown that  
8 he is entitled to evidence related to this claim, his motion should be denied.

9 **C. The Defendant's Discovery Requests Contain Additional Fatal Flaws and Should be**  
10 **Denied**

11 **1. Defendant's Request for Press Releases and Journalist Contact Information**  
12 **[Request 22]**

13 The defendant has requested what he characterizes as impeachment information regarding  
14 statements made by government agents and attorneys. First, this request is overbroad. The individuals  
15 who generally communicate with the press regarding a case, such as the United States Attorney and the  
16 U.S Attorney's Office Press Information Officer, are exceptionally unlikely to ever testify and therefore  
17 cannot be impeached. Second, press releases issued by the U.S. Attorney's Office are publicly available  
18 on the internet.

19 Third, impeachment information need not be turned over until the witness testifies. *See United*  
20 *States v. Rinn*, 586 F.2d 113, 119 (9th Cir. 1978) ("[S]ince information concerning 'favor or deals'  
21 merely goes to the credibility of the witness, it need not be disclosed prior to the witness testifying.").  
22 Likewise, disclosures of witness statements are governed by the Jencks Act, 18 U.S.C. § 3500, et. seq.  
23 That Act provides that no report regarding a witness statement, other than the defendant's, shall be  
24 subject to subpoena, discovery or inspection until the witness has testified on direct examination in the  
25 trial of the case. This request should be denied.

26 **2. Defendant's Request for Grand Jury Records [Request 27]**

27 The defendant has requested the names and contact information for every person subpoenaed to  
28 testify before the grand jury in the present case.

Government disclosure of grand jury information is generally prohibited by Rule 6(e). In order

1 to obtain disclosure of grand jury proceedings, a defendant has the burden of showing “that ‘a  
2 particularized need’ exists. . . which outweighs the policy of secrecy.” Pittsburgh Plate Glass Company  
3 v. United States, 360 U.S. 395, 400 (1959). “Unsubstantiated, speculative assertions of improprieties in  
4 the proceedings do not outweigh the policy of grand jury secrecy.” United States v. Ferreboeuf, 632  
5 F.2d 832, 835 (9th Cir. 1980) (quotations and citations omitted).

6 The defendant’s bare assertion that the information requested is relevant to potential pretrial  
7 motions for outrageous government conduct, vindictive and/or selective prosecution, does not meet this  
8 burden. He fails to explain the relevancy and materiality of the information and as a result cannot  
9 explain how his need for the information outweighs the need for grand jury secrecy. Moreover, as  
10 explained above, even relevant information would not automatically be subject to disclosure because the  
11 defendant is not entitled to discovery for the purposes of his potential pretrial motions.

12 **3. Defendant’s Request for Government Communications [Requests 33-36]**

13 The defendant argues that he is entitled to communications related to the decision to prosecute  
14 the defendant, and to communications between the U.S. Attorney’s Office and the California  
15 Department of Justice, the Sacramento County District Attorney’s Office, and local law enforcement  
16 agencies for the purpose of his potential pretrial motions.

17 These requests are overbroad, including requests for information that could have no relevance to  
18 defendant’s purported purpose in seeking the discovery. The defendant has also failed to establish that  
19 he is entitled to discovery for the purpose of his potential pretrial motions. Furthermore,  
20 communications and memoranda of this type are protected from disclosure by Rule 16(a)(2). See  
21 United States v. Armstrong, 517 U.S. 456, 462-63 (1996) (observing that Rule 16(a)(2) “exempts from  
22 defense inspection ‘reports, memoranda, or other internal government documents made by the attorney  
23 for the government or other government agents in connection with the investigation or prosecution of  
24 the case.’”); United States v. Fort, 472 F.3d 1106, 1115 (9th Cir.2007) (concluding that “Rule 16(a)(2)’s  
25 protection of investigative materials extends beyond the work product privilege as defined in the civil  
26 context”). The defendant does not provide a basis to overcome this prohibition.

1                   **4. Defendant's Request for All Text Messages from Work and Personal Phones**  
2                   **of Agents [Request 38]**

3                   The defendant requests all text message records from personal and work phones for the purpose  
4 of potential pretrial motions. As explained above, the defendant has failed to make the threshold  
5 showing that he is entitled to discovery related to those motions. The defendant has failed to explain  
6 how this information would be material to his defense against the case in chief.

7                   In addition, the defendant fails to explain the relevance or materiality of this request to his  
8 potential motions. This failure is compounded by the improperly broad language of the request, which  
9 would likely include private messages between agents and their family members, agents and other  
10 agents discussing unrelated cases, agents and confidential informants in cases unrelated to this one. This  
11 request should be denied.

12                   **5. Defendant's Request for Statements of Third Parties who are Not**  
13                   **Prospective Witnesses [Request 40]**

14                   The defendant requests statements by third parties who are not prospective witnesses for the  
15 purpose of potential pretrial motions and adequate preparation of defense counsel for trial. The  
16 defendant fails to explain the materiality or relevance of these statements to his defense of the case and  
17 offers no statutory or legal authority that would serve as a basis for this discovery. Notably, the Jencks  
18 Act and Rule 26.2 do not require the production of statements of non-witnesses. United States v. Schier,  
19 438 F.3d 1104, 1112 (11th Cir. 2006); In re United States, 834 f.2d 283, 287 (2d Cir. 1987). Therefore,  
20 this request should be denied.

21                   **6. The Defendant's Request for Any and All Documents that Would Indicate**  
22                   **Whether the ATF Complied with the Administrative Procedures Act**  
23                   **[Request 46]**

24                   The defendant request any and all documents that would indicate whether the ATF in fact  
25 complied with the Administrative Procedures Act in formulating question 11.a on ATF form 4473. In  
26 support of this request defendant cites to a case from the Fourth Circuit that does not resolve the issue.  
27 Fortunately, however, this is not an open question, since the Ninth, Third, and Eleventh Circuits have  
28 upheld the inclusion of the question on the form. United States v. Johnson, 680 F.3d 1140, 1144-47 (9th  
Cir. 2012) (finding the district court properly ruled as a matter of law that the actual buyer was required  
by the statute); United States v. Soto, 539 F.3d 191 (3d Cir. 2008) (finding the actual buyer question is

1 required by statute and applies to straw purchases); United States v. Nelson, 221 F.3d 1206, 1210 (11th  
2 Cir. 2000) (finding an Administrative Procedures Act challenge to the actual buyer question is without  
3 merit).

4 Moreover, defendant's request is too vague and too broad to constitute a reasonable discovery  
5 request. As defense counsel stated in an email to government counsel, the items requested "could be in  
6 the federal register, it could be industry bulletins, it could be agency memoranda. I don't know." The  
7 federal register and industry bulletins are equally accessible to defense counsel as they are to  
8 government counsel; the government suggests counsel begin his search there. The defendant has failed  
9 to comply with required procedures for obtaining policy manuals, and agency guidelines are not  
10 discoverable as "material to the defense" or Brady. United States v. Henson, 123 F.3d 1226, 1237 (9th  
11 Cir. 1997) (procedure for obtaining ATF documents); United States v. Johnson, 872 F.2d 612, 619 (5th  
12 Cir. 1989); United States v. Hensel, 699 F.2d 18, 39 (1st Cir. 1983); United States v. Marbelt, 129 F.  
13 Supp. 2d 49, 56 (D. Mass. 2000). The defendant has failed to make a showing that he is entitled to any  
14 such documents. This request should be denied.

15  
16 Dated: March 28, 2013

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