STATE BAR OF TEXAS
ADVANCED CRIMINAL LAW COURSE
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CHAPTER 50
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RULE 29 MOTION FOR JUDGMENT OF ACQUITTAAL

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FEDERAL PRETRIAL MOTIONS

BY

MICHAEL P. HEISKELL

I. PURPOSE OF DEFENSE PRETRIAL MOTIONS

A. To challenge and contest indictments;
B. To seek disclosure of relevant materials; and
C. To seek suppression of said material when warranted.
D. To “win” the case.
E. To make appellate record.

II. TIME TO FILE PRETRIAL MOTIONS

A. Rule 12(c), Fed. R. Crim. P.
   1. Deadline normally set by court at arraignment or shortly thereafter. If not set at this point then deadline is start of trial.
   2. Court has discretion to extend or reset deadlines for filings.
   3. Rule 12(b)(4)(B) allows a defendant at the arraignment to request notice of government’s intent to use any evidence in its case in chief that the defendant may be entitled to discover under Rule 16.

B. Rule 47, Fed. R. Crim. P.

   Party must serve a written motion and any hearing notice at least seven (7) days before the hearing unless a rule or the Court sets a different period.

C. Check Local Rules, (e.g. Western District Local Rule CR-12 (14 days after arraignment)).

D. Failure to Timely File; Rule 12 (b)(3), Fed. R. Crim. P.

   Can result in adverse ruling unless good cause is shown for the untimeliness of the filing.

III. MOTIONS THAT MUST BE MADE PRIOR TO TRIAL

A. Defect in instituting proceedings, including:
   1. Improper Venue;
2. Pre-Indictment Delay;
3. Speedy Trial Violation;
4. Selective or Vindictive Prosecution; and
5. Grand Jury or Preliminary Hearing Error

B. Defect in Indictment, including:
   1. Duplicitous indictment (2 or more offenses in same count);
   2. Multiplicitous indictment (same offense in more than one count);
   3. Lack of specificity;
   4. Improper joinder; and
   5. Failure to state offense.

C. Suppression of Evidence

D. Severance of Charges or Defendants

E. Discovery (Rule 16)

IV. SPECIFIC RULES REGARDING ALIBI, INSANITY, PUBLIC AUTHORITY DEFENSES

A. (1) Rule 12.1(a), Fed.R.Crim.P. allows the government to request in writing that the defendant notify it of any intended Alibi Defense. Such request must state the time, place and date of the offense within 14 days of such a request or some other time in the court’s discretion, the defendant must serve written notice of the alibi defense by stating: (1) each specific place where the defendant claims to have been at the time of the alleged offense and (2) the names, addresses and phone numbers of each alibi witness on whom the defendant intends to rely.

(2) Rule 12.1(b), Fed.R.Crim.P. allows a defendant to serve a 12.1 (a) notice on the government in order to obtain the names, addresses, and phone numbers of each witness—other than the alleged victim unless a need is shown the government intends to rely on to establish the defendant’s presence.

(3) Failure to comply can result in the exclusion of the witness from testifying.

B. (1) Rule 12.2(a), Fed.R.Crim.P. requires a Notice of Insanity Defense be served on the government in writing within the time for filing pre-trial motions or any later time the court sets. Any failure to do will result in a denial of this defense to be asserted at trial.

(2) Rule 12.2(b), Fed.R.Crim.P. also requires a Notice of Expert Evidence of a Mental Condition be served on the government in writing within the time for filing pre-trial motions or any later time the court sets. Failure to do so may result in exclusion of this evidence.

C. Rule 12.3, Fed.R.Crim.P. requires a Notice of Public Authority Defense be served on the government within the time for filing pre-trial motions or at any later time the court sets. Such a notice must contain:
(1) the law enforcement agency or federal intelligence agency involved;
(2) the agency member on whose behalf the defendant claims to have acted; and
(3) the time during which it is claimed the defendant acted with public authority.

The same rules regarding the government’s request and the defendant’s response found in Rule 12.1, Fed.R.Crim.P. (Alibi Defense) applies here as well.

V. GOVERNING RULES

A. Substantive Federal Rules (All under Fed. R.Crim. P., except as otherwise noted)
   1. Rule 12, (Primary Rule);
   2. Rule 16, (Discovery and Inspection);
   3. Rule 5.1(a) (Preliminary Hearing);
   4. Rule 7(f) (Bill of Particulars) (must move for same within 14 days after arraignment or at a later time if the court permits);
   5. Rule 12(b)(4)(B) (Notice Request of Government’s Intent to Use Evidence);
   6. Rule 12(h) (Suppression Hearing Witness Statements);
   7. Rule 12.1 (Reciprocal Discovery of Alibi Defense Witnesses);
   8. Rule 12.3 (Reciprocal Discovery of Public Authority Defense Witnesses);
   9. Rule 17 (Subpoena to Third Party);
   10. Rule 26.2 (Production of Witness’ statement during trial)
   11. Rule 32 (Probation Revocation or Supervised Release Revocation);
   12. Rule 46(j) (Detention Hearing Witness Statements);
   13. Rule 404(b), Fed. R. Evid. (Notice of other Crimes, Wrongs or Acts);
   14. Rules 413 and 414, Fed.R.Evid.; (Notice of Similar Acts Witness Statements or summaries);
   15. Rule 807, Fed. R. Evid. (Hearing Statement under Residual Exception);
   16. 18 U.S.C.§ 3500 (Jencks Act)
   17. Brady & Gigilo

B. Federal Rules (Form and Content)

C. Local Rules (see excerpts, infra.).

VI. POST TRIAL MOTIONS

A. Rule 29 **Motion for Judge of Acquittal**

   (a) **Before submission to Jury:**

   After government closes its evidence or after the close of all the evidence the Court on defendant’s motion must enter a judgment of acquittal for why offense for which the evidence is insufficient. The court may on its own do the same and may reserve the decision. See Rule 29(b)

   (b) **After Jury Verdict or Discharge**

   Defendant may move for same within 14 days. See Rule 29(c)

   (c) **Conditional Ruling on a Motion for New Trial**

   If the Court enters judgment of acquittal after a guilty verdict the court must conditionally determine whether a new trial should be granted if the judgment is later vacated or reversed. See Rule 29(a)

B. Rule 33 **Motion for New Trial**

   Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if required by the interest of justice.

   It must be filed within 14 days after the verdict. If newly discovered evidence is the basis then 3 years after the verdict

VII. PRACTICE TIPS

A. Formulate a trial plan or strategy and use motions to advance same.

B. Organize legal memo files, checklist and loose leaf notebook so that necessary legal authorities can be readily found.

C. Avoid Boilerplate Motions—be creative, unique and use affidavits whenever possible

D. Review Fifth Circuit Pattern Jury Instructions.

LOCAL CRIMINAL RULES OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Effective September 1, 2016

LCrR 1.1 Definitions.
Unless the context indicates a contrary intention, the following definitions apply in these rules:

(a) **Court.** The word “court” means the district judges of the United States District Court for the Northern District of Texas, as a collective body.

(b) **Presiding Judge.** The term “presiding judge” means the judge to whom a case is assigned. The word “judge” includes district judges and magistrate judges.

(c) **Attorney.** The word “attorney” means either:

   (1) a person licensed to practice law by the highest court of any state or the District of Columbia; or

   (2) a party proceeding pro se in any criminal action.

(d) **Clerk.** The word “clerk” means the clerk of this court.

(e) **ECF.** The term “ECF” means electronic case filing and refers to the court’s web-based document filing system that allows a document to be transmitted, signed, or verified by electronic means in a manner that is consistent with technical standards established by the Judicial Conference of the United States.

(f) **Judge’s Copy.** The term “judge’s copy” means a paper copy of an original pleading, motion, or other paper that is submitted for use by the presiding judge.

**LCrR 16.1 Exchanging Exhibits, Exhibit Lists, and Witness Lists.**

(a) **Exchanging Exhibits.** All exhibits, except those offered solely for impeachment, that a party intends to offer at trial, must be marked with gummed labels or tags that identify them by the exhibit number under which they will be offered at trial, and must be exchanged with opposing parties at least 14 days before the scheduled date for trial. When practicable, a copy of such exhibits must be furnished to the presiding judge.

(b) **Exchanging Exhibit and Witness Lists.** At least 14 days before the scheduled date for trial, the parties must file with the clerk and deliver to opposing parties and the court reporter, separate lists of exhibits and witnesses, except those offered solely for impeachment.

**LCrR 23.1 Proposed Findings in Nonjury Cases.**

Unless otherwise directed by the presiding judge, at least 14 days before trial in all nonjury cases, parties must file with the clerk and serve on opposing parties proposed findings
of fact and conclusions of law. The parties must submit such amendments to the proposed findings of fact and conclusions of law as the presiding judge directs.

**LCrR 24.1 Contact with Jurors.**

A party, attorney, or representative of a party or attorney, shall not, before or after trial, contact any juror, prospective juror, or the relatives, friends, or associates of a juror or prospective juror, unless explicitly permitted to do so by the presiding judge.

**LCrR 30.1 Requested Jury Charge.**

Unless otherwise directed by the presiding judge, at least 14 days before trial, each party must file with the clerk and serve on opposing parties the requested jury charge, including instructions. The requested instructions should cite the authorities relied on.

**LCrR 32.1 Nondisclosure of Recommendation.**

A probation officer shall not disclose any recommendation regarding the sentence.

**LCrR 45.1 Time Deemed Filed.**

A pleading, motion, or other paper that is filed by electronic means before midnight central time of any day will be deemed filed on that day. A pleading, motion, or other paper that is filed on paper before the clerk’s office is scheduled to close on any day will be deemed filed on that day.

**LCrR 47.1 Motion Practice.**

Unless otherwise directed by the presiding judge, motion practice is controlled by subsection (h) of this rule. In addition, the parties must comply with the following:

(a) **Conference.** Before filing a motion, an attorney for the moving party must confer with an attorney for each party affected by the requested relief to determine whether the motion is opposed. Conferences are not required for motions to dismiss the entire action or indictment, or when a conference is not possible.

(b) **Certificate of Conference.**

  (1) Each motion for which a conference is required must include a certificate of conference indicating that the motion is unopposed or opposed.

  (2) If a motion is opposed, the certificate must state that a conference was held, indicate the date of conference and the identities of the attorneys conferring, and explain why agreement could not be reached.
(3) If a conference was not held, the certificate must explain why it was not possible to confer, in which event the motion will be presumed to be opposed.

(c) Proposed Order. An unopposed motion must be accompanied by an agreed proposed order, signed by the attorneys or parties. An opposed motion that is submitted on paper must be accompanied by a proposed order, set forth on a separate document, unless an order is not required by subsection (h) of this rule.

(d) Brief. An opposed motion must be accompanied by a brief that sets forth the moving party’s contentions of fact and/or law, and argument and authorities, unless a brief is not required by subsection (h) of this rule. A response to an opposed motion must be accompanied by a brief that sets forth the responding party’s contentions of fact and/or law, and argument and authorities. A responding party is not required to file a brief in opposition to a motion for which a brief is not required by subsection (h) of this rule.

(e) Time for Response and Brief. A response and brief to an opposed motion must be filed within 14 days from the date the motion is filed.

(f) Reply Brief. Reply briefs may not be filed unless the moving party requests, and the presiding judge grants, leave to do so. If leave is granted, the reply brief shall be filed no later than the deadline set by the presiding judge.

(g) No Oral Argument. Unless otherwise directed by the presiding judge, oral argument on a motion will not be held.

(h) Uniform Requirements on Motion Practice.

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EXTEND TIME  X  X  X
JUDGMENT OF ACQUITTAL  X  X
LEAVE TO FILE  X  X  X
LIMINE  X  X  X
NEW TRIAL  X
PRODUCE DOCUMENTS  X  X  X
PROTECTIVE ORDER  X  X  X
QUASH  X  X  X
SANCTIONS  X  X  X
SUBSTITUTE COUNSEL  X  X
TRANSFER  X  X
WITHDRAW  X  X

NOTE: If a motion is not listed, a brief, certificate of conference, and an order are required.

LCrR 47.2 Briefs.

(a) **General Form.** A brief must be printed, typewritten, or presented in some other legible form.

(b) **Amicus Briefs.** An amicus brief may not be filed without leave of the presiding judge. The brief must specifically set forth the interest of the amicus curiae in the outcome of the litigation.

(c) **Length.** A brief must not exceed 25 pages (excluding the table of contents and table of authorities). A reply brief must not exceed 10 pages. Permission to file a brief in excess of these page limitations will be granted by the presiding judge only for extraordinary and compelling reasons.

(d) **Tables of Contents and Authorities.** A brief in excess of 10 pages must contain:
(1) a table of contents with page references; and

(2) an alphabetically arranged table of cases, statutes, and other authorities cited, with page references to the location of all citations.

**LCrR 47.3 Confirmation of Informal Leave of Court.**

When a presiding judge informally grants leave, such as an extension of time to file a response, an attorney for the party to whom leave is granted must file a document confirming the leave and must serve the document on all other parties.

**LCrR 47.4 Motion Practice in Cases Seeking Post-Conviction Relief.** [New Rule]

Motion practice in a prisoner application, motion, or petition filed under 28 U.S.C. § 2241, § 2254, or § 2255 is governed by the local civil rules.

**LCrR 49.1 Filing Criminal Cases.**

When a criminal case is filed, the United States must also submit, for each defendant, a completed criminal-case cover sheet, in the approved form.

**LCrR 49.2 Filing and Serving Pleadings, Motions, or Other Papers.**

(a) **Filing with the Clerk.** Except for discovery material, a pleading, motion, or other paper that the Federal Rules of Criminal Procedure permit or require to be filed, that is submitted on paper, must be filed with the clerk’s office for the appropriate division. Such pleading, motion, or other paper must not be sent directly to the presiding judge.

(b) **Original and Judge's Copy Required.** An original and one judge's copy of each pleading, motion, or other paper that is submitted on paper must be filed with the clerk. If a pleading, motion, or other paper is filed by electronic means, the judge's copy must be submitted following procedures set forth in the ECF Administrative Procedures Manual.

(c) **Document Containing More Than One Pleading, Motion, or Other Paper.** Except for a proposed order, a document may contain more than one pleading, motion, or other paper. Any such document must clearly identify in the title each included pleading, motion, or other paper.

(d) **Certificate of Service.** All pleadings, motions, notices, and similar papers that Fed. R. Crim. P.49 or a court order requires or permits be served must contain a certificate of service.

(e) **Serving by Electronic Means.** Delivery of the notice of electronic filing that
is automatically generated by ECF constitutes service under Fed. R. Crim. P. 49(b) on each party who is a registered user of ECF.

(f) **Electronic Filing Required.** Unless the presiding judge otherwise directs, an attorney—other than a prisoner pro se party—must file any pleading (except an indictment or information), motion, or other paper by electronic means, subject to the restrictions and requirements of the ECF Administrative Procedures Manual. A party may, for cause, move to be excused from the requirement of electronic filing.

(g) **Registration as an ECF User Required.** Unless excused for cause, an attorney—other than a prisoner pro se party—must register as an ECF user within 14 days of the date the attorney appears in a case, following the registration procedures set forth in the ECF Administrative Procedures Manual.

**LCrR 49.3 Required Form.**

In addition to the requirements of the Federal Rules of Criminal Procedure, each pleading, motion, or other paper must:

(a) contain on its face a title clearly identifying each included pleading, motion, or other paper;

(b) contain a signature block that sets forth the attorney’s bar number for the jurisdiction in which the attorney is admitted to practice, and a facsimile number and e-mail address where information may be sent to the attorney;

(c) use a page size of 8½ x 11 inches;

(d) be typed, printed, or legibly handwritten on numbered pages; and

(e) when submitted on paper, unless otherwise provided by the local criminal rules or order of the presiding judge, be two-hole punched at the top and either stapled in the upper, left-hand corner or secured with a durable fastener at the top.

**LCrR 49.4 Notice of Orders and Judgments.**

(a) **Furnishing Copies of Orders and Judgments.** Unless the presiding judge otherwise directs, the clerk shall furnish a copy of each order and judgment to counsel of record by first class mail or, where the clerk has the capability to do so, by electronic transmission. To receive orders and judgments by electronic transmission, the attorney of record must sign an agreement form provided by the clerk, and must comply with the applicable procedures established by the clerk. Where a party is represented by more than one attorney of record, the attorney designated in accordance with LCrR 49.4 (b) or (c) shall receive copies of orders and judgments and distribute them to co-counsel for the same party who have not received a notice of electronic filing from ECF.
(b) **Designation of Counsel to Receive Orders and Judgments.** The clerk shall designate an attorney to receive copies of orders and judgments, in the following manner:

1. the first attorney to sign an indictment; and
2. the attorney appointed or retained to represent a defendant, or, when a defendant is represented by more than one attorney, the attorney who appears to be acting as lead counsel.

(c) **Change in Designation of Counsel.** If the attorney designated to receive orders and judgments desires that another attorney be substituted for this purpose, the attorney must request substitution in the manner prescribed by the clerk.

**LCrR 49.5 Electronic Signature.**

(a) **What Constitutes Electronic Signature.** The signature of an attorney who submits a pleading, motion, or other paper for filing by electronic means is the login and password issued to the attorney by the clerk.

(b) **Requirements for Electronic Signature.** An attorney who submits a document for filing by electronic means must place on the document an “s/” and the typed name of the attorney, or a graphical signature, in the space where the attorney’s signature would have appeared had the document been submitted on paper.

(c) **Certification of Signature of Another Person.** By submitting a document by electronic means and representing the consent of another person on the document, an attorney who submits the document certifies that the document has been properly signed.

(d) **Requirements for Another Person’s Electronic Signature.** An attorney who submits a document by electronic means that is signed by another person—other than a charging document or a document signed by a defendant—must:

1. include a scanned image of the other person’s signature, or represent the consent of the other person in a manner permitted or required by the presiding judge; and
2. maintain the signed paper copy of the document for one year after final disposition of the case.

**LCrR 49.6 Requirement of Paper Copies of Certain Electronically-Filed Documents.**

When a charging document—including a complaint, information, indictment, or
superseding indictment—or any document signed by a criminal defendant is submitted by electronic means, the attorney who submitted the document must deliver an original, signed paper document to the clerk within 7 days.

**LCrR 53.1 Photographs, Broadcasting, Recording, and Television Forbidden.**

No person may photograph, electronically record, televise, or broadcast a judicial proceeding. This rule shall not apply to ceremonial proceedings or electronic recordings by an official court reporter or other authorized court personnel.

**LCrR 53.2 Dress and Conduct.**

All persons present in a courtroom where a trial, hearing, or other proceeding is in progress must dress and conduct themselves in a manner demonstrating respect for the court. The presiding judge shall have the discretion to establish appropriate standards of dress and conduct.

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**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**LOCAL RULES as of January 2014**

**CRIMINAL RULES**

CrLR6. **GRAND JURY WITNESSES**

Names of witnesses appearing before a grand jury may be sealed for cause.

CrLR12. **CRIMINAL PRETRIAL MOTION PRACTICE**

CrLR12.1. **Implementation.** Federal Rule of Criminal Procedure 12 and this rule are
to be followed to ensure consistent and efficient practice before this Court. Motions and responses that do not comply with these rules are waived.

CrLR12.2. **Form.** A pretrial motion shall be in writing and state specifically the basis for the motion. The motion shall be supported by a statement of authority. It shall also be accompanied by a separate order granting the relief requested and by an averment that the movant has conferred with the respondent, but that an agreement cannot be reached on the disposition of the motion. If the motion presents issues of fact, it shall be supported by affidavit or declaration which sets forth with particularity the material facts at issue. An unopposed motion and its order must bear in the captions “unopposed.”

CrLR12.3. **Responses.** If the respondent contests the motion, the response must be in writing, accompanied by authority and controverting affidavit or declaration of material facts, together with a separate order denying the relief sought.

CrLR12.4. **Service.** All motions must be served on all parties and contain a certificate of service.

CrLR12.5. **Submission.** At the time of arraignment the judicial officer shall set the time for pretrial motions and for any responses to the motions.

CrLR23. **TRIAL**


CrLR23.2. **Electro Mechanical Devices.** Except by leave of the presiding judge, no photo- or electro-mechanical means of recordation or transmission of court proceedings is permitted in the courthouse.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LOCAL RULES as of May 24, 2016

SECTION II: CRIMINAL RULES

LOCAL RULE CR-1 Scope

The rules of procedure in any criminal proceeding in this court are those prescribed by the laws of the United States, the Federal Rules of Criminal Procedure, these local rules, and any orders entered by the court. These rules shall be construed as consistent with acts of Congress and rules of practice and procedure prescribed by the Supreme Court of the United States and the United
LOCAL RULE CR-6 The Grand Jury

(a) Selection of Grand Jurors. Grand jurors shall be selected at random in accordance with a plan adopted by this court pursuant to applicable federal statute and rule.

(b) Grand Jury Subpoenas. Sealed grand jury subpoenas shall be kept by the clerk for three years from the date the witness is ordered to appear. After that time, the clerk may destroy the subpoenas.

(c) Signature of the Grand Jury Foreperson. The grand jury foreperson shall sign the indictment with initials rather than his or her whole name. The foreperson will continue to sign the concurrence of the grand jury using his or her whole name.

LOCAL RULE CR-10 Arraignments

In the interest of reducing delays and costs, judges and magistrate judges may conduct the arraignment at the same time as the post-indictment initial appearance.

LOCAL RULE CR-24 Trial Jurors

(a) Communication with Jurors.

(1) No party or attorney for a party shall converse with a member of the jury during the trial of an action.

(2) After a verdict is rendered an attorney must obtain leave of the judge before whom the action was tried to converse with members of the jury.

(b) Signature of the Petit Jury Foreperson. The petit jury foreperson shall sign all documents or communications with the court using his or her initials.

LOCAL RULE CR-47 Motions

(a) Form and Content of a Motion. All motions and responses to motions, unless made during a hearing or trial, shall be in writing, conform to the requirements of LOCAL RULES CV-5 and CV-10, and be accompanied by a separate proposed order for the judge’s signature. The proposed order shall be endorsed with the style and number of the cause and shall not include a date or signature block. Dispositive motions those which could, if granted, result in the dismissal of an indictment or counts therein or the exclusion of evidence shall contain a statement of the issues to be decided by the court. Responses to dispositive motions must include a response to the movant’s statement of issues. All motions, responses, replies, and proposed orders, if filed electronically, shall be submitted in A searchable PDF@ format. All
other documents, including attachments and exhibits, should be in a searchable PDF@ form whenever possible.

(1) Page Limits.

(A) Dispositive Motions. Dispositive motions shall not exceed thirty pages, excluding attachments, unless leave of court is first obtained. Likewise, a party opposing a dispositive motion shall limit the response to the motion to thirty pages, excluding attachments, unless leave of court is first obtained. Any reply brief shall not exceed ten pages, excluding attachments.

(B) Non-dispositive Motions. Non-dispositive motions shall not exceed fifteen pages, excluding attachments, unless leave of court is first obtained. Likewise, a party opposing a non-dispositive motion shall limit the response to the motion to fifteen pages, excluding attachments, unless leave of court is first obtained. Any reply brief shall not exceed five pages, excluding attachments.

(2) Briefing Supporting Motions and Responses. The motion and any briefing shall be contained in one document. The briefing shall contain a concise statement of the reasons in support of the motion and citation of authorities upon which the movant relies. Likewise, the response and any briefing shall be contained in one document. Such briefing shall contain a concise statement of the reasons in opposition to the motion and a citation of authorities upon which the party relies.

(3) Certificates of Conference. Except as specified below, all motions must be accompanied by a “certificate of conference.” It should be placed at the end of the motion following the certificate of service. The certificate must state: (1) that counsel has conferred with opposing counsel in a good faith attempt to resolve the matter without court intervention; and (2) whether the motion is opposed or unopposed. Certificates of conference are not required of pro se litigants (prisoner or non-prisoner) or for the following motions:

- motions to dismiss;
- motions for judgment of acquittal;
- motions to suppress;
- motions for new trial;
- any motion that is joined, by, agreed to, or unopposed by all the parties;
- any motion permitted to be filed ex parte;
- objections to report and recommendations of magistrate judges;
- for reconsideration; and
- dispositive motions.

(b) Timing of a Motion.

(1) Responses. A party opposing a motion has fourteen days from the date the motion was served in which to serve and file a response and any supporting documents,
after which the court will consider the submitted motion for decision. Any party may separately move for an order of the court lengthening or shortening the period within which a response may be filed.

(2) **Reply Briefs and Sur-Replies.** Unless otherwise directed by the presiding judge, a party who has filed an opposed motion may serve and file a reply brief responding to issues raised in the response within seven days from the date the response is served. A sur-reply responding to issues raised in the reply may be served and filed within seven days from the date the reply is served. The court need not wait for the reply or sur-reply before ruling on the motion. Absent leave of court, no further submissions on the motion are allowed.

(c) **Affidavit Supporting a Motion.** When allegations of fact not appearing in the record are relied upon in support of a motion, all affidavits and other pertinent documents shall be served and filed with the motion. It is strongly recommended that any attached materials have the cited portions highlighted or underlined in the copy provided to the court, unless the citation encompasses the entire page. The page preceding and following a highlighted or underlined page may be submitted if necessary to place the highlighted or underlined material in its proper context. Only relevant, cited-to excerpts of attached materials should be attached to the motion or the response.

**LOCAL RULE CR-49 Service and Filing**

(a) **Generally.** All pleadings and documents submitted in criminal cases must conform to the filing, service, and format requirements contained in LOCAL RULES CV-5, CV-10, and CV-11.

(1) **Defendant Number.** In multi-defendant cases, each defendant receives a "defendant number." The numbers are assigned in the order in which defendants are listed on the complaint or indictment. When filing documents with the court, parties shall identify by name and number each defendant to whom the document being filed applies.

(2) **Sealed Indictments.** In multi-defendant cases involving one or more sealed indictments, the government should, at the time the sealed indictment is filed, provide the clerk with appropriately redacted copies of the indictment for each defendant. The goal of this procedure is to protect the confidential aspect of the sealed indictment with regard to any defendants not yet arrested.
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
LOCAL RULES as of April 26, 2012

RULE CR-12. PRETRIAL MOTIONS

(a) Motion by Defendant. Unless otherwise ordered by the court, the defendant must file any pretrial motion:

(1) within 14 days after arraignment; or

(2) if the defendant has waived arraignment, within 14 days after the latest scheduled arraignment date.

(b) Motion by the Government. Unless otherwise ordered by the Court, the government must file any pretrial motion by the latest of the following dates:

(1) within 14 days after receiving defendant's motions;

(2) within 21 days after the arraignment; or
(3) if the defendant has waived arraignment, within 21 days after the latest scheduled arraignment date.

Committee Notes

1. The language of Rule CR-12 has been amended as part of the general restyling of the local criminal rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

2. The form of motions and responses, and the time for filing a response, are governed by CR-47.

3. Notwithstanding the preference in the Federal Rules of Criminal Procedure for case-specific scheduling orders (see Committee Note, proposed amendment to Fed. R. Crim. P. 12(c)), the rule retains the practice of setting motions deadlines by local rule, recognizing that the practice is suitable for the vast majority of criminal cases filed in this district, and that the district court may set specific deadlines different from the rule in appropriate cases.

RULE CR-47. MOTIONS AND RESPONSES

(a) Requirements. When filing a motion or response, a party must:

(1) cite the legal authority upon which the party relies; and

(2) submit a proposed order stating the relief the party seeks.

(b) Time for Filing Response. If a party opposes a motion, the party must file its response with the clerk and serve a copy on all parties within 11 days of service of the motion.

Committee Notes

1. Rule 47 is a new rule consisting of portions of the substance of former CR-12, renumbered as CR-47 to conform more closely to the organizational structure of the Federal Rules of Criminal Procedure and to make it clear that the requirements apply to all motions and responses and not only pretrial motions and responses. These changes are intended to be stylistic only, except as noted below.

2. The rule requires the submission of a proposed order with motions and responses.
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SMERMAN DIVISION
UNITED STATES OF AMERICA,

v.

JOHN DOE,

CASE NO. ______________

MOTION FOR DISCOVERY IN AID OF
JOHN DOE’S BOND HEARING

COMES NOW the accused, JOHN DOE, by and through his counsel, and moves this Honorable Court to direct the attorney for the Government to provide him with the following information that is relevant and material to his bond hearing:

1. Jenks material for any witness that the government intends to call at Mr. Doe’s bond hearing;
2. *Jenks* material for any witness whose statements have been proffered to the court in the government’s Position on Pretrial Release;

3. *Jenks* material for any unindicted coconspirators whom the government quotes or to whom the government attributes statements;

4. Any written reports of the Consul in Riyadh, Saudi Arabia who allegedly spoke with Mr. Doe in November 2011 about him not wanting to return to the United States;

5. Documentation of any and all communication, written or unwritten, between the Government of Saudi Arabia and the United States Government concerning the arrest of Mr. Doe;

6. The basis for the allegation that Mr. Doe would flee the country with the help of confederates who are still at large;

7. Any and all photographs, in the possession of the government, taken of Mr. Doe upon his release to the United States Authorities earlier this year;

8. Any and all photographs, in the possession of the government, taken of Mr. Doe while he was in custody in Saudi Arabia;

9. Any and all documentation of or information about the manner in which Mr. Doe was physically held while in custody in Saudi Arabia;

10. Any and all written reports or notes taken by any doctor who has examined Mr. Doe and whom the government intends to call or whose statements the government has already proffered;
11. Any and all reports, cables or other written statements of the Consul in Riyadh, Saudi Arabia whose statements about the lack of physical abuse the government has proffered in its Position on Pretrial Detention.

Respectfully submitted,

/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

JOHN DOE

MOTION FOR EXPEDITED REVIEW OF DETENTION ORDER
AND MEMORANDUM

COMES NOW the defendant, JOHN DOE, by and through his attorney, MICHAEL P. HEISKELL, who respectfully requests the District Court to review the order of detention entered December 16, 2016. The Defendant files this request pursuant to 18 U.S.C. § 3145(b). Review of the order of detention by the District Court is de novo. United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985) (“... the court acts de novo and makes an independent determination ...”). The District Court can make the de novo determination based on its independent consideration of the record before the magistrate and the additional record adduced before it “as unfettered as it would be if the district court were considering whether to amend its own action.” Id., at 50 (citation omitted). See also United States v. Koenig, 912 F.2d 1190 (9th Cir. 1990).
The two considerations in determining the appropriateness of releasing a presumptively innocent individual without conditions, releasing under certain conditions, and incarceration, are:

1) is the person a flight risk, and
2) is the person a danger to the safety of the community. Indeed, conditions of release may not be set “unless the judicial officer determines that [release without conditions] will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” 18 U.S.C. § 3142(b). Thus, the purpose of setting conditions of release is to achieve the goals of assuring the defendant’s appearance at trial, and to protect the safety of the community.

At the hearing that resulted in the defendant’s incarceration the Magistrate-Judge found, and the record clearly indicated, JOHN DOE was not a flight risk. There was no indication whatsoever that he is a danger to the community. Mr. JOHN DOE’s parents reside in and own a business in Arlington, Texas.

Since JOHN DOE presents no risk of flight, and no danger to society, it is not appropriate to even set conditions on his release. 18 U.S.C. § 3142(b). If conditions are set, they must be “the least restrictive” to “reasonably assure the appearance . . . and the safety of . . . the community.” 18 U.S.C. § 3142. Incarceration is an option only if “no conditions or combination of conditions will reasonably assure the appearance of the person . . . and the safety of . . . the community.” 18 U.S.C. § 3142(e). See also United States v. Minns, 863 F. Supp 360, 363 (N.D. Tex. 1994).

JOHN DOE, through counsel, has requested a copy of the tape recording of the detention hearing, and plans to transcribe that hearing, and provide the transcription, and the tape recording to the Court as soon as possible.

Wherefore, JOHN DOE requests this Court to review the hearing de novo, reverse the decision ordering JOHN DOE detained, and either delete the conditions of release, or amend them to include either daily reporting, and/or electronic monitoring, with home confinement, with the exception of time to go to work and back. JOHN DOE also requests a hearing date be set so that he can present witnesses on the issue of his ability to abide by conditions. One such witness would be Constance Langston, his present employer, who can explain that JOHN DOE’s ability to abide by conditions, but that JOHN DOE is also greatly needed by her to complete his work on her behalf. JOHN DOE would also like other witnesses on his behalf. Witnesses were not presented in the hearing because that hearing was held the same day as JOHN DOE’s arrest.

JOHN DOE asks that this request be expedited because he is in custody. Furthermore, expedition is requested because JOHN DOE would like to be release during the holiday season. JOHN DOE’S trial is scheduled for January 25, 2017, and he would very much like to remain released pending the trial, to be able to assist counsel in preparing for that event.

Respectfully submitted,
/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

CERTIFICATE OF SERVICE
December 19, 2016

VIA E-MAIL: Greg.Gloff@usdoj.gov

Gregory S. Gloff, Esq.
U.S. Attorney's Office
800 Franklin, Suite 280.
Waco, Texas 76701

RE:  United States of America v. John Doe;
Cause No.: 01:08-CR-00195-XXXX-1
Specific Requests for Discovery

Dear Mr. Gloff:

Pursuant to the Federal Rules of Criminal Procedure, Federal Rules of Evidence, Discovery Policy for Criminal Cases USAO Western District of Texas (October 15, 2010)\(^1\), and case law, I am writing to make specific requests for discovery on behalf of my client, John Doe (hereinafter “Doe”).

\(^1\) NOTE FOR SEMINAR ATTENDEES: To access discovery policies for all United States Attorney’s Offices in the country. Please go to https://www.justice.gov/usao/resources/foia-library/public-usao-criminal-discovery-policies
Brady/Giglio Material

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Doe requests that you produce sufficiently in advance of trial any exculpatory evidence material to guilt or punishment, including impeachment evidence or information (whether in the form of witness statements or not). In the event witness interviews were conducted of any person the government expects to call as a witness at trial, the substance of which constitutes impeachment material subject to production pursuant to *Brady/Giglio*, cause such interviews to be reduced to writing for production at trial, including any agent’s handwritten notes. Should you have a question with regard to whether certain information constitutes *Brady/Giglio* material, or when it must be produced, I request that you present the information to the court with notice to me, for review *in camera* to resolve these issues.

A. Information Regarding Government Witnesses and Evidence

1. Any and all arrests within the past ten (10) years, including date, arresting agency, the charge, and disposition of the charge;

2. Any and all convictions within the past ten (10) years including the date of the conviction, the court, the charge, and the disposition of the charge;

3. Any and all promises made to each of said witnesses, including promises of leniency, no prosecution, payment of money, recommendations to courts, or any other promises of benefit to any said witnesses or any member of their family, close friend and/or associate;

4. The identification of all criminal conduct known to have been committed by said witness which did not result in any arrest or charge;

5. Any and all plea agreements that each of said witnesses have agreed to whether in state or federal court;

6. Any and all information concerning false statements made by said witness, including but not limited to the following:
   a. False statements on any written documents including, but not limited to, employment applications, rental applications, etc.
   b. False claims of employment, income, and/or residence;
   c. False testimony;
   d. False claim of taxable income; and/or
   e. False statements to any investigating agency, federal, state or local;

7. Any and all searches for corroboration of a specific event in which it was determined that the witness’ recall of any of the facts is incorrect;
8. Any and all statements of other persons to the effect that said witness does not have a good reputation for honesty or credibility, or that the person has an opinion that the witness is not honest or credible;

9. Any and all inconsistent statements;

10. Any and all interviews of other persons who relate events different than the way in which the witness relates the same event;

11. Disclosure as to whether any such witness was acting as a government agent during any of the events he has related concerning the defendants in this case;

12. Any and all records and information revealing prior misconduct or bad acts attributed to the witness;

13. The name, court and case number of each case in which the witness has testified as a defense or prosecution witness;

14. The existence and identification of each occasion on which the witness who was, or is, an informer, accomplice, co-conspirator or expert, has testified before any court, grand jury, or any administrative agency;

15. Doe specifically requests any and all information in the possession of the government, or known to the government, which indicates that any of the allegations in the indictment about the defendants are untrue;

16. Doe also specifically requests disclosure of any and all material known to the government or which may become known, or which through due diligence may be learned from the investigating officers or the witnesses or persons having knowledge of this case, which is exculpatory in nature or favorable to the accused or which may lead to exculpatory or favorable material or which might serve to mitigate punishment, including any evidence impeaching or contradicting testimony of a government witness in this cause.


Doe requests the following material covered by Rule 16, Federal Rules of Criminal Procedure, be disclosed regarding defendant Doe’s written or recorded statements:

a. The substance of any and all relevant oral statements (whether or not recorded in a written record) made by Doe, whether before or after arrest, in response to interrogation by any and all persons then known by Doe to be a government agent, which the government intends to use at trial, whether in case in chief, as rebuttal, or for impeachment (Fed. R. Crim. Proc. 16(1)(1)(A));

b. Any and all relevant written recorded statement(s) by Doe which are within the government’s possession, custody, or control and which you and/or any other attorney for the government has knowledge of its existence, or could
have knowledge of its existence through the exercise of due diligence (Fed. R. Crim. Proc. 16(a)(1)(B)(i));

c. Any and all portions of any and all written record(s) containing the substance of any and all relevant oral statement(s) made by Doe, whether before or after arrest, if Doe made the statement(s) in response to interrogation by a person Doe knew was a government agent (Fed. R. Crim. Proc. 16(a)(1)(B)(ii));

d. With regard to the three requests listed above, Doe is specifically requesting any and all statement(s), confession(s) or admission(s) relating directly or indirectly to the charges in this case, made by Doe to investigating officers and/or third parties. This request includes any and all statement(s) or admission(s) that may have been incorporated in any report, memorandum, transcript or other document or recording prepared by federal, state or local government agents and/or attorneys. The request also encompasses statements made by Doe to a third party who then made a statement to the government in which Doe’s remarks were repeated or reported and included in any such third-party’s statement. This request also encompasses any statements made by any agents of Doe to government agents or attorneys that the government considers to be statements made by Doe;

This request not only includes written or recorded statements made by Doe to government or state agencies but to other individuals as well. This request also includes not only verbatim statements made by Doe, but also any summaries of government or state reports setting out the substance of the defendant’s statements or statements attributable to him;

e. With regard to the four requests listed above, the identity of any government personnel present at the time of any statement referred to above:

Doe requests the following additional material discoverable pursuant to Rule 16:

f. A complete copy of Doe’s prior criminal record, if any (Fed. R. Crim. Proc. 16(a)(1)(D));

g. Any and all books, papers, documents, data, photographs, tangible objects, building or places, or copies or portions of any such items that are within the government’s possession, custody, or control and which are material to preparation of Doe’s defense, including but not limited to:

1. DOJ policy statements, guidelines, memoranda and opinions, formal and informal, which refer to or relate to prosecution of any of the offenses named in the indictment herein;

2. All documents relating to any of the allegations in the indictment.

(Fed. R. Crim. Proc. 16(a)(1)(E)(i));

h. Any and all books, papers, documents, data, photographs, tangible objects, building or place, or copies or portion of any such items that are within the
government’s possession, custody, or control and which the government intends to use at trial. This includes not only items that will marked and offered into evidence, but all documents that will be relied upon or referred to in any way by any witness (including any experts) called by the government during its case in chief. We request that any document in this category be specifically identified from among the mass of documents that may be produced pursuant to defendant’s Rule 16 request, both to enable counsel to prepare effectively for trial and to afford Doe an opportunity to move to suppress any evidence the government intends to use in its case in chief. (Fed. R. Crim. Proc. 16(a)(1)(E)(ii));

i. Any and all books, papers, documents, data, photographs, tangible objects, building or places, or copies or portions of any such items that are within the government’s possession, custody, or control which were obtained from and/or belong to Doe (Fed. R. Crim. Proc. 16(a)(1)(E)(iii)).

1. Notice of Evidence Subject to Suppression

   a. Doe requests notice of the government’s intention to use any evidence (in its case in chief at trial) which the defendant may be entitled to suppress under Rules 4, 12(b)(3)(C), or 41, Federal Rules of Criminal Procedure, and/or the Fourth, Fifth or Sixth Amendments to U.S. Constitution.

   Rule 12(b)(4)(B), Federal Rules of Criminal Procedure, provides for notice of evidence “at the arraignment or as soon thereafter as is practicable” request such evidence “in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C)…” Doe now requests such notice in order to comply with Rule 12(b)(3)(C)’s requirement that motions to suppress be raised prior to trial.

   b. Doe further requests that the government disclose all search warrants, returns, and affidavits used in the investigation of the defendant and all seizure reports showing seizures of evidence without use of a search warrant.

2. Notice Summary of Expert Testimony

   Pursuant to Rule 16(a)(1)(G) please provide the names, written summary and the basis for same for any expert the government intends to utilize in its case-in-chief.

3. Electronic Surveillance

   Pursuant to 18 U.S.C. §§ 2510, et seq., and Fed. R. Crim. Proc. 16(a)(1)(A), (B), and (E), please provide the following:

   a. Any and all applications for and supporting materials (e.g. affidavits) concerning any and all Title III interception(s) collected during the investigation of this case, subject to a Protective Order signed by the Court.

   b. Any and all tapes and/or electronic media of any and all communication(s) captured pursuant to Title III during the investigation of this case in the Doe and/or many of his alleged co-
defendants, co-conspirators, and/or unindicted co-conspirators were overheard or mentioned.

c. Any and all logs and/or other items reflecting how there interceptions or recording were made, monitored, and preserved. This includes but is not limited to court orders, court extensions, log books, minimization orders, orders dictating procedures for gathering such information and the review and transcription thereof, transcripts of recorded conversations or communications, call lists, and any drafts or summaries of the foregoing.

4. Witness Names and Witness Statements

Doe requests the names of all witnesses which the government intends to call at trial, together with their statements as defined by Rule 26.2, Federal Rules of Criminal Procedure, and 18 U.S.C §3500. If the government feels that statements in its possession do not meet the requirements of Rule 26.2, it is specifically requested that these statements be immediately delivered for inspection in camera by the court.

I realize that Rule 26.2 and Section 3500 literally require disclosure only after direct examination of the witness. However, in this case, I anticipated that early disclosure will be required by the court.

5. Informant Information

a. Doe requests disclosure of the identity of all informants who have furnished information which may be material to Doe’s guilt or innocence phase, if any were used;
b. The identity of all informants who were present at any of the events which are described in the indictment, including any and all overt acts;
c. The actual number of informants employed by the government in this case;
d. All government report containing information from confidential informants described in any of the items listed above and which are material to the instant case.


Doe specifically requests notice of any prior similar acts of any and all defendants which the government intends to introduce at the trial. Doe also specifically requests notice and disclosure of any extraneous “bad acts” the government intends to introduce at trial pursuant to Fed. Rules of Evid. 404(b).

7. Audio and Video Tapes and Photographs

Doe specifically requests that the government reveal and produce copies of all audio or video tapes or photographs alleged by the government to contain the voice or visual
image of Doe or any co-defendant or alleged co-conspirator and which the government may use at trial.

8. **Review of Personnel Files**

   It is requested that you review the personnel files of all agents who will be called at the trial to determine if they can contain “perjurious conduct or other like dishonesty.” See *United States v. Henthorn*, 931 F.2d 29, 30-31 (9th Cir. 1991).

9. **Co-Conspirators Statements**

   Doe requests notice and disclosure of any and all statements of co-defendants or persons claimed by the government to be co-conspirators which the government intends to introduce as evidence against Doe.

10. **Co-Defendant Statements**

    Doe specifically requests notice and disclosure of any statements of co-defendants to government agents which in any way implicate Doe in any criminal wrongdoing. This information is sought to enable this defendant to consider whether or not a motion to sever need be made.

11. **Bruton Statements**

    Doe specifically requests notice and disclosure of the substance of any statements that may be admissible against any indicted or unindicted co-defendant and/or co-conspirator, but not against Doe. See *Bruton v. United States*, 391 U.S. 123, 126-28 (1968).

12. **Rule 807 Residual Hearsay**

    Doe requests the government to provide notice of its intention to offer any statements under Fed. Rule of Evid. 807, the particulars of any such statement, as well as the name and address of the declarant.

Thank you very much for your consideration of these matters.

Sincerely,

JOHNSON, VAUGHN & HEISKELL

/s/Michael P. Heiskell
Michael P. Heiskell
MPH/cij

cc:     Hon. U.S. District Judge
        John Doe
April 2, 2016

SUPPLEMENTAL DISCOVERY
LETTER AND REQUEST FOR NOTICE

Aaron Wiley
Assistant U.S. Attorney
1100 Commerce Street, 3rd Floor
Dallas, Texas 75242

RE: US v. Joe Client
Cause No. 03:09-XXX-D(03)

Dear Mr. Wiley:

Thank you for the discovery that you have provided thus far. The discovery consists of: 1) the NCIC of Mr. Client and his two co-defendants; 2) a three-page ATF report; 3) a one-page printout of what appears to be information pertaining to an automobile; 4) a ten-page “Offense Report” from the Dallas Police Department of which the 2nd, 3rd, 6th, 7th, 8th, 9th, and 10th pages are blank; 5) a five-page “Arrest Report” from the Dallas Police Department; 6) a five-page DEA report of investigation; 7) a photograph of a Hi-Point .380 caliber pistol; 8) a photograph of a Lorcin L380 pistol; 9) a blank page indicating that 1.96 kilograms of powder cocaine will be produced at trial; 10) a one-page ATF summary of events regarding whether the Hi-point and Lorcin pistols function as designed; 11) a one-page summary of events regarding whether the Hi-point and Lorcin pistols have travelled in interstate commerce; 12) a one-page statement of Jennifer McCarty’s qualifications; and 13) a one-page report from the Southwestern Institute of Forensic Sciences at Dallas.

To the extent that there are additional material to which the defense is entitled, I am sending this letter to ensure that the defense receives them. Accordingly, please consider this letter as the defense’s formal request that the government make available to me all materials and information which the government must disclose pursuant to the Federal Rules of Criminal Procedure, Federal Rules of Evidence, case law, and the Pretrial Order issued by the Court. This request includes, but is not limited to, all statements and materials gathered by the law enforcement agencies of the city of Dallas, the county of Dallas, any federal law enforcement agencies including the ATF and DEA, and any state and/or federal task-forces that have gathered statements, information, records, transcripts and computer data that in any way relate to the charged offense(s). More specifically, this request includes the following information:
I. **Statements**

In responding to this request, the defense asks that you ask each law enforcement agency involved in investigating or prosecuting this case, including the Dallas County Police Department, ATF and DEA, to search its files for responsive information.

(a) **Defendant’s Written or Recorded Statements [FRCrP 16(a)(1)(B)]**

(1) Any relevant written or recorded statements by the defendant within the possession, custody, or control of the government that are known to the government, or through due diligence may become known.

(2) Any reference in any written record of any oral statement made before or after arrest by the defendant to a person known by the defendant to be a government agent.

(3) Defendant’s grand jury testimony (if any) relating to the charged offenses.

(4) Defendant’s statements made in open court (if any), including any statements made in state-level court proceedings for alleged conduct that is the same or related to the instant alleged federal offense.

(b) **Defendant’s Oral Statements [FRCrP 16(a)(1)(A)]**

The substance of any oral statements made by the defendant whether before or after interrogation by any person then known by the defendant to be a government agent or law enforcement officer that the government intends to use in any manner at trial regardless of whether any written record of the statement exists. In the event the government intends to use such an oral statement at trial, I request that it be reduced to writing and produced. This request including the substance of the defendant’s response to *Miranda* warnings (if any).

II. **Defendant’s Prior Record [FRCrP 16(a)(1)(D)]**

This request includes the defendant’s entire criminal record, including all arrests and offenses regardless of conviction or severity. It includes all matters that may affect the defendant’s criminal history score pursuant to U.S.S.G. Chapter 4. It also includes any matters that the government believes may influence any statutory enhancement provisions such as (but not limited to) 18 U.S.C. §924(e).

III. **Documents, Data and Objects**

(a) **Material to Preparing a Defense [FRCrP 16(a)(1)(E)(1)]**

The defense requests the opportunity for inspection, copying or photocopying of documents, data or tangible objects within the possession, custody or control of the government and are material to the preparation of the defense. Please separately identify any materials the government intends to use at trial during its case-in-chief.

(b) **Material Government Intends to Use in its Case in Chief at Trial [FRCrP 16(a)(1)(E)(ii)]**

Please produce or otherwise make available all documents, data and tangible objects including tape recordings and transcripts, which the government intends to use as evidence during its case-in-chief. In this regard, please produce any index or working exhibit list of items you intend to introduce at trial.

(c) **Obtained from or Belonging to Defendant [FRCrP 16(a)(1)(E)(iii)]**

A list of all materials obtained from or belonging to the defendant that are within the possession, custody or control of the government regardless of how obtained or the identity of the person that obtained them.

IV. **Reports of Examinations and Tests [FRCrP 16(a)(1)(E)(iii)]**

Please produce any results or reports of physical or mental examinations, and/or scientific tests or
experiments within the possession, custody or control of the government by the tests or existence of due diligence may become known to you, and material to the preparation of the defense or are intended for use by the government as evidence in the government’s case in chief at trial. In the event the results of any scientific were reported orally to you or to any government official or law enforcement officer, I request that you cause a written report of the results to be made and produced. In complying with this request, please contact any law enforcement agency involved in the investigation or prosecution of this case to determine whether relevant examinations or tests were conducted, and, if so produce the results or reports.

V. **Expert Witnesses [FRCrP 16(a)(1)(G)]**
Please advise the defense if you intend to offer any expert testimony under the Federal Rules of Evidence through any witness, including a government agent or employee or law enforcement officer. I request that you prepare and produce a summary of the witness’ opinion testimony, the grounds or basis for any such opinion testimony and the qualifications of the expert witness. Rather than first supplying this information within your pretrial materials, I ask that you provide it to the defense at your earliest opportunity so that my client will be able to better estimate the relative strength of the government’s case and, in turn, decide as soon as reasonably possible whether to plead guilty or proceed to trial.

VI. **Other Offense Evidence [FRE 404(b)]**
I request notice of any “other offense” evidence you intend to use in your case in chief. In the event that you identify any “other offense” evidence that you intend to offer in rebuttal, please produce and identify such evidence separately.

VII. **Summary Witness or Charts [FRE 1006]**
In the event you intend to call a summary witness at trial or present evidence in the form of a chart, I request production within a reasonable time prior to trial of all the original documents or tape recordings upon which such testimony or chart is based.

VIII. **Brady-Giglio Material**
Pursuant to *Brady v. Maryland* and *Giglio v. United States*, the defense requests that the government produce in advance of trial any exculpatory evidence that is material to guilt or punishment. This request includes impeachment of evidence and/or information. Should the government have question with regard to whether certain evidence constitutes Brady/Giglio material, or when it must be produced, the defense requests that the government produce the information to the court, with notice to the defense, for review *in camera*

IX. **Jencks Act Material**
The defense requests that the government produce any Jencks Act material pretrial and, unless otherwise directed by the court’s pretrial order, more than one business day prior to the day of a witness’ direct examination.

X. **Government Plea Offer to Defendant**
As you know, “defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process.” Also, “during plea negotiations are ‘entitled to the effective assistance

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of competent counsel.”5 In Lafler, the U.S. Supreme Court explained that a defendant that declines a plea offer upon the erroneous advice of his/her defense attorney may have a claim of ineffective assistance of counsel. So that I may properly advise Mr. Client on this matter, please confirm, in writing, any plea offer that the government has already extended and/or advise the defense of any plea offer that it would be willing to extend to Mr. Client. In exchange, I will either discuss or re-review the plea offer (if any) with Mr. Client and then advise the government of his decision.

XI. Specific Requests

a) Any audio or video of the incident including, but not limited to, the traffic stop, “pat-down” of Mr. Client, arrest of Mr. Client, and search of the vehicle. If no audio or video recordings exist, please advise me in writing.

b) Any scientific and/or forensic test results, regardless of the nature of the result, performed on any of the physical evidence in this case, including all items submitted to the Southwestern Institute of Forensic Sciences. This request includes, but is not limited to, any fingerprint or DNA testing done on the “cardboard box” and “two tape/plastic wrappers” described in the SWIFS document marked “Exhibit 7.” If no testing has been done, please advise me in writing.

c) Any reports/synopsis of investigation, reports of interview, and associated surveillance of anyone else related to this case, no matter how marginal. This request includes any of the reports/synopsis of investigation, reports of interviews, and associated surveillance of co-defendants Griffin and Young. I note that discovery already provided by the government included reports from both DEA and ATF. It therefore, seems likely that, at the minimum, some individual(s) related to this case were under investigation by the DEA. The defense considers this to be a Brady request. If no such reports/synopsis of investigation, reports of interview, or associated surveillance exists please advise me in writing.

d) A copy of any cellular or mobile telephone records that the government or law enforcement has obtained in connection with this or any related case(s), regardless of whether the government intends to rely on such records at trial.

e) The opportunity to physically review and photograph the evidence in this case. In particular, the defense needs to physically review and photograph the above-described “card-board box,” “two tape/plastic wrappers,” the kilograms of powder cocaine, the duffel bag in which the $175,350 and Mr. Client’s wallet were reportedly found by the police. If these items are no longer in possession of the government or law enforcement, or are for some other reason unavailable, please advise me in writing. To schedule a review of the evidence, either you or a law enforcement agent may contact me at 817-457-2999.

Thank you for your time and consideration of this matter.

Sincerely,

JOHNSON, VAUGHN & HEISKELL

5 Id.
JOHN DOE'S OMNIBUS MOTION FOR DISCOVERY AND INSPECTION

The United States has provided the defense thousands of pages of discovery, including the defendant’s post arrest statement. Nevertheless, certain evidence has not been provided as of this date such as Giglio material or any notice of the government’s intent to offer 404(b) evidence. Therefore, in an abundance of caution, John Doe respectfully requests this Honorable Court, pursuant to Rule 16 of the Federal Rules of Criminal Procedure and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, order the Government to produce for inspection and copying the following, which are known to, or are in the possession of, the Government or any of its agents, or which through due diligence would become known from the investigating officers or witnesses or persons having knowledge of this case.

A. OTHER STATEMENTS OF THE DEFENDANT

1. Discovery of statements or confessions of John Doe under Rule 16(a)(1), Federal Rules of Criminal Procedure, should include not only written or recorded statements made by John Doe to Government agents, but to other individuals as well. Davis v. United States, 413 F.2d 1226, 1230-1231 (5th Cir. 1969); United States v. Viserto, 596 F.2d 531, 538, 4 Fed. R. Evid. Serv. 32 (2d Cir. 1979).

2. Discovery of John Doe's statements under Rule 16(a)(1) should include not only verbatim statements made by John Doe, but also any summaries or Government reports, notes, or interviews setting out the substance of John Doe's statements or statements attributable to him. United States v. Fioravanti, 412 F.2d 407, 411-412 n.12 (3d Cir. 1969); United States v. Jefferson, 445 F.2d 247, 250 (D.C. Cir. 1971).

3. Even if the oral statement is made to a third party who then makes a statement to the Government, the substance of the John Doe's statement should be discoverable. United States v. Thevis, 84 F.R.D. 47, 55-56 (N.D. Ga. 1979). Although the Jencks Act requires that statements by third parties to the Government be produced prior to cross-examination by the Defendant's attorney, there is authority to allow the Court to order such production earlier, even prior to trial. Id. Davis v. United States, 413 F.2d at 1230-1231.
(recordings of conversation between a defendant and a government informant held to be statement of defendant and discoverable).

B. STATEMENTS ALLEGED TO BE ADMISSIBLE UNDER THE COCONSPIRATOR'S EXCEPTION TO THE HEARSAY RULE

1. As a Defendant's agent, statements made by co-conspirators within the scope of that agency and in furtherance of same are said to be impliedly authorized by John Doe as a principal and are, therefore, admissions by John Doe. Given that such co-conspirator's statements are admissible because they are treated as statements of or adopted by John Doe, then such statements should be discoverable as John Doe's own, pursuant to Rule 16(a)(1)(A), on the same theory. *United States v. Mays*, 460 F. Supp. 573, 575 (E.D. Tex. 1978).

C. CRIMINAL RECORD OF JOHN DOE


D. TANGIBLE OBJECTS

1. Rule 16(a)(1)(C), Federal Rules of Criminal Procedure, authorizes the discovery of all books, papers, documents and tangible objects in the possession or control of the Government. The tangible objects requested, including but not limited to the papers, instruments, writings, and documents herein, are all tangible objects obtained from John Doe and others by seizure.

2. These objects are discoverable since the Government relied upon them in obtaining an indictment against John Doe, and, they are, of necessity, "material" to the cause and the preparation of an adequate defense. *United States v. Pascual*, 606 F.2d 561, 565-566 (5th Cir. 1979); *United States v. Lambert*, 580 F.2d 740, 744 n.4 (5th Cir. 1978).

E. STATEMENTS OF CO-DEFENDANTS


2. Production of a co-defendant's statement is important not only to adequately prepare a defense and to determine whether or not to advise John Doe to take the stand, but also is critical to the determination of whether or not to seek a severance from any co-defendants under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968).

F. PERSONS HAVING KNOWLEDGE OF CASE

1. The names and addresses of persons known to and interviewed by the Government who have knowledge of facts pertaining to this case are discoverable pursuant to Rule 16(a)(1)(C), Fed. R. Crim. P.; Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); *United States v. Baum*, 482 F.2d 1325, 1331 (2d Cir. 1973):
Witnesses, particularly eyewitnesses to a crime, are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.

*Gregory v. United States*, 369 F.2d at 188.

3. Upon request, the Government must ordinarily disclose the whereabouts of each government witness unless the Government can show why such disclosure should not be made. The witness' desire not to be interviewed is an insufficient showing of why disclosure should not be made. *United States v. Opager*, 589 F.2d 799, 805, 3 Fed. R. Evid. Serv. 1013 (5th Cir. 1979); *United States v. Chaplinski*, 579 F.2d 373 (5th Cir. 1978).

**G. CRIMINAL RECORDS OF GOVERNMENT WITNESSES**

1. The arrest and conviction records, or "rap sheets," of individuals the Government plans to call as witnesses should be discoverable pursuant to Rule 16(a)(1)(B)(C), Fed. R. Crim. P.

2. This information is critically important information for meaningful cross-examination by John Doe's counsel. And John Doe, unlike the Federal Government with its vast data storage and investigative facilities, is at a substantial disadvantage without such information. Wright, Federal Practice and Procedure, Criminal, § 254 at 91-92, (noting that defense counsel is at a "substantial disadvantage" without the criminal records of Government witnesses in advance of trial).

3. In *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) the criminal record of a key Government witness was ordered disclosed by the Fifth Circuit Court of Appeals because it was determined to be of value in impeaching that witness' credibility, and favorable to defendant.

**H. STATEMENT OF INDIVIDUALS WHO WILL NOT BE GOVERNMENT WITNESSES**

1. The written statements in the possession of the Government of individuals who the Government does not plan to call as witnesses are discoverable under the provisions of Rule 16(a)(1)(C), Fed. R. Crim. P., as such statements would not be obtainable at any time under the Jencks Act, since that statute provides for discovery only of statements of witnesses who actually testified at trial. Accordingly, pursuant to Rule 16(a)(1)(C), Fed. R. Crim. P., John Doe should be granted discovery of the statements of any individuals who will not be witnesses at trial. Moore's Federal Practice, Section 16.05 (4). *Davis v. United States*, 413 F.2d 1226 (5th Cir. 1969).

**I. IDENTITY OF INFORMER**

1. The name, identity and whereabouts of an informer who gave information leading to the arrest of John Doe, as well as information as to whether said informer was paid by the Government for such information, is discoverable pursuant to Rule 16(a)(1)(C), Fed. R. Crim. P., where said informant is a witness to or has knowledge of facts relevant to the case. *United States v. Barnes*, 486 F.2d 776 (8th Cir. 1973); *Roviaro v. United States*, 353 U.S. 53, 64, 77 S. Ct. 623, 629 (1957); *United States v. Nixon*, 777 F.2d 958, 19 Fed. R. Evid. Serv. 932 (5th Cir. 1985); *United States v. Fischel*, 686 F.2d 1082 (5th Cir. 1982).

**J. EXAMINATIONS, TESTS AND EXPERIMENTS**
1. Discovery of the examinations, tests and experiments requested herein is authorized by Rule 16(a)(1)(D), Fed. R. Crim. P. No specific showing of materiality or reasonableness is required under the mandatory provisions of Rule 16(a). United States v. Hughes, 413 F.2d 1244, 1250 (5th Cir. 1969), cert. granted, 396 U.S. 984, 90 S. Ct. 479 (1969) and judgment vacated as moot, 397 U.S. 93, 90 S. Ct. 817 (1970).

K. TRANSCRIPTS OF GRAND JURY TESTIMONY

1. The transcript(s) of the testimony of individuals who testified before the Grand Jury in this case, which are requested herein are discoverable pursuant to Rule 16(a)(1)(C), Fed. R. Crim. P., since such transcripts are "documents" under the rule. United States v. Hughes, 413 F.2d at 1255-57.

2. Discovery of recorded testimony of witnesses other than John Doe may be discoverable pursuant to Rule 6(e), Fed. R. Crim. P., which provides for pre-trial discovery of such Grand Jury testimony. Dennis v. United States, 384 U.S. 855, 86 S. Ct. 1840 (1966).

3. Grand Jury testimony should be disclosed any time the Government demonstrates no need for secrecy, Nolan v. United States, 395 F.2d 283, 286 (5th Cir. 1968), and the defense shows a semblance of need (e.g. where said Grand Jury witnesses are individuals the Government intends to call at trial). Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968), opinion supplemented, 404 F.2d 1335 (D.C. Cir. 1968); United States v. Bright, 630 F.2d 804, 6 Fed. R. Evid. Serv. 550 (5th Cir. 1980).

4. Where, as here, the Government's case may depend upon oral, unrecorded statements of John Doe or alleged co-conspirators, any of the Grand Jury testimony regarding the substance of those statements is necessary to adequately prepare a defense and disclosure should be required prior to trial. Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements. Dennis v. United States, 384 U.S. at 872-873, 86 S.Ct. at 1850-51.

L. EXCULPATORY EVIDENCE

1. The exculpatory or favorable evidence requested herein is discoverable pursuant to the Due Process clause of the Fifth and Fourteenth Amendments to the Constitution. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

2. This right of John Doe to disclosure of "favorable" evidence exists whether such evidence is material to the John Doe's guilt or to mitigation of his punishment, Brady at 1196-97, and regardless of whether such exculpatory evidence would be admissible in John Doe's behalf at trial or in obtaining further evidence.

3. Evidence which may serve to impeach the testimony or credibility of a Government witness is discoverable under Brady since the duty upon the Government to disclose evidence favorable to a defendant under Brady applies to any information favorable to the accused either as direct or impeaching evidence.

4. The Supreme Court has placed upon prosecutor’s the affirmative duty to determine whether exculpatory evidence is in the possession of any agent or agency involved in the investigation of the Defendant. Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555 (1995). The United States Attorney or other agents of the United States Government involved in the investigation and preparation of this case have in their possession, custody or control of each of the above requested items and information, or through the exercise of reasonable diligence would be able to obtain such possession or locate the whereabouts of such items or information. Each of these items is material to the preparation of an adequate defense and is reasonable in light of the facts set out herein.

M. PROMISES TO CO-DEFENDANTS OR UNINDICTED COCONSPIRATORS OR OTHER WITNESSES
1. The evidence of any representations which have been made by the Government or which the
Government will make at any future time is discoverable pursuant to the Due Process Clause of the Fifth
and Fourteenth Amendments to the Constitution, and the withholding of any such evidence constitutes a
Such evidence is not only exculpatory in the sense that it is legitimate grounds for impeachment of any
witnesses the Government may call to testify against the Defendants, *Williams v. Dutton*, 400 F.2d at 800
(impeachment evidence is exculpatory evidence discoverable under *Brady*), but also is discoverable by
Defendant in order to show such witnesses' bias or prejudice in testifying at such trial. *Davis v. Alaska*, 415

**N. EVIDENCE OF OTHER ACTS**

1. Federal Rule of Evidence 404(b) permits the government to introduce:

   Evidence of other crimes, wrongs, or acts… [other than to prove character] …for other purposes,
such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or accident…

   However, the government is required to provide notice of its intent to introduce such evidence:

   [U]pon request by the accused, the prosecution in a criminal
   case shall provide reasonable notice in advance of trial, or during trial
   if the court excuses pretrial notice on good cause shown, of the
   general nature of any such evidence it intends to introduce at trial.

2. Defendant John Doe so requests.

   WHEREFORE, John Doe respectfully moves this Honorable Court to Order the production of the
   above described papers, documents, and information now in the possession of the Government or which
   through reasonable diligence could be obtained or located, and for such other and further relief as this
   Honorable Court should deem just and proper.

Respectfully submitted,

/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

**CERTIFICATE OF CONFERENCE**
**CERTIFICATE OF SERVICE**
**ORDER**
COMES NOW, the defendant, JOHN DOE, by and through undersigned counsel, and hereby moves this Honorable Court to order the government to disclose the identity of the confidential informant in this case and to order that the government provide the defense with the correct address of said informant and/or make said informant available to the defense for the purpose of an interview. Additionally, the defendant seeks discovery of the informant’s prior record, promised immunities, and evidence of issues of bias or credibility, and moves the Court to order the government to produce this information. In support of this motion, defendant shows that he has previously made a request pursuant to F. R. Crim. P. 16 for this information, a copy of said request is attached.

Defendant further moves the Court for an evidentiary hearing on this motion and requests that, pursuant thereto, the Court conduct an in camera examination of the confidential informant in this case.

Defendant JOHN DOE was indicted on May 30, 2016, for delivery of cocaine base. The conduct referred to allegedly occurred on or about January 5, 2016.

Discovery has revealed the following facts about the case: at the time of the alleged offenses, a civilian confidential informant (CI) was acting as an agent of the D.E.A. pursuant to an ongoing investigation of suspected narcotics dealings. The informant is alleged to have introduced Special Agent Battiste to a potential source of cocaine on January 5, 2016, and was present on January 5, 2016, when the cocaine was allegedly delivered by the same individual. The informant allegedly identified the deliverer as JOHN DOE. At all times relevant to the charged transactions the informant was not only a percipient witness, but was a participant in those transactions.

LAW

The seminal case on the privilege afforded government informers and the circumstances requiring disclosure of their identities is Roviaro v. United States, 353 U.S. 53 (1957). In that case the Supreme Court explained:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of that privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that function.
Roviaro, 353 U.S. at 59. However, the Court further explained that the privilege is limited by:

“...the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of his cause, the privilege must give way. [Footnote omitted.] In these situations, the trial court may require disclosure and, if the Government withholds the information, dismiss the action.” [Footnote omitted.]

Roviaro, 353 U.S. at 60-61. In Roviaro, the Court articulated the method for evaluating whether the identity of a confidential informant should be ordered disclosed:

The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Roviaro, 353 U.S. at 62.

In evaluating claims for disclosure of an informant's identity, the Fifth Circuit has refined the principles enunciated in Roviaro to a three-part test:

First, we evaluate the level of the informant's involvement in the alleged activity; the greater the participation, the more likely disclosure is required. Second, we consider the helpfulness of disclosure to the asserted defense. The third factor is the government's interest in nondisclosure.


Defendant JOHN DOE submits to the court that he is entitled to know the identity of the confidential informant under the principles of Roviaro and the jurisprudence of the Fifth Circuit, as set forth in his argument below.

ARGUMENT

The instant case is so similar to Roviaro that, as a matter of law, the court should order the government to disclose the identity of the confidential informant.

At least one Circuit has held that where a case bears strong similarities to Roviaro, disclosure of the informant's identity is required as a matter of law. In United States v. Price, 783 F.2d 1132 (4th Cir. 1986), the Fourth Circuit stated:

Due to the similarities in these cases, it is clear from the record before this court that disclosure in this case was required as a matter of law. [Footnote omitted.]

Price, 783 F.2d at 1140. All of the same factors which led the court in Price to conclude that disclosure was required as a matter of law are present in this case. Disclosure of the identity of confidential informant to the defense is required as a matter of law.
Defendant further moves the court to order the government to produce the informant for an interview by the defense or, alternatively, to produce his current address. The Fifth Circuit has held that when "the court has ordered disclosure of [an informant's identity], the prosecutor must make known the informant's name and address and must make a reasonable effort to produce the informant at trial." Fitzpatrick v. Procunier, 750 F.2d 473, 476 (5th Cir. 1985). Furthermore, in order to more effectively interview the informant, the defense seeks discovery of the informant's prior record, promised immunities, and evidence of issues of bias or credibility. United States v. Auten, 632 F.2d 478 (5th Cir. 1980); Giglio v. United States, 405 U. S. 150 (1972); Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); United States v. Fowler, 465 F.2d 664 (D. C. Cir. 1972).

Evidentiary hearing and in camera examination

In the event that the Court is not satisfied with the showing of entitlement to disclosure set forth above, defendant further moves that the Court grant an evidentiary hearing thereon and conduct an in camera examination of the confidential informant whose identity is sought to be disclosed in order to determine the need for disclosure. As the Eighth Circuit has held, "[t]he District Court may undertake an inquiry into the facts without violating the informant privilege by holding an in camera proceeding to determine the materiality of the informant's knowledge [footnote setting forth procedure for such a hearing omitted]." United States v. Grisham, 748 F.2d 460, 462 (8th Cir. 1984); see also, United States v. Hurse, 453 F.2d 128, 130-31 (8th Cir. 1972), cert. denied, 414 U.S. 908 (1973), and authorities cited therein.

Conclusion

For the reasons stated above, defendant JOHN DOE is entitled to disclosure of the identity of the confidential informant. He is likewise entitled to have the government produce the informant for an interview and/or to provide the defense with the current address of the informant. He is further entitled to discovery of the CI's prior record, promised immunities, and any other information bearing on bias or credibility of the informant. Accordingly defendant respectfully moves the Court to order the government to produce this information and further moves for an evidentiary hearing on these issues, including an in camera examination of the CI.

Respectfully submitted,

Respectfully submitted,
/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

/CERTIFICATE OF CONFERENCE/
/CERTIFICATE OF SERVICE/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
DEFENDANT'S MOTION FOR BILL OF PARTICULARS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

COMES NOW JOHN DOE, defendant, by and through undersigned counsel and moves this court to order that the government, pursuant to Rule 7(f), counsel requests the government to clarify the indictment by filing a bill of particulars. In support of this motion counsel shows as follows:

A. BILL OF PARTICULARS
   (RULE 7(f) Fed. R. Crim. P.)

Counsel has finally completed an exhaustive review of the more than 10,000 pages in discovery provided by the government that encompasses alleged transactions in the states of Tennessee and Mississippi. Approximately 100 individuals are identified in the voluminous pages provided. The time frame encompassed in said discovery covers the time frame from 2006 until 2008, as to this alleged conspiracy. However, the indictment alleges a more expansive time frame from 2000 to 2008. In order to avoid any surprise and resulting prejudice as a result of government witnesses whose statements may not be memoralized or recorded in any way, and, thus, at this time not provided to counsel, the defendant respectfully requests this Court to Order the government to file a bill of particulars to inform the defendant more precisely the when, where and to whom the distribution was targeted during the time frame alleged.

WHEREFORE, premise considered, Mr. Doe moves that the Court exercise its discretionary power under Fed. Rule Crim. P. 7(d), 7(f) and order the Government to file a bill of Particulars in this matter as more specifically requested herein by Mr. Doe.

Respectfully submitted,
/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

CERTIFICATE OF SERVICE/ and CERTIFICATE OF CONFERENCE

NOTARY STAMP & OATH

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION
MOTION TO STRIKE SURPLUSAGE

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

COMES NOW JOHN DOE, defendant, by and through undersigned counsel and moves this court to order that the government Strike Surplusage from the indictment in this cause pursuant to Fed. Rule Crim. P. Rule 7(d). In support of this motion counsel shows as follows:

A.  SURPLUSAGE  
   (RULE 7(d) Fed. R. Crim. P.)

1. As to the Indictment please strike the following language “That starting from on or about sometime in 2000…” since there is no discovery provided to counsel to reflect any transactions from 2000 to 2006 that relates to the alleged conspiracy in our case. Counsel has received over 10,000 pages of discovery and this expansive time frame is not referenced in said discovery as it pertains to this alleged conspiracy.

2. As to the Indictment also strike the following language, “…others both known and unknown to the grand jury…” since it suggests, together with the above language, a greater conspiracy that can be arguably proven.

3. Mr. Doe will suffer great harm and prejudice by allowing the above cited language to remain in our indictment as outlined in the affidavit attached hereto as Exhibit A.

WHEREFORE, premise considered, Mr. Doe moves that the Court exercise its discretionary power under Fed. Rule Crim. P. 7(d), 7(f) and order the Government to strike the surplusage referenced above or, in the alternative, file a bill of Particulars in this matter as more specifically requested by Mr. Doe.

Respectfully submitted,
/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

CERTIFICATE OF SERVICE

CERTIFICATE OF CONFERENCE

EXHIBIT A

STATE OF TEXAS                     )
COUNTY OF TARRANT                   )
AFFIDAVIT
OF MICHAEL P. HEISKELL

My name is Michael P. Heiskell and I am over the age of eighteen year and of sound mind and state the following under oath:

I am the attorney for John Doe, who is accused in Count 1 of this indictment with four other individuals with Conspiracy to Possess with Intent to Distribute Cocaine. Count 1 uses the phrase that other members of said conspiracy are “known and unknown to the grand jury.” The discovery provided by the government in this case only reveals and identifies the accused individuals named in this indictment, and does not allude to any other individuals in any way. This phrase in the indictment will require undersigned counsel together with his investigator to spend countless hours in trying to discover who these individuals are via conferences with the government and co-counsel. If there are no such individuals this is a needless, cumulative, and prejudicial phrase that should be struck. By striking same the court will economize the discovery and shorten the trial of this cause.

____________________
Michael P. Heiskell

SUBSCRIBED AND SWORN TO BEFORE ME on this the _____ day of __________, 20__.  

____________________
Notary of Public Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA                           §
§
V.                                                   §
§ CRIMINAL NO.
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE SURPLUSAGE AND THE MOTION FOR BILL OF PARTICULARS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

I.

A Bill of Particulars should be granted where the matters requested are necessary to inform defendant of the charges against him with sufficient precision to enable him to prepare his defense, and avoid surprise, or necessary to enable defendant to plead a double jeopardy bar of further prosecution for the same offense. United States v. Gorel, 622 F.2d 100 (5th Cir. 1979), cert. denied, 445 U.S. 943 (1980); see also, United States v. Mato-Peralta, 691 F. Supp. 1988 (S.D.N.Y. 1988) (proper function of bill of particulars is to apprise defendant of charges against him with necessary precision so as to avoid unfair surprise at trial, and to preclude second prosecution for the same offense). See also, Grady v. Corbin, 110 S.Ct. 2084 (1990).

Without knowing the specific dates of any alleged conduct in the conspiracy count, Mr. Doe is unable to prepare a defense, unable to receive effective assistance of counsel, and is deprived of a fair trial, due process of law, and protection from double jeopardy. See U.S. v. Bortnousky, 820 F2d 572 (2nd Cir. 1987). It is particularly important to allege dates in this indictment rather than a global reference to a 8 year time span.

Discovery has been expansive. However, of little help to the accused in this regard. It is like searching for a needle in a haystack.

II.

With respect to alleged drug conspiracy cases, bills of particulars are especially necessary in order to enable a defendant to adequately meet the charges against him and mount a competent defense. See United States v. Hughes, 817 F2d 268, 272 (5th Cir. 1987), also see United States v. Taylor, 707 F.Supp. 696 (S.D.N.Y. 1989) (defendant charged with conspiracy to distribute drugs entitled to bill of particulars stating names of all persons government would claim at trial were co-conspirators, dates that each such defendant joined conspiracy, and approximate dates and locations of any meetings or conversations at which government would contend defendant joined conspiracy, in order to allow defendant to prepare defense and to define crime charged sufficiently to bar future prosecution for the same offense; see also, United States v. William, 113 F.R.D. 177 (M.D. Fla 1986) (motion for bill of particulars granted insofar as it sought a list of unindicted co-conspirators, at least when that information was not otherwise known to defendants).

III.

Although the decision to grant a bill of particulars or not is within the sound discretion of the trial court, the Fifth Circuit has ruled that when faced with a conspiracy indictment a bill of particulars is a
proper procedure for discovering the names of unindicted co-conspirators who the government plans to use as witnesses. *United States v. Barrentine*, 591 F2d 1069 (5th Cir. 1979).

If, on the other hand, the government is not aware of other conspirators the language referring to same should be stricken. The prejudice to the accused of including unnecessary and unwarranted allegations is that: (1) the accused will be forced to spend precious time and energy attempting to refute allegations the government may have not intention of attempting to prove; (2) the reading of the allegation to the jury will make it appear that the government has evidence of a far greater conspiracy than that which the government has actual evidence of. Furthermore, the Court should be made aware if this case involves multiple conspiracies involving various individuals, or the single conspiracy alleged herein.

The above requested information necessary to Mr. Doe in order to avoid unfair surprise at trial and to prepare an adequate defense. Without same, he will suffer severe prejudice.

Respectfully Submitted,

/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA §
Plaintiff,

§
§

vs.

§
§

CRIMINAL CASE NO. _____________

JOHN DOE, et. al,
Defendants

DEFEandleNT JOHN DOE’S MOTION AND BRIEF IN SUPPORT OF
PRE-TRIAL PRODUCTION OF ALL JENCKS ACT MATERIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant John Doe (“Doe”), by and through his attorney of record, moves this Court for entry of an
order directing the Government to produce to Defendant Doe and his counsel at least one week in
advance of trial of this matter all “Jencks Act” material pursuant to 18 U.S.C. § 3500 and FED. R. CRIM.
P. 26.2.

Defendant Doe is aware that the statute and rule above mentioned do not require delivery of the Jenks
Act Materials on the date requested. Nevertheless, early disclosure of such materials would fulfill two
goals. First, it would allow counsel for Defendant Doe to better prepare cross-examination of the
witnesses, which is consistent with Defendant Doe’s due process rights and his entitlement to effective
assistance of counsel. Second it will promote judicial economy and the proper administration of justice
by avoiding delays, which would be caused if FED. R. CRIM. P. 26.2 and Section 3500 were strictly
followed by having the Government provide such information only after the witness testifies. The fact
that FED.R.CRIM.P. 26.2 (g) has been recently expanded to include production of Jencks material to
several proceedings indicates a willingness on Congress’ part to make Jencks material available at an
earlier date. The order requested is within the discretion of the Court.

WHEREFORE, PREMISES CONSIDERED, Defendant John Doe respectfully requests that this motion
be granted for the aforementioned reasons.

Respectfully submitted,
/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

CERTIFICATE OF SERVICE
CERTIFICATE OF CONFERENCE
TO THE HONORABLE JUDGE OF SAID COURT:

Defendant John Doe (“Doe”), by and through his attorney of record, respectfully moves this Court for the entry of an order compelling the Government to disclose, prior to trial of this matter, all evidence that is intends to offer pursuant to Rule 404(b) of the Federal Rules of Evidence. Such disclosure should include, but not be limited to the following:

1. A description of the other crime, wrong or act the government intends to offer, including the date(s) or place(s) the other crimes, wrongs or acts allegedly occurred;

2. The names and addresses of all persons who were witnesses to or have knowledge of such crime, wrong or act;

3. Copies of all documents, materials, or other tangible objects which the government intends to offer into evidence in conjunction with such 404(b) evidence;

4. All evidence which is exculpatory within the purview of Brady v. Maryland, 373 U.S. 83 (1963), with regard to such other crimes, wrongs or acts evidence, i.e., all evidence which detracts from the probative value of such evidence, or which indicates that the probative value of the evidence might be outweighed by its prejudicial effect; and

5. A statement of the purpose for which such evidence is offered, i.e., a declaration from the government of whether the evidence is being offered to show motive, or opportunity, or intent, etc.

WHEREFORE, PREMISES CONSIDERED, Defendant John Doe respectfully requests this Court to enter an order consistent with this motion,

Respectfully submitted,

__________________________
Attorney for Defendant
State Bar No. ____________________

JOHNSON, VAUGHN & HEISKELL

/CERTIFICATE OF SERVICE/
/CERTIFICATE OF CONFERENCE/
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA §

§

§

vs.

§

§

Cause No.

JOHN DOE §

DEFENDANT JOHN DOE’S MOTION AND BRIEF TO
PRESERVE AGENTS’ NOTES AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant John Doe (“Doe”), by and through his attorney of record, respectfully files this motion to preserve and review agents’ notes and in support thereof would respectfully show the Court as follows:

Defendant Doe requests the preservation of all rough notes, memoranda, resumes, synopses, etc. taken by any and all Government agents and others who were present during interviews of Defendant Doe conducted prior to indictment.

Defendant Doe is entitled to any written records containing the substance of relevant oral statements made by him according to FED. R. CRIM. P. 16(a)(1)(A). This Rule was amended in 1991 and effectively expands the earlier Rule, which required the Government to disclose only the “substance” of any oral statement, which the Government intended to offer into evidence at the trial. Thus, although the Defendant can and has presented compelling need for whatever rough notes of his interview might exist in the Government’s files, the Rule itself does not equivocate. The Defendant has requested whatever written records exist and therefore, the Government must disclose those written records to Defendant.

Earlier cases have sometimes determined that the provision of final memoranda is an adequate substitute for rough field notes. See, e.g., United States v. Service Deli, Inc., 151 F.3d 938 (9th Cir. 1998). But the applicability of Brady is irrelevant; the possible inconsistency between the rough notes and final memoranda of interview is not relevant to the absolute disclosure requirements contained in Rule 16(a)(1)(A). Courts have defined the term “any” as used by Congress to be very expansive. See United States v. Gonzales, 520 U.S. 1 (1997) (“Read naturally the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”); see also Berlanga v. Reno, 56 F.Supp. 2d 751, 760 n. 17 (S.D. Tex. 1999) (“when Congress says ‘any’ it means ‘any.....’”). Accordingly, when the Rule requires the production of “any” written record containing the substance of “any” relevant oral statement made by the Defendant, the Government should be required to produce any and all such written records, including rough notes.

Moreover, some courts before the 1991 amendment of Rule 16 have required the in camera inspection of FBI notes of witness interviews under the dictates of the Jencks Act, 18 U.S.C. § 3500. See, e.g., United States v. Gaston, 608 F.2d 607 (11th Cir. 1979). In any event, such a conclusion is unnecessary given the current language of Rule 16. Here, the notes may assist the jury in deciding whether any of the alleged admissions contained in the typed memoranda of interviews were actual witness statements or merely the agents’ and lawyers’ after-the-fact summaries of what they hoped to be the responses to leading questions.
Granting the instant request imposes no undue burden upon the government since, as a matter of policy, FBI agents are already required to preserve all investigative notes until there has been final disposition of a matter.

WHEREFORE, PREMISES CONSIDERED, Defendant Doe respectfully requests this Court to permit the inspection and copying of any handwritten notes taken by Government representatives during their investigation of Defendant Doe.

Respectfully submitted,

/S/
Attorney for Defendant
State Bar No. 09383700

CERTIFICATE OF CONFERENCE
CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA §
Plaintiff
§
§

VS. §
§
§

CRIMINAL NO. §

JANE DOE (3) §
Defendant
§

DEFENDANT’S MOTION AND BRIEF TO REQUIRE THE
GOVERNMENT TO COMPLY WITH RULE 106, FEDERAL RULES OF EVIDENCE

TO THE HONORABLE JERRY BUCHMEYER, UNITED STATES DISTRICT JUDGE NORTHERN
DISTRICT OF TEXAS, DALLAS DIVISION:

COMES NOW, JANE DOE, Defendant in the above styled and numbered cause, and moves this
Honorable Court to enter an order requiring the Government to be prepared at trial to comply with the
provisions of Rule 106 of the Federal Rules of Evidence and in conformity with the Due Process
requirements under the U.S. Constitution would show as follows:

I.
a. The defense knows that the Government intends to introduce at trial a large number of
writings, recorded statements, and portions of same. Which such writings and statements, and what
portions, the defense has no way of knowing at this time.
b. When the Government introduces any writing or statement or part thereof, Rule 106
gives the defense the right to compel the Government to introduce at that time any other part of such
writing or statement, or any other writing or statement which ought in fairness be considered
contemporaneously with the offered material.
c. To insure that Rule 106 is observed to avoid unfairness from the admission of less than
all of a writing or statement when more will establish the proper context, setting, or meaning of same and
to prevent delay at trial, the Court should instruct the Government prior to trial, to be prepared to comply
with Rule 106 should demand be made.

WHEREFORE, Defendant prays this motion be in all things granted.

Respectfully submitted,

Michael P. Heiskell
State Bar No. 09383700
JOHNSON, VAUGHN, & HEISKELL
5601 Bridge Street, Suite 220
Fort Worth, Texas 76112
(817) 457-2999
(817) 496-1102 fax

CERTIFICATE OF SERVICE
CERTIFICATE OF CONFERENCE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA §

VS. §

CASE NUMBER §

JOHN DOE §

MOTION TO TAKE DEPOSITIONS PURSUANT TO 18 U.S.C. § 3503
AND RULE 15 OF THE RULES OF CRIM. P. AND MEMORANDUM

COMES NOW, the defendant, JOHN DOE, by and through his attorney, Peter Fleury, Assistant Federal Public Defender, and moves this Court for an order that the testimony of witnesses be taken by deposition. In support of said motion, counsel for the defendant states that there are numerous witnesses essential to the defendant’s case that are citizens of Pakistan, and whose visas expire on August 31, 2016.

These are exceptional circumstances. Unless the trial is scheduled to be before August 31, 2016, these relevant and material witnesses will be lost forever. The Defendant’s counsel received from the Defendant letters sent to counsel care of the Defendant. The letters were postmarked in Nigeria. The Defendant submits these letters in support of the previous motion and requests that the Court reconsider its order denying the motion.

The Defendant’s entire defense in this case is that the Defendant was told from his earliest memories that he was born JOHN DOE, that he was born in the United States, that he was a United States citizen, that his mother was a United States citizen, and that he always used the name JOHN DOE. The Defendant claims to have been told he was brought from America to Nigeria by his Nigerian father at a very early age.

Attached are affidavits from the witnesses, as indicated above, indicating what their testimony would be if the Defendant had the ability to present it to the jury.

There are, of course, many other people who could testify as to the name used by the Defendant throughout his life, and his state of mind regarding his place of birth. The defendant shall supply names and addresses and further notice shall be given as required by 18 U.S.C. § 3503(b).

These witnesses, their testimony, and the evidence referred to are otherwise unavailable to the Defense. The Defendant does not have the funds to pay for the transportation of these witnesses, and knows of no procedure to otherwise secure their appearance at trial or otherwise produce their testimony. Unless the motion is granted, the Defendant will be denied his right to compulsory process for obtaining witnesses in his favor, a fair trial, due process, and the effective assistance of counsel as guaranteed by the fifth and sixth amendment to the United States Constitution.

Attorney for the defendant

/Certificate of Service/
/Certificate of Conference/
IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION  

UNITED STATES OF AMERICA §  
$  

vs. §  
CRIMINAL NO.: 3:00-CR-XXXX  
$  

JOHN DOE §  

DEFENDANT’S EX PARTE MOTION FOR LEAVE TO SERVE  
SUBPOENAS DUces TECUM UNDER RULE 17(C)  

Pursuant to Federal Rule of Criminal Procedure 17(c), Defendant moves this Court for leave to file subpoenas duces tecum upon non-parties for production of books, papers, documents, or other objects to Defendant’s counsel prior to trial. These subpoenas are needed for defense preparation in this document-intensive case. A proposed order is attached which includes a protective order covering the subpoenaed documents.

Respectfully submitted,

__________________________________
Attorney for Defendant
State Bar No. ____________________

CERTIFICATE OF CONFERENCE  
CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA §

§

vs. § CRIMINAL NO.: 3:00-CR-XXXX

§

JOHN DOE §

ORDER GRANTING LEAVE TO SERVE
SUBPOENAS DUces TECUM UNDER RULE 17(C)

Upon due consideration of the uncontested Motion of Defendants for Leave to Serve Subpoenas Duces Tecum upon non-parties for production of books, papers, documents, or other objects to Defendants’ counsel prior to trial, and pursuant to Fed. R. Crim. Proc. 17(c), it is hereby ORDERED THAT:

1. Defendant is authorized to obtain through his respective attorneys the issuance and service of subpoenas duces tecum upon non-parties, commanding them to produce books, papers, documents or other objects described in such subpoenas for inspection by defense counsel and for use as evidence at trial. Such subpoenas may command the delivery of such materials to an attorney for the defendants on a date or dates prior to the commencement of the trial in this action.

2. Materials produced by a non-party in response to a subpoena duces tecum served as authorized herein shall be deemed confidential and shall be subject to the restrictions on use and disclosure set forth herein, unless and until otherwise ordered by the Court.
   a) Confidential materials produced in response to a subpoena duces tecum served as authorized herein may be used by the receiving counsel and by any other persons obtaining access to such materials hereunder only for the purposes of preparing for and conducting the trial of this action.
   b) Prior to the trial of this matter, confidential materials produced in response to a subpoena duces tecum served as authorized herein shall not be disclosed by the receiving counsel, not by any other persons obtaining access to such materials hereunder, except that (i) receiving defense counsel may disclose such materials to counsel for the Government if deemed appropriate; and (ii) counsel for the parties may disclose such materials to attorneys, legal assistants, and staff personnel associated with or employed by such counsel, to consulting and/or testifying experts or their employees or agents retained by such counsel to assist in the preparation and defense of this case, and to the individual Defendants represented in this action by such counsel, all for the purpose and to the extent required to assist in counsels’ preparation for and presentation of the case at trial.

3. Any of the parties may move the Court for an order authorizing disclosure or use of specific confidential materials to persons or for purposes not specified above or determining that specified materials are not confidential and are not subject to the restrictions of this paragraph (c). Any party moving for such an order hereunder shall give notice of its motion to all the parties and to the non-party by whom the materials that are the subject
of the motion were produced. Any such motion, or any other pretrial motion which
discloses the contents or substance of confidential materials or to which such materials
may be attached shall not be required to be disclosed to the Government, subject to
further order of the Court.

4. Nothing herein shall be construed or applied to prohibit or restrict the disclosure or use of any
evidence, including evidence comprising, referring to or disclosing otherwise confidential
materials, in the course of the trial or other public proceedings in this matter.

IT IS SO ORDERED.

________________________________
United States District Judge

Signed at Dallas, Texas on the ____ day of __________________, 20__.

________________________________
United States District Judge
MOTION TO PERMIT JOHN DOE TO PRESENT
DEFENSE WITNESSES BY VIDEO-CONFERENCE

Defendant John Doe, by and through his undersigned counsel, respectfully requests that this Court permit counsel to present defense witnesses by video conference. In support of this motion, counsel would show as follows:

1. After the government rests its case, counsel for John Doe anticipates presenting testimony of a number of defense witnesses. Most of these witnesses reside in Louisiana and Mississippi. Most of these witnesses have jobs and cannot afford to be away from work.
2. It would be extremely expensive for John Doe to transport, house, and feed these witnesses in Fort Worth, Texas. It would be a financial hardship for these individuals to be away from work. These problems are particularly acute in a case such as this where it will be difficult to anticipate when their testimony will be needed.
3. These individuals can go to the Federal District Court in Shreveport to present their testimony.
4. Undersigned counsel has spoken with the facilities officer responsible for arranging a video conference in Shreveport, who stated that the District Court has the equipment to interface with this Court should this motion be granted.
5. If necessary, counsel can disclose the relevance of these witnesses to this Court ex parte.

MEMORANDUM OF LAW

Various courts have held that a defendant’s Sixth Amendment right to confrontation is not violated by the presentation of testimony by video conference so long as the witness: (1) is sworn; (2) is subject to full cross-examination; and (3) testifies in full view of the jury, court, defense counsel, and the defendant. United States v. Benson, 79 F.Appx. 813 (6th Cir. 2003) citing United States v. Gigante, 166 F.3d 75, 80 (2d Cir. 1999).

Other courts have sanctioned the process as well. See e.g., Garcia-Martinez v. City and County of Denver, 392 F.3d 1187, 1193 (10th Cir. 2004)(holding that trial court’s refusal to permit use of a deposition not an abuse of discretion where defendant had not shown that other means of presenting testimony had been pursued such as live video-conference); United States v. Sotomayor-Vazquez, 249 F.3d 1, 13 (1st Cir. 2001) (defense witness presented at trial by video-conference). Cooey v. Strickland, Slip Copy, 2009 WL 4842393, (S.D.Ohio 2009) (Live video testimony presented in Section 1983 civil rights action); United States v. Avery, Slip Copy, 2009 WL 5743215 (W.D.Tenn.2009)(Live video testimony by psychiatrist at competency hearing); Fuentes v. United States, Slip Copy, 2009 WL 1806660, (W.D.Va. 2009) (Defendant testified by live video at Section 2255 proceeding).
Because the presentation of defense witnesses is necessary for John Doe to exercise his Sixth Amendment right to present a defense and his Fifth Amendment right to due process of law, the Defendant respectfully requests that he be permitted to present defense witnesses through video-conference.

Respectfully submitted,

/s/
Attorney for Defendant
State Bar No. ______________

CERTIFICATE OF CONFERENCE
CERTIFICATE OF SERVICE
ORDER

IN THE UNITED DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA §

§
DEFENDANT JOHN DOE’S MOTION FOR AUTHORIZATION TO MAKE LIMITED DISCLOSURE OF CONTENTS OF THE PRESENTENCE INVESTIGATION REPORT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant John Doe seeks authorization of the Court to make limited disclosure of the contents of the Pre-Sentence investigation reports of the defendant, John Doe. In support of the same, the Defendant would show:

A. The above named defendant has been convicted in this cause of count one of the indictment and is awaiting sentencing. The United States Probation Office has prepared or is preparing a Presentence Investigation Report to the Court. Within such report, in the portion relating to any adjustment for Acceptance of Responsibility will be a recitation of the defendant’s version of his offense behavior. Within such report (in Part B-Defendant’s Criminal History) will be a detailed recitation of the defendant’s criminal history and a description of any offenses of which the defendant was convicted or the facts relating to an arrest. Within such report (in Part C-Offender Characteristics), will be any information relating to the defendant’s mental and emotional health and any substance abuse, and the defendant’s employment record.

B. The remaining defendant is currently scheduled for trial in this court on June 5, 2017. It is possible that the contents of the “defendant’s version” portion and Parts B and C of the presentence investigation reports of the convicted defendants may contain potential Brady/Giglio information. Under the rules of the Court, the contents of the presentence investigation report are confidential and not subject to disclosure. In order to avoid any potential claim of the suppression of Brady/Giglio material, the defendant seeks authorization to disclose (1) that portion of Part A of the report which contains any recitation of the defendant’s version of the offense conduct and (2) Parts B and C of each presentence investigation report to the undersigned attorney for your defendant.

C. The granting of such authorization will avoid any necessity for the Court to have make an in camera examination of the presentence investigation reports.

WHEREFORE, PREMISES CONSIDERED, the defendant prays that the Court will grant authorization to the Government to disclose (1) that portion of Part A of the report which contains any recitation of the defendant’s version of the offense conduct and (2) Parts B and C of each presentence investigation report to the undersigned attorney.

Respectfully submitted

____________________________
Attorney for Defendant
State Bar No.__________________

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

vs.

CRIMINAL NO.
MOTION AND BRIEF TO DISMISS
(MISCONDUCT BEFORE GRAND JURY)

NOW COMES JOHN DOE, Defendant, and moves to dismiss the indictment in this cause based upon misconduct before the grand jury and shows as follows:

I.
Undersigned counsel was faxed on Sunday afternoon, May 4, 2013, the grand jury transcript of testimony of case agent Frank Smith. In said transcript, it is apparent that the grand jurors were subjected to false and misleading statements made by agent Smith and the prosecutor. Said false and misleading statements include, but were not limited to the following:

I.
Agent Smith’ statement to the Grand Jury that Probationer Johnson has not been supervised by the defendant and that Johnson had paid “nothing” on his restitution during the 2012 calendar year. (Grand Jury transcript pp. 16-17)
In truth and fact, the government’s own exhibit (Government Exhibit 27) reflects payment of $800.00 toward restitution in 2012.

2. Agent Smith’ contention that Johnson had completed or discharged a state probation, which should have lead to Johnson’s revocation of his federal probation (Grand Jury transcript pp. 17-18)
In truth and fact, when a federal probationer discharges or completes a concurrent state probation, as was the situation in the instant case, there is no cause nor justification for the federal court to revoke this federal probation, unless other factors exist to reflect that he violated his federal probation for matters occurring during said probation.

1. Agent Smith’ allegation that your defendant received Mavericks tickets and other items of gratuities not alleged in the indictment. (Grand Jury transcript pp.19)
In truth and fact, the government now claims that Johnson provided Cowboy tickets as opposed to Mavericks tickets. Furthermore, the government has chosen to redact a full page regarding this testimony before the grand jury without representing a compelling reason for doing so. Counsel submits that in redacting said testimony from defendant’s transcript, it is obvious something improper or inappropriate was stated to the grand jury regarding the defendant and/or Johnson that likely implies that the defendant engaged in more criminal activity than alleged in the indictment. Said implication is misconduct. United States v. Sigma Int’l., 244 F.3d 841, 854 (11th Cir. 2001).

2. Agent Smith’ statement to the Grand Jury that “....they just hit a lick, which in street terms means something is stolen.” (Grand Jury transcript p. 24)
In truth and fact, said phrase “to hit a lick” does not mean something is stolen. It simply means that someone came across a good deal or received good fortune.

3. Agent Smith’ statement to the Grand Jury that Johnson stated to the defendant that he did not want to go to jail regarding the purchase of the digital camera. (Grand Jury transcript p. 25)
In truth and fact, there is no such statement made by Johnson reflected in the taped conversations regarding this transaction as reflected in the government exhibits.

4. Agent Smith’ testimony to the Grand Jury that the items the Defendant purchased were believed by him to be “hijacked cargo” after said term was used by the prosecutor. (Grand Jury transcript p.28)
This highly inflammatory term employed before the Grand Jury certainly implies more than the evidence reflects. There is no statement by Johnson, nor the defendant indicating that these matters were hijacked by anyone. Furthermore, once again the government redacts the remaining portion of Smith’ testimony, indicative of inappropriate comments.
5. Finally, Agent Smith tells the Grand Jury that your defendant “is known to have a lot of other things going on besides receiving stolen property, sexual favors, and other things.” (Grand Jury transcript p.29)

This statement accues the defendant of crimes not being investigated by the grand jury thus prejudicing the defendant. This is prohibited. See United States v. Hogan, 712 F.2d 757, 761-62 (2nd Cir. 1983). United States v. Feurtado, 191 F.3d 420, 423-25 (4th Cir. 1999).

The cumulative effect of the transgressions committed before the Grand Jury has resulted in an improper influence over said Grand Jury and justifies dismissal.

Respectfully submitted,

________________________________________
Attorney for Defendant
State Bar No. _______________________

CERTIFICATE OF SERVICE

CERTIFICATE OF CONFERENCE
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA §

vs. § NO. ______________________

JOHN DOE §

MOTION AND BRIEF TO DISMISS COUNTS EIGHT AND NINE OF THE
SUPERCEDING INDICTMENT (MULTIPlicitious INDICTMENT)

COMES NOW JOHN DOE, Defendant in the above-entitled and numbered cause and moves this Court
to dismiss Counts Eight and Nine of the Superceding Indictment, filed May 20, 2016, for the reason that
said counts are multiplicitious to counts Six and Seven of our indictment.
Counts Six and Seven charge your defendant with violations of 18 U.S.C. § 201 (c)(1)(B) (Illegal
Official). Counts Eight and Nine are based upon the identical set of facts as alleged in Counts Six and
Seven and, are thus, multiplicitous.
Indictments charging a single offense in different Counts are multiplicitious. See United States v. Miller,
576 F.3d 528, 531 (5th Cir. 2009), where indictment resulting in two (2) separate convictions of running
over police officers in a motor vehicle. It is deemed multiplicitious because crime resulted from same
conduct. Such indictments result in multiple sentences for a single offense, in violation of constitutional
double jeopardy provisions.
WHEREFORE, your defendant requests the Court dismiss Counts Eight and Nine of the Superceding
Indictment.

Respectfully submitted

________________________________________
Michael P. Heiskell
State Bar No. 09383700
JOHNSON, VAUGHN, & HEISKELL
5601 Bridge Street, Suite 220
Fort Worth, Texas 76112
(817) 457-2999

CERTIFICATE OF SERVICE

CERTIFICATE OF CONFERENCE
JOHN DOE, the defendant, is charged in count one of the indictment, along with four other individuals, with conspiracy to distribute and to possess with intent to distribute cocaine and cocaine base. The conspiracy count incorporates two separate and distinct crimes, one involving cocaine (punishable under 21 U.S.C. §841(b)(1)(A)(ii)) and the other involving cocaine base (punishable under 21 U.S.C. §841(b)(1)(A)(iii)). The sentence for violating the cocaine base statute far exceeds a sentence for violating the cocaine powder statute. Because the count charges [defendant] with two different crimes in a single count, the charge is duplicitous. The duplicity in this charge violates [defendant’s] constitutional rights to due process and a unanimous verdict. Therefore, the Court should dismiss count one.

Duplicity occurs when two or more separate offenses are joined in the same count. An indictment that charges two conspiracies in a single count is duplicitous. See United States v. Robin, 693 F.2d 376, 378 (5th Cir. 1982) (“‘Duplicity’ is the joining in a single count of two or more distinct and separate offenses.”); see also United States v. Klinger, 128 F.3d 705, 708 (9th Cir. 1997) (same); United States v. Murray, 618 F.2d 892, 896 (2d Cir. 1980) (same). An indictment must be measured in terms of whether it exposes the defendant to any of the inherent dangers present in a duplicitous indictment. United States v. Alsobrook, 620 F.2d 139 (6th Cir. 1980). These dangers are 1) if the indictment count fails to inform the defendant of the charges against him, 2) if the defendant would be subject to double jeopardy, 3) if the defendant would be prejudiced by evidentiary rulings at trial, and 4) if the defendant would be convicted by less than a unanimous verdict. See Robin, 693 F.2d at 378. Here, at least three of the enumerated dangers of a duplicitous indictment are present, thus dismissal is warranted.

First, count one fails to provide [defendant] with sufficient notice of the charges against him. This analysis begins the problems identified in [defendant’s] contemporaneously filed motion to dismiss or in the alternative for a fill of particulars for count one. The broad, vague and conclusory allegations of conspiracy are made even more problematic by fact that there are actually two different conspiracy charges set forth within count one. These problems are magnified because the “conspiracy doctrine is inherently subject to abuse and . . . the government frequently uses conspiracy to cast a wide net that captures many players . . . .” Thus, when evaluating a conspiracy charge courts must be “careful to guard against guilt by association, to ‘scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass.’” United States v. Evans, 970 F.2d 663, 668 (10th Cir. 1992) (quoting Kottekakos v. United States, 328 U.S. 750, 773 (1946)). Thus, particularly when combined with the other defects found in count one, the duplicitous nature of the count prevents [defendant] from having sufficient notice of the charge against him.

Second, the wording of the indictment may enable the government to re-try [defendant] on nearly the same charge if the jury were to accept him on count one. Count one charges him with a conspiracy to possess and distribute cocaine and cocaine base. If the jury were to acquit [defendant] on this count, the government may re-indict [defendant] and charge him with possession with intent to distribute either cocaine or cocaine base. If [defendant] is acquitted in this case, the government would argue that the jury concluded that [defendant] was not involved in a conspiracy involving both cocaine and cocaine base but just one or
the other. Such a scenario would unfairly subject [defendant] to double jeopardy as much of the same evidence in this trial would be used against him in the next trial.

Third, [defendant] is in danger of being convicted by a less than a unanimous jury verdict. Count one of the indictment is sure to confuse jurors as it incorporates several different crimes: a conspiracy, possession with intent to distribute cocaine base, and possession with intent to distribute cocaine powder. Matters are further complicated because the count involved four different individuals who have varying degrees of involvement. There is a significant likelihood that the jury might convict [defendant] without unanimously agreeing on [defendant’s] guilt of the same offense.

WHEREFORE for the foregoing reasons, the defendant moves this Honorable Court to dismiss count one of the indictment.

Respectfully submitted,

____________________
[Counsel for Defendant]

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served via first class mail upon:

[Name/Address]

____________________
[Counsel for Defendant]

Dated: ______________
MOTION AND BRIEF FOR SEVERANCE OF COUNTS

COMES NOW, the defendant, JOHN DOE, by and through undersigned counsel, and moves the Court, pursuant to the provisions of Rules 8 and 14 of the Federal Rules of Criminal Procedure, for a severance of count three of the Indictment and for a separate trial as to count one for the reason that count three is misjoindened and the joinder of all three counts is prejudicial.

RULE 8 MISJOINER

The gun the defendant possessed was not the gun used in the robbery and is not alleged in the indictment to be the gun used in the indictment.

Rule 8(a) allows joinder of two or more offenses in a single indictment only if the offenses charged... are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The possession of a gun is not a crime that is the same or similar character as the commission of a robbery. The allegation that the defendant possessed a gun nearly two months after the alleged robbery is not based on the same act or transaction as the any of the robberies, nor can it be said to be based on any common scheme or plan connecting the earlier completed robberies.

RULE 14 PREJUDICIAL JOINER, AND RULE 404(b)

Rule 14 states that "[i]f it appears that a defendant ... is prejudiced by a joinder of offenses .. in an indictment ... , the court may order a separate trial of counts ...".

The alleged offense in count three is not the same or similar character as in counts one and two. The Fourth Circuit has said in U. S. v. Foutz, 540 F.2d 733, that where two or more offenses are joined for trial solely on the theory that offenses were of the same or similar character, three sources of prejudice may justify the granting of a severance: (1) the jury may confuse and cumulate evidence and convict the defendant of one or both crimes when it would not convict him of either if it could keep evidence properly segregated; (2) that the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not to the other; or (3) that the jury may conclude that the defendant is guilty of one crime and then find him guilty of others because of his criminal disposition.

Foutz has an interesting factual basis because it involved two different robberies of the same bank within two and one-half months and the Court reversed for prejudicial joinder. The Court here admonishes at page 738 that "the only real convenience served by permitting joint trial of unrelated offenses against the wishes of the defendant may be the convenience of the prosecution in securing a conviction."

Furthermore, the prejudice to the defendant is clear and unambiguous. By the inclusion of Count three, the jury will be told the defendant is a convicted felon. The distillation of centuries of Anglo-American jurisprudence developed the bedrock principal that a defendant is to be presumed innocent and tried based on evidence relevant to allegation, not based on his character or reputation. Thus, for these and for other reasons, proof of a defendant's prior conviction has been deemed too prejudicial and too lacking in probative value to be admissible against the defendant. The inclusion of count three would violate this fundamental precept of our law. The government would be allowed to present before the jury evidence
that would otherwise be admissible on the robbery, and use of a weapon during the commission of a robbery charges, severely prejudicing his right to a fair trial based on admissible evidence. The defendant is even further prejudiced by the misjoinder as the jury will here evidence that he possessed a weapon on a date subsequent to the robbery. This evidence also would have been inadmissible as to the first two counts absent the prejudicial joinder.
WHEREFORE, the defendant prays that count three be severed from the indictment.

Respectfully submitted,

/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

/certificate of service/

/Certificate of Conference/
NOW COMES the defendant, JOHN DOE (hereinafter “Doe”) through counsel, and respectfully moves this Honorable Court for relief from improper and prejudicial jointer of your defendant in the Indictment under Rule 8, and pursuant to Rules 12 and 14 of the Federal Rules of Criminal Procedure, to sever and order a separate trial for this Defendant and certain others, on the following grounds:

I. BACKGROUND

Our Indictment is lengthy. It consists of six (6) separate conspiracies. The Indictment essentially charges the defendants with separate and unrelated schemes that lack the requisite sameness or commonality to permit their joiner of both offenses and Defendants under Rule 8 of the Federal Rules of Criminal Procedure. For example, Doe is charged with Conspiracy to Extort and Conspiring to Commit Money Laundering pursuant to said Extortion, a scheme that has no commonality in law, or in fact, to the four (4) separate conspiracies involving a combination of other co-defendants. Conversely, the other four (4) separate conspiracies and alleged overt acts involve separate schemes, have no commonality in fact, or in law, to defendant Doe. Yet all are in the same indictment.

II. CUMULATIVE EVIDENCE

Joint trial of these six (6) separate conspiracies, and other conspiracies within same, serve only to prejudice Doe by permitting a culmination of evidence on totally unrelated charges and defendants. Counsel is aware of the fact that evidence against co-defendants that “spill over” on a particular defendant is rarely sufficient to constitute “compelling prejudice.” However, our case is unique due to the extreme complex nature of the allegations, and the anticipated massive jury instructions that will be required to encompass six (6) separate conspiracies, and substantive counts that run the gamut from bribery of state and local officials (separate counts), to tax fraud and evasion (separate counts), to the forfeiture allegations. Our case presents an extreme and serious risk that the jury will be unable to make a reliable judgment about guilt, or innocence, despite any cautionary jury instructions. See Zafiro v. United States, 506 U.S. 534, 539 (1993).

If defendant Doe is tried with the other defendants in this case, charged in the four (4) separate conspiracies and varied substantive counts, he will be materially prejudiced because of the confusion engendered in the minds of the jury as to each defendant’s actual role and activities in the unrelated
transactions in this indictment. The jury may cumulate that evidence of the various offenses charged and find guilt, when, if considered separately it would not so find. Doe will be prejudiced by the interacting effect of the cumulative evidence for each offense and each defendant and overburdened by the presentation of simultaneous and separate defenses due to the improper joinder of counts and defendants.

III.

CO-DEFENDANTS STATEMENTS

Doe will be prejudiced by the admission in evidence of co-defendant statements through audiotapes and other evidence, which prejudice cannot be dispelled by cross-examination if the co-defendant does not take the witness stand and testify. Limiting instructions to the jury in this regard will unlikely erase the prejudice.

IV.

MISJOINDER

The key language for analysis under Rule 8 (b) is that the defendants be charged with having “participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.” United States v. Helms, 897 F.2d 1293, 1299-1300 (5th Cir. 1990). To define the “same act or transaction” of a number of defendants is truly to define the concept of a conspiracy, and the courts have so held. See, e.g., United States v. Broussard, 80 F. 3d 1025, 1036 (5th Cir. 1996); United States v. Polk, 56 F. 3d 613, 632 (5th Cir. 1995); United States v. Box, 50 F. 3d 345, 357 (5th Cir. 1995).

Some courts have found it useful to analogize a conspiracy to a wheel: “For a wheel conspiracy to exist those people who form the wheel’s spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise. Otherwise the conspiracy lacks ‘the rim of the wheel to enclose the spokes.’” Levine, supra at 663, quoting Kotzeakos v. United States, 328 U.S. 750, 755, 66 S. Ct. 1239 (1946).

In sum, the essence of a common plan (not “several similar plans”) must be adequately alleged in the indictment for it to pass the test of Rule 8(b), and this indictment manifestly does not.

V.

Prejudicial Joinder

Rule 14(a) provides, as a separate and additional source of relief available to Doe, that the court may order separate trials of defendants even if they are not misjoined under Rule 8(b):

The question of whether to sever the trials is in the sound and broad discretion of the trial judge. United States v. Hernandez, 962 F. 2d 1152, 1157-68 (5th Cir. 1992). See also, Schaffer v. United States, 221 F2d 17(5th Cir. 1955).

Doe cannot receive a fair trial without severance for all reasons cited hereinabove under “Misjoinder.” The injustice and denial of due process would be serious enough if the government could “prove” one offense by merely providing a second offense of similar character (the so-called “spill-over” effect)6.

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WHEREFORE, defendant John Doe prays for severance from each and every defendant indicted in the four (4) separate conspiracies, and the above referenced substantive counts, and for his separate trial as to each conspiracy alleged against him in the indictment.

Respectfully submitted,

/S/ Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

CERTIFICATE OF SERVICE

CERTIFICATE OF CONFERENCE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA §

§

v. § CASE NUMBER

§

JOHN DOE §

UNOPPOSED MOTION FOR LEAVE TO FILE
MOTION TO SUPPRESS STATEMENTS AND MEMORANDUM
(MOTION INCORPORATED)

1. MOTION FOR LEAVE

Now comes Defendant JOHN DOE, through undersigned counsel, and requests leave to file a motion to suppress statements the defendant is alleged to have made to his parole officer. The defendant’s attorney simply failed to recognize this issue. Counsel assumed the statements were made in a non-custodial setting, but it is clear that the statements were made while the defendant was in custody. Although trial is presently scheduled for August 21, 2016, the defendant is filing, contemporaneously with this motion, a motion to continue the trial setting, thus, if that motion is granted, leave to file this motion should not cause any undue scheduling problems for the court or the government. Leave should be granted pursuant to Fed. R. Crim. P. 12(f) to enable the defendant to receive effective assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

2. MOTION TO SUPPRESS (TO BE CONSIDERED, IF LEAVE TO FILE IS GRANTED)

A. Factual Background:
The defendant was arrested on March 15, 2016, on a parole violator’s warrant. The offense alleged in the indictment is based on facts and evidence surrounding this arrest. Subsequent to the arrest the defendant was interviewed by his parole officer. There is no indication in the discovery provided by the government that the defendant was read his rights as required in

B. Law and Argument:

As the Fifth Circuit has noted:

The government bears the burden of proving by a preponderance of the evidence that both the waiver of Miranda rights and the confession were voluntary. Colorado v. Connelly, 479 U.S. 157, . . . (1986); Lego v. Twomey, 404 U.S. 477, . . . (1972); United States v. Terrazas-Carrasco, 861 F.2d 93, 95 (5th Cir. 1988). United States v. Raymer, 876 F.2d 383, 386 (5th Cir. 1989), cert. denied, 493 U.S. 870 (1989).

The Fifth Circuit has also noted, where an in custody defendant was questioned by his parole officer:

... We have considerable doubt as to the propriety of even calling the parole officer as a witness for such a purpose. But, pretermitting that, we have no doubt that the testimony was inadmissible unless the officer gave prior Miranda warnings. A parolee is under heavy psychological pressure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer. The use of admissions extracted in this manner from the parolee, in his trial on charges based on the criminal conduct inquired about, raises an issue significantly different from that in United States v. Johnson, 455 F.2d 932 (5th Cir. 1972). There we held that because a parole revocation hearing was not an adversary or a criminal proceeding but rather was an administrative hearing wherein the exclusionary rule has no application, prior Miranda warnings are not required as a condition to the admission in evidence at the revocation hearing of statements made by the parolee to the parole officer. United States v. Deaton, 468 F.2d 54, 544 (5th Cir. 1972), cert. denied, 410 U.S. 934 (1973).

Conclusion
The defendant prays that this court grant leave to file the defendant’s motion to suppress the defendant’s statements to his parole officer. Furthermore, the defendant prays that if leave is granted, the court will consider the motion to suppress statements in this case, and absent a factual response by the government that indicates the motion should be denied, grant this motion to suppress statements. If the government avers that the Miranda warnings were given, and the defendant voluntarily waived his rights, the defendant requests a hearing on the matter.

Respectfully submitted,

/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700

CERTIFICATE OF CONFERENCE

CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA, §

v. § CRIMINAL NO. 4:02-CR-108

LEAMON RAY CAVITT, JR. §

MOTION TO SUPPRESS AND SUPPORTING BRIEF

Defendant, Leamon Ray Cavitt, Jr., by and through his counsel, Michael P. Heiskell, pursuant to the Fourth Amendment to the Constitution of the United States, hereby respectfully moves the Court to suppress both the physical evidence seized from Defendant and the statements made by him following the unduly extended traffic stop and detention underlying this case.

BRIEF IN SUPPORT OF MOTION TO SUPPRESS

I. STATEMENT OF UNCONTESTED FACTS

The facts set forth herein are based on the Department of Public Safety Videotape previously filed in this case, the Fifth Circuit opinion in United States v. Cavitt, 550 F.3d 430 (5th Cir. 2008) and the Joint Pre-Trial Hearing Order filed as Document # 24 in related case No. 4:04-CV-219 and are both undisputed and dispositive of this case.

2. Granelli approached the passenger side of the van Cavitt was driving, leaned into the window due to the fact that it was raining, and asked Cavitt for his driver's license.
3. After looking at the license Cavitt presented, Granelli commented on the fact that the license did not resemble Cavitt, stating, "Boy, you've changed a lot in this picture. Lost a bunch of weight?"
4. Cavitt informed Granelli that he was traveling back to his home in East St. Louis, Illinois, after visiting his daughter in Lancaster, Texas.
5. Granelli requested rental documents for the van, which Cavitt provided. The documents revealed that Cavitt had rented the van on October 27, 2002, at 12:21 p.m., and that it was due back on October 29, 2002.
6. Granelli asked for permission to sit in the passenger seat to get out of the rain. Inside the van, Granelli noticed several bags inside.
7. Granelli returned to his patrol car to check Cavitt's license and issue a warning. Inside the vehicle Granelli stated suspicions he had about Cavitt's behavior and stated to ride-along detective Jon Britton, "I sure would love to search this guy."
8. After a brief further discussion, Granelli “proposed a plan: ‘I’m going to tell him we’re gonna have to get off the road.’ He radioed Cavitt’s driver’s license number and tag information to dispatch and mused: ‘I wonder if there’s some place we can get out of the weather. ’ ” After again discussing the details of the van rental, Granelli again said “I think I’m going to see if he’ll follow me up to the Texaco station.” Ultimately, “Granelli resolved: ‘I’m gonna just go say – see if he’ll follow me over there, so I can get my business done without get everything wet. Think that will alarm him too much if I go do that?’”

7 As of July 20, 2009, the Government has not provided Defendant’s counsel with any statements allegedly made by Defendant. If such statements exist and the Government intends to use them, Defendant will address them in due course once the Government discloses them.
9. The license check came back negative.
10. Granelli approached the van and said to Cavitt “I’ve got a warning for you to sign but I can’t do it in this weather; can you follow me here up the road and we’ll get out of the rain real quick?” Cavitt agreed and complied.
11. Approximately six minutes later, at Exit 56, both vehicles pulled under an overhang. Both officers approached Cavitt’s van. Granelli did not ask Cavitt to sign the warning and did not return his driver’s license. Instead, he told Cavitt that he was previously unable to examine the rental papers due to the rain and asked to see them again. The officers also had Cavitt exit the van.
12. Granelli and Britton asked Cavitt more questions about his travels, whether there was a drug problem in East St. Louis, and whether Cavitt had ever used drugs. Cavitt admitted having used marijuana nine years ago. Granelli asked Cavitt whether anyone had ever asked him to haul drugs. Cavitt answered “no” and denied that there were any drugs in his van.
13. Granelli asked for permission to search the mini-van, and Cavitt responded, "Yeah, sure."
14. As Granelli and Britton were searching the van, Cavitt attempted to drive away and a struggle ensued. The officers did not return Cavitt’s driver’s license prior to searching the van.
15. Five kilograms of cocaine were located inside the van.

II. ARGUMENT

As succinctly stated by the Fifth Circuit in United States v. Cavitt, 550 F3d 430, 435 (5th Cir. 2008), citing United States v. Thomas, 12 F.3d 1350, 1366 (5th Cir. 1994) “[e]vidence obtained by the government in violation of a defendant’s Fourth Amendment rights may not be used to prove the defendant’s guilt at trial.” In connection with a traffic stop, a Fourth Amendment violation occurs when the detention extends beyond the valid reason for the stop. United States v. Cavitt, supra, at 436, citing United States v. Santiago, 310 F3d 336, 341-342 (5th Cir. 2002). More specifically, once the officer has verified that the vehicle in issue is not stolen and that defendant does not have any warrants outstanding, he must either issue a citation or warning and allow the defendant leave, unless the officer has a reasonable suspicion - supported by articulable facts - that a crime has been or is being committed. Id. No such suspicion or facts exist in this case.

On the contrary, the DPS videotape and the undisputed facts set forth herein plainly show that the officers did not have a “reasonable suspicion” nor any “articulable facts.” The officers knew that they did not have them and decided to concoct and implement a scheme to trick Defendant into following them to a location several miles away from the initial traffic stop so that they could carry out their illegal plan to search his vehicle at any cost. The detention, then, was plainly and unduly extended beyond the initial reason for the stop. Thus, the subsequent search — at the second location — was not reasonably related to the circumstances justifying the traffic stop and violated Defendant’s Fourth Amendment rights. Id.

To the extent that Defendant “consented” to the search at the second location, it was invalid as a matter of law because “Consent” induced by an officer’s misrepresentation is ineffective.” United States v. Cavitt, supra, at 439, citing United States v. Webster, 750 F.2d 307, 322 (5th Cir. 1984). The videotape and the undisputed facts set forth herein also show that the “consent” was invalid because it was involuntary and the product of coercion due to defendants’ illegal detention and the officers’ continued interrogation and failure to return his driver’s license. United States v. Cavitt, supra, at 439 , citing United States v. Jenson, 462 F3d 399, 407 5th Cir. 2006). See also, United States v. Jones, 234 F3d 234, 242 (5th Cir. 2000).

CONCLUSION

Since all of the evidence seized in this case was seized after Defendant’s illegal detention and removal to a location several miles from the initial traffic stop, it should all be suppressed.
Respectfully submitted,

/s/  
Michael P. Heiskell  
Texas State Bar No. 09383700  
JOHNSON, VAUGHN, & HEISKELL  
5601 Bridge Street, Suite 220  
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(817) 457-2999  
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CERTIFICATE OF CONFERENCE
CERTIFICATE OF SERVICE
DEFENDANT JOHN DOE’S MOTION TO SUPPRESS MISSISSIPPI TITLE III
COMMUNICATIONS FOR FAILING TO COMPLY WITH SEALING REQUIREMENTS

TO THE HONORABLE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

COMES NOW Defendant, JOHN DOE, by and through his attorney of record, and respectfully moves the Court for an order suppressing any and all evidence obtained from applications and orders pursuant to Title III authorizing the interception of wire communications, and all evidence derived therefrom, as a result of the Government’s failure to comply with immediate sealing requirements, and for cause would show unto the Court the following:

I. STATUTORY AUTHORITY

The statutory authority for interception of wire, oral, or electronic communications is found in 18 U.S.C. § 2518 et seq.

The specific authority relative to the sealing requirements is found in 18 U.S.C. § 2518(8)(a) which provides in part as follows:

“...the recording of the contents of any wire, oral, or electronic communications under this subsection shall be done in such a way to protect the recording from editing and other alterations. Immediately upon the expiration of the period of the Order, or extensions thereof, such recording shall be made available to the Judge issuing such Order and sealed under his directions.... The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be requisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom, under subsection (3) of § 5217.” (emphasis added).

II. FACTUAL BACKGROUND

The wire communications sought to be intercepted and monitored was a cellular telephone number subscribed by Sherrell Crawford of Gulfport, Mississippi, in possession of and utilized by co-defendant, Derek Pettis. Your defendant, John Doehas been identified by the Government as having his voice captured on said recordings. He, therefore, has standing as an aggrieved person.
On May 22, 2007, this court ordered the authorization of a thirty (30) day interception of wire communication based upon an Application for said interception being filed by the Government. (Appendix: Exhibit A).

On May 22, 2007, the interceptions apparently commenced. The thirty day order granted on May 22, 2007, would expire thirty (30) days from said date, or more specifically on June 21, 2007.

At the expiration of the Court Order [June 21, 2007] no immediate Order to Seal the audiotapes derived from the interceptions recorded between May 22, 2007, and June 20, 2007, was Ordered by the Court. However, an Order was entered on June 25, 2007, for said recordings to be sealed (Appendix: Exhibit B). The Order to seal was entered four (4) days from the date of expiration from the original order and five (5) days after the interception was terminated. In addition, there exists a Nunc Pro Tunc Order for sealing of this same information dated July 12, 2007, seventeen (17) days from the date of the original order and eighteen (18) days after the interception was terminated.

III.
SUPPRESSION WARRANTED FOR FAILURE TO COMPLY WITH 18 U.S.C. § 2518 (8)(a)

All materials intercepted as a result of the Order of May 22, 2007, (Appendix: Exhibit A) including, but not limited to, audio conversations, monitor logs, minimization logs, and reports of activity should be suppressed as a result of the Government’s failure to comply with the immediacy requirements of 18 U.S.C. § 2518(8)(a). The Order of May 22, 2007, (Appendix: Exhibit A) was terminated on June 21, 2007. No sealing Order was entered until June 25, 2007, (Appendix: Exhibit B), four (4) days after the expiration of the June 21, 2007, Order, and five (5) days after the interception terminated. A Nunc Pro Tunc Order of Sealing covering the same information was issued even later – July 12, 2007.

Finally, all material intercepted as a result of any subsequent interception Orders including, but not limited to, audio conversations, monitor logs, minimization logs, reports of activity should be suppressed because such interceptions were predicated, in part, on information illegally obtained by the May 22, 2007, Order, (Appendix: Exhibit A). Such material, illegally obtained because it failed to comply with the sealing requirements of 18 U.S.C. § 2518(8)(a), has so tainted any subsequent Orders to intercept, as to make it unsupported by probable cause as a matter of law.

WHEREFORE, it is respectfully prayed that all material seized pursuant to the Orders for interception of wire communications from the cellular phone described above be suppressed, and for such other and further relief to which he may justly entitled. Defendant further prays for the Court to Order a pre-trial hearing on this motion.

Respectfully submitted,

/s/
Attorney for Defendant
CERTIFICATE OF CONFERENCE

CERTIFICATE OF SERVICE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

V.

CRIMINAL NO.
01:08-CRXXXXXXX
DEFENDANT JOHN DOE’S BRIEF IN SUPPORT OF BOTH
MOTIONS TO SUPPRESS TITLE III INTERCEPTIONS
(MISSISSIPPI AND TENNESSEE)

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

Defendant, John Doe (“Doe”), files this his Brief in Support of His Motion to Suppress seeking to suppress all material seized as a result of interceptions pursuant to Title III, 18 U.S.C. § 2510 et. seq., and the Orders of May 22, 2007, September 11, 2007, and October 22, 2007.

TITLE III INTERCEPTIONS

The interception of wire, oral and electronic communications is governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”), 18 U.S.C § 2510 et. seq. The interception of “Title III” communications requires a court order based upon an application by an authorized applicant that sets forth “a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including” the nature of the crime being committed, the identity of the person committing the offense who is to be intercepted, the types of communications to be intercepted and a particular description of the facilities or place subject to interception. 18 U.S.C. § 2518(1). Title III requires the applicant for an order to provide, “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” 18 U.S.C. § 2518(1)(c). Title III authorizes the interception of wire, oral or electronic communications for a period up to, but not to exceed thirty (30) days. See 18 U.S.C. § 2518(5). The authorizing court may grant extensions of the original interception order but such extensions may not exceed thirty (30) days in duration. See id.

DELAY IN OBTAINING SEAL REQUIRES SATISFACTORY EXPLANATION

Section 2518(8)(a) provides, “[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions.” Title III provides an exclusionary rule for failure to comply with the sealing requirements of the statute. It states, “[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral or electronic communication or evidence derived therefrom...” 18 U.S.C. § 2518(8)(a). The purpose of the seal is to ensure that the government has no opportunity to edit or alter the recordings. See id. The government must provide a “satisfactory explanation” both for the complete absence of a seal and for a delay in obtaining the seal. See United States v. Ojeda-Rios, 495 U.S. 263-64 (1990).

WHEN A NEW ORDER IS CONSIDERED AN “EXTENSION”

Because Title III’s sealing requirements is triggered by the expiration of the order or any extension thereof, the determination of whether a subsequent order is a new order or an extension of the first is critical to a determination of compliance with Title III’s sealing requirement. Accordingly, the court’s analysis begins with a determination of whether each subsequent order qualifies as an extension of the original. As a threshold matter a subsequent order must authorize surveillance of the same subject, at
the same location, regarding the same subject matter as an earlier authorized surveillance in order to be considered an extension. See United States v. Carson, 969 F.2d 1480, 1488 (3rd Cir. 1992). In addition, the subsequent order must cover the same communication facility as the prior order to qualify as an extension of the first. See United States v. Ojeda-Rios 875 F.2d 17, 21 (2nd Cir. 1989), vacated and remanded on other grounds by 495 U.S. 257 (1990).

Though an extension need not be obtained prior to the expiration of the first order, a subsequent authorization qualifies as an extension of the earlier order only if the new authorization is obtained as soon as administratively practical or any delay is satisfactorily explained. See Carson, 969 F.2d at 1488. Short administrative delays resulting from the process required to comply with the Title III are permissible. See id. Other gaps between original order and extension require an objectively reasonable and satisfactory explanation by the government. See id. Nonetheless, there is a temporal limit and some gaps – even those for which the government has an objectively reasonable and satisfactory explanation – are too long as a matter of law. For example, a subsequent Title III order entered seventeen (17) days after expiration of the first authorization is too long to qualify as an extension. If a subsequent order does not qualify as an extension of the original, then the court must designate the date of the original order as the effective date for sealing purposes. See id. at 1488.

“…[n]ot all orders authorizing the surveillance of the same subject, at the same location, concerning the same criminal subject matter can be construed as ‘extension’ of a prior order governing similar surveillance…we hold that an order authorizing surveillance of the same subject, at the same location, regarding the same matter as earlier authorized surveillance, constitutes an ‘extension’ of the earlier authorization for purposes of § 2518(8)(a) if, but only if, the new authorization was obtained as soon as administratively practical or any delay is satisfactorily explained, i.e. is shown to have occurred without fault of bad faith on the part of the Government.”

IMMEDIATE SEALING

Once the court has determined the effective date for each order and any extensions, it must next determine whether the government has complied with the immediate sealing mandate of Title III. The requirement that the tapes be sealed immediately means that the tape should be sealed as soon as practical after the surveillance ends or as soon as practical after the final extensions order expires. See id. at 1491. Generally sealing should not require more than one or two days at most. See United States v. Coney 407 F.3d 871, 873 (7th Cir. 2005). In the case of United States v. Matthews, 411 F.3d 1210, 1221 (11th Cir. 2005) the court noted:

“Three circuits have held that the recordings are sealed ‘immediately upon the expiration of the period of the order’ if they are sealed within one or two days of the expiration. United States v. McGuire, 307 F.3d. 1192, 1204 (9th Cir. 2002); United States v. Wilkinson, 53 F. 3d. 757, 759 (6th Cir. 1995); United States v. Wong, 40 F.3d. 1347, 1375 (2nd Cir. 1994)… we must give the term ‘immediately’ some meaning. That being the case, we agree with the 2nd, 6th, and 9th circuits that ‘within one to two days’ is a reasonable, workable interpretation of the term.”

Courts have found that the following delays do not meet Title III’s immediate sealing requirements and thus the government must provide a satisfactory explanation for the delay: (a) ten (10) days (see Coney, 407 F.3d at 871); (b) fourteen (14) days (see Carson, 969 F.2d at 1490; United States v. Pedroni, 958 F.2d 262, 265 (9th Cir. 1992)); (c) five (5) calendar days, including an intervening weekend (see United States v. Pitera, 5 F.3d 624, 627 (2nd Cir. 1993); (d) one (1) or two (2) see United States v. Matthews, 411 F.3d. 1210, 1221 (11th Cir. 2005)). The attorneys supervising this case did have the benefit of Coney and Matthews cases as well as the Ojeda-Rios and Carson cases. However, in the Monitoring
instructions given by the Government attorney to the agents there is absolutely no reference to this fundamental requirement. See Attachment to Brief.

SATISFACTORY EXPLANATION

If the results of surveillance under Title III are not sealed immediately, the government must provide a satisfactory explanation or the tapes are subject to exclusion. For an explanation of a delay in sealing to be "satisfactory" it must explain both why a delay occurred and why it is excusable. See Ojeda-Rios, 495 U.S. at 265. The explanation proffered must have been "objectively reasonable at the time." Id. at 267. Under Ojeda-Rios, a good-faith, objectively reasonable misunderstanding of what triggers sealing can constitute a satisfactory explanation for a delay. See id. 266-67. However, even an innocent mistake about the law will not excuse delay when unsupported by an objective reading of the extent of case law. See Carson, 969 F.2d at 1492:

"[T]herefore, the Government [must] explain not only why delay occurred but also why it is excusable…the excuse offered must be 'objectively reasonable' and must be the actual reason for the delay, 'based on evidence presented and submissions made in the District Court, and 'not merely a post-hoc rationalization.'"

In the instant case, the defendant can find no evidence of actual reasons for delay memorialized and catalogued by the Government at the time the delays were made. A government lawyer may not rely upon the advice of a supervisor, but rather has an affirmative duty to check the status of the law on admissibility of evidence in his case. See id.

In addition, to an objectively reasonable mistake of law, "an extraneous unforeseen emergent situation" may sometimes excuse the delay. Carson, 969 F.2d at 1487 (internal citations omitted). Even so, the government "must prove the actual reason for the sealing delay rather than an excuse for some ulterior purpose or administrative bungle." United States v. Vastola. 989 F.2d 1318, 1323 (3rd Cir. 1993) (emphasis in original). Thus for example, a prosecutor's routine duties, no matter how hectic, are not a satisfactory explanation for failing to comply with Title III immediate sealing requirement. See United States v. Quintero, 38 F.3d 1317, 1330 (3rd Cir. 1994).

INTEGRITY OF PROCESS COMPROMISED

The fact that the statute contains its own exclusionary rule […]shall be a prerequisite for the use or disclosure of the contents of any wire, oral or electronic communication or evidence derived therefrom […] makes the Government’s evidence derived as a result of the Title III interceptions like the biblical house built upon sand, the illegal foundation of the initial interception tainting all future interceptions, thereby destroying the foundation of the admissibility of any of the interceptions. The delay in sealing of the interception as a result of the May 22, 2007, Order, coupled with the absence of evidence of any sealing as a result of the September 11, 2007, Order from the Tennessee Judge, and the delay in sealing of the interceptions as a result of the October 22, 2007, Order by the Tennessee Judge, reflects a complete failure to comply with the immediacy requirements of 18 U.S.C. § 2518(8)(a), and undermines the integrity of the process that the intercepted material had not been altered or tampered with. Additionally, as each illegal interception is predicated on information obtained from a prior illegal interception, the entire Title III interceptions must be suppressed.

Respectfully submitted,

/s/
Attorney for Defendant
State Bar No. __________________
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA §
§ CRIMINAL NO.
§ 3:00-CR-442-R

VS.
§
§

MISSY DOGMA (3) §

DEFENDANT MISSY DOGMA’S REQUEST
FOR ADDITIONAL PEREMPTORY CHALLENGES
(Rule 24 (b) Fed. R. Crim. Pro.)

TO THE HONORABLE JERRY BUCHMEYER, UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION:
COMES NOW, MISSY DOGMA, Defendant, by and through undersigned counsel, and files this her
Request for Additional Peremptory Challenges pursuant to Rule 24(b) of the Federal Rules of Criminal
Procedures.

I. ARGUMENT

Since this is a case involving five defendants, the defendant requests additional peremptory challenges to
be exercised separately in order to insure due process.

Respectfully submitted,

/s/ ______________________________

Attorney for Defendant
State Bar No. ________________

CERTIFICATE OF SERVICE
CERTIFICATE OF CONFERENCE
DEFE N D A N T JOH N D O E ’ S

R E Q U E S T T O S U BB I T M E N T O N E ( 1 ) PA GE Q U E S T I O N N A I R E


C O M E S N O W J O H N D O E, de f e n d a n t, b y a n d t h r o u g h u n d e r s i g n e d c o u n s e l , a n d fi l e s t h e R e q u e s t t o S u b m i t O n e ( 1 ) P a g e J u r o r Q u e s t i o n n a i r e a n d r e s p e c t f u l l y r e q u i r e s t s t h e C o u r t t o s u b m i t t h e a t t a c h e d q u e s t i o n n a i r e t o p r o s p e c t i v e j u r o r s, ( S e e E x h i b i t “ A ” a t t a c h e d h e r e t o).

I.

T h i s i s a c a s e r e g a r d i n g a l l e g a t i o n s o f C o n s p i r a c y t o M a n u f a c t u r e a n d D i s t r i b u t e a C o n t r o l l e d S u b s t a n c e. A t t a c h e d h e r e t o i s a p r o p o s e d o n e ( 1 ) p a g e j u r o r q u e s t i o n n a i r e w h i c h t h e d e f e n d a n t i s r e q u e s t i n g b e s u b m i t t e d t o t h e p r o s p e c t i v e j u r o r s i n t h e i n s t a n t c a s e. I t i s r e s p e c t f u l l y s u b m i t t e d t h a t t h e q u e s t i o n s c o n t a i n e d i n t h e a t t a c h e d q u e s t i o n n a i r e a r e e i t h e r b i o g r a p h i c a l i n n a t u r e o r g o d i r e c t l y t o r e v e a l i n g e n t p r e j u d i c e. T h e b i o g r a p h i c a l q u e s t i o n s a r e s u b m i t t e d i n t h e f o r m o f a q u e s t i o n n a i r e i n o r d e r t o s a v e t h e c o u r t t i m e a n d r e s o u r c e s. F u r t h e r m o r e, a q u e s t i o n n a i r e w i l l h e l p i n s u r e h o n e s t, p r i v a t e r e s p o n s e s t o p e r t i n e n t q u e s t i o n s i n t h i s c a s e. I n s t e a d o f t h e P a r t i e s h a v i n g t o r e p e a t e a c h b i o g r a p h i c a l q u e s t i o n t o e a c h j u r o r o v e r a n d o v e r a g a i n , t h e q u e s t i o n n a i r e e l i m i n a t e s t h i s p r o b l e m. F u r t h e r m o r e, b y s u b m i t t i n g b i o g r a p h i c a l q u e s t i o n s t o t h e j u r o r s i n t h e f o r m o f a q u e s t i o n n a i r e , t h i s p r o c e d u r e a s s u r e s t h a t e a c h j u r o r i s a s k e d t h e s a m e i d e n t i c a l q u e s t i o n s i n t h e s a m e f a s h i o n.

R e g a r d i n g t h e q u e s t i o n s, w h i c h a r e d e s i g n e d t o r e v e a l b i a s a n d p r e j u d i c e, t h e S u p r e m e C o u r t h a s h e l d t h a t t r i a l J u d g e s h a v e b r o a d d i s c r e t i o n o v e r j u r y s e l e c t i o n. Skilling v. United States, 130 S. Ct. 2896, 2917 (2010). I n a d d i t i o n, R u l e 2 4 ( a ) o f t h e F e d. R. C r i m. P r o c. P r o v i d e s f o r a t t o r n e y ’ s t o “ a s k f u r t h e r q u e s t i o n s t h a t t h e c o u r t c o n s i d e r s p r o p e r; o r s u b m i t f u r t h e r q u e s t i o n s t h a t t h e c o u r t m a y a s k i f i t c o n s i d e r s t h e m p r o p e r.” T h i s q u e s t i o n n a i r e s a t i s f i e s t h i s r u l e. T h e c a s e o f U n i t e d S t a t e s v. I b l e, 6 3 0 F 2 d 3 8 9 ( 5 t h C i r. 1 9 8 0) i s a l s o i n s t r u c t i v e:

[W]hile federal rules of procedure 24(a) give wide discretion to the trial court, voir dire may have little meaning if it is not conducted at least in part by counsel. The “federal” practice of almost exclusive voir dire examination by the court does not take into account the fact that it is the parties, rather than the court, who have a full grasp of the nuances and the strength and weaknesses of the case. Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes…Experience
Counsel respectfully submits that the following criteria be given weight in deciding this important issue:

1. The questionnaire is a less threatening or intimidating way to question the jurors;
2. The questionnaire is the best way to deal with confidential or sensitive issues;
3. There is a focus on areas of concern regarding potential challenges for cause;
4. It can identify pre-trial publicity without tainting the panel;
5. The defense will work with the prosecution to formulate the ultimate questions; and
6. It will shorten the voir dire.

For the foregoing reasons, it is respectfully requested that this Court submit the attached Questionnaire in its entirety to prospective jurors in order to save court time and to assure the revelation of potential bias or prejudice.

Respectfully submitted,

/s/Michael P. Heiskell
Michael P. Heiskell
State Bar No. 09383700
<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where do you live?</td>
<td></td>
</tr>
<tr>
<td>What jobs have you held in the past?</td>
<td></td>
</tr>
<tr>
<td>Marital Status:</td>
<td></td>
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<tr>
<td>If married, for how long?</td>
<td></td>
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<tr>
<td>If married, how many times?</td>
<td></td>
</tr>
<tr>
<td>Highest grade completed in school:</td>
<td></td>
</tr>
<tr>
<td>If college, please list any degrees received:</td>
<td></td>
</tr>
<tr>
<td>Where does your spouse work?</td>
<td></td>
</tr>
<tr>
<td>Circle any of the following in which you have had training or education:</td>
<td></td>
</tr>
<tr>
<td>Criminal Justice</td>
<td>Criminology</td>
</tr>
<tr>
<td>Have you ever served as a juror in a:</td>
<td></td>
</tr>
<tr>
<td>Criminal case</td>
<td>Civil Case</td>
</tr>
<tr>
<td>Did you return a verdict?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Were you the foreperson?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Have you or anyone you know had a good or bad experience involving law enforcement?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Have you, a relative or close friend ever been charged with any criminal offense?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Have you, a relative or close friend ever been employed by a pharmacy?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Are you acquainted with anyone addicted to prescription drugs?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Do you feel that availability of prescription drugs are a problem in your community?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>How do you feel about the government using undercover methods including undercover agents, and video to investigate alleged crimes?</td>
<td></td>
</tr>
<tr>
<td>The citizen accused in this case is originally from the African Country of Ghana. Could this fact cause you to feel that he is at a disadvantage in defending these charges?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Which of the following describes you? Check all that apply:</td>
<td></td>
</tr>
<tr>
<td>Analytical</td>
<td>Opinionated</td>
</tr>
<tr>
<td>Have you ever volunteered or worked for any organization that treats or counsels persons for addictive behaviors?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>United States District Court</td>
<td></td>
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<tr>
<td>For the Northern District of Texas</td>
<td></td>
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<tr>
<td>Fort Worth Division</td>
<td></td>
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</tbody>
</table>
UNITED STATES OF AMERICA
Plaintiff,

-vs-

JOHN DOE, Defendant.

CASE NO: 4: 1000 (Judge Means)

JOHN DOE’S
MOTION FOR SPECIFIC INQUIRY OF PROSPECTIVE JURORS

John Doe, by and through his undersigned counsel, pursuant to Federal Rule of Criminal Procedure 24(a), respectfully requests that this Court permit counsel to conduct the following inquiry of prospective jurors. In support of this motion, counsel would show the following:

1. It is the government’s contention that John Doe distributed hundreds of kilos of cocaine and one thousand of pounds of marijuana in Louisiana and Mississippi. Evidence will be presented that Doe was a contractor who restored homes in Shreveport and raised pit bulls on property adjacent to his home. It is expected that the government will claim that John Doe concealed money and drugs on the property where he raised the dogs and that he used the properties he restored and the dogs he raised to facilitate his unlawful conduct. The government may seek to admit evidence that at the time of John Doe’s arrest the police found two handguns in his residence. (These weapons were lawfully possessed). The government will offer evidence that John Doe deposited $100,000 or more in cash into various bank accounts over a four or five year period. The government will seek to introduce evidence that John Doe raced cars to show payments in cash and unexplained wealth. The government will also seek to introduce evidence that John Doe alleged in the indictment and may introduce evidence at trial that John Doe was referred to by some individuals as “Good.”

2. Counsel requests permission to ask the following questions of prospective jurors.
   (1) Does anyone have any experience with pit bulls.
   (2) Does anyone have an opinion about pit bulls.
   (3) Does anyone have an opinion about people who own pit bulls.
   (4) Does anyone have an opinion about people who raise dogs for sale.
   (5) Does anyone own a gun.
   (6) Does anyone have any strong opinions about gun ownership.
   (7) Has anyone ever remodeled a home.
   (8) Has anyone ever hired someone to do work on a home.
   (9) Has anyone ever paid cash for a service.
   (10) Does anyone have an opinion about people who pay cash for a service.
   (11) Does anyone have an opinion about people who keep their saving at home and not in a bank.
   (12) Does anyone have a nickname.
   (13) Does anyone know someone who has a nickname.
   (14) Does anyone have any opinion about people who have nicknames.
   (15) Has anyone watched live broadcasts of criminal trials on TV.

MEMORANDUM OF LAW
Federal Rule of Criminal Procedure 24(a)(1) authorizes the District Court to permit the attorneys for the parties to examine prospective jurors. Alternatively, Federal Rule of Criminal Procedure 24(a)(2) authorizes the Court to permit counsel to submit questions for the Court to pose to prospective jurors. As the Supreme Court recently reaffirmed in *Skilling v. United States*, ___U.S.___, 130 S.Ct. 2896, 2917 (2010), “No hard-and-fast formula dictates the necessary depth or breath of voir dire. Jury selection, we have repeatedly emphasized, is ‘particularly within the province of the trial judge.’”

To the extent that the purpose of *voir dire* is to determine whether jurors can render a verdict solely upon the basis of the evidence presented, we believe that the questions suggested herein will assist in the process by helping the court to uncover any prejudices a juror might have.

Respectfully submitted,

/s/ 
Attorney for Defendant
State Bar No. ______________

CERTIFICATE OF CONFERENCE

CERTIFICATE OF SERVICE

ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

V.

CRIMINAL NO.

01:08XXXXXXX

JOHN DOE (3), ET. AL.
MOTION IN LIMINE
AND INCORPORATED BRIEF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

COMES NOW, JOHN DOE, by and through undersigned counsel and moves this Honorable Court to order the prosecuting attorneys and the government witnesses not to mention, allude to, or refer to, in any manner, any extrinsic acts, prior convictions, alleged violations of the law or other crimes, wrongs or acts generally alleged to have been committed by Defendant in particular the pending money laundering indictment in Memphis Tennessee, in the presence of the jury until a hearing has been held outside they jury until a hearing outside the presence of the jury to determined the admissibility of such items Said extrinsic acts, and any prior convictions of alleged violations of the law include, but are not limited to:

1. Any alleged acts of criminal wrongdoing by the Defendant not alleged in the indictment.
2. Any alleged prior convictions for any criminal offense until such alleged prior conviction is shown to be admissible in this trial.
3. Any alleged involvement in any offense not alleged in the indictment.
4. Any reference to any Defendant or the actions alleged in this indictment being subject to any investigation by any other law enforcement agency.

Rule 401, Federal Rules of Evidence, states:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

Rule 402, Federal Rules of Evidence, states in part:

...Evidence which is not relevant is not admissible.

Rule 403, Federal Rules of Evidence, states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or, needless presentation of cumulative evidence.

Rule 404, Federal Rules of Evidence, states in part:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith or a particular occasion.

(b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The government’s argument that the aforementioned remote prior convictions are “intrinsic” is without merit. The 4th Circuit case of United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994) is clearly distinguishable from our case. Our case involves dissimilar offenses and convictions, which are far more remote than the one to two year time difference in the Kennedy case. The remote convictions involving your defendant during his teen and early twenty years in the state of Minnesota, do not provide any context for the charged offense since the priors involve simple possession charges while the instant case involves a drug distribution conspiracy. Lastly,
said priors do not aid the jury in understanding how the defendant obtained drugs—all issues advanced by the government in support of its position.

For extrinsic acts to be relevant to an issue other than character, they must be shown to be offenses and also they must be similar to the charged offense. *United States v. Guerrero*, 650 F.2d 728, 733 (5th Cir. 1981). See also *United States v. Garcia Orozco*, 997 F.3d 1302 (9th Cir. 1993), where evidence of defendant’s arrest for possession with intent to distribute heroin was irrelevant in present prosecution for possession with intent to distribute marijuana. The extrinsic evidence, including the money laundering allegations, in our case is dissimilar as well. In addition, the prior convictions are too remote. The remoteness of the extrinsic acts evidence weakens its probative value. See *United States v. Broussard*, 80 F.3d 1025, 1040 (5th Cir. 1996).

The Court must follow the *Beechum* test to determine the admissibility of extrinsic evidence. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978)(en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). First, the Court must determine that the extrinsic offense evidence is relevant to an issue other than the Defendant's character, i.e., motive, opportunity, intent, preparation, and the like. The second step is that "the evidence must possess probative value that is not substantially outweighed by its undue prejudice" and must meet the other requirements of Rule 403, Federal Rules of Criminal Procedure. To determine whether probative value extrinsic offense evidence substantially outweighs any possible unfair prejudice, courts must make common-sense assessments of relevant circumstances surrounding extrinsic evidence, considering such factors as (1) the extent to which the defendant’s unlawful intent is established by other evidence; (2) the overall similarity of the extrinsic and charged offenses and (3) how much time separates the extrinsic and charged offenses. *United States v. Adair*, 436 F.3d 520 (5th Cir. 2006), *cert denied*, 126 S.Ct. 2306. Other Circuits also recognize the remoteness issue as well. See *United States v. Van Horn*, 277 F.3d 48 (1st Cir. 2002); *United States v. Jourdain*, 433 F.3d 652 (8th Cir. 2006).

WHEREFORE, PREMISES CONSIDERED, Defendant prays this motion be in all things granted.

Respectfully submitted,

/s/
______________________________
Attorney for Defendant
State Bar No.____________________

CERTIFICATE OF SERVICE
CERTIFICATE OF CONFERENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA §

V. § CRIMINAL NO.

JOHN DOE (3), ET. AL. §
DEFENDANT'S MOTION TO IMMEDIATELY DISCLOSE ANY AND ALL CONTACT BETWEEN GOVERNMENT AGENTS OR PROSECUTORS AND POTENTIAL JAILHOUSE INFORMANTS INCARCERATED WITH DEFENDANT

TO THE HONORABLE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

Defendant by and through counsel, hereby moves this Court to order the government to immediately disclose any and all contact between government agents or prosecutors and potential informants incarcerated with defendant. In support, defendant relies upon Rules 12(b)(4) and 16(a)(I)(A) of the Federal Rules of Criminal Procedure, the Fifth, Sixth, and Eighth Amendments, and submits the following:

Defendant, since his arrest, has been incarcerated at the Correctional Facility with other pre-trial detainees, and convicted persons, some of whom are facing lengthy state or federal sentences. Jailhouse informants have been used frequently by prosecuting authorities and have surfaced seeking “deals” in return for testimony in a disturbing number of federal criminal cases. The possibility of manufactured conversations exists.

As a safeguard and to permit the require pre-trial resolutions of Defendant’s objections to any testimony of this sort, he requests immediate disclosure of government (state or federal) sponsored or monitored contacts with the defendant regarding the allegations in the indictment and any such conversations the prosecution is aware of.

Respectfully submitted,

/s/Michael P. Heiskell
Attorney for Defendant
State Bar No.__________________

CERTIFICATE OF SERVICE
CERTIFICATE OF CONFERENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

V.                          CRIMINAL NO.

JOHN DOE (3), ET. AL.
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO IMMEDIATELY DISCLOSE ANY AND ALL CONTACT BETWEEN GOVERNMENT AGENTS OR PROSECUTORS AND POTENTIAL JAILHOUSE INFORMATION INCARCERATED WITH DEFENDANT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

Government tolerated, sponsored or planted informants are both highly unreliable and frequently used, particularly in serious cases. For example, the government planted an informant in the same cell as the defendant in United States v. Henry, 447 U.S. 264, 266-267 (1980). He was instructed not to interrogate the defendant about his involvement in the crime but to be alert to any statements. Id. The informant ultimately testified at the defendant’s trial concerning incriminating statements made by the defendant. Id. Relying on Massiah v. United States, 377 U.S. 201 (1964), the Supreme Court stated “the question here is whether under the facts of this case a Government agent ‘deliberately elicited’ incriminating statements from Henry within the meaning of Massiah.” Id., at 270. It then upheld the decision of the Fourth Circuit Court of Appeals that by “intentionally creating a situation likely to induce Henry to make incriminating statement without the assistance of counsel, the Government violated Henry’s Sixth Amendment right to counsel.” Id., at 274.

Later in Maine v. Moulton, 474 U.S. 159 (1985), the Court expanded the Henry holding by finding “knowing exploitation by the state of an opportunity to circumvent the defendant’s right to counsel is equivalent to intentional creation of such an opportunity.”

The United States Supreme Court has noted that “[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.” On Lee v. United States, 343 U.S. 747, 757 (1952); see also United States v. Swiderski, 539 F.2d 854 (2d Cir. 1976) (informer paid $10,000.00 for his services, worked on a contingent fee basis); United States v. Sarvis, 523 F.2d 1177, 1180 (D.C. Cir. 1974); United States v. Wasko, 473 F.2d 1282 (7th Cir. 1973); United States v. Leonard, 494 F.2d 955, 961 (D.C. Cir. 1974); United States v. Garcia, 528 F.2d 580 (5th Cir.), cert. denied sub nom. Sandoval v. United States, 426 U.S. 952 (1976).

For these reasons the United States Supreme Court has held that snitch or accomplice testimony “ought not to be passed upon…under the same rules governing other apparently credible witnesses…” Crawford v. United States, 212 U.S. 183 204 (1908). Indeed, the Nevada Supreme Court has noted “that a jail-house is now available in a fairly large number of homicide cases.” D’Agostino v. State, 823 P.2d 283, 285 (Nev. 1992). The Court went on to hold that special precautions must be taken to avoid presenting unreliable evidence to the jury:

A legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to “cooperate” with the state and to say anything that is “helpful” to the state’s case. It is up to the trial judge to see that there are sufficient assurances of reliability prior to admitting this kind of amorphous testimony to keep this kind of unreliable evidence out of the hands of the jury…

Id., at 284; see also Cal. Penal Code §1127a (trial courts must instruct jurors that “testimony of an in-custody informant that should be viewed with caution and close scrutiny”); People v. (Thomas) Thompson, 45 Cal.3d 86 (1988) (on proportionality review, court finds prosecution’s need to rely on

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8 The Supreme Court state in dictum in Kuhlman v. Wilson, 477 U.S. 436 (1986) that the defendant’s right to counsel was not violated by the police placing in the defendant’s cell an informant who merely listened and reported what the defendant said.
“snitch” testimony “disconcerting”); *Tibbs v. State*, 337 So.2d 788, 790 (Fla. 1976) (reversing a murder conviction/death sentence as being against the weight of the evidence. The testimony of a cell mate snitch was dismissed as “the product of purely selfish considerations.”); *Barnes v. State*, 469 So.2d 126, 132 (Miss. 1984) (testimony of jailhouse snitches must “be viewed with caution and suspicion even in the absence of any proof of a leniency/immunity agreement.”).

The Louisiana Supreme Court views the word of an informant as being less credible than that of a law-abiding citizen when it comes to probable cause to search. A distinction must be drawn “between an ‘informant’ who is a member of the criminal community and an informant who is the witness or victim of a crime.” *State v. Ross*, 561 So.1004, 1009 (La. App. 4th Cir. 1990), citing *State v. Morris*, 444 So.2d 1200 (La. 1984). The testimony of a snitch may simply be too insubstantial to support a conviction. See *Jackson v. Virginia*, 443 U.S. 307 (1979)); White, *Regulating Prison Informer Under the Due Process Clause*, 1991 S.Ct. Rev. 103, 104-105.

WHEREFORE, Defendant requests that this Court require the government to immediately disclose any and all contact between government agents or prosecutors and informants incarcerated with Defendant so that he can seek appropriate relief.

Respectfully submitted,

/s/
Attorney for Defendant
State Bar No. ____________

CERTIFICATE OF SERVICE
CERTIFICATE OF CONFERENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA §

V. § CRIMINAL NO. §

JOHN DOE (3), ET. AL. §

DEFENDANT'S MOTION TO PRECLUDE IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR CONVICTIONS
TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:

Defendant, by and through, undersigned counsel, respectfully moves this Honorable Court for an Order precluding the Government from impeaching him should he testify at trial. In support of this motion, Defendant submits the following:

Federal Rule of Evidence 609 provides, *inter alia*, that “evidence that an accused has been convicted of … a crime [punishable by death or imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs the prejudicial effect of the accused.” Fed. Rule Evid. 609(a)(1). The Rule also provides that “evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” Fed. Rule Evid. 609(a)(2). Under Rule 609(a)(1) “the prosecution must show that the probative value of a prior conviction outweighs the prejudice to the defendant.” *United States v. Lipscomb*, 702 F.2d 1049 (D.C. Cir. 1983). In this case, the Government cannot make the requisite showing with respect to Defendant’s prior convictions.

Respectfully submitted,

/s/
Attorney for Defendant
State Bar No. ______________

CERTIFICATE OF SERVICE
CERTIFICATE OF CONFERENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA §

V. § CRIMINAL NO. § 01:08XXXXXXXXXXXX

JOHN DOE (3), ET. AL. §

MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO PRECLUDE IMPEACHMENT OF DEFENDANT WITH
EVIDENCE OF PRIOR CONVICTIONS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION:
In United States v. Fearwell, 595 F.2d 771 (D.C. Cir. 1978), the D.C. Circuit admonished that, “Rule 609(a)(2) is to be construed narrowly; it is not carte blanche for admission on an undifferentiated basis of all previous convictions for purposes of impeachment; rather, precisely, because it involves no discretion on the part of the trial court in the sense that all crimes meeting its stipulation of dishonesty or false statement must be used for impeachment purposes, Rule 609(a)(2) must be confined...to a ‘narrow subset of crimes’—those that bear directly upon the accused’s propensity to testify truthfully.” Id., at 777, citing United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) (emphasis in original). In Defendant’s case, his conviction has no bearing upon his propensity to testify truthfully.

In Smith, the D.C. Circuit explained that “[b]y the phrase ‘dishonesty and false statement’ the [Congressional Conference Committee] means no crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.” 551 F.2d at 362, citing H.R. Conf. Rep. No. 9301597, 93d Congo Sess. 9, reprinted in [1974] U.S. Code Congo & Admin. News, pp. 7098, 7103. Further the Smith court noted that even an offense that does not per se bear on credibility may be used to impeach if “the prosecutor has first demonstrated to the court the underlying facts which warrant the dishonesty or false statement description.” Id., at 364. It is the Government’s burden to “produce[s] fact[s] which demonstrat[e] that the particular conviction involved fraud or deceit.” United States v. Glenn, 667 F.2d 1269, 1273 (9th Cir. 1982), citing United States v. Smith, 551 F.2d 364.

In Defendant’s case the Government has produced no information suggesting that the offenses for which he has been convicted involved fraud or deceit. The D.C. Circuit has held that the Government bears “the burden of proof in establishing the admissibility of [a] prior conviction[].” United States v. Crawford, 613 F.2d 1045, 1053 (D.C. Cir. 1979) (citations omitted). This Court should not allow the Government to impeach Defendant with his prior conviction absent an “inquiry into the nature and circumstances” of the conviction. Id., at 1053.

WHEREFORE, for all the foregoing and any others which may appear to this Court in a full hearing on this matter, Defendant respectfully requests that the government not be permitted to impeach him under Federal Rule of Evidence 609 with his prior conviction.

Respectfully submitted,
/s/Michael P. Heiskell
Attorney for Defendant
State Bar No. _____________________

CERTIFICATE OF SERVICE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA §

V. § CRIMINAL NO. 1:23-CR-456-R

JOHN DOE §

DEFENDANT’S MOTION UNDER RULE 201 OF THE FEDERAL RULES OF EVIDENCE FOR ADVANCE NOTICE OF ANY MATTER WHICH EITHER THE COURT OR THE GOVERNMENT MAY CONTENT AS APPROPRIATE FOR JUDICIAL NOTICE AND BRIEF IN SUPPORT THEREOF
TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the defendant, JOHN DOE, by and through counsel of record and moves that the court disclose at least thirty (30) days prior to trial or as far in advance as possible, any matter it may contend is appropriate for judicial notice, and in support thereof would show as follows:

1. The Government may intend to ask the Court to take judicial notice of adjudicative facts.
2. The Court itself may intend to take judicial notice of a fact.
3. Under Rule 201(e), a party is given the opportunity to be heard as to the propriety of taking judicial notice.
4. The Notes of Advisory Committee on Proposed Rules following Rule 201 provide in part as follows:

   Note to Subdivision (e). Basic consideration of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of that latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely.

5. Since a party is entitled to the opportunity to contest the propriety of taking judicial notice, he also must be given the opportunity to present to the Court information pertinent to the decision, which would be done at a hearing called for that purpose. See Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1086 (2d Cir. 1982).

6. In view of the foregoing, and in the interest of judicial economy and fair play, it is appropriate that such questions be addressed prior to trial, if possible, and certainly prior to the jury being given a judicially noticed fact.

WHEREFORE, Defendant moves that the court;

A) Disclose to the defense any belief it now has that any fact is appropriate for judicial notice;
B) Instruct counsel for the Government to disclose any similar belief on its part;
C) Give advance notice to the defense and require the Government to do the same should the question of judicial notice arise during trial; and
D) Conduct a hearing, before the jury is given a judicially noticed fact, at which the defense shall have the opportunity to contest the propriety thereof.

Respectfully Submitted,

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/s/ __________________________________________
Attorney for Defendant
State Bar No. ________________

CERTIFICATE OF SERVICE
CERTIFICATE OF CONFERENCE
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA §

v. § NO: 4:14-CR-000158-ALM-CAN

JOHN DOE (2) §

DEFENSE MOTION AND BRIEF FOR JUDGMENT OF ACQUITTAL
RULE 29 (a) AND (c), FED. R. CRIM. PROC.

LEGAL PROVISIONS INVOLVED

[T]he court on the defendant’s motion must enter a judgment of acquittal of any offense for
which the evidence is insufficient to sustain a conviction.

Rule 29(a), Federal Rules of Criminal Procedure (emphasis added)
The standard of proof beyond a reasonable doubt... “plays a vital role in the American scheme of criminal procedure,” because it operates to give “concrete substance” to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. At the same time, by impressing upon the factfinder the need to reach a subjective state of near certitude as to the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. 

The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts of evidence.... Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.... [W]hen such a conviction occurs..., it cannot constitutionally stand.

After Winship, the critical inquiry on review of the sufficiency of evidence to support a criminal conviction must be not simply whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.


INTRODUCTION

Nearly 37 years ago, in its seminal decision in Jackson v. Virginia, 443 U.S. 307, 317-18 (1979), the Supreme Court recognized that “a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.... [W]hen such a conviction occurs..., it cannot constitutionally stand.” Not surprisingly, Jackson’s constitutional imperative is embodied in Federal Rule of Criminal Procedure 29(a) itself, which provides that a district court “must enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.”

The evidence adduced at trial in this case was woefully insufficient on the key element of Mr. Doe’s intent to willfully join in the conspiracy alleged in this single count indictment in order to prove his guilt beyond a reasonable doubt.

The record reflects (1) a glaring absence of evidence that Mr. Doe possessed the requisite mental state to commit this offense, and (2) the government’s theory of Mr. Doe’s criminality being dependent on conjecture and speculation.

Why then did the jury convict John Doe on Count One? As the Court knows, there are many reasons why a jury might improperly render a “guilty” verdict in the face of patently insufficient evidence. This risk of an invalid conviction merely increases where, as here, the defendant had previous administrative sanctions for somewhat similar conduct in evidence against him, and surrendered his pharmacist license when confronted by government agents. Ultimately, however, the Court’s task in adjudicating Mr. Doe’s Rule 29 motion is not to ascertain why the jury rendered a verdict for which the evidence was constitutionally insufficient. Instead, the Court’s sole task is to undertake an independent review of the trial record and to determine, as a matter of law, whether it was

As demonstrated below, the evidence adduced at trial was constitutionally insufficient to prove John Doe’s guilt on Count One beyond a reasonable doubt. Indeed, the defense respectfully submits that, when the trial record is subjected to a careful review, it is clear that the Government does not have a colorable argument in support of the evidentiary sufficiency of its case as it related to the requisite mental state that must be proven beyond a reasonable doubt.

This memorandum of law proceeds as follows: PART ONE summarizes the essential elements of the offense as articulated in the Court’s final instructions to the jury. PART TWO discusses the standard of review applicable to a defendant’s Rule 29 motion. PART THREE addresses the evidence at trial with respect the culpable mental state. PART FOUR then compares the record evidence in this case to federal appellate decisions adjudicating a defendant’s Rule 29 motion. When this comparative analysis is undertaken, entry of a judgment of acquittal is the only outcome consistent with the record and governing law.

**PART ONE: THE OFFENSE ELEMENTS**

Because the Court is familiar with its final charge to the jury, the defense will not engage in an extended discussion of the essential elements of the offense. Nevertheless, a brief review of those elements – each of which the Government bore the burden of proving with evidence beyond a reasonable doubt – provides a useful starting point for the balance of this memorandum.

The Court charged the jury that, in order to convict Mr. Doe on Count One, it was required to find that the Government had proven three essential elements beyond a reasonable doubt:

First: That two or more persons, directly or indirectly, reached an agreement to distribute or dispense, or to possess with the intent to distribute or dispense, specifically Hydrocodone, outside the usual course of professional practice or not for a legitimate medical purpose;

Second: That the defendant knew of the unlawful purpose of the agreement; and

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9 In Baker, the government initially appealed the Court’s post-verdict judgment of acquittal but then voluntarily dismissed its appeal a few days before its opening brief was to the Fifth Circuit.
Third: That the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose.

It is noteworthy that each of the required elements contain the required culpable mental states to act in a conspiracy to violate the law. The First element refers to the agreement to possess with intent…” The Second element contains the culpable state of knowledge of “the unlawful purpose of the agreement.” The Third element addresses the mental state of acting “unlawfully”… with the intent to further its unlawful purpose.” (emphasis added).

The Court’s instructions further included the definition of “Knowingly” – To Act, as well as “Willfully” – To Act, to assist the trier of fact. These instructions encapsulates the requirement that the government adduce sufficient, substantial evidence that Mr. Doe purposely, with a specific intent to violate the law, entered into an agreement with two individuals to unlawfully dispense and distribute hydrocodone. The government in its opening statements, final arguments, and oral arguments to rebut the Rule 29 motions, repeatedly assert that Mr. Doe’s “confessions,” coupled with his relinquishment of his pharmaceutical licenses is overwhelming evidence of guilt. The government further asserts that the testimony of co-defendant, Remossive Lewis, is additional compelling evidence on the issue of the defendant’s culpable mental state. As will be addressed more thoroughly in PART THREE of this memorandum, the reliance on such evidence is misguided and misplaced. The Government’s evidence included and is riddled with inferences. Mr. Doe’s written statement to Investigator Jones of the Texas State Board of Pharmacy reflected Mr. Doe’s lack of knowledge of the unlawful agreement. Special Agent Dunn’s testimony revealed two misrepresentations by Mr. Doe regarding his presence, or lack thereof, at the pharmacy during critical operating hours. Dunn also testified that Mr. Doe was aware that his co-defendant “Dr. Sammie Lewis” was not licensed in Texas and that neither Sammie Lewis’ nor Remossive Lewis’ required licenses were displayed in the pharmacy. When asked by Dunn why he turned over the pharmacy to two unlicensed individuals, Mr. Doe replied that he was having problems getting the pharmacy off the ground and that he needed to work at Parkland Hospital. However, these statements and admissions fall far short of confessing to participation in the charged conspiracy. Mr. Doe’s statements are confessions to administrative violations which prompted him to surrender his license for such administrative violations.

Remossive Lewis testified that there was a written agreement between “Dr. Lewis” and Mr. Doe. However, no such agreement was ever produced by the government. She further testified that Mr. Doe would coach Lewis and others on the mixture of certain drugs. She was not present when Lewis and Mr. Doe first met and was unaware of what conversations took place between them at the time. She admitted that she and Lewis received the monetary proceeds from the pharmacy. Indeed, she was the lone signatory on the Capital One bank account (the Accent Pharmacy bank account) and that Lewis directed her as to who and what to pay from said account. She has also agreed to forfeit the luxury autos purchased with the proceeds, and cash seized from the Capital One account. There was no evidence adduced from her that Mr. Doe received any proceeds from this venture. Indeed, the Government failed to directly connect Mr. Doe with any proceeds or financial gain from the operation of the pharmacies. The Government was required to prove the requisite mental states with evidence, not through conjecture, speculation, or piling inference upon inference or by working backwards from the assumption that Mr. Doe is guilty.
See, e.g., *Evans-Smith v. Taylor*, 19 F.3d 899, 910 (4th Cir. 1994) (“To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt the defendant was guilty.”) The Government failed to satisfy its burden and Mr. Doe is thus constitutionally entitled to a judgment of acquittal.

**PART TWO: THE STANDARD OF REVIEW**

The Due Process Clause requires the government to present evidence sufficient to prove each element of a criminal offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); U.S. Const. Amend. V; *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). “The Standard of proof beyond a reasonable doubt plays a vital role in the American scheme of criminal procedure, because it operates to give ‘concrete substance’ to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding… [T]he standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.” *Jackson*, 443 U.S. at 315, quoting *Winship*, 397 U.S. at 363 and 372 (Harlan, J., concurring). The “virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions…reflect[s] a profound judgment about the way in which law should be enforced and justice administered.” *Winship*, 397 U.S. at 361-362, quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); see also *Winship*, id. at 372 (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

In *Jackson*, the Supreme Court held that “[a]fter Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” Id. at 318-319. The sufficiency standard thus requires the trier of fact to apply the “fundamental substantive constitutional standard” rationally to the facts in evidence.” Id. Further, “a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.” Id. However, “[u]nder Winship, which established proof beyond a reasonable doubt as an essential to due process,” when such a conviction occurs…, it cannot constitutionally stand.” Id. at 317-318. And “Winship presupposes as an essential of the due process guaranteed by the Fourteenth [and Fifth] Amendment[s] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.” *Id.*

Criminal convictions are supported by sufficient evidence “if a reasonable trier of fact could conclude that the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to the jury’s verdict and drawing all reasonable inferences from the evidence to support the verdict.” *United States v. Mmahat*, 106 F.3d 89, 97 (5th Cir. 1997), cert. denied, 522 U.S. 977 (1997); *United States v. Lewis*, 476 F.3d 369, 377 (5th
Cir. 2007); United States v. Fountain, 277 F.3d 714, 717 (5th Cir. 2001); United States v. Cuellar, 478 F.3d 282, 287 (5th Cir. 2007); United States v. Harris, 477 F.3d 241, 244 (5th Cir. 2007). On a defendant’s motion for a judgment of acquittal, the question for the court is whether the evidence adduced at trial, when viewed in the light most favorable to the government, was “sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that” the defendant committed the offense charged in the indictment, Regalado Cuellar v. United States, 553 U.S. 550, 568 & n.8 (2008) (reversing conviction for money laundering because, “[a]lthough … the [g]overnment introduced some evidence regarding the effect of transporting illegally obtained money to Mexico, the [g]overnment has not pointed to any evidence in the record from which it could be inferred beyond a reasonable doubt that petitioner knew that taking the funds to Mexico would have had one of the relevant effects” (italics added)); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (“[T]he inquiry involved in ruling on a motion for summary judgment or for directed verdict necessarily implicated the substantive evidentiary standard of proof that would apply at the trial on the merits…. [Thus, on] a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies[,] … the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt.”).

In reviewing the trial record for evidentiary sufficiency, “[a]ll evidence is considered, not just that supporting the verdict ….” United States v. Peterson, 244 F.3d 385, 389 (5th Cir. 2001); see United States v. Richards, 204 F.3d 177, 206 (5th Cir. 2000) (explaining that the court must “consider ‘the countervailing evidence as well as the evidence that supports the verdict’” (quoting United States v. Brown, 186 F.3d 661, 664 (5th Cir. 1999)). Thus, if exculpatory evidence is adduced during the prosecution’s case-in-chief, that evidence must be considered, even though it militates against guilt. See Evans-Smith, 19 F.3d at 909 n.29 (“Favoring the prosecution with all inferences does not mean that [the court] must ignore evidence that is in the record, but which [the prosecution] ignore[s].”). In addition, where, as here, the defendant exercised his right to present a defense, the reviewing court’s sufficiency analysis must take into account the evidence adduced during the defendant’s case-in-chief as well. 10 See United States v. White, 611, F.2d 531, 536 (5th Cir. 1980) (holding that, “[i]f a defendant renews his motion for judgment of acquittal at the end of all evidence,” the court is required “to examine all the evidence rather than to restrict its examination to the evidence presented in the [g]overnment’s case-in-chief”) This includes uncontradicted evidence of the defendant’s reputation for good character. See United States v. Toro, 383 F. Supp. 397, 400 (D.P.R. 1974) (considering, inter alia, a defense witness’s uncontradicted testimony that the defendant “was generally of good character” and then granting the defendant’s Rule 29 motion).

The Rule 29 standard of review “does not require complete judicial abdication to the determination of the trier of fact.” United States v. Martinez, 555 F.2d 1269, 1271 (5th Cir. 1977)

10 Consistent with the 1994 amendments to Rule 29, there are actually two pending Rule 29 motions before the court: the initial motion that the defense made immediately after the close of the Government’s case-in-chief, and the renewed motion made after the close of all the evidence. Under the amended Rule 29(b), the court must decide the former motion solely on the basis of the evidence adduced during the Government’s case-in-chief. The latter motion however, must be decided on the basis of the entire trial record. Because no incriminating evidence was adduced during the defense’s case-in-chief – and because the Government did not put on a rebuttal case – this memorandum of law assumes that the Court will resolve Mr. Doe’s Rule 29 motion on the basis of all evidence adduced at trial.
(holding that a verdict must be reversed if not “supported by ‘substantial evidence’”); see also Mortensen v. United States, 322 U.S. 369, 374 (1944) (‘[W]e have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict.”); United States v. Moreland, 665 F.3d 137, 149 n.6 (5th Cir. 2011) (“We remain highly deferential to jury verdicts, but are obligated, as judges, to reverse a conviction where, having viewed all evidence in the light most favorable to the prosecution, we must conclude that the record cannot support a conclusion that the prosecution established guilt beyond a reasonable doubt.”).

Although the reviewing court is required to draw in the government’s favor all inferences that are reasonably supported by the record evidence, a reviewing court “cannot ‘credit [the prosecution with] inferences within the realm of possibility when those inferences are unreasonable.” Moreland, 665 F.3d at 149 (reversing defendant’s conviction for possession of child pornography). Moreover, if the only reasonable inference to be drawn from a particular constellation of evidence is one that favors the defendant, the court must consider that exculpatory inference. See Evans-Smith, 19 F.3d at 909 n.29.

With respect to the drawing of inferences, it is also important to keep in mind that there is a constitutionally significant distinction between an “evidentiary or “basic’ fact[,]” on the one hand, and “an ‘ultimate’ or ‘element’ fact,” on the other. Ulster County Court v. Allen, 442 U.S. 140, 146 (1979). Where the prosecution asks the jury to infer a fact that is also an element of the offense (e.g., that the defendant possessed the requisite mental state), it is not enough that the record evidence reasonably supports the prosecution’s desired inference. Instead, the prosecution’s burden is to adduce evidence sufficient to prove that inference “beyond a reasonable doubt.” Id.; see also e.g., Regalado Cuellar, 553 U.S. at 567 n.8 (reversing conviction because the prosecution failed to adduce evidence “from which it could be inferred beyond a reasonable doubt” that the defendant possessed the requisite mental state for money laundering). Thus, in United States v. Alvarez, 451 F.3d 320 (5th Cir. 2006) the Fifth Circuit reversed a conviction where the prosecution “attempt[ed] to cobble together inferences from the testimony presented in support of the verdict against [the defendant].” Id. at 337. The Fifth Circuit explained that, even though “a rational jury might make the chain of [evidentiary] inferences” proffered by the prosecution, that inferential chain was too weak to support a rational finding “beyond a reasonable doubt that the elements of the crime [were] proven.” Id. (italics in original); see also Piaskowski v. Casperson, 126 F. Supp. 2d 1149, 1159-60 (E.D. Wis. 2001) (“The ultimate finding of guilt in this case required the jury to pile speculation on top of the inferences drawn from more inferences. Each step along the way required the jury to eliminate one or more alternatives, thus multiplying the risk of error. Such verdict is not rational.”)

A reviewing court may not affirm a conviction that “rest[s] on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference.” Alvarez, 451 F.3d at 333-34 (reversing conviction where the government’s proffered evidence of an essential element of the offense was “both circular and self-serving”); see also United States v. Harris, 420 F.3d 467, 474 (5th Cir. 2005) (“Speculation may resolve the timing of Harris’s intent and the actions that night, but the speculation on the basis if evidence does not a reasonable inference make.”); Martinez, 555 F.2d at 1271 (holding that, where the jury’s verdict “could be reached only as a
result of speculations or assumptions about matters not in evidence,” then the jury’s verdict must be reversed. Indeed, “if the evidence at trial raises only a suspicion of guilt, even a strong one, then that evidence is insufficient.” Guidry v. Dretke, 397 F.3d 306, 331 (5th Cir. 2005) (internal quotation marks omitted). “Even under [a] deferential standard of review, a conviction may not be affirmed … based on evidence that merely creates the inference that the defendant might be guilty.” United States v. Elashyi, et al., 554 F. 3d. 480, 492 (5th Cir. 2008) (italics added); see also United States v. Hernandez, 301 F.3d 886, 893 (5th Cir. 2002) (“[T]here is a critical line between suspicion of guilt and guilt beyond a reasonable doubt… Even looking at the government’s case in the most favorable light possible, the government has not transcended the realm of speculation to the realm of certainty beyond a reasonable doubt.”); Piaskowski v. Bett, 256 F.3d 687, 692-93 (7th Cir. 2001) (“As strong suspicion that someone is involved in criminal activity is no substitute for proof of guilt beyond a reasonable doubt…. Although a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation.”). Thus, in Evans-Smith, the Fourth Circuit, in reversing the defendant’s murder conviction, held:

“To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from explaining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty. The prosecution has attempted to accomplish only the first alternative, not the second. As the Supreme Court has long taught, “it is the duty of the Government to establish … guilt beyond a reasonable doubt.”

19 F.3d at 910 (quoting In re Winship, 397 U.S. 358, 362 (1970)).

PART THREE: THE EVIDENCE ADDUCED AT TRIAL

For purposes of this matter, the Court’s focus is exclusively on the evidence in support of the indictment. Ultimately, the trial record is most notable for the absence of evidence that can support a rational finding of guilt beyond a reasonable doubt. By the defense’s tally, there were three witnesses called by the Government that provided evidence related to Mr. Doe’s alleged culpable mental state. This memorandum will address these witnesses testimony in the order received by the Court.

I. WAYNE JONES

Investigator, Wayne Jones, of the Texas State Board of Pharmacy (“TSPB”) was a Government witness who initially outlined his over 40 years of total law enforcement experience with TSPB, and two municipalities. His testimony initially focused on making undercover purchases from Accent Pharmacy. During one of his undercover trips to the pharmacy, he encountered “Dr. Sammie Lewis” who engaged him in conversation regarding his professional status as a medical doctor. This conversation lead to Lewis offering to evaluate and treat Jones’ relative. Investigator Jones was also present during the execution of the search warrant at the pharmacy and conducted an interview of John Doe. He testified that he documented this interview in his written report and that he also took a handwritten statement from Mr. Doe (Government’s Exhibit No. 11). Jones testified that during his interview, Mr. Doe was surprised by the activities
at the pharmacy and would only say that he had no knowledge of the activity at the pharmacy. The handwritten statement of Mr. Doe declared that he was unaware of Lewis’ operation “to this extent” and that he “trusted” Lewis and “the co-workers to run the pharmacy.” This evidence is exculpatory in nature and reflects Mr. Doe’s lack of knowledge and willful agreement to further the conspiracy’s unlawful purpose. The Government’s take on the evidence is totally different. It parse’s the phrase “to this extent” in order to seek an inference that he was aware of the alleged conspiracy only to a certain point. Investigator Jones also testified that Mr. Doe voluntarily surrendered his license after his interview. This act on Mr. Doe’s part was an initial acknowledgment of an administrative violation that could be imposed and in no way implicates him in a crime. Indeed, Investigator Jones testified under cross-examination that Mr. Doe undertook efforts with his counsel, subsequent to this event, to obtain his license back from TSPB which resulted in proposed rehabilitation efforts in order to do so. He concluded his testimony by discrediting proposed Government witness, Sammie Lewis.

II. JOEL DUNN

DEA Special Agent, Joel Dunn was the case agent and government witness who testified that he was present at the search warrant and interviewed Mr. Doe. Dunn testified that Mr. Doe initially stated that he would come to the pharmacy daily. However, when confronted with the fact that the pharmacy was under surveillance, his story shifted to stating that he came often. When Dunn asked Mr. Doe about Sammie Lewis and his wife, Remossive Lewis, Mr. Doe indicated that he was aware that Sammie Lewis did not have a pharmacist license in Texas but that he was educated elsewhere. Mr. Doe also acknowledged that the licenses for neither Lewis nor his wife, Remossive, were displayed in the pharmacy. Dunn also testified that Mr. Doe was asked why he turned over the pharmacy to two unlicensed individuals. Mr. Doe responded that he was having trouble getting the pharmacy off the ground and that he needed to work at Parkland Hospital.

Finally Dunn testified that he reminded Mr. Doe of his prior administrative sanction and that Mr. Doe voluntarily surrendered his license for the pharmacies.

Dunn’s testimony provides compelling evidence of administrative violations somewhat similar to Mr. Doe’s previous sanction for allowing an unlicensed individual to operate in a pharmacy. There is no direct evidence, nor admissions from Mr. Doe, that he knowingly and purposefully engaged in the conspiracy alleged. Once again, the Government’s stance regarding Dunn’s testimony is one of inference piled on top of inference regarding Mr. Doe’s willfulness in joining the conspiracy alleged. The mental gymnastics engaged in by the Government would require one to pile speculation on top of the inferences drawn from such evidence.

III. REMOSSIVE LEWIS

The Government entered into a plea bargain agreement with Remossive Lewis, the wife of Sammie Lewis, and called her as a witness.

11 The Government after having entered a plea agreement with Lewis and placing his name on their witness list chose not to call him to the stand.
Ms. Lewis whose testimony, as instructed by the Court, is to be weighed with great caution and care, testified that her role in the operation of the pharmacy was limited. She testified that despite being the lone signatory on the pharmacy’s bank account at Capital One, she received her instructions for operating the account from Sammie Lewis. She also testified that she was physically separated from Sammie Lewis on at least two occasions during the operation of the pharmacy which resulted in her obtaining a separate home in an apartment. Importantly, she testified that she was not present nor privy to any conversations between Sammie Lewis and John Doe when they first met. However, she curiously recalled a written agreement between Lewis and Doe that she claimed would either be located in she and Lewis’ home, or the pharmacy. No such agreement was ever produced by the Government. Remossive Lewis also testified that from time to time Mr. Doe would coach Lewis on how to mix the pharmaceuticals. She also testified that Mr. Doe worked at Parkland Hospital at night and would come by the pharmacy tired and sleepy. In fact, she testified that he would sleep while at the pharmacy until Sammie Lewis instructed him to go home and rest.

This testimony from one of the alleged co-conspirators did not offer any direct evidence that Mr. Doe knowingly and intentionally joined the charged conspiracy. Again, one needs to engage in conjecture and inference upon inference to connect the dots to attempt to prove Mr. Doe’s culpable mental state. Faced with an absence of evidence, including the total lack of proof that Mr. Doe received any proceeds, financial gains, nor luxury items for his role in the conspiracy unlike his alleged co-conspirators, the Government engages in conjecture and speculation built on inferences. Mr. Doe’s role and lack thereof at the pharmacy does not come close to satisfying the requisite culpable mental states that must be proven beyond a reasonable doubt. Such a conjectural showing is insufficient to support the conviction.

PART FOUR: COMPARING THE RECORD EVIDENCE TO THE CASE LAW

The evidence adduced at trial was insufficient to secure a valid conviction. When the trial record in this case is compared against relevant case law, the patent insufficiency of the Government’s evidence becomes even more strikingly obvious.

As the threshold element, the government was required to prove beyond a reasonable doubt that Mr. Doe knowingly and intentionally joined in the charged conspiracy. The Government’s evidence established no more, and arguably substantially less, than a legally insufficient coin flip on this element. The government repeatedly asserts that Mr. Doe confessed to the crime by his statements and his actions.

I. MR. DOE’S STATEMENTS

A. Wayne Jones

Investigator Jones of the TSPB interrogation of Mr. Doe revealed evidence that Mr. Doe expressed “surprise” that the pharmacy was being operated in the fashion that it was by “Dr. Sammie Lewis.” Jones further testified that Mr. Doe orally stated that he had “no knowledge” of the activities at the pharmacy. The handwritten statement of Mr. Doe corroborated his oral
statements and his surprised demeanor by again asserting that he was “unaware” of the operation of the pharmacy “to this extent” (see Government’s Exhibit No. 11). The last line of the statement outlined that he “trusted” Lewis and the “co-workers” to operate the pharmacy. It is quite evident from the compelling and substantial evidence from the mouth and pen of Mr. Doe that he was not aware of the charged conspiracy and certainly did not join in said conspiracy willfully. The Government’s tortured logic regarding this evidence would involve a suspension of belief that Mr. Doe was “unaware” and had “no knowledge” of the charged conspiracy and that the phrase “to this extent” belies Mr. Doe’s own statements and that he was knowledgeable of the conspiracy only to a certain degree. This logic calls for conjecture and speculation and is not proof beyond a reasonable doubt.

B. Joel Dunn

As detailed above in PART THREE, Special Agent Jones testified that Mr. Doe initially misled him regarding his frequency of visits at the pharmacy until confronted with surveillance evidence. Agent Dunn also testified that Mr. Doe admitted that the requisite pharmacy licenses for “Dr. Sammie Lewis” and his wife, Remossive Lewis, were not displayed at the pharmacy. These admissions certainly invoke administrative violations of the TSPB. However, these were certainly not admissions of involvement in the charged criminal conspiracy.

II. MR. DOE’S ACTIONS

Both Investigator Jones and Agent Dunn testified that Mr. Doe surrendered, respectively, his personal pharmacy licenses issued by the TSPB and the pharmaceutical licenses issued by the DEA. Thus, the Government’s argument that the actus reus – licenses surrendered to the governing agencies – proved the mens rea beyond a reasonable doubt.

The Fifth Circuit, however, already has rejected efforts to prove mens rea in such a “circular and self-serving” fashion. Alvarez at 334. In Alvarez, a jury convicted the defendant of knowingly possessing drugs that were found “in the residence over which [the defendant] exercised custody and control.” Id. at 334. The defendant did not dispute that a “cache of drugs and money” was found “hidden” in the residence (a trailer). Id. The defendant did, however, dispute the allegation the he has “knowledge” of the drugs and money. Id. In support of evidentiary sufficiency of its case, the government pointed to several pieces of circumstantial evidence that, in its view, supported a finding of “knowledge” beyond a reasonable doubt. Among other things, the government argued “that the existence of the … hidden compartment [in which the drugs and money were found] shows that [the defendant] knew about the compartment’s contents ….” Id. The Fifth Circuit called this argument “both circular and self-serving.” Id. The Fifth Circuit pointed out that, if accepted, the government’s argument “would all but eliminate the knowledge requirement each time a hidden compartment merely existed.” Id. at 335.

What the Government is seeking to argue in this case – that Mr. Doe’s surrender of his license is evidence that he possessed the requisite intent, and knowledge in willfully joining the conspiracy – is analogous to the “circular and self-serving” argument it unsuccessfully advanced in Alvarez. Rather than adduce actual evidence that Mr. Doe acted with the requisite intent to join
the charged conspiracy, the Government started from a presumption of guilt and then made a series of arguments for why Mr. Doe must have been acting with the requisite mens rea when he committed the actus reus.12

The Government’s evidence in this case was characterized by modest evidentiary showings, equivocal or attenuated evidence of guilt, or a combination of all three. See also, United States v. Cartwright, 359 F.3d 281, 291 (3rd Cir. 2004) (evidence found insufficient where Government asked the jury to make a series of inferences on weak facts where “countless other scenarios that do not lead to the ultimate inference the Government seeks to draw” were also plausible). The issue of mens rea was recently addressed in United States v. Cessa, 785 F.3d 165 (5th Cir. 2015) where it was held that evidence of the defendant’s knowing acceptance of illegal drug proceeds as payment for his services was not sufficient to support his conviction for a money laundering conspiracy notwithstanding that his actions had the effect of concealing the illegal proceeds. The Court reasoned that there was insufficient evidence to prove beyond a reasonable doubt that the defendant joined the conspiracy, “knowing its purpose and with the intent to further the illegal purpose” citing United States v. Fuchs, 467 F.3d 889, 906 (5th Cir. 2006). The Court further stated that additional circumstantial evidence of intent to further the illegal conspiracy must be present. Id. 906. This is the identical and critical third element in our case where the government’s evidence falls woefully short. The Supreme Court decision in Elonis v. United States, 135 S. Ct. 2001 (2015) provides more guidance. The holding in Elonis is based on the principle that “wrongdoing must be conscious to be criminal,” and that a defendant must be “blameworthy in mind” before he can be found guilty. Id. at 2009. This principle does not mean that a defendant must know that his conduct is illegal (i.e., ignorance of the law is no excuse), but rather, he must have knowledge of “the facts that make his conduct fit the definition of the offense.” Id., citing Staples v. United States, 511 U.S. 600, 608, fn.3 (1994).

CONCLUSION

The Government’s evidence in this case has failed to satisfy the required element of mens rea on the part of John Doe. The evidentiary record in this case, and for this defendant, clearly suggests that a grant of this Rule 29 motion is just and required.

Respectfully submitted,

/s/Michael P. Heiskell

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12 The motive theories advanced by the Government, though unsupported by any evidence, were diverse. One motive theory was that Mr. Doe “believed” that his prior administrative sanction in 2009 resulted in punishment so lenient that he decided to engage in similar conduct. However, the government also infers that he took this similar conduct to the next level by purposely taking a giant step in joining the charged criminal conspiracy. This strained reasoning defies logic. An additional theory advanced is that Mr. Doe obtained monies from the conspiratorial scheme in order to open a second pharmacy. However, there was absolutely no evidence ever proffered on this theory.
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA §

v. § NO: 4:14-CR-000000

JOHN DOE (2), §
Defendant.

JOHN DOE’S MOTION FOR NEW TRIAL
RULE 33, FED. R. CRIM. PROC.

INTRODUCTION

Rule 33 states that upon the Defendant’s motion, “the court may vacate any judgment and
grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33; United States v. Wall,
389 F.3d 457, 466 (5th Cir. 2004). “The burden of demonstrating that a new trial is warranted ‘in
the interest of justice’ rests on the defendant.” United States v. Soto-Silva, 129 F.3d 340, 343 (5th
Cir. 1997). Rule 33 motions are not favored and are viewed with great caution. United States
v. Blackthorne, 34 F.3d 449, 452 (5th Cir. 2004). “The grant of a new trial is necessarily an extreme
measure, because it is not the role of the judge to sit as a thirteenth member of the jury.” United
States v. O’Keefe, 128 F.3d 885, 898 (5th Cir. 1997); but see United States v. Robertson, 110 F.3d
1113, 11120 n. 11 (5th Cir. 1997).

“Motions for new trial are based either on the grounds that the verdict was against the
weight of the evidence or that some error was committed by the court or the prosecution which
substantially affects the rights of the accused.” United States v. Simms, 508 F. Supp. 1188, 1202
(W.D. La. 1980). In the Fifth Circuit, “the generally accepted standard is that a new trial
ordinarily should not be granted unless there would be a miscarriage of justice or the weight of
evidence preponderates against the verdict.” United States v. Wright, 634 F.3d 770, 775 (5th Cir.
2011)(emphasis added); see Wall, 389 F.3d at 466.

Unlike the Rule 29 motion where the evidence must be viewed in a light most favorable
to the verdict, in determining whether to grant a Rule 33 motion, the Court “may weigh the
evidence and may assess the credibility of the witnesses during its consideration of the motion
for new trial.” United States v. Tarango, 396 F.3d 666, 672 (5th Cir. 2005) (citing Robertson, 110
F.3d at 1117). Thus, the court has broad discretion to grant a new trial “in the interest of justice.”
United States v. Scroggins, 379 F.3d 233 (5th Cir. 2004), vacated on other grounds, 543 U.S.
1112, 125 S.Ct. 1062, 160 L.Ed.2d 1049 (2005); United States v. Antone, 603 F.2d 566 (5th Cir.
Deference is given to the district court because it actually observed the demeanor of witnesses and their impact on the jury. Wall, 389 F.3d at 465; O’Keefe, 128 F.3d at 893.

“[E]vidence which merely discredits or impeaches a witnesses’ testimony does not justify a new trial.” United States v. Blackthorne, 378 F.3d 449, 455 (5th Cir. 2004)(citation omitted). A new trial may be appropriate where the evidence only tangentially supports a guilty verdict and the evidence “preponderates sufficiently heavily against the verdict such that miscarriage of justice may have occurred.” Tarango, 396 F.3d at 672.

I. DISCUSSION

The Government has failed to present sufficient evidence that John Doe was part of a conspiracy between he and the co-defendants, as alleged in the indictment. See also, John Doe’s MOTION AND BRIEF FOR JUDGMENT OF AQUITTAL (Rule 29 (a) and (c), Fed. R. Crim. Proc.) filed contemporaneously with this motion. The testimony of the government’s witnesses failed to establish a conspiracy but merely supports the conclusion that the Defendant associated with his co-defendants regarding the sale of a pharmacy to said co-defendants who were, as it turned out, unlicensed to operate the pharmacy.

To prove the conspiracy under 21 U.S.C. § 846, the government must prove the offense elements to include, but not limited to, that Mr. Doe joined in the conspiracy willfully, with the intent to further its unlawful purpose.

The evidence adduced at trial only tangentially supported a guilty verdict. The inference upon inference relied upon by the government in its evidence presentation allegedly relied upon “confessions” given orally and in writing by Mr. Doe to the investigating agents. However, close scrutiny of said “confessions” reveal the demeanor of surprise and actual statements reflecting his lack of knowledge of the internal operations of the pharmacy by his co-defendants. His alleged incriminating statements to special agent Dunn only proved administrative violations of the rules and regulations of the Texas State Pharmacy Board and did not encompass the requisite culpable mental state one must possess to “willfully” join the charged criminal conspiracy with the “intent to further its lawful purpose” (See Court’s instructions on Third essential element of conspiracy).

The evidence regarding Mr. Doe’s surrender of his pharmaceutical licenses reflect his acknowledgment of the administrative rules and his attempt to respond in good faith. This act is not, and should not, be construed as a tacit admission of guilt. The testimony of co-defendant, Remossive Lewis, whose credibility can be reasonably and honestly questioned, failed to supply the missing link of Mr. Doe’s mens rea. First, her minimizing of her role during her testimony belies the documentary evidence (bank records) and her unjust enrichment from the proceeds she and co-defendant, Sammie Lewis, exclusively obtained. Her attempts to provide the link by stating that Mr. Doe and Sammie Lewis memorialized the unlawful conspiracy strains credibility by the nature of this testimony and her statements that she actually observed the contract at her house or office. In addition, this alleged written agreement was never produced and never cited by any other witness. Finally, her plea agreement and her understanding that she is anticipating probation and/or home confinement as a
sentence, also deeply compromises her credibility.

This Rule 33 motion invokes the “interest of justice” standard as appropriate where the weight of the evidence preponderates against a verdict. Wall at 466.

The evidence in this case lacks sufficiency and credibility on the issue as to whether Mr. Doe willfully joined in the charged conspiracy with the intent to further its unlawful purpose of distribution and dispensing of hydrocodone.

CONCLUSION

For all of the reasons at forth, above and in the defendant’s Motion and Brief for Judgment of Acquittal (Rule 29 (a) and (c), Fed. R. Crim. Proc.), Mr. Doe respectfully requests that the court grants this motion and order a new trial.

Respectfully submitted,
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