A P P E N D I X 4

Counsel Letters & Motion to Withdraw

U.S. Department of Justice

United States Attorney
Western District of Washington

Please reply to:
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September 13, 2017

Emily M. Gause
emily@emilygauselaw.com

Re: United States v. George Hernandez, CR16-5358RJB
USDC, W.D. Washington

Dear Ms. Gause:

We are writing to respond to your September 7, 2017, Supplemental Discovery request.

In item 1, you request material related to an early 2014 investigation of Mr. Hernandez. You state that if the 2014 investigation "did not result in an arrest, such material would be 'helpful to the defense' and must be provided to Mr. Hernandez," and you cite *United States v. Price,* 566 F.3d 900, 914 (9th Cir. 2009). *Price*, however, does not support your request. *Price* dealt with the prosecution's failure to disclose impeachment information about the prosecution's star witness, who testified at trial. *Id.* Nothing in *Price* – or in any other authority that we are aware of -- suggests that the prosecution is obligated to produce material into prior investigations of a defendant if those investigations did not result in an arrest. If you are aware of any such authority, or if you have any specific reason to believe there is exculpatory information related to the 2014 investigation, please let us know.

In item 2, you request "evidence" of the GPS tracking warrant signed on July 21, 2015. To address this request, we contacted Officer Walkinshaw, who told us that all data from the GPS tracker would have been automatically overwritten after approximately seven days. As a result, no data exists.

In items 3, 4, 6, 7, 8, 9, 10, and 11, you request various forms of impeachment material on potential prosecution witnesses. Had this case gone to trial, the prosecution would have met its duties to produce discoverable impeachment material on its witnesses. Mr. Hernandez, however, chose to plead guilty and not go to trial. A defendant who pleads guilty is not entitled to impeachment material on people who might have testified at trial. *United States v. Ruiz,* 536 U.S. 622 (2002). If you are aware of any authority to the contrary, please let us know.

In item 5, you request the "name of any witness to any of the charged conduct who made an arguably favorable statement concerning Mr. Hernandez." We do not agree that we are

required to produce "arguably" favorable information (and you do not define the term "arguably"). In any event, we are not aware of any such witnesses.

In item 12, you request "[a]ny and all" officer notes. This is effectively a request for *Jencks* material. The *Jencks* Act's disclosure requirements are only triggered after a witness has testified at trial. 18 U.S.C. § 3500(a). Mr. Hernandez pled guilty and there was no trial. Thus, the *Jencks* Act does not apply. If you are aware of any authority to the contrary, please let us know.

Yours truly,

ANNETTE L. HAYES
United States Attorney

MICHAEL DION
Assistant United States Attorney

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Siddharth Velamoor
United States Attorney's Office
Western District of Washington

Sent Via Email Only

September 7, 2017

RE: *United States v. George Hernandez*; CR 16-05358-RJB
Supplemental Discovery Request

Dear Mr. Velamoor:

This constitutes defendant's supplemental request for discovery. Federal Rule of Criminal Procedure 16 requires that the government disclose to the defendant any documents or objects that are material to preparing the defense, even after a guilty plea has been entered. Fed.R.Crim.P. 16(a)(1)(E). The government is also required to disclose discovery within its possession, custody, or control, *or* "if the attorney for the government knows or could know through due diligence that they exist, and the results are either material to preparing the defense or the government intends to use them in its case-in-chief at trial." United States v. Cedano-Arellano, 332 F.3d 568, 571 (9th Cir. 2003); Fed.R.Crim.P. 16(a)(1)(F).

We ask for production of the following at this time:

1. We believe that the full Drug Enforcement Administration investigation into Mr. Hernandez in early 2014 is discoverable material that must be provided to Mr. Hernandez under Brady v. Maryland and progeny. If such investigation did not result in an arrest, such information would be "helpful to the defense" and must be provided to Mr. Hernandez. United States v. Price, 556 F.3d 900, 914 (9th Cir. 2009).

2. Although there is a GPS tracking warrant signed on July 21, 2015, I do not have any evidence of GPS tracking in this case.

3. The Government has an affirmative *duty* to seek out information which bears on the credibility of any CI including possible bias, motives for lying or exaggerating, and prior bad acts." Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). We request that you provide this information.

Brady/Giglio Material

4. **Inconsistent Statements:** Any and all prior inconsistent statements or omissions of information by witnesses, whether or not reduced to writing.

5. **Information Helpful to the Defense:** The name of any witness to any of the charged conduct who made an arguably favorable statement concerning Mr. Hernandez

6. **Consideration/Promises/Benefits:** In accordance with the Rule 16, we ask for disclosure by the government of any and all consideration or benefits given to witnesses, including witnesses interviewed by the government which may not be called at the time of trial. Consideration includes any promises, expectations, or benefits hoped for by the witness. "Consideration" means anything, whether bargained for or not, which arguably could be of value or use to the witness, including formal or informal and direct or indirect leniency, favorable treatment or recommendations, or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, tax court, I.R.S., court of claims, administrative, or other dispute with the United States. "Consideration" also means any favorable treatment or recommendations with respect to criminal, civil or tax immunity grants, relief from forfeiture, monetary payments, permission to keep the fruits of criminal activity (such as cash, vehicles, aircraft, real property, rewards or fees) witness fees and special witness fees, provisions of food, clothing, shelter, transportation, legal services or other benefits, placement in a "witness protection program," and anything else which could possibly reveal an interest, motive, or bias in favor of the government or against the defense or which could act as an inducement to testify or to color testimony.

7. **Witness Impeachment:** Production of all exculpatory or impeaching police reports for all witnesses and victims, including potential witnesses whether or not the government intends to call them at the time of trial.

8. **DOC Records:** Review and production of material in probation or Department of Corrections (DOC) files of government witnesses which may bear on the credibility of such witness. United States v. Strifler, 851 F. 2nd 1197, 1201 (9th Cir. 1988).

9. **Criminal History**: Any and all records and information revealing the CI's (and other witnesses) prior convictions, convictions for crimes involving false statements or dishonesty, and juvenile convictions, including but not limited to relevant "rap" sheets and/or NCIC computer check o; and the victim/witness's entire criminal record, including

prison and jail records, and any information therein which bears on credibility. *See* Carriger v. Stewart, 132 F.3d 463, 480 (9th Cir. 1997); United States v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977); Fed.R.Evid. 609.

10. **Prior Bad Acts**: Any and all records and information revealing prior misconduct or bad acts attributed to the witnesses, including—but not limited to—acts conducted by the witness. Fed.R.Evid. 608(b); *Weinstein's Evidence*, ¶ 608[5] at 608-25 (1976).

11. **Henthorn**: Any impeaching information contained in the personnel file for any law enforcement agents involved in this matter (see *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991).

12. **Notes:** Any and all officer field notes, interview notes, or other notes not yet produced in discovery.

Please advise whether the government's view of what constitutes Brady/Giglio is consistent with our view with respect to the materiality standard at the trial stage and with respect to its obligation to seek and reveal information which has not been reduced to writing.

The Materiality Standard

At the post trial stage, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995). At the pretrial stage the Brady materiality standard must be even broader than that set forth above from Kyles, which was a retrospective post-trial examination of the evidence for reversible error. The proper pretrial standard as to what can be considered "favorable" is any evidence relating to guilt or punishment "and which tends to help the defense by either bolstering the defense's case or impeaching prosecution witnesses." See United States v. Sudikoff, 36 F. Supp. 2d 1196, 1200 (C.D. Cal. 1999) (rejecting the appellate standard suggested by the government in holding that "Brady requires disclosure of exculpatory information that is either admissible or is reasonably likely to lead to admissible evidence," and specifically directing that "any information that reveals any variations in the proffered testimony of an accomplice witness testifying pursuant to a leniency agreement is relevant to the witness's credibility and therefore must be disclosed under Brady," as well as "any information that reveals the nature of the negotiation process that led to the leniency agreement"); United States v. Peitz, No. 01-CR852, 2002 WL 226865, at *3, 2002 S. Dist. LEXIS 2338 at *7-8 (N.D. Ill. Feb. 13, 2002) (following the standards set forth in Sudikoff); United States v. Carter, 313 F. Supp. 2d 921, 924 (E.D. Wis. 2004) (agreeing with Sudikoff and Peitz that, "[i]n the pretrial context, the court should require disclosure of favorable evidence under Brady and Giglio without attempting to analyze its 'materiality' at trial," because a judge cannot know what possible effect certain evidence will have on a trial not yet held and further observing that "the Brady materiality standard determines prejudice from admittedly improper conduct and thus should not be considered as approving all conduct that does not fail its test.").

Brady/Giglio Applies to Information, Not Just Documents and Records

The Brady/Giglio obligation applies to information, not just records, reports, and notes. If a potential witness makes inconsistent statements during a government interview or reveals other bases for impeachment, that information must be disclosed to the defense even if it is not memorialized in a report or the notes of an agent.

We are not implying that you would intentionally hide this information, but because the government almost never records these interviews of important witnesses, prosecutors now have a much greater burden in meeting their obligations to ferret out this "information" from its agents and detectives, and not merely rely on what has been reduced to writing.

If you disagree with our view of the government's obligations as to materiality and as to information not reduced to writing, please advise so we can ask for clarification from the Court.

We request the timely production of these materials. Please advise of any questions or concerns.

Thank you,

Emily M. Gause
Attorney for George Hernandez

JUDGE ROBERT J. BRYAN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, vs. GEORGE HERNANDEZ, Defendant.	No. CR16-5358-RJB DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

I. MOTION

George Hernandez, through counsel, Emily M. Gause, moves this Court to permit him to withdraw his guilty plea. On January 10, 2017, Mr. Hernandez entered a plea of guilty to one count of possession of controlled substances in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B), and possession of a firearm in furtherance of drug trafficking crime in violation of 18 U.S.C. 924(c). This motion is based on Federal Rule of Criminal Procedure 11(d)(2)(B), the authority cited herein, the records and files of this case, and any testimony to be adduced at a hearing.

II. BASIS FOR MOTION

The decision whether to permit the withdrawal of a plea "is solely within the discretion of the district court." United States v. Showalter, 569 F.3d 1150, 1154 (9th Cir. 2009). Before the imposition of a sentence, however, withdrawal of a guilty plea should be freely allowed if a defendant "can show a fair and just reason for requesting the

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withdrawal." Fed.R.Crim.P. 11(d)(2)(B). Courts have explained that "[f]air and just reasons for withdrawal include inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered his plea." United States v. McTiernan, 546 F.3d 1160, 1167 (9th Cir.2008) (internal citation omitted). The defendant has the burden of demonstrating the existence of at least one of these conditions. Fed.R.Crim.P. 11(d)(2)(B); United States v. Davis, 428 F.3d 802, 805 (9th Cir.2005); United States v. Showalter, 569 F.3d 1150, 1154 (9th Cir. 2009).

A. MR. HERNANDEZ HAS A FAIR AND JUST REASON TO WITHDRAW HIS GUILTY PLEA DUE TO NEWLY DISCOVERED EVIDENCE

For the first year after this federal case was filed, Mr. Hernandez was represented by George Trejo. On November 4, 2016, the Court granted Mr. Hernandez' request to remove Mr. Trejo as his attorney. Federal Public Defender Colin Fieman was then appointed to represent Mr. Hernandez. Two months later, Mr. Hernandez pleaded guilty to possession of controlled substances with a five-year mandatory minimum and possession of a firearm in furtherance of drug trafficking with a five-year consecutive mandatory minimum. *See* Dkt. No. 37. On April 13, 2017, the Court allowed current counsel to substitute into the case.

For the first year of Mr. Hernandez's federal case, he never reviewed discovery with his attorney. His attorney did not employ an investigator nor attempt to research or discovery who the confidential informant was. When Mr. Hernandez was reassigned to FPD Colin Fieman, he discussed the concerns he had about who he thought might be the confidential informant, including veracity issues and factual issues within the search warrant affidavit. Although Mr. Fieman discussed these things with Mr. Hernandez, he did not do additional research about that suspected informant's criminal history or circumstances surrounding his cooperating with law enforcement. He did not seek to confirm the informant's identity.

Since Mr. Hernandez has retained current counsel, an investigator has been employed to help investigate information about the suspected informant. Mr. Hernandez was provided publicly accessible information regarding the informant's prior cases in Pierce County Superior Court, including indicators that he was cooperating as an informant

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from 2009 to 2011 and beyond. Although the informant has criminal history, it was not disclosed in the affidavit for search warrant.

The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. A defendant may argue that his guilty plea was not voluntary and intelligent because it was made in the absence of withheld material, because a defendant's decision whether to plead guilty is often heavily influenced by his appraisal of the prosecution's case. A waiver cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution. Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); United States v. Nelson, 979 F. Supp. 2d 123 (D.D.C. 2013).

Mr. Hernandez is entitled to full awareness of favorable material evidence known to the government prior to making a decision to plead guilty or go to trial. Because he was not provided with information regarding the criminal history of the informant nor the cooperation details, such as benefits received or consideration given, Mr. Hernandez feels that he could not fully evaluate his case and make informed decisions about whether to plead guilty or go to trial. If Mr. Hernandez had known that the suspected informant had a pending drug charge prior to his participation into the investigation of Mr. Hernandez, it would have confirmed Mr. Hernandez's suspicions about the informant and caused Mr. Hernandez to pursue his trial defenses further. And because the affidavit for search warrant relied entirely on this informant's information and participation to support probable cause to search Mr. Hernandez and his property, the informant is a critical part of the government's case. Thus, this is "newly discovered evidence" that justifies allowing Mr. Hernandez to withdraw his guilty plea.

B. MR. HERNANDEZ HAS A FAIR AND JUST REASON TO WITHDRAW HIS GUILTY PLEA BECAUSE OF DISCOVERY VIOLATIONS

The Government has not turned over important discovery and, even after Mr. Hernandez's attorney requested such information be produced, it refused to provide the information.

In United States v. Soto-Zuniga, the Ninth Circuit recently held that a lower court abused its discretion by denying a defendant's pretrial motion for discovery because such production *could have* assisted the defendant in formulating a defense, even if the evidence

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was not admissible or relied upon by the government. United States v. Soto–Zuniga, 837 F.3d 992 (9th Cir. 2016). In that case, the discovery in question was not in the *actual* possession of the investigating law enforcement agency, nor was it in the possession of the United States Attorney's Office. But still, the Court required that it be produced.

"It behooves the government to interpret the disclosure requirement broadly and turn over whatever evidence it has pertaining to the case." Id. at 922; Fed. R. Crim. P. 16(a)(1)(E). **The Ninth Circuit holds that Rule 16(a)(1)(E) permits discovery related to the constitutionality of a search or seizure.** Id. at 1001. When a defendant's discovery request is narrowly tailored to defend against the prosecution's claims against him, discovery must be provided under Rule 16.

Under Federal Rule of Criminal Procedure 16(a)(1)(E), Mr. Hernandez has a right to discovery of documents that are "material to preparing the defense." Materiality is a "low threshold; it is satisfied so long as the information ... would have helped" to prepare a defense. United States v. Hernandez–Meza, 720 F.3d 760, 768 (9th Cir. 2013) (citation and internal quotation marks omitted). The test is not whether the discovery is admissible at trial, but whether the discovery may assist the defendant in formulating a defense, including leading to admissible evidence. *See* Id. ("Information is material even if it simply causes a defendant to completely abandon a planned defense and take an entirely different path." (citation and internal quotation marks omitted)); United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993) ("This materiality standard normally is not a heavy burden; rather, evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." United States v. Soto–Zuniga, 837 F.3d 992, 1003 (9th Cir. 2016).

In the affidavit for search warrant, the Government's sole vehicle to obtaining these charges against Mr. Hernandez, the Tacoma Police officer/affiant briefly mentions that there was a DEA investigation into Mr. Hernandez in early 2014. That investigation did not lead to any arrests. It wasn't until July 2015 that the Tacoma Police Department resumed an investigation which resulted in the search warrant and subsequent arrest of Mr. Hernandez. The details of the 2014 investigation, including *why it did not result in charges*, was never provided to Mr. Hernandez. This is despite a supplemental discovery request

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by current counsel asking for the information and indicating she believed it could be favorable and required to be produced under Brady v. Maryland. The government responded by refusing to provide the information stating: "Nothing in Price or any authority that we are aware of suggests that the prosecution is obligated to produce material into prior investigations of a defendant if those investigations did not result in an arrest." If the DEA was investigating Mr. Hernandez for over a year and could not gather enough evidence to arrest him or charge him, the lack of evidence is information that could be exculpatory and material to his ability to defend against the charges in this case.

VI. CONCLUSION

For the reasons stated above, Mr. Hernandez asks this Court to permit him to withdraw his guilty plea due to newly discovered evidence not known to him at the time of the plea hearing including evidence that has been withheld from him by the Government.

DATED this 6th day of October, 2017.

Respectfully submitted,

s/ *Emily M. Gause*
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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed Defendant George Hernandez's Motion to Withdraw Guilty Plea with the clerk of the court using the CM/ECF system which will send notification of such filing to all parties of record.

Dated this 6th day of October, 2017.

s/ Emily M. Gause
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