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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

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| **UNITED STATES OF AMERICA** | **10-CR-60066-HO** |
| **v.** | |
| **STEVEN DWIGHT HAMMOND and DWIGHT LINCOLN HAMMOND,** | **UNITED STATES' RESPONSE TO DEFENDANTS' FIRST MOTION FOR DISCOVERY** |
| **Defendants.** | |

The United States of America, by and through Dwight C. Holton, United States Attorney for the District of Oregon and Kirk A. Engdall and Frank R. Papagni, Jr., Assistant United States Attorneys, hereby submit the following response to Defendants' First Motion For Discovery.

## I. INTRODUCTION

In their First Motion for Discovery, defendants have asked for discovery into a broad array of areas. As discussed below, defendants' motion for discovery should be denied in the most part, as the majority of their requests are either moot or seek materials that are not discoverable. The government understands its continuing discovery obligations and has been

and will continue to provide all relevant, discoverable materials. To date, the government has provided defendants with twenty compact discs containing approximately 6,000 items, as evidenced by the discovery log. *See Exhibit 1* (August 4, 2010 Discovery Log). This discovery included copies of more than 6,500 written reports, witness statements, fire investigative reports, search warrant materials, temporary flight restriction documents, photographs, and audio recordings. Prior to providing all this discovery, the government met with defense counsel and gave a two hour PowerPoint presentation that went over the evidence the government possessed as of that date. Again, any additional relevant, discoverable items will be provided to defendants as they become available to the government. For this reason and others set forth below, the Court should reject defendants' request.

## II. APPLICABLE STANDARDS FOR DISCOVERY

Discovery in criminal cases generally is controlled by Rule 16 of the Federal Rules of Criminal Procedure.[1] Pretrial discovery is also governed by the *Jencks Act* (18 U.S.C. § 3500), and *Brady v. Maryland*, 373 U.S. 83 (1963), along with cases decided thereunder. Defendant seeks a wide range of material, much of it non-discoverable. The government has provided, and will continue to provide defendants with pretrial discovery in accordance with those discovery standards. Indeed, much of the material provided to date goes beyond what is called for by these rules, and beyond the scope of the time frame identified in the Indictment. The government has taken and will continue to take a broad view of its discovery obligations. This broad view, however, does not create an obligation to provide nondiscoverable, irrelevant materials.

[1]Unless otherwise noted, any reference to a "Rule" herein refers to the Federal Rules of Criminal Procedure.

**A. Rule 16**

Rule 16 provides for disclosure of five types of information: (1) the defendant's own statements; (2) the defendant's prior criminal record; (3) documents and tangible things which are within the government's possession, custody, or control, and which are material to the preparation of the defense, are intended for use as evidence in the government's case-in-chief, or were obtained from or belong to the defendant; (4) results or reports of physical or mental examinations or scientific tests or experiments; and, (5) a summary of the qualifications and opinions of expert witnesses who will testify at trial. The government has complied and will continue to comply with the requirements of Rule 16.

The power to compel discovery under Rule 16, however, is not unlimited. Rule 16(a)(2) also provides as follows:

> Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Furthermore, Rule 16 applies only to statements, documents, and materials to which federal prosecutors have knowledge and access, that is, generally the files of the Department of Justice and of the investigative agency and any other law enforcement agencies that are part of the prosecution team. *United States v. Santiago*, 46 F.3d 885, 893-94 (9th Cir. 1995); *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989). To the extent that there is a good faith reason to believe that any other government agency other than those identified in the discovery could have

potentially discoverable or exculpatory information relevant to this case, the government has and will make appropriate inquiries to identify such information.

Further, "[t]o obtain discovery under Rule [16(a)(1)(E)],[2] a defendant must make a *prima facie* showing of materiality." *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984). A "general description of the materials sought or a conclusory argument as to their materiality is insufficient to satisfy the requirements of Rule 16(a)(1)(c)." *Cadet*, 727 F.2d at 1468. Similarly, a request for "all 'relevant' evidence" will be "inadequate to meet the requirements" of the rule. *Id.* Nor can a request for "all of the files" of the investigative agency be granted absent a showing of materiality. *United States v. Gordon*, 974 F.2d 1110, 1116-17 (9th Cir. 1992).

Defendants would have this Court dilute the materiality requirement relative to what the government is obligated to produce under Rule 16(a)(1)(E). Defendants, are, in effect, requesting any file that any agency has on not only the charges in the Indictment but on any individual the government has ever interviewed or considered as a witness. *See, e.g.*, Def. Disc. Mot. Req. Specific Requests # 7, 12, and 16. Defendants also repeatedly refer to "any and all information" or "any and all records" without any reference to the materiality of the information sought. *See Id.*

Rule 16(a)(1)(A) governs pretrial discovery of the defendant's own statements. It requires disclosure of "the substance of any *relevant* oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial." (Emphasis added).

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[2]Then-Rule 16(a)(1)(C).

A defendant's oral statements "need only be disclosed if made in response to interrogation by persons known to be government agents." *United States v. Hoffman*, 794 F.2d 1429, 1432 (9th Cir. 1986). The defendant is not entitled to a pretrial discovery *order* requiring the production of any oral statements he may have made to persons other than government agents, since "'the Jencks Act prohibits the pre-trial disclosure of the [government] witness' statements, even when such statements contain quotations allegedly attributed to the defendant . . . .'" *Hoffman*, 794 F.2d at 1433, quoting *United States v. Walk*, 533 F.2d 417, 420 (9th Cir. 1975).

Besides a defendant's statements in response to interrogation, Rule 16(a)(1)(B) further requires the government to:

> disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:
>
> (I) any *relevant written or recorded statement* by the defendant if:
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> - the statement is within the government's possession, custody, or control; and
>
> - the attorney for the government knows – or through due diligence could know – that the statement exists . . .

(Emphasis added). Thus, any recorded or written statements of a defendant are discoverable only if they are relevant.

Defendants' request goes much further than what is required, seeking not only "any and all statements" as well as their co-conspirators, agents and employees to law enforcement, employees or agents of any Government agency with administrative authority and any informer

or agent of any such entity. *See, e.g.*, Def. Disc. Mot. Req. Specific Requests # 2. Defendants also seek "any and all information and material...relating to any communication, oral, written or recorded, of any Defendant" or an employee or agent of a Defendant "whether or not the Government intends to produce evidence or testimony regarding such statements or testimony" at any stage. *See, e.g.*, Def. Disc. Mot. Req. Specific Requests # 8. Perhaps most broad, defendants go further and request "any written, recorded, or unwritten or unrecorded" statements made by Defendants including "statements made to witnesses other than law enforcement officers at any time" including person to person or telephonic. *See, e.g.*, Def. Disc. Mot. Req. General Requests # 2. Notwithstanding the restrictions on the scope of discovery under Rules 16(a)(1)(A) and 16(a)(1)(B), the government has provided defendants with substantial discovery in this area, including interview reports regarding numerous witnesses, much of which would not be "relevant"under Rule 16(a)(1)(B). Neither the rules nor the Due Process Clause require further production.

**B. The *Jencks Act***

The *Jencks Act* provides that no statement or report of any "Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until such witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500(a). Unless exculpatory, statements of witnesses and potential witnesses are generally "unavailable until such witnesses have testified at trial." *United States v. Taylor*, 802 F.2d 1108, 1118 (9th Cir. 1986). Statements of prospective government witnesses who do

not testify at trial are not discoverable at all under the *Jencks Act*. *Cadet*, 727 F.2d at 1469; *United States v. Mills*, 641 F.2d 785 (9th Cir. 1981).

The *Jencks Act* narrowly defines "statement" as –

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e). Accordingly, investigative reports of law enforcement agencies often will not constitute *Jencks Act* material, even if the reports contain summaries of prospective witnesses' statements. Unless the summaries were shown to and were adopted or approved by the witnesses, or unless the reports are substantially verbatim transcriptions of the witnesses' statements, they are not *Jencks Act* material and are not discoverable.

Despite these limitations, the government has provided the defendants with reports of interviews of many prospective witnesses including, but not limited to, neighbors and acquaintances of defendant. The government will also continue to provide additional witness statements when and if they become available. This is beyond that which the government is technically required to produce, even after a witness has testified at trial, under a strict interpretation of the *Jencks Act*. *United States v. Claiborne*, 765 F.2d 784, 801 (9th Cir. 1985) (FBI summaries of witness interviews are not normally *Jencks Act* material). *See also United States v. Bobadilla-Lopez*, 954 F.2d 519, 522 (9th Cir. 1992) (to be discoverable under the *Jencks*

*Act*, statements must "reflect the witness' own words" and must "also be in the nature of a complete recital that eliminates the possibility of portions being selected out of context").

**C. *Brady* Material**

Under *Brady v. Maryland*, the government must disclose to the defendant exculpatory evidence which is "material either to guilt or to punishment. . . ." *Brady*, 373 U.S. 83, 87 (1963). *Brady* does not, however, create "a constitutional duty to disclose every bit of information that might affect the jury's decision; [the government] need only disclose information favorable to the defense that meets the appropriate standard of materiality." *United States v. Little*, 753 F.2d 1420, 1440-41 (9th Cir. 1984). *See also United States v. Agurs*, 427 U.S. 97, 106 (1976) ("there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor").

The mere possibility that an item of information might help the defense or might affect the outcome of the trial "does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-110. Rather, evidence is material only if "its suppression undermines confidence in the outcome of the trial," *United States v. Bagley*, 473 U.S. 667, 678 (1985), or if the information "is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Agurs*, 427 U.S. at 108; *Bagley*, 473 U.S. at 675. Defendant repeatedly refers to exculpatory information, which the government has and will continue to prove, if it exists. Simply asking for exculpatory information does not entitle defendants to require the government to produce a virtually limitless amount of material (much of which is not discoverable under Rule 16(a)(2))

based on speculative and ambiguous references to potentially exculpatory that does not meet the threshold of materiality.

*Brady* also encompasses evidence affecting the credibility of key government witnesses. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). While such evidence includes "criminal records of government witnesses, favors and deals given to government witnesses, and grants of immunity given to government witnesses," the government "need not disclose this material prior to the direct examination of the relevant witness." *United States v. Laurins*, 660 F. Supp. 1579, 1584 (N.D. Cal. 1987), *aff'd*, 857 F.2d 529 (9th Cir. 1988). The government is aware of its obligations under *Giglio* and will provide that material where and when it is appropriate to do so. Defendants' request for not only criminal histories for defendants but for "any person the Government intends or is considering calling as a witness during any stage of this proceeding" is premature at this time and to the extent it seeks information on people that do not end up being called as witnesses, it must be denied. *See, e.g.*, Def. Disc. Mot. Req. Specific Requests # 5.

Exculpatory information in formal investigative reports is discoverable *Brady* material. Rough notes are discoverable under *Brady* if the prosecutor perceives, or the defendant can raise, a "colorable claim that the rough notes contain evidence favorable to the defendant and material to his claim of innocence or to the applicable punishment" that had not been included in any formal report provided to the defendant. *United States v. Taylor*, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986) (citing *United States v. Griffin*, 659 F.2d 932, 939 (9th Cir. 1981)). "'[M]ere speculation about materials in the government's files [does not require] the district court . . . under *Brady* to make the materials available for [defendant's] inspection.'" *United*

*States v. Michaels*, 796 F.2d 1112, 1116 (9th Cir. 1986) (citation omitted). The government has reviewed the notes of any interviews and confirmed that the reports incorporate all that information, so any request for rough notes should be denied.

The government has and continues to perform its constitutional obligations to review items for exculpatory information. Prosecutors are presumed to properly discharge their discovery duties. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). As a result, the Court should reject defendants' requests for exculpatory or *Brady* or *Giglio* materials to the extent they appear to seek information that is not otherwise subject to discovery or that is sought prematurely.

## III. DEFENDANTS' DISCOVERY REQUESTS

In their First Motion for Discovery, defendants make both specific and general requests for discovery. The government will address those requests below, but notes generally that with many of defendants' requests, it is not entirely clear what defendants are actually seeking and it is equally unclear as to how that material would potentially be discoverable under Rule 16 or *Brady*. Many of defendants' requests surpass the government's discovery obligations and defendants are simply not entitled to every single piece of evidence gathered by the government, particularly when it leads nowhere.

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## A. SPECIFIC DISCOVERY REQUESTS[3]

**Request 1 (Request for Physical Evidence)**: The government does not oppose this request to test all physical evidence. The government does, however, object to the extent defense wishes to do any testing that might destroy or alter the evidence and prevent the government from verifying any results. The government will provide a list of items in evidence and the defense may indicate which items it wishes to test and where the testing is to be done so that the items can be delivered to that location and the chain of custody preserved.

**Request 2 (Records of All Statements)**: As discussed in Part II, defendants are entitled to statements to law enforcement as well as all written and recorded relevant statements. The government has already provided some 6000 items of discovery which include records, documents, reports, memoranda and other writings setting forth statements purportedly made by defendants. To the extent defense is requesting that the government search out any potential statements, relevant or not, from any agency, the government objects because the request is overbroad and seeks irrelevant and unnecessary materials.

**Request 3 (Search Warrant Information)**: The government does not oppose this request to the extent it is related to this case and is otherwise unsealed or available in the public record. Indeed, this information was provided to defendants in the August 4, 2010 discovery materials.

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[3] The Specific and General Request Numbers correspond with the Defendants' Motion. The government will not set out the entire request in full because of the length of many of the requests, but attempts to paraphrase them.

**Request 4 (Boot Print Evidence)**: The government does not oppose this request to the extent it is related to this case and is otherwise unsealed or available in the public record. Indeed, the government has already provided such information to defense and will continue to provide such information so long as it is in the government's possession or control.

**Request 5 (Criminal History for Defendants and Any Witness the Government is Considering Calling)**: The government provided the majority of this information to defendants on April 4, 2011. As discussed in Part II, the government is under no obligation to turn over criminal history reports on witnesses, much less on any individuals the government is considering calling, at this stage. The government will provide this information as required and in advance of the testimony of any witness and consistent with the Court's Trial Management Order.

**Request 6 (404(b) Evidence)**: Evidence of other acts has been provided in discovery. The government is still determining what it will offer at trial. Should the government offer evidence pursuant to FRE 404(b) in its case-in-chief or otherwise, the government will give defendants adequate notice and provide such evidence in accordance with the requirements of the law.

**Request 7 ("Any and all records, documents notes" etc. regarding "any contact" by "any employee, agent or contractor of any Government agency [federal, state, or local]" involved in the investigation regarding anything in the Indictment with any other employees, agent of contractor of any such agency that refer to any matters in the indictment or defendants):** As noted above, the government has provided substantial evidence

to defendants, understands its ongoing discovery obligations and will continue to provide any and all relevant, discoverable materials in its possession or control as it relates to the matters referenced in the indictment. This request, to the extent it seeks, any item whether or not it is relevant or discoverable, must be denied. At bottom, defendants seems to be asking for anything in any agency file that mentions the matters in the Indictment or defendants without any limitation that the material be relevant—defendants are not entitled to every item in every agency file.

**Request 8 ("Any and all" information relating to communication with defendants or any of defendants' employees or agents "whether or not the Government intends to produce evidence or testimony regarding such statements")**: The government opposes this request as being overly broad and because Rule16(a)(2) does not authorize discovery or inspection of statements made by persons the government does not intend to call as witnesses except as provided in the *Jencks Act*. Defendants seek materials which include "any" comments a defendant or their employee has "ever" made to the government without limiting their request in any way or noting its relevance. Discovery should not be allowed if it is a "mere fishing expedition based on the defendant's mere hopes of finding exculpatory evidence." *United States. v. Velarade*, 485 F.3d 533 (10th Cir. 2007).

**Request 9 (Notice of when defendants were first considered responsible for information in the Indictment):** This information has already been provided to defendants.

**Request 10 (Reports Provided to Experts and Consultants):** The government has provided reports of its experts in discovery. To the extent those experts were provided

information, that information was provided in discovery and should be referenced in those reports. Should the government intend to use additional expert testimony, reports by those experts will also be provided.

**Request 11 (Character or Reputation Evidence for Defendants):** The government has provided some character and reputation evidence in discovery even though it may not have been discoverable. The government will continue to be provided if and when it becomes relevant and discoverable. *See generally United States v. McClintock,* 748 F.2d 1278, 1287 (9th Cir. 1984) (tape recording of witness showing business not always engaged in a fraudulent practice not exculpatory); *United States v. Hedgcorth,* 873 F.2d 1307 (9th Cir. 1989) (excluding inadmissable character evidence.

**Request 12 (All reports, photographs audio, visual recording prepared at any time in any investigation of the matters referenced in the Indictment including from Harney County and OSP concerning the Hammonds and matters in the Indictment)**: The government has previously provided the relevant, discoverable materials in its possession that are responsive to this request. Any additional discoverable, relevant reports will also be discovered as they become available to the government. To the extent this request seeks irrelevant or otherwise nondiscoverable materials, it should be denied.

**Request 13 (Interagency Standards for Fire and Aviation Operation)**. This information has been provided and is generally available to the public. *See* http://www.nifc.gov/policies/pol_ref_redbook_2011.html.

**Request 14 ("Actual Use Reports" from 1982-2006)**. The "Actual Use Reports" have been requested by the government from the Bureau of Land Management and will be discovered as soon as they come into the government's possession.

**Request 15 (Reports of Surveillance of defendants', defendants' property or any co-conspirator, employee or agent of defendant)**. No such surveillance per-se has been done on defendants or other co-conspirators in this case/investigation. Reports of observations by government agents and witnesses have been discovered.

**Request 16 (Training Records for all Government employees mentioned in discovery)**. The government has provided training records of all relevant government employees. Additional training records of witnesses will be made available as they become relevant.

**Request 17 (Cell phone records and billing statements for telephones, radios, and other communication devices in the possession of any employee, agents or contractor of any Government agency)**. The government opposes this request as being overbroad and unduly burdensome as well as seeking information that is not relevant and not discoverable. Here, as in Request 8, defendants seek materials which include "all" communication devices of "any employee, agent, contractor or employee of any Government agency [federal, state, or local] involved in any of the fires referenced in the indictment." Defendants appear to be on a fishing expedition and this request should be denied. *See United States v. Velarade*, 485 F.3d 533 (10th Cir. 2007).

**Request 18 (Copy of a Map)**: The government does not oppose this request. A copy of the requested map will be discovered to defendants.

**Request 19 (All reports and other information in addition to what was provided in discovery concerning a Washington State fire and all fires in which Wade Kean Kirkwood was suspected):** The discovery found in Bates Numbers 06.G03353 through 06.G03886 is a compilation of fire investigation training materials and an arson investigation case study provided by BLM fire investigators. The case study referenced an arson which occurred in the State of Washington by convicted arsonist, Wade Kean Kirkwood. The discovery materials requested by defendants referencing all fires of a suspicious origin in the State of Washington during 2004 and Wade Kean Kirkwood are not otherwise relevant to this case. No further discovery is warranted.

**Request 20 (Materials regarding the fires referenced in the Indictment)**: The majority of the materials referenced in this request and in its multiple subparts have been provided to defense. Defense counsel has advised the government that the items listed in Request 20 are items which their fire cause consultant believes should be included in the discovery for each of the listed fires. Most, if not all of the items have already been discovered or will be discovered during the continual and ongoing discovery process. Some of the items, however, do not exist or are otherwise not in the possession or control of the government.

In lieu of listing each referenced fire, the following general response is applicable to each of the listed fires:

The fire origin and cause reports and the photo logs requested have either been previously provided or were never in existence. The government will make itself available to defense to resolve any questions concerning the hundreds of photographs of the fires.

Requested weather reports and lightning strike data in the possession of the government have been provided to defense. Any additional weather reports are available to the public and defendants. Additional lightning strike data is available for purchase from the private vendor, "Viasala" Contact information for this vendor can be made available to defendants upon request.

The requested lab test results on the "exhaust system of BLM vehicles" consists of an exhaust emission test of two, quad four-wheeled vehicles. This report will be provided to defendants. No other exhaust tests were done on BLM or BLM contractor vehicles.

Defendants' requested discovery of records of drip torches or similar devices and their fuel which were used by government personnel are not in existence. Drip torches are ubiquitous items utilized by wildland firefighters and as such, no records are kept regarding specific individuals using such tools.

Records of tests for "accelerants at any of the...possible [fire] ignition points" have already been provided in the fire cause reports and discovered to defendants on April 4, 2011.

The government is not aware of any other relevant, discoverable items related to these fires in its possession, but will provide it if it becomes available.

**Request 21 (Requests for certain information for "any matters listed in the Indictment)**: This request similarly seeks a range of information regarding matters in the Indictment. The radio logs, photographs, dispatch logs, maps, tracking information, footwear

information, vehicle information, logs, notes, maps, and timelines have been discovered and will continue to be discovered pursuant to Rule 16, *the Jencks Act*, *Brady*, and *Giglio*.

**B. Defendants' General Requests**

**Requests 1- 15, 19 (General Discovery Requests):** The first twenty General Request seek similar information as sought in the Specific Requests. The government is aware of its discovery obligations, as discussed in Section II of this motion, and will provide all relevant, discoverable materials as well as any exculpatory material to defendants. To the extent that any of these requests (which often refer to "any and all") seek irrelevant or nondiscoverable items, the government requests those requests be denied.

**Requests 16-17 (Notes of Agents):** These requests seek the handwritten notes whether or not they were memorialized in reports. Defendants are not entitled to the notes. As previously explained, the notes were incorporated into memorandum and the government has or will review all the notes for any missing or exculpatory information.

**Request 18 (Grand Jury Minutes and Testimony as Well As Documents Used by Witnesses Before the Grand Jury):** The government will disclose all grand jury testimony of trial witnesses consistent with its obligations under the *Jencks Act* and *Brady*. The government will also disclose any exculpatory information if it exists. Otherwise, the information before the grand jury is not discoverable.

**Request 20 (Personnel Files of Each Law Enforcement Agent Who will Testify):** The government will comply with all its obligations regarding the provision of witness

statements, *Giglio* material, and other relevant information in a timely manner prior to trial. Disclosure of the entire personnel file is neither necessary nor appropriate.

**Request 21 (Names and Addresses of all percipient witnesses)**: Memoranda of interviews have been discovered to defendants. As additional witnesses are interviewed, the reports of such interviews will be discovered in a timely manner prior to trial, notwithstanding the fact that they need only be discovered after the testimony of each witness. The defense can obtain address information through publically available databases.

**Request 22 (Criminal History Checks of Prospective Government Witnesses)**: Routine criminal history checks for all government witnesses will be provided as will any relevant, discoverable material including information pursuant to the *Jencks Act, Brady* and *Giglio* consistent with the law. To the extent this request seeks irrelevant information, information not in the government's possession, or information that is publically available to defendants it should be denied.

**Requests 23-26 (Brady, Exculpatory, and Mitigating Evidence)**: The government has and will continue to comply with the mandate of *Brady* and provide any exculpatory information..

**Request 27 and 28 (Commencement and Termination Date of the Grand Jury as well as Number of Grand Jurors Present and Number Voting to Indict):** To the extent that any of this information is considered public information, defendants are directed to the United States District Court Clerks Office to obtain this information. Generally, however, information concerning the grand jury is protected pursuant to Rule 6 of the Federal Rules of Criminal

Procedure and the defendant is not entitled to that information. The government further notes that release of information regarding the number of grand jurors voting to indict requires a court order. *See* Fed. R. Crim. Pro. 6(c)

**Request 29 (Name of Every Prospective Government Witness)**: The government has already discovered multiple interview memorandum and will provide a witness list in accordance with the trial management order of the Court. The government is under no obligation to identify persons the government considered but declined to call as witnesses as such decisions involves trial strategy of the parties. The government will continue to comply with the requirements of the *Jencks Act and Brady*.

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## V. CONCLUSION

For the reasons stated above – particularly, the government's already demonstrated willingness to provide discovery beyond its statutory and constitutional discovery obligations and the fact that defendants' seek information that has either already been turned over or is not subject to discovery – the defendants' motion to for discovery should be denied.

Respectfully submitted this 17th day of June 2011.

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