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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FORTUNATO RODELO-LARA, a/k/a "Nato" Defendant.	CASE NO. 12-0030 EMC-7 UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCOVERY Date: December 11, 2013 Time: 9:00 a.m.

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The defendant Fortunato RODELO-Lara has filed a motion to compel discovery from the United States.[1] The defendant's motion seeks two broad categories of discovery materials: first, he seeks exculpatory and impeachment materials possessed by the San Francisco Police Department and the San Francisco City and County's Office of Citizens' Complaints. Second, he seeks exculpatory materials relating to the alleged use of various government intelligence programs to conduct electronic surveillance in this case, as well as the alleged use of cell-site simulator devices. Both requests are meritless, and should be denied in their entirety.

I. BACKGROUND

1. On January 17, 2012, a grand jury in the Northern District of California returned a 15-count indictment charging 20 individuals with various drug trafficking offenses. 11 of the 20 individuals, including the defendant here, Fortunato RODELO-Lara, were apprehended. Six of those 11 defendants remain in the case at this time.

A. How the Investigation Began, or, "it all began with a cell phone"

2. The indictment was the culmination of a lengthy investigation led by special agents and task force officers (TFOs) of the Drug Enforcement Administration ("DEA"). As described in documents that have been disclosed to the defendant, this investigation began in approximately March of 2008, when an individual, referred to initially in DEA-6 reports as a Source of Information ("SOI"),[2] reported to the DEA and to the San Francisco Police Department that a drug trafficking organization led by Santos CABRERA-Arteaga was importing multi-kilogram shipments of cocaine into the San Francisco Bay Area. *See, e.g.*, Gov. Exhibit 1 (Bates 06000782-0600787)[3]; *see also* Def. Exhibit A at pg. 23 (Bates 01000055). The individual claimed to have observed CABRERA-Arteaga engage in

[1] The defendant indicated in the body of his motion that the other remaining defendants involved in this case were joining his motion. Def. Mot. 1. However, the caption of his motion identifies only him, not any other defendants, and the motion was recorded on the docket as being filed by him alone. *See* Docket No. 226. Until this matter is clarified, the United States will assume that the motion is being filed by defendant RODELO-Lara only.

[2] SOIs would subsequently be referred to in wiretap affidavits and other pleadings as confidential sources, or "CSs".

[3] This exhibit is being filed under seal to protect personal identifying information of individuals described therein. *See* Fed.R.Cr.P. Rule 49.1.

narcotics activity, and was able to buy ounce quantities of crack from members of CABRERA-Arteaga's organization during drug trafficking. *Id.*; *see also* Def. Exhibit A at pg. 74 (Bates 01000106). The individual further alleged that CABRERA-Arteaga and his organization employed Honduran nationals to distribute the cocaine in San Francisco, Seattle, Portland, and elsewhere. *Id.* The individual provided a phone number for CABRERA-Arteaga,[4] as well as phone numbers for several Honduran "runners," or street-level dealers, whom the individual alleged were working for CABRERA-Arteaga. *Id.* Subsequently, in approximately December of 2008, an individual, again referred to in initial reports as a SOI, provided a new phone number for CABRERA-Arteaga. Gov. Exhibit 2 (Bates 06000832-06000833).[5]

3. These leads were collected and developed by DEA analysts, agents, and task force officers, including, among other individuals, DEA TFO Carl Bonner, the lead case agent in this investigation who would subsequently be the affiant on several wiretap applications. As will be discussed in further detail below, while Bonner had been with the San Francisco Police Department for much of his career in law enforcement, in 2003 he was detailed on a full-time basis to the DEA, and was a sworn federal law enforcement officer from that point until January of 2012. Gov. Exhibit 3 (Bonner Declaration).

4. DEA issued administrative subpoenas pursuant to 21 U.S.C. § 876(a) to obtain toll records from cell phone service providers for the phone numbers described above. *See, e.g.*, Gov. Exhibit 2. DEA analysts reviewed those toll records, and discovered that the phones were linked to several other DEA investigations, including two previous investigations in the San Francisco Bay Area and one contemporaneous investigation in Seattle. Def. Exhibit A at pgs. 21-27 (Bates 01000053-1000059). In addition, agents identified certain common phone numbers that were being called by both

[4] The defendant in his motion writes, "[i]t all began with a cell phone. In May 2008, DEA task force agents obtained the cell phone number of Santos Cabrera Arteaga. . . . How the DEA got this phone number, however, is remarkably unclear." Def. Mot. 3. To the contrary, as discussed above, it is in fact both unremarkable and abundantly clear how the DEA got CABRERA-Arteaga's phone number: they got it from someone who bought drugs from CABRERA-Arteaga's organization.

[5] This exhibit is being filed under seal to protect personal identifying information of individuals described therein. See Fed.R.Cr.P. Rule 49.1.

the CABRERA-Arteaga phones and phones associated with the Seattle investigation. These common phone numbers were ultimately determined to be used by members of a related San Francisco-based drug trafficking organization, led by Antonio Jose DIAZ-Rivera. *Id.* As a result, agents began to suspect that the DIAZ-Rivera organization was supplying drugs to both the CABRERA-Arteaga organization and individuals in Seattle. *Id*.

B. The Investigation Progresses From Phone Records to Pen Registers

5. From there, the investigation began to snowball. Beginning in early 2009, DEA agents began getting court orders to install pen registers and trap and trace devices on phones identified as associated with the CABRERA-Arteaga and DIAZ-Rivera organizations. *See, e.g.*, Def. Exhibit A at pgs. 19-20 (Bates 01000052-53). These pen-trap orders allowed agents to capture incoming and outgoing dialing and signaling information; the orders also authorized agents to get cell site information from the service providers, that is, records kept by the service providers indicating which cell tower a particular cell phone was using, and thus, the general neighborhood in which the phone was located.[6] Agents were able to use the dialing and signaling information to identify numerous phones associated with the CABRERA-Arteaga and DIAZ-Rivera organizations. *See, e.g.*, Def. Exhibit A at pg. 43 (Bates 01000075). Agents were able to use the cell site information to confirm that particular phones were in the general vicinity of residences associated with CABRERA-Arteaga and DIAZ-Rivera. *See, e.g.*, Def. Exhibit A at pg. 38 n.28, and pg. 44 (Bates 01000070 and 01000076). Over the course of the

[6] In his motion, the defendant notes that some courts have found that pen-trap orders that allow for the acquisition of cell site information are unconstitutional without a probable cause showing. Def. Mot. 5 at n. 1-3 (citing *In re Application of the United States*, 809 F. Supp. 2d 113 (E.D.N.Y. 2011), and *In re Application of the United States*, 736 F. Supp. 2d 578 (E.D.N.Y. 2010), *rev'd*, No. 10-0550 (E.D.N.Y. Nov. 29, 2011). The majority of courts, however, have found that cell site information does not require a probable cause showing and can properly be obtained, as it was here, pursuant a showing of "specific and articulable facts" under 18 U.S.C. § 2703(d). *See, e.g., In re Application of the United States for an Order Directing A Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304 (3d Cir. 2010); *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013); *see also United States v. Graham*, 846 F. Supp. 2d 384 (D. Md. 2012); *United States v. Velasquez*, Case No. 08-730-WHA, 2010 WL 4286276, at *5 (N.D. Cal. Oct. 22, 2010) (noting that cell site location information is less accurate than precision GPS information, and therefore can be obtained without a probable cause showing); *United States v. Moreno-Nevarez*, Case No. 13-0841-BEN, 2013 WL 5631017 (S.D. Cal. Oct. 2, 2013).

investigation, agents got 54[7] pen-trap orders for a variety of telephones.

C. The Investigation Progresses From Pen Registers to GPS Surveillance

6. Beginning in approximately May of 2009, agents stepped up their level of surveillance: along with toll records and pen-trap orders, they now began to obtain warrants to monitor the precise location of particular cell phones associated with the CABRERA-Arteaga and DIAZ-Rivera organizations. *See, e.g.*, Def. Exhibit P. These warrants allowed agents to monitor a phone's precise location using global positioning system (GPS) technology, to a degree much more accurate than cell site information. Agents were able to use this precision location information to, among other things, aid in physical surveillance by observing activities at specific addresses that were frequented by target cell phones, leading them to identify multiple stash houses used by the CABRERA-Arteaga and DIAZ-Rivera organizations. *See, e.g.*, Def. Exhibit A at pg. 31 (Bates 01000063). Agents were also able to use this precision location information to develop evidence that members of both organizations were driving vehicles containing drugs throughout California, Oregon, Washington, Utah, and elsewhere. *See, e.g.*, Def. Exhibit A at pgs. 39-40 (Bates 01000072-01000073). Over the course of the investigation, agents got 48 precision location information warrants.

D. The Investigation Progresses From GPS Surveillance to Wiretaps

7. Beginning in approximately January of 2010, as the investigation continued to progress, agents stepped up their level of surveillance yet again: this time, along with toll records, pen-trap orders, and GPS surveillance warrants, they began getting wiretap orders to intercept communications on particular phones associated with the CABRERA-Arteaga and DIAZ-Rivera organizations. Between January and October of 2010, agents got five separate wiretap orders authorizing interception on 11 different telephones. Agents were able to use these intercepted communications to fully identify several of the key members of the CABRERA-Arteaga and DIAZ-Rivera organizations, including CABRERA-Arteaga, DIAZ-Rivera, and Fortunato RODELO-Lara, the defendant filing the instant motion. *See generally* Def. Exhibit A. Agents also used intercepted communications to identify and seize shipments

[7] The defendant in his motion says there were 69 pen-trap orders; the United States is unaware of how the defendant tallied this figure, but will confer with counsel in an effort to resolve the discrepancy.

of drugs and drug proceeds, including, for example, a shipment of approximately $260,000 in cash that the United States alleges defendant Jose EVARISTO-Rauda was transporting by car from Seattle to San Francisco. *See generally* Indictment, Docket No. 1 at pg. 10.

E. From Investigation to Indictment and Discovery

8. The indictment, as mentioned above, was returned in this case in January of 2012. Since then, the United States has disclosed the following materials to the defendants as part of the discovery process:

- All known investigative reports relevant to this investigation, totaling approximately 1,319 pages.[8] (The vast majority of these reports are DEA reports, as this investigation was led by DEA. However, to the extent that relevant reports from other agencies exist, including state and local agencies that assisted in the investigation, such reports have, to the best of counsel's knowledge, been disclosed.)
- An index of the reports described above.[9]
- Applications, affidavits, orders, and related documents for all wiretaps that were obtained in this case, approximately 1,158 pages.
- Applications, affidavits, orders, and related documents for wiretaps obtained in a related federal case in the Central District of California, approximately 149 pages.
- Six CDs containing all wire and electronic communications that were intercepted in this case.
- Draft transcripts for many of the communications described above.[10]
- Applications, warrants, and related documents for all precision location information/GPS surveillance that was conducted as part of this case, approximately 1,752 pages.
- The actual GPS information that was obtained as a result of these orders, approximately 89.5megabytes of .html files.
- Approximately 1,594 photographs that were taken as part of this investigation.
- An index of the photographs described above.[11]

[8] Some reports were disclosed twice, out of an abundance of caution, so the total number of unique pages of disclosed reports is undoubtedly less than 1,319.

[9] The United States disclosed this index to the defendants even though it is precisely the kind of "internal government document" work product that is generally *not* subject to disclosure under Rule 16. F.R.Cr.P. 16(a)(2). Nonetheless, the United States disclosed for the limited purpose of helping the defendants review discovery and familiarize themselves with the case.

[10] The United States has not tallied the total number of draft transcripts of wire and electronic communications that have been disclosed, but estimates it to be at least several hundred transcripts. In any event, the United States has disclosed all such draft transcripts in its possession.

- All pen-trap applications and orders that were obtained as part of this investigation, approximately 1,040 pages.
- A spreadsheet of all toll records and call data that were obtained as part of this investigation, listing 742,907 records.
- All materials that were disclosed as part of discovery in a related federal case in the Western District of Washington.[12]

This list is non-exhaustive. Other materials, such as airline travel records and criminal histories, have been disclosed, but as they are not germane to the defendant's motion for discovery, the United States does not list them here.

II. THE DEFENDANT'S REQUEST FOR BRADY INFORMATION IN THE POSSESSION OF THE SAN FRANCISCO POLICE DEPARTMENT AND THE SAN FRANCISCO OFFICE OF CITIZENS' COMPLAINTS IS A FISHING EXPEDITION

9. The defendant has moved this Court for an order requiring the United States to produce all exculpatory material and impeachment evidence relating to the officers and informants involved in this case that is in the possession of the San Francisco Police Department (herein "SFPD") and the San Francisco City and County's Office of Citizen Complaints (herein "SFOCC"), pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Def. Mot. 1-2. This is a thinly-veiled attempt to turn the United States' *Brady* obligations into an aimless fishing expedition into the files of a local police department and city agency. This Court must not permit the United States' *Brady* obligations to be coopted in this manner.

10. At the outset, the United States emphasizes that it is well aware of its obligations under *Brady*, and if anything has been over-inclusive in this regard in its production of information and documents to the defense throughout this case. As described above, the United States has disclosed a broad range of materials in this case, above and beyond its obligations and well before the defendant can claim any entitlement to them. For instance, the United States has turned over indexes of disclosed reports and photographs, in an effort to aid the defendants in reviewing and familiarizing themselves with the case. Moreover, the United States has disclosed to the defendants a variety of materials that are ordinarily not discoverable, such as pen-trap applications and orders. *See United States v. West*, 633 F.

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[11] See footnote 7, *supra*.

[12] The United States has not tallied the Seattle materials, but agrees with the defendant's assessment that it consists of "several gigabytes" of information.

Supp. 2d 447, 451-52 (E.D. Mich. 2009) (finding that pen-trap applications and orders are not disclosable under Fed.R.Crim.P. 16); *United States v. Chavez-Chavez*, Case No. 07-1408-WQH, 2008 WL 1847229, at *3-4 (S.D. Cal. April 22, 2008) (same). The United States disclosed these materials out of an abundance of caution that such applications and orders could conceivably be construed by the defendants to contain *Brady* material (which, incidentally, they do not). Along similar lines, and as the defendant notes in his motion, the United States has provided "several gigabytes of additional discovery related to the investigation in the Western District of Washington, as well as wiretap documents related to a state-court wiretap[13] in Los Angeles directed at the suspected source of supply in Southern California." Def. Motion 7. The United States provided these materials out of an abundance of caution that they conceivably could be construed to contain *Brady* material (which, again, at least so far as the United States is concerned, they do not). Thus, any suggestion by the defendant that the United States is somehow shirking or disregarding its *Brady* obligations is meritless.

A. *Brady* is Not a Discovery Tool

11. Given this context, the defendant's motion for a ruling on *Brady* material is a perplexing one. For starters, the United States' obligations under *Brady* are self-executing, and therefore are generally not the proper subject of pretrial court orders. *See, e.g., United States v. W.R. Grace*, 401 F. Supp. 2d 1069, 1076 (D. Mont. 2005). In other words, *Brady* is not a discovery tool; defendants cannot use *Brady* simply to search for *Brady* materials. *See, e.g., United States v. Weld*, Case No. 08-083-PJH, 2009 WL 901871, at *2 (N.D. Cal. April 1, 2009); *United States v. Flores*, Case No. 08-0730-WHA, 2011 WL 1100137, at *1 (N.D. Cal. March 24, 2011) (concluding that "it is up to the government to determine what must be disclosed to honor its self-executing duty under *Brady/Giglio*); *United States v. Lam*, Case No. 06-0644-CRB-(EDL), 2008 WL 191420, at *2 (N.D. Cal. January 22, 2008) (citing *United States v. Siriprechapong*, 181 F.R.D. 416, 421 (N.D. Cal. 1998)) (noting that "[t]he *Brady* rule . . . is considered more in the nature of a constitutional protection, rather than a basis for granting or

[13] This appears to be a factual error by the defendant. The Los Angeles wiretap documents that the United States provided to the defendants were federal wiretaps, authorized by a United States District Court Judge in the Central District of California, not by a state court.

withholding discovery. No specific request to disclose *Brady* material is required, and the government is under a self-executing obligation to provide it"); *see also United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985) (noting that "[a]n interpretation of *Brady* to create a broad, constitutionally required right of discovery would entirely alter the character and balance of our present systems of criminal justice") The United States acknowledges and embraces its duty. The Court's inquiry should end here.

B. Even if *Brady* Can Be Used As a Discovery Tool, this was a Federal Investigation by a Federal Law Enforcement Officer at a Federal Agency

12. Defendant nonetheless seeks to use *Brady* as a discovery tool to search for *Brady* material. As grounds, he goes to great lengths to demonstrate that Carl Bonner was the United States' lead case agent in this investigation. This is not in dispute; the United States will readily agree that Bonner was in every sense the lead case agent here. But to extrapolate from there that the entire SFPD and SFOCC are therefore somehow "agents" of the federal government for purposes of *Brady* defies logic.

13. It defies logic because it is based on a faulty premise: that Bonner was acting in his capacity as an SFPD officer throughout this investigation. If this were in fact the case, then perhaps the defendant's argument might be more compelling. However, as described in further detail in the attached declaration, while Bonner has spent much of his career with the SFPD, from approximately 2003 until approximately January of 2012 he was detailed *full-time* to the DEA as a federal task force officer. It was in this capacity that DEA TFO Bonner served, from approximately 2008 until 2012, as the lead case agent in this case. For example, DEA TFO Bonner was the affiant on numerous federal affidavits, including four wiretap affidavits, and numerous affidavits in support of GPS monitoring of cell phones. In each affidavit, DEA TFO Bonner explained,

> I am a sworn Federal Task Force Officer ("TFO") currently detailed to the San Francisco Drug Enforcement Administration ("DEA"). I am also an Inspector of Police assigned to the Investigative Bureau of the San Francisco Police Department ("SFPD") and I have been a sworn California Peace Officer for over 24 years. . . . I have been deputized by the Administrator of the DEA to exercise the powers of enforcement personnel set forth in Title 21, United States Code, Section 878, and *I am therefore an investigative or law enforcement officer of the United States within the meaning of Title 18, United States Code, Section 2510(7), that is, an officer of the United States* who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Title 18,

United States Code, Section 2516.

Def. Exhibit A at pgs. 1-2 (Bates 01000033-01000034) (emphasis added); *see also* Def. Exhibit P at pgs. 1-2 (Bates 07000007-07000008). Moreover, in every affidavit that DEA TFO Bonner signed as part of this investigation, the signature line underneath his name identified him as a DEA Task Force Officer. *See, e.g.*, Def. Exhibit A at pg. 121 (Bates 010000153). Not once did he sign an affidavit as a San Francisco Police Department officer. Nor did DEA TFO Bonner ever seek any state court search warrants or wiretap affidavits in this investigation, further demonstrating that this was a federal investigation by a federal law enforcement officer at a federal agency. Indeed, the first time that DEA TFO Bonner was identified as "SFPD Officer Bonner" in this case was in the defendant's motion.[14]

14. The defendant makes several erroneous allegations in an effort to lend credence to his assumption that this was somehow a local investigation by local officers. For example, the defendant states that the "Metro Task Force Group" referred to in wiretap applications is "a joint federal, state, and local narcotics task force that involves officers and agents from many state and federal law enforcement agencies" in drug investigations. Def. Mot. 8-9. In fact, the Metro Task Force Group is the team within the DEA San Francisco Field Division to which DEA TFO Bonner was assigned, which is supervised by a DEA supervisory agent. This much should be clear just from the discovery that has been disclosed to the defendant. *See, e.g.*, Gov. Exhibit 1 (DEA-6 investigative report authored by "TFO Carl Bonner" at "Metro TF 1" and signed by Group Supervisor William F. Sicord[15], describing meeting between "DEA Task Force Officer Carl Bonner," a DEA analyst, an SFPD officer, and an SOI); *see also* Def. Exhibit A at pgs. 1-2 (Bates 01000033-01000034) (DEA TFO Bonner states "since July of 2003 I have been assigned to the *San Francisco DEA Field Division as a Task Force Officer with the Metro Task Force Group*," and further describing his "assignment with the DEA") (emphasis added). Moreover, as

[14] As described in his declaration, Bonner's detail at DEA expired in January of 2012, just when the investigation was concluding and the charges in this case were filed. Gov. Exhibit 3. He has since returned to SFPD, and is now an inspector in the Investigations Bureau – Homicide Detail. *Id.* The fact that Inspector Bonner is no longer a federal agent for a federal agency does not change the fact that, for the duration of the investigation in question, he was exactly that.

[15] Sicord is described elsewhere in the materials disclosed to the defendant as a DEA Special Agent.

described in the Bonner Declaration, the Metro Task Force Group is comprised exclusively of DEA special agents and DEA task force officers who, like DEA TFO Bonner, are detailed on a full-time basis from local agencies to the DEA. Gov. Exhibit 3.

15. Similarly, the defendant claims in his motion that "the pre-wiretap investigation of the case was directed by SFPD officers and was driven by information supplied by SFPD informants." To be sure, SFPD officers participated in the investigation of this case, and information supplied by SFPD informants played an important role in developing probable cause for a wiretap. But to say that the case was "directed" and "driven" by SFPD is a vast, misleading overstatement. For one thing, the defendant entirely overlooks the numerous tips and leads developed by DEA Seattle and the Seattle Police Department, which are described in detail in the very wiretap affidavit to which the defendant cites for support and which were at least as instrumental in developing probable cause as was the information from SFPD sources. Def. Exhibit A at pgs. 25-26 (Bates 01000057-58). He also overlooks numerous DEA reports that have been disclosed in discovery that describe the significant amount of investigation conducted by DEA analysts in anticipation of developing probable cause for the first Bonner wiretap affidavit. *See, e.g.*, Gov. Exhibit 4 (Bates 060000777-060000781).[16] He certainly overlooks a DEA-6 report by DEA TFO Bonner entitled "Case Initiation: CABRERA-Arteaga DTO," dated September 3, 2008, a full 15 months before Bonner's first wiretap affidavit. Gov. Exhibit 5 (Bates 060000772-73).[17] Indeed, of the 1,000-plus pages of investigative reports documenting this investigation that have been disclosed to the defendant, the vast majority are DEA reports. This makes sense: it was a DEA investigation, led by a DEA TFO. The defendant is now attempting to turn this DEA investigation into an SFPD one, *ex post facto*, purely to justify his fishing expedition into the files of the SFPD.[18] This he must not be allowed to do.

[16] This exhibit is being filed under seal to protect personal identifying information of individuals described therein. See Fed.R.Cr.P. Rule 49.1.

[17] *See* footnote 16, *supra*.

[18] The defendant states in his motion that it would defeat his due process rights to allow the United States to use the SFPD as a "sword" for investigative tactics, but then "shield" the SFPD from its *Brady* obligations. However, as demonstrated above and throughout the materials that have been disclosed to the defendants, the "sword" here was the DEA, not the SFPD.

C. The Defendant's Reliance on *Fort* is Misplaced

16. The defendant relies on *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2006), for the proposition that because, as he sees it, Carl Bonner was an SFPD officer, the SFPD and SFOCC therefore fall within the scope of the United States' *Brady* obligations. But *Fort* did not address *Brady* obligations; it dealt purely with the discovery requirements of Rule 16, which the defendant does not invoke in his motion. Indeed, as the Ninth Circuit explained at the outset of its decision in *Fort*, "it is important to note that this appeal does not involve the government's disclosure rules obligations under *Brady v. Maryland*, or other disclosure rules. The identifying information here pertains to inculpatory, not exculpatory, evidence, and nothing in this opinion should be interpreted to diminish or dilute the government's *Brady* obligations." *Id.* at 1110. The Ninth Circuit was even more explicit about the limited applicability of its holding in *Fort* when it denied *en banc* review:

> The sole question presented here was whether inculpatory (non-*Brady*), non-public investigative reports made by local police and then turned over to federal prosecutors for use in a federal prosecution concerning the same acts of the same persons are or are not exempted from disclosure by Federal Rule of Criminal Procedure 16(a)(2). The majority held that such materials are exempted from disclosure by Rule 16(a)(2). *The parties did not raise an issue about, and we did not rule on, the scope or application of Brady disclosure requirements.*

United States v. Fort, 478 F.3d 1099 (9th Cir. 2007) (emphasis added). The defendant's attempt, therefore, to shoehorn the *Fort* decision on Rule 16 disclosures into the footprint of his *Brady* argument is misplaced.

D. *Cerna* Does Not Apply, and Even If It Does, the United States Is Already Employing Much of the Guidance It Suggests

17. The defendant's reliance on *United States v. Cerna*, 633 F. Supp. 2d 1053 (N.D. Cal. 2009), is perhaps more promising than his reliance on *Fort*, but ultimately, *Cerna* too does not apply. In *Cerna*, the Court reasoned that if a "federal prosecutor uses a state or local officer as a 'lead investigating agent, *Brady* requires turnover of the defense-favorable records in the possession of the agent."[19] *Id.* at 1059 (citing *United States v. Price*, 566 F.3d 900 (9th Cir. 2009)). Here, as described

[19] The court in *Cerna* also acknowledged "that "California (and its state and local police) are separate sovereigns. And, it is true that ordinarily the United States cannot control the local police,"

above, the lead investigating agent in this case was a federal task force officer, not a state or local officer, and this investigation was at all times federal in nature. Thus, *Cerna* should not apply. Moreover, notably, the Court in *Cerna* ultimately found after an evidentiary hearing that the SFPD was *not* an agent of the United States for purposes of *Brady*. Order, October 5, 2009, *United States v. Cerna*, Case No. 08-00730-WHA (Docket No. 692). Interestingly, the Court reached its conclusion *despite* finding that there was a written, case-specific interagency agreement between SFPD and various federal agencies involved in that investigation. *Id.* at pg. 6. No such case-specific interagency agreement exists in the instant case.

18. *Price*, which was cited by the *Cerna* Court, involved a Portland Police Department officer who was also apparently a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). *Price*, 566 F.3d at 906. *Price* is distinguishable, however, because, there, the prosecutor plainly should have known that *Brady* material existed, since he had specifically tasked the case agent to find the materials in question. And, *Price* notwithstanding, the Ninth Circuit has generally been loath to characterize state and local agencies as within the scope of the United States' *Brady* obligations. *United States v. Dominguez-Villa*, 954 F.2d 562, 565-66 (9th Cir. 1992) (holding that the district court exceeded authority by requiring review of personnel files of state law enforcement witnesses for *Brady/Henthorn* purposes); *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (finding that a federal prosecutor was under no *Brady* obligation to turn over materials possessed by California Department of Corrections); *see also W.R. Grace*, 401 F. Supp. 2d at 1079 n.10 (D. Mont. 2005) (noting that although federal prosecutors consulted with and received files from state environmental quality agency, under "longstanding Ninth Circuit precedent," federal prosecutors are generally not deemed to have access to material held by state agencies for *Brady* purposes).

19. Even assuming for the sake of argument that *Cerna* applies, it is difficult to fathom what remedy the Court could order that the United States is not already employing to discharge its obligations under *Brady*. For instance, the Court could conceivably order the United States to consult with Bonner

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though the court noted that such facts were not dispositive.

about whether any potential *Brady* materials exist within the files of SFPD to his knowledge — yet this the United States is already doing in an effort to discharge its *Brady* obligations. *See generally* Gov. Exhibit 3 (noting that Bonner has been asked to assist United States in preparing discovery materials, even though he is no longer a DEA TFO). The Court could also conceivably order counsel for the United States to personally review SFPD's files to determine whether any potential *Brady* materials exist — yet this would run directly afoul of the Ninth Circuit's ruling in *United States v. Herring*, 83 F.3d 1120 (9th Cir. 1996) (vacating district court's order for AUSA to personally review personnel files of testifying law enforcement witnesses). If anything, the guidance suggested in *Cerna* is instructive:

> While a prosecutor has a duty to learn of any favorable evidence known to others acting on behalf of the government, *Brady* does not require a prosecutor to unearth from an agency, even an agency involved in the investigation, every random scrap of paper of possible defense use. Given their enormity, it would be impractical to scour all files and desks and lockers looking for all nuggets, large and small. Fishing expeditions are not required. Instead, a prosecutor is required to use due diligence — affirmative due diligence — to gather *Brady* material from known and plausible sources of exculpatory information and then to turn over any *Brady* material that is found. The degree of diligence that is due depends on the facts and circumstances. It is impossible to give an exhaustive list of the factors. Certainly, one ever-present factor is judgment informed by experience as to where *Brady* materials may plausibly reside. Seasoned prosecutors and assisting agents know the usual range of plausible locations. Where a prosecutor has a specific reason to suspect that *Brady* material may reside at a source, of course, the prosecutor must inquire, even if the source would otherwise seem implausible.
>
> . . .
>
> Another factor is the extent to which a particular investigative channel is used to obtain inculpatory information. When a prosecutor vigorously mines a particular channel for prosecution evidence, the prosecutor should use proportionate vigor to extract *Brady* material from the same source. Another consideration is the importance profile of the subject matter in the trial. The greater the importance, the more diligence is indicated and vice versa. Due diligence will almost always require more than generally asking a local police contact to check for *Brady* information, for such a request is unlikely to translate into a genuine effort to retrieve defense evidence with the same rigor as prosecution evidence. In sum, while a prosecutor cannot be expected to unearth every defense nugget imaginable, a prosecutor must exercise such diligence as is due in the circumstances to learn of and to produce *Brady* material.

20. Bearing this guidance in mind, the United States represents that it is diligently and affirmatively carrying out its *Brady* responsibilities. But the United States has never "vigorously

mine[d]" all of SFPD for *inculpatory* information, so even *Cerna* counsels that it should not be required to mine likewise for exculpatory information. Therefore, the defendant's broad request to hold the United States responsible for all possible or potential exculpatory information held by the SFPD and SFOCC should be denied.

E. Defendant's Specific Requests For Discovery Are Meritless

21. The defendant makes some specific requests for alleged *Brady* material, in addition to his broad ranging request for any exculpatory information possessed by the SFPD and the SFOCC. In particular, he requests impeachment materials for law enforcement officers who provided information that was included in DEA TFO Bonner's first wiretap affidavit, including materials in their personnel files; impeachment materials regarding SFPD informants identified in the United States' wiretap applications; and any materials that discredit the representations made by DEA TFO Bonner in his wiretap affidavits. Given the nature of the materials requested, the United States presumes that the defendant intends to file a motion pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), arguing that DEA TFO Bonner omitted material information from his wiretap affidavits. However, this request for discovery materials to prepare a *Franks* motion is in direct contradiction to the requirement in *Franks* that the defendant make a "substantial preliminary showing" *before* any further action is required. If the defendant cannot make this substantial preliminary showing, he cannot attack the sufficiency of the affidavit.[20] The Supreme Court explained that the reason for this substantial preliminary showing requirement was to "prevent the misuse of a veracity hearing for purposes of discovery or obstruction." *Id.* at 171. Granting the defendant's requests would therefore sanction the very kind of abuse the *Franks* Court prohibited.

22. Defendant's request for impeachment materials in law enforcement personnel files suffers from another fatal problem: it is in reality a *Henthorn* request for witnesses who have not, and who well may not, testify. *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). Impeachment

[20] If the defendant claims that he has made a "substantial preliminary showing" based on his allegations that either secret government intelligence programs or cell-site simulator technology must have been used in this investigation, such allegations are, as discussed in further detail below, baseless.

information relating to government witnesses does not have to be produced until the time that the witness testifies. *United States v. Rinn*, 586 F.2d 113, 119 (9th Cir. 1978). Because there is no trial or hearing even scheduled at this point at which a law enforcement witness might testify, the defendant's request is highly premature.

III. THE DEFENDANT'S MOTION TO COMPEL SOURCES OF ELECTRONIC SURVEILLANCE IS BASED ON FAULTY ASSUMPTIONS OF FACT AND FAULTY STATEMENTS OF THE LAW

23. Pursuant to *Brady*, the defendant makes a broad request for the United States to disclose all "sources of electronic surveillance" that were used in this case, including information from "the NSA's secret spying program," DEA's Special Operations Division (SOD), the Hemispheres Project, and the Northern California Regional Intelligence Center, as well as any information relating to the use of cell-site simulator technology. (For ease of reference, the United States will refer to these entities collectively as the "alleged programs.") This motion is based on faulty assumptions of fact and faulty statements of the law. Accordingly, it should be denied.

A. The Defendant's Assumption that the United States Must Have Used the "Alleged Programs" is Entirely Speculative

24. At the outset, it is important to emphasize that there are some things that the parties can agree on. For example, the defendant is correct when he states that this investigation relied extensively on the use of electronic surveillance to establish probable cause for wiretap affidavits. Def. Mot. 20-23. The defendant is also correct when he states that *Brady* and its progeny extend to material that could aid him in succeeding on a motion to suppress. Def. Mot. 19; *see also United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993).

25. From there, however, his argument veers away from both the facts in this case and the applicable law. For starters, for the reasons discussed above, the defendant is not entitled to use *Brady* as a discovery tool to obtain information about all of the sources that the United States used to conduct electronic surveillance. *See Bagley*, 473 U.S. at 675 n.7; *see also* para. 11, *supra*.

26. More importantly, his assumption that the United States must necessarily have used the "alleged programs" to conduct electronic surveillance in this case is based entirely on speculation. He

relies primarily on a spreadsheet that the United States has turned over that lists toll records of all calls that were made by telephones associated with this investigation. This spreadsheet, as the defendant correctly notes, lists 742,907 calls. As the United States has represented to counsel for the defendants, some of these toll records were obtained through pen-trap orders installed on target telephones; the remaining toll records were obtained by DEA administrative subpoenas to telephone companies that provided service to the target telephones.

27. The defendant argues that administrative subpoenas could not have been used to obtain these toll records because "federal law prohibits the acquisition of such call data without a court order or a warrant." Regrettably for the defendant, this is a faulty statement of the law. The Controlled Substances Act permits the DEA to issue administrative subpoenas requiring "the production of any records . . . which the Attorney General finds relevant or material to the investigation." 21 U.S.C. § 876(a). The Ninth Circuit has unambiguously approved of the use of DEA administrative subpoenas to obtain toll records from phone companies, just as the DEA did here. *United States v. Plunk*, 153 F.3d 1011, 1020 (9th Cir. 1998). In *Plunk*, the defendant questioned the DEA's use of administrative subpoenas to obtain his telephone records in a drug investigation. The Ninth Circuit rejected his argument because the defendant lacked standing to challenge the subpoena. "Under long standing Ninth Circuit precedent, individuals possess no reasonable expectation of privacy in telephone records." *Id.* In approving of the use of administrative subpoenas to obtain toll records, the Ninth Circuit noted that 21 U.S.C. § 876 was "written to give the DEA broad powers to investigate violations of federal drug laws" and "provides no express right to challenge the Attorney General's subpoenas issued under it." *Id*.

28. Nor has the United States attempted to conceal or disguise its use of administrative subpoenas to obtain toll records. In fact, several DEA reports have been turned over to the defendants that explicitly refer to the use of administrative subpoenas to obtain toll records at the outset of this investigation. *See, e.g.*, Gov. Exhibits 2 and 5. Thus, the defendant's claim that the United States is "shrouding" the sources of its electronic surveillance in "secrecy" is simply not true.[21]

[21] In a footnote, the defendant suggests that the United States is not only "shrouding" the

29. That said, the United States has not turned over, and will decline to turn over if asked, copies of the administrative subpoenas themselves. To be clear, the actual toll records that were obtained have been turned over in their entirety. The subpoenas that were used to obtain those call records, however, plainly do not fall within the scope of Rule 16. F.R.Cr.P. Rule 16(a). Nor has the defendant articulated any reason why they would be covered by Rule 16. *See United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) (noting that conjectural assertions of materiality do not trigger the United States' discovery obligations under Rule 16).

30. Nor, so far as the United States can see, do the subpoenas contain any *Brady* material. This would be the case even if the administrative subpoenas somehow demonstrated that the United States used the "alleged programs" in violation of the pen register statute to obtain toll records in this case.[22] As the Supreme Court has held in *Smith v. Maryland*, 442 U.S. 735 (1979), the use of a pen register does not constitute a search for Fourth Amendment purposes because people do not have a subjective expectation of privacy in numbers they dial because they "realize that they must convey phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.* at 743-44. Moreover, in *United States v. Forrester*, 512 F.3d 500, 512 (9th Cir. 2008), the Ninth Circuit held that evidence obtained in violation of the pen register statute need not be suppressed, stating that even if surveillance was conducted in violation of the pen register statute, "[t]he statutory text, our general reluctance to require suppression in the absence of statutory

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"sources" of its electronic surveillance, but that it is withholding some of the fruits of that surveillance as well, specifically, cell-site information. Def. Mot. 24 n.11 ("[o]ddly . . . the cell-site information is provided for a relatively small minority of phone calls [in the spreadsheet]. *It is unclear whether this information was withheld from the spreadsheet disclosed or whether it was not obtained in the first place*" (emphasis added). Counsel for the United States categorically denies "withholding" cell-site information or any other information from the spreadsheet, and, in fact, has clearly represented to the defendant that it has disclosed all cell-site information in its possession. See Gov. Exhibit 6 (discovery letter dated May 6, 2013, from undersigned counsel to counsel for all defendants, disclosing a CD that "contains *a list of all toll records and pen register data . . . that was obtained as part of the investigation in this case . . .* [including] *cell-site information, for all calls during which the United States obtained such information*" (emphasis added). The defendant's baseless allegation that the United States is still withholding information is uncharacteristic of the otherwise cooperative relationship that the parties have enjoyed throughout this proceeding.

[22] The United States neither confirms nor denies whether any of the "alleged programs" listed by the defendant were used in this investigation. Any such admission, whether affirmative or not, would likely implicate the Classified Information Procedures Act (CIPA). *See* 18 U.S.C. App. III § 6.

authorization, other circuits' holdings and our own indirect precedent all therefore lead us to conclude that suppression is inappropriate." *Id*. at 513. In short, there can be no *Brady* material if there is nothing that can be suppressed in the first place. Thus, the defendant's motion for *Brady* material is doubly moot: moot once because the United States has disclosed that it used administrative subpoenas to obtain the very telephone records that the defendant speculates were obtained using the "alleged programs," and moot again because even if such programs were used, no Fourth Amendment protections would have been implicated.[23]

B. The Defendant's Three-Part Proposed Order Is Meritless

31. Even if this Court were to conclude that an order was necessary to require the United States to comply with its self-executing *Brady* obligations, the order the defendant seeks here is improper. The order he seeks has three parts: he seeks communications between law enforcement and various intelligence agencies; he seeks the sources for the toll records listed in the spreadsheet described above; and he seeks an order for disclosure of all phone numbers and cell site information obtained in this investigation. All three parts of his proposed order are meritless.

32. The first part of the defendant's proposed order is directed not just at the United States Attorney's Office but specifically at the "NSA, DEA SOD, Hemisphere, and U.S. Department of Justice to disclose all communications between intelligence services and law enforcement related to this case." Def. Mot. 29. This order would be overbroad because it is in no way limited to the alleged *Brady* evidence about call records that the defendant believes the United States is hiding from him. Moreover, even if it were limited in scope, it is not clear that this Court would have the authority to order individual agencies within the executive branch to disclose information. *See, e.g., United States v. Jennings*, 960 F.2d 1488, 1491 (9th Cir. 1992) ("[w]e therefore interfere in the practices of the executive branch only when there is 'a clear basis in fact and law' for doing so . . . Absent a violation of a recognized right under the Constitution, a statute, or a procedural rule, a district court is not entitled to exclude evidence

[23] A second reason why the Fourth Amendment is not implicated here is that the defendant likely lacks standing to raise such a challenge, as many of the telephones at issue in this investigation were subscribed under false names. *See, e.g.*, Def. Exhibit A at pgs. 4-5 (Bates No. 01000036-37)(describing target telephone used by defendant Antonio Jose DIAZ-Rivera as being subscribed to "James Bond."

as a sanction against government practices disapproved of by the court") (internal citations omitted). The defendant does not cite to any legal authority for his discovery request, other than *Brady*, which, as discussed above, is not a discovery tool. To the contrary, similar requests have been denied in other districts. *See, e.g.*, *United States v. Jack*, 257 F.R.D. 221, 233-34 (E.D. Cal. 2009) (denying defendant's *Brady* request for communications between prosecution team and CIA, and denying defendant's *Brady* request for affidavit from government verifying that the NSA did not intercept defendant's telephone calls); *United States v. Chalmers*, 410 F. Supp. 2d 278, 287 (S.D.N.Y. 2006) (denying defendant's *Brady* request for materials held by, among others, Defense Intelligence Agency (DIA), NSA, and CIA).

33. The second part of the defendant's requested order seeks to compel the United States to disclose the sources of the toll records that the United States turned over to the defendant in the spreadsheet described above. This the United States has already done. The problem is that the defendant either does not like or does not believe the fact that some of the toll records were obtained by administrative subpoena. There is nothing a court order can do to remedy the defendant's denial of reality.

34. The same is true of the third part of the defendant's requested order, which seeks disclosure of "all phone numbers, call records (with phone numbers for each call), and cell-site data obtained in this investigation." Again, this the United States has already disclosed. Gov. Exhibit 6 (discovery letter dated May 6, 2013, from undersigned counsel to counsel for all defendants, disclosing a CD that "contains *a list of all toll records and pen register data . . . that was obtained as part of the investigation in this case . . .*").

C. The Defendant's Proposed Order Regarding the Use of Cell-Site Simulator Technology is Moot

35. Finally, the defendant seeks an order compelling disclosure of a wide range of materials relating to the alleged use of cell-site simulator technology in this case. The United States has advised the defendants that no such devices were used in this case. Therefore, the order the defendant seeks is moot.[24]

[24] The United States takes serious issue with some of the factual representations and legal analyses that the defendant makes in support of his conclusion that cell-site simulators must have been

IV. CONCLUSION

36. For the reasons discussed above, the defendant's motion should be denied in its entirety.

DATED: November 12, 2013

Respectfully submitted,

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used in this case. Nonetheless, because the requested order is moot, the United States will not belabor these points unless instructed to do so by the Court.