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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ABDALLAH OSSEILY, Defendant.	No. CR 19-117-JAK GOVERNMENT'S CLASSIFIED MOTION #1 FOR AN ORDER PURSUANT TO SECTION 4 OF THE CLASSIFIED INFORMATION PROCEDURES ACT AND FEDERAL RULE OF CRIMINAL PROCEDURE 16(d)(1); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; EXHIBITS; REQUEST FOR A CLASSIFIED HEARING **CLASSIFIED, IN CAMERA, EX PARTE, AND UNDER SEAL WITH THE COURT INFORMATION SECURITY OFFICER OR HIS DESIGNEE**

(U) MEMORANDUM OF POINTS AND AUTHORITIES

I. (U) LEGAL STANDARDS GOVERNING CIPA

A. (U) The Analytical Framework for CIPA, Section 4

(U) CIPA establishes procedures for handling classified information in criminal prosecutions. It creates "a pretrial procedure for ruling upon the admissibility of classified information." United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988); 18 U.S.C. App. 3 §§ 1-16. That procedure "endeavor[s] to harmonize a defendant's right to a fair trial with the government's right to protect classified information." Sedaghaty, 728 F.3d at 903; United States v. Abu-Jihaad, 630 F.3d 102, 140 (2d Cir. 2010). At its core, CIPA "evidence[s] Congress's intent to protect classified information from unnecessary disclosure at any stage of a criminal trial," United States v. O'Hara, 301 F.3d 563, 568 (7th Cir. 2002), while also protecting "a defendant's right to a full and meaningful presentation of his claim to innocence," Sedaghaty, 728 F.3d at 903 (punctuation and citation omitted).

B. (U) CIPA § 4

(U) Section 4 governs criminal discovery. 18 U.S.C. App. 3 § 4. CIPA does not alter established principles for discovery or admissibility. Sedaghaty, 728 F.3d at 903-04. Instead, Congress intended CIPA § 4 to clarify district courts' preexisting powers under Federal Rule of Criminal Procedure 16(d)(1) to deny or restrict discovery in order to protect national security. Sarkissian, 841 F.2d at 965; United States v. Mejia, 448 F.3d 436, 455 (D.C. Cir. 2006). Rule 16(d)(1) allows courts to deny or restrict criminal discovery for "good cause," including for "the protection of

information vital to the national security." Fed. R. Crim. P. 16(d)(1) & advisory committee's note on 1966 amendments. See, e.g., United States v. Abonce-Barrera, 257 F.3d 959, 969 (9th Cir. 2001) (applying Rule 16(d)(1); affirming refusal to order disclosure of all cases on which an informant worked); United States v. Toner, 728 F.2d 115, 122 (2d Cir. 1984) (same; affirming limitation on inquiry into an informant's reasons for approaching the FBI, which would have jeopardized other investigations).

(U) Consistent with Rule 16(d)(1), CIPA § 4 confirms that, "upon a sufficient showing," a court "may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery," or alternatively, "to substitute a summary of the information for such classified documents." 18 U.S.C. App. 3 § 4. Like Rule 16(d)(1), CIPA § 4 authorizes the government to demonstrate the need for such alternatives through *ex parte*, *in camera* submissions. *Id.*; see United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998).

C. (U) Four-step framework for assessing discoverability of classified information.

(U) A four-step framework for assessing discoverability of classified information applies to CIPA § 4 motions.

1. (U) Discoverability

(U) The "district court must first determine whether, pursuant to the Federal Rules of Criminal Procedure, statute, or the common law, the information at issue is discoverable at all." Sedaghaty, 728 F.3d at 904. CIPA does not "expand the traditional rules of criminal discovery under which the government is not required to

provide criminal defendants with information that is neither exculpatory nor, in some way, helpful to the defense." United States v. Varca, 896 F.2d 900, 905 (5th Cir. 1990).

(U) This step requires a straightforward application of Rule 16, the Jencks Act (18 U.S.C. § 3500), and constitutional rules under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio, 405 U.S. at 153-54. Under Rule 16, an item is discoverable if, for example, it is "material to preparing the defense" or "the government intends to use the item in its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(E)(i)-(ii). The Jencks Act requires production of prosecution witnesses' recorded or written statements related "to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(e)(1); see generally United States v. Stinson, 647 F.3d 1196, 1208 (9th Cir. 2011). The Constitution requires production of evidence (including impeachment material) that is favorable to the defendant and material to guilt or punishment. United States v. Bagley, 473 U.S. 667, 682-83 (1985) (defining "material"). However, there is no constitutional requirement that the prosecution disclose "all . . . investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795 (1972).

2. (U) Assertion of the classified-information privilege

(U) If an item is discoverable, the district court must determine whether the government has properly asserted a privilege over classified information. Sedaghaty, 728 F.3d at 904; Klimavicius-Viloria, 144 F.3d at 1261. "Classified information" is "information or material that has been determined by the United States government pursuant to an Executive Order, statute, or

regulation, to require protection against unauthorized disclosure for reasons of national security[.]" 18 U.S.C. App. 3 § 1(a). In general, the Executive Branch has sole authority to determine proper classification. United States v. Abu-Ali, 528 F.3d 210, 253 (4th Cir. 2008); United States v. El-Mezain, 664 F.3d 467, 523 (5th Cir. 2011).

(U) In CIPA proceedings, the relevant privilege is the "classified information privilege." See, e.g., United States v. Yunis, 867 F.2d 617, 622-23 (D.C. Cir. 1989); El-Mezain, 664 F.3d at 520-22. Although the Ninth Circuit has inaccurately referred to the privilege as the "state secrets privilege," a distinct common-law privilege discussed in United States v. Reynolds, 345 U.S. 1, 7-8 (1953), and applicable in civil proceedings. See Sedaghaty, 728 F.3d at 904; Klimavicius-Viloria, 144 F.3d at 1261. However, the Ninth Circuit has never actually applied the Reynolds standard—including its requirement that the privilege be invoked by the relevant "head of the department"—in a CIPA appeal.

(U) The state-secrets privilege was inapplicable. It is a common-law evidentiary privilege with "constitutional overtones," derived from the separation of powers and Executive Branch authority to protect national security. Reynolds, 345 U.S. at 6. When invoked, the state-secrets privilege is absolute: it cannot be overcome, even by "the most compelling necessity." Id. at 11. Instead, any privileged information "is completely removed from the case" and cannot be produced or used by any party, "irrespective of the [opposing party's] countervailing need for it." Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1081-82 (9th Cir. 2010) (en

banc). Not even a court can access state-secrets material; the information is "protected from disclosure—even for the purpose of in camera examination by the court." El-Masri v. United States, 479 F.3d 296, 306 (4th Cir. 2007). This may force dismissal of civil claims, regardless of the merits. See Mohamed, 614 F.3d at 1083.

(U) Because of its bright-line consequences, the state-secrets privilege has "unusually strict procedural requirements[.]" Fazaga v. Federal Bureau of Investigation, 916 F.3d 1202, 1228 (9th Cir. 2018). It must be formally invoked by the head of the department with control over the information, after personal examination by that official. Id.; Mohamed, 614 F.3d at 1080. This certification ensures the government exercises "serious, considered judgment" before invoking a privilege that can result in the "dismissal [of an] entire action" brought by a private party. Mohamed, 614 F.3d at 1080 (citations omitted).

(U) The common-law privileges applicable in the CIPA context are more flexible. Governed by Roviaro v. United States, 353 U.S. 53, 60-61 (1957) rather than Reynolds, the classified-information privilege yields to a judicial determination that the information at issue is "helpful to the defense of an accused, or is essential to a fair determination of a cause." Roviaro, 353 U.S. at 60-61; see Klimavicius-Viloria, 144 F.3d at 1261 (applying Roviaro to determine whether criminal defendant was entitled to classified information). Thus, notwithstanding the government's invocation of a classified-information privilege in CIPA proceedings, a court *can* order disclosure to the defense. Sedaghaty, 728 F.3d at 904. Thereafter, CIPA authorizes the government to seek a substitution designed to

place the defendant in substantially the same position as if he had been provided classified information in its original form. 18 U.S.C. App. 3 § 6(e)(1). If the district court rejects the government's proposal, the Attorney General himself must determine whether the classified information should nevertheless remain undisclosed. Id. § 6(e)(1). If the Attorney General so determines, the government risks sanctions—up to and including dismissal of its criminal case. Id. § 6(e)(2).

(U) Because the classified-information privilege is more flexible than the state-secrets privilege—and more accommodating to non-government parties—the requirements for invoking it are less strict. The privilege need not be invoked "by the head of the department"—for instance, by the Attorney General. *Mohamed*, 614 F.3d at 1080. Rather, it may be invoked by any high-ranking government official with "original classification authority" who describes the harm to national security that "reasonably could be expected to result" from disclosure. Executive Order 13,292, § 1.1(a)(4), 68 Fed. Reg. 15,315 (March 25, 2003).

(U) As the Fourth and Fifth Circuits have recognized, CIPA itself does not require that the "government privilege . . . be initiated by an agency head." El-Mezain, 664 F.3d at 521; United States v. Rosen, 557 F.3d 192, 198 (4th Cir. 2009). Instead, district courts must prevent disclosure of any classified materials "[u]pon motion of the United States," and "classified information" is defined as "any information or material that has been determined by the United States government pursuant to an Executive Order, statute, or regulation, to require protection against unauthorized disclosure

for reasons of national security[.]" 18 U.S.C. App. 3 §§ 1(a), 3; see El-Mezain, 664 F.3d at 521-22. Moreover, while some CIPA provisions explicitly require Attorney General participation, CIPA's discovery provisions do not. See El-Mezain, 664 F.3d at 522. But see United States v. Aref, 533 F.3d 72, 78-79 (2d Cir. 2008) (adopting contrary, state-secrets framework).

(U) To be sure, both Klimavicius-Viloria and Sedaghaty include statements reciting a requirement that the government "make a formal claim of state-secret privilege" under CIPA, "lodged by the head of the department" with actual control over the matter. Klimavicius-Viloria, 144 F.3d at 1261; accord Sedaghaty, 728 F.3d at 904.

(U) But those statements were mere mislabelings, making their precedential effect unclear. Sedaghaty never analyzed or applied the Reynolds standard; the court did not address the sufficiency of the government's privilege claim. See Sedaghaty, 728 F.3d at 908. While Klimavicius-Viloria purportedly undertook that analysis—indicating that the court "examined the government's sealed submissions" and concluded that they satisfied the Reynolds standard—its conclusion is impossible. Klimavicius-Viloria, 144 F.3d at 1261. The privilege claim in Klimavicius-Viloria was not lodged by the head of the relevant department. See Government's Memorandum Re: CIPA Procedure, United States v. Turi, CR 14-191-PHX-DGC (D. Ariz.) (CR 166), at 4 n.2 (June 10, 2015). Nor was the privilege claim in Sedaghaty. Id. at 5. Thus, the cases cite Reynolds for a standard they did not apply. Because neither case confronted and resolved a germane issue after reasoned consideration, their mislabelings are not binding. See United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001).

(U) Klimavicius-Viloria and Sedaghaty likewise lack precedential support for their reference to state-secrets procedures. For the proposition that the government must make a "formal claim of the state secrets privilege" in CIPA proceedings, Sedaghaty cited only Klimavicius-Viloria. See 728 F.3d at 904. Klimavicius-Viloria, in turn, cited only Sarkissian. See 144 F.3d at 1261. In Sarkissian, however, the court merely "assumed *arguendo*" that the Reynolds standard could apply to CIPA. Sarkissian, 841 F.2d at 966.

3. (U) Relevance and helpfulness

(U) If the classified information is discoverable and a privilege applies, the district court must determine whether the classified information is "relevant and helpful to the defense of the accused." Sedaghaty, 728 F.3d at 904. This is the same standard, adopted from Roviaro v. United States, 353 U.S. 53, 60-61 (1957), that governs disclosure of informants' identities—as to which the government holds a similar, qualified privilege. Sedaghaty, 728 F.3d at 904; Roviaro, 353 U.S. at 59.

(U) In Roviaro, the Supreme Court considered the application of the informant's privilege to the general discovery rules, pursuant to which the government may withhold from disclosure the unclassified identity of its informants. Roviaro, 353 U.S. at 55. The Court noted that the privilege implicates two fundamental competing interests: (1) the interest of the defendant in mounting a defense; and (2) the public interest in enabling the government to protect its sources. The Court relied on two basic principles to resolve the competing interests. First, it noted that the defendant's interest was triggered only when information in the government's possession

was "relevant and helpful." Id. at 60. Second, when the evidence is deemed relevant and helpful, the Court held that resolving the interests "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." Id. at 62.

(U) In the seminal case, United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia applied the reasoning of Roviaro in interpreting the statutory requirements of CIPA and held that classified information may be withheld from discovery when the information is not relevant or when the information is relevant but not helpful to the defense. Yunis, 867 F.2d at 622-23. The Ninth Circuit adopted this same standard in Klimavicius-Viloria, 144 F.3d at 1261 ("In order to determine whether the government must disclose classified information, the court must determine whether the information is 'relevant and helpful to the defense of an accused.'") (quoting Yunis, 867 F.2d at 623) (other citations omitted).

(U) In Yunis, the court found that the government had an interest in protecting not only the contents of the conversations, but also the sources and methods used to collect them. 867 F.2d at 623. The court recognized that--as in cases in which the United States invokes its informant privilege--much of the government's national security interest in the recorded conversations "lies not so much in the contents of the [Rule 16] conversations, as in the time, place, and nature of the government's ability to intercept the conversations at all." Id. at 623; see also United States v. Felt, 491 F. Supp. 179, 183 (D.D.C. 1979) ("Protection of sources, not

information, lies at the heart of the claim [of privilege] by the Attorney General."). As the Yunis court explained:

> Things that did not make sense to the District Judge would make all too much sense to a foreign counter intelligence specialist who could learn much about this nation's intelligence gathering capabilities from what [the documents withheld from discovery] revealed about sources and methods. Implicit in the whole concept of an informant type privilege is the necessity that information gathering agencies protect from compromise "intelligence sources and methods."

Yunis, 867 F.2d at 623. Thus, disclosure is improper if "[n]othing in the classified [information] in fact goes to the innocence of the defendant *vel non*, impeaches any evidence of guilt, or makes more or less probable any fact at issue in establishing any defense to the charges." Yunis, 867 F.2d at 624.

4. (U) Standard for Deletion of Classified Information

When a court finds that classified information is not relevant and helpful to the defense, it may authorize the government to delete such information from discovery. 18 U.S.C. App. 3, § 4; see, e.g., United States v. Hayat, 710 F.3d 875, 899-900 (9th Cir. 2013) ("The government must disclose classified information only if it is 'relevant and helpful to the defense of an accused.'"). Courts, including the Ninth Circuit, have consistently upheld the deletion of classified information that is not both relevant and helpful to the defense. Sedaghaty, 728 F.3d at 909 (finding that "[t]he bulk of the information the government sought to withhold was not discoverable," or "not relevant and helpful to the defense," and thus was properly withheld). Under the "relevant and helpful" test, "information meets the standard for disclosure 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the

result of the proceeding would have been different.'" Klimavicius-Viloria, 144 F.3d at 1261 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

(U) Similarly, "[i]nculpatory material which the government does not intend to offer at trial need not be disclosed" under this standard; it "cannot conceivably help a defendant, and therefore is both unnecessary and useless to him." United States v. Rahman, 870 F. Supp. 47, 52 (S.D.N.Y. 1994). This is consistent with this Court's analysis of informant-identity disclosure under Roviaro. *See* United States v. Whitney, 633 F.2d 902, 911 (9th Cir. 1980) (affirming denial of motion to reveal identity; defendant's "assertion that identification of the informant was somehow essential to the preparation of his defense, especially as the informant's knowledge tended to be inculpatory, simply does not bear scrutiny"); United States v. Hernandez-Berceda, 572 F.2d 680, 682-83 (9th Cir. 1978) (similar; rejecting argument that "even apparently inculpatory testimony may be helpful").

(U) Thus, "[i]f the government does not want the defendant to be privy to . . . [inculpatory] information that is classified," it "may . . . forego its use altogether." Abu-Ali, 528 F.3d at 255. The availability of this choice is essential to CIPA's animating principle: allowing the government to pursue criminal defendants without risking national security. See generally United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363-64 (11th Cir. 1994) (discussing related purpose to limit potential for "graymail"). National security interests include "protecting the source and means of surveillance that goes beyond protection of the actual contents"

of a classified report. El-Mezain, 664 F.3d at 522. What appears innocuous or opaque to courts may "make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what [classified] documents reveal[] about sources and methods." *Yunis*, 867 F.2d at 523.

(U) Cumulative classified information is also not "relevant and helpful" and may be withheld from the defendant. See, e.g., United States v. Renzi, 769 F.3d 731, 751 (9th Cir. 2014); Abu-Jihaad, 630 F.3d at 142.

5. (U) Balancing

(U) Finally, if discoverable classified information is relevant and helpful to the defense, the district court may balance national security concerns against the defendant's need for documents. Sarkissian, 841 F.2d at 965; see Roviaro, 353 U.S. at 62.

(U) Classified information that does not satisfy steps (1) or (3)—or which does not survive the balancing undertaken in step (4)—can be withheld from discovery. See Sedaghaty, 728 F.3d at 909; United States v. Hayat, 710 F.3d 875, 899-900 (9th Cir. 2013); Klimavicius-Viloria, 144 F.3d at 1261; Yunis, 867 F.2d at 622-25. That is, "upon a sufficient showing, a court "may authorize the United Sates to delete specific items of classified information" from discovery. 18 U.S.C. App. 3 § 4.

(U) Indeed, Congress plainly intended to allow courts to take into account national security interests in considering motions filed under Section 4:

> When pertaining to discovery materials [Section 4 of CIPA] should be viewed as clarifying the court's powers under Federal Rule of Criminal Procedure 16(d)(1). This

> clarification is necessary because some judges have been reluctant to use their authority under the rule although the advisory comments of the Advisory Committee on Rules states that "among the considerations taken into account by the court" in deciding on whether to permit discovery to be "denied, restricted or deferred" would be "the protection of information vital to the national security."

S. Rep. No. 96-823, at 6 (1980), as reprinted in 1980 U.S.C.C.A.N. 4294, 4299-4300. See also Sarkissian, 841 F.2d at 965 (describing as "meritless" defendant's argument "that CIPA forbids balancing national security concerns against defendant's need for documents" and stating that "[o]n issues of discovery, the court can engage in balancing"); United States v. Turi, 143 F. Supp. 3d 916, 920-922 (D. Ariz. 2015) (discussing CIPA balancing test and applicable point when disclosure is required). Accordingly, CIPA is entirely consistent with the law under Rule 16 that holds that courts should consider the jeopardy that disclosure may bring to important government interests in evaluating whether the defendant's need for this information outweighs the government's interest.

D. (U) Substitutions

(U) Even where classified information is discoverable, a court may authorize the government "to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove." 18 U.S.C. App. 3 § 4. In general, a summary is adequate if it gives the defendant "substantially the same ability to make his defense as would disclosure of the specific classified information." 18 U.S.C. App. 3 § 6(c)(1); Sedaghaty, 728 F.3d at 905 (applying CIPA § 6 to analyze a substitution produced in discovery); United States v. Mohamud, 666 Fed. Appx. 591, 594-95 (9th Cir. 2016).

(U) "[P]recise, concrete equivalence" is not required; "that insignificant tactical advantages could accrue to the defendant by the use of the specified classified information should not preclude the court from ordering alternative disclosure." Sedaghaty, 728 F.3d at 905 (quoting legislative history). A summary should not use "slanted wording" to bolster inculpatory information while discrediting exculpatory information. Id. at 905-906. It likewise cannot exclude "relevant and helpful" information, under the above standard. Id. Nevertheless, it need not provide all the benefits of the original classified source. United States v. Moussaoui, 382 F.3d 453, 478 n.29 (4th Cir. 2004).

E. (U) Overview of Applicable Traditional Criminal Discovery Rules

(U) The following traditional rules of criminal discovery are applicable here.

1. (U) Rule 16

(U) Rule 16(a)(1) identifies specific categories of information or materials that are "subject to disclosure" after a defendant's request. These potentially discoverable materials, as pertinent here, are "papers, documents, data . . . if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense." Fed. R. Crim. P. 16(a)(E)(i). To obtain discovery under Rule 16(a)(E)(i), a defendant must make a prima facie showing of materiality. United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990). This "low threshold" is satisfied when the information requested would help the defendant prepare his defense. United States v. Lucas, 841 F.3d 796, 804 (9th

Cir. 2016) (quoting United States v. Hernandez-Mesa, 720 F.3d 760, 768 (9th Cir. 2013)). "Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the government is in possession of information helpful to the defense." Id. (quoting Mandel, 914 F.2d at 1216); accord United States v. Doe, 705 F.3d 1134, 1150 (9th Cir. 2013).

(U) Rule 16(a)(2) specifically excludes from discovery, reports, memoranda, or other internal government documents and witness statements except as provided in the "Jencks" Act. Case law has similarly held Rule 16(a) inapplicable to statements by witnesses, prospective witnesses, and non-witnesses. United States v. Mills, 641 F.2d 785, 790 (9th Cir. 1981).

(U) Rule 16(d)(1) permits a court, for good cause, to deny, restrict, or defer discovery or inspection, or grant other appropriate relief. Fed. R. Crim. P. 16(d)(1). Under this provision and related principles, sensitive law enforcement information may properly be withheld from the defense. See, e.g., United States v. Abonce-Barrera, 257 F.3d 959, 969 (9th Cir. 2001) (affirming district court's refusal to order government to disclose all cases on which a confidential informant had worked because defense failed to show that list would be material).

2. (U) Brady/Giglio Obligations

(U) Pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, the government must provide to the defense, in time for effective use at trial, any evidence favorable to the accused that is relevant to guilt or punishment. Brady's principles extend to

evidence affecting key government witnesses' credibility, including impeachment material. Giglio v. United States, 405 U.S. 150, 153-55 (1972); United States v. Bagley, 473 U.S. 667, 676 (1985)(plurality); Banks v. Dretke, 540 U.S. 668, 700-01 (2004). Nonetheless, there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all investigation done on the case. Moore v. Illinois, 408 U.S. 786, 795 (1972); see also Weatherford v. Bursey, 429 U.S. 545, 559 (1977)("There is no general constitutional right to discovery in a criminal case, and Brady did not create one.").

II. (U) THE LEGAL STANDARDS GOVERNING FISA USE AND NOTICE

A. (U) Legal Standards: FISA Notice Requirements

(U) The government is required to provide notice to a criminal defendant if the government seeks to use in a proceeding information "obtained" or "derived" from electronic surveillance or physical search conducted pursuant to FISA.

> Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court . . . of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing or other proceeding or at a reasonable time prior to an effort to do so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or use such information.

50 U.S.C. §§ 1801, 1806.

(U) An "aggrieved person" is "a person who is the target of electronic surveillance or any other person whose communications or activities were subject to electronic surveillance" and against whom

the government seeks to introduce FISA information in a proceeding. 50 U.S.C.A. § 1801(k). In other words, "if the government intends to use or disclose information obtained or derived from a [FISA] acquisition, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition." Clapper v. Amnesty Int'l USA, 133 S.Ct 1138, 1154 (2013) (citing 50 U.S.C. §§ 1806(c), 1806e, 1881e(a) (2006 ed. and Supp. V.))

(U) Information "obtained" from FISA is information that is the direct product of the surveillance or physical search. Information may be "derived" from electronic surveillance or physical search when it is an indirect product of an investigation that originates in FISA collection. The government's notice obligations apply equally to FISA "derived" information as to information obtained directly to FISA.

B. (U) The Meaning of FISA "Derived"

(U) While FISA does not define the phrase "derived from," the fact that Congress's use of the term "derived from" in Title III, FISA strongly suggests that Congress intended to incorporate within FISA notice requirement the analytical framework of the "fruit of the poisonous tree" doctrine developed by the Supreme Court in the context of the Fourth Amendment's exclusionary rule.[1] The incorporation of this doctrine finds further support in Congress's

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[1] (U) The government's use of the fruit of the poisonous tree doctrine as the analytical framework for the "derived from" analysis in no way implies that FISA surveillance violates the Fourth Amendment or is otherwise illegal. Rather, the "fruits" doctrine, coupled with the closely related "independent source" and "inevitable discovery" doctrines, provides the most analogous mode of analysis for determining if evidence is "derived from" FISA surveillance.

explicit reference to the Fourth Amendment in 50 U.S.C.A. § 1881a(i)(3):

> If the court finds that a certification submitted in accordance with subsection (g) contains all of the required elements and that the targeting and minimization procedures . . . are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the Court shall enter an order approving that certification and the use, or continued use in the case of an acquisition authorized pursuant to a determination under subsection (c)(2), of the procedures for the acquisition.

(U) The "derived from" standard contained in Title III and FISA parallels the "fruit of the poisonous tree" doctrine developed by the Supreme Court primarily in the context of the Fourth Amendment exclusionary rule. "[T]he exclusionary rule . . . prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint." Murray v. United States, 487 U.S. 533, 536-37 (1988).

(U) The Fourth Amendment fruit-of-the-Position-Tree Doctrine requires courts to determine whether the acquisition of evidence that the government intends to introduce at trial was an "indirect result" of an unlawful search, and if so, whether the acquisition was nevertheless "so attenuated as to dissipate the taint." Murray, 487 U.S. at 536-537 (citations omitted). The first "but for" inquiry asks whether a causal link can be drawn between the search and the acquisition of evidence. The second (which is more akin to a proximate cause inquiry as whether "the connection between

unconstitutional police conduct and the evidence is so remote or has been interrupted by some intervening circumstances." Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016).

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ABDALLAH OSSEILY, Defendant.	No. CR 19-117-JAK GOVERNMENT'S SUPPLEMENTAL CLASSIFIED BRIEF PURSUANT TO SECTION 4 OF THE CLASSIFIED INFORMATION PROCEDURES ACT AND FEDERAL RULE OF CRIMINAL PROCEDURE 16(d)(1); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; AND EXHIBITS **CLASSIFIED, IN CAMERA, EX PARTE, AND UNDER SEAL WITH THE COURT INFORMATION SECURITY OFFICER OR HIS DESIGNEE**

(U) Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorneys Annamartine Salick, Matthew J. Jacobs, and Valerie L. Makarewicz,

hereby files its Supplemental Classified Brief Pursuant to Section 4 of the Classified Information Procedures Act ("CIPA") and Federal Rule of Criminal Procedure 16(d)(1).

(U) MEMORANDUM OF POINTS AND AUTHORITIES

A. (U) TRADITIONAL FOURTH AMENDMENT LEGAL STANDARDS

1. (U) The Exclusionary Rule and Derivative Evidence

(U) The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016). The "exclusionary rule," developed in the twentieth century as a remedy to deter Fourth Amendment violations, bars the admission of evidence at trial against a defendant that was obtained in violation of a defendant's Fourth Amendment rights. See, e.g., United States v. Calandra, 414 U.S. 338, 347 (1974) ("The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens"). The "rule is calculated to prevent, not repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only efficiently available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

(U) The exclusionary rule forbids using at trial "evidence obtained as a direct result of an illegal search or seizure," as well as "evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" Segura v. United States, 468 U.S. 796, 804 (1984) (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)). This derivative evidence -- the so-called "fruit of the poisonous tree" -- is "tainted" by the prior "illegality" and thus inadmissible, subject to a few recognized exceptions. United States v. Gorman, 859 F.3d 706, 716 (9th Cir.), order corrected, 870 F.3d 963 (9th Cir. 2017).

(U) To determine whether evidence is in fact "derivative" of an illegal act, courts look to the "causal connection between the illegality and the evidence". United States v. Chamberlin, 644 F.2d 1262, 1269 (9th Cir. 1980). The central question is whether "granting [the] establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by some means sufficiently distinguishable to be purged of the primary taint." Wong Son v. United States, 371 U.S. 471, 487-88 (1963). Thus, evidence obtained as "a direct result of an unconstitutional search or seizure is plainly subject to exclusion," Segura, 468 U.S. at 804. But whether "derivative evidence is admitted or excluded 'will depend on the precise role the illegal seizure in fact played in the subsequent discovery.'" United States v. Smith, 155 F.3d 1051, 1060 (9th Cir. 1998) (citing United States v. Bacall, 443 F.2d 1050, 1057 (9th Cir. 1971)).

(U) The inquiry is not a "but-for" test. Exclusion is not warranted by the "mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence" because "but-for causality is only a necessary, not a sufficient, condition for suppression." Hudson v. Michigan, 547 U.S. 586, 592 (2006). In other words, evidence should not be suppressed simply because "it would not have come to light but for the illegal actions of the police." Segura, 468 U.S. at 815.

2. (U) Fruit of the Poisonous Tree Exceptions

(U) Despite the exclusionary rule's "broad deterrent purpose" it has "never been interpreted to proscribe the use of illegally

seized evidenced in all proceedings or against all persons." Calandra, 414 U.S. at 348. Indeed, "[s]uppression of evidence . . . has always been our last resort, not our first impulse" because exclusion "generates substantial social costs." Hudson, 547 U.S. at 591 (citing United States v. Leon, 468 U.S. 897, 907 (1984). The Supreme Court expressly "rejected [the] indiscriminate application" of the exclusionary rule and "held it to be applicable only where its remedial objectives are thought most efficaciously served -- that is, where its deterrence benefits outweigh its substantial social costs." Hudson, 547 U.S. at 591 (internal citations omitted).

(U) The Supreme Court developed three exceptions to the fruit of the poisonous tree doctrine that allow the admission of evidence following an illegal act. When an expectation is found to apply, evidence uncovered after an illegal act is not considered "derived" from the initial act. These exceptions are: (1) the independent source exception; (2) the inevitable discovery exception; and (3) the attenuated basis exception. Gorman, 859 F.3d at 718. The independent source and inevitable discovery doctrines apply to circumstances in which the illegal search was not a "but for" cause of the discovery of the evidence, either because that evidence was independently discovery through a source that did not depend on the unlawful act or because the evidence eventually would have been discovered without the unconstitutional search. See Murray v. United States, 487 U.S. 533, 537 (1988); Nix v. Williams, 467 U.S. 431, 443-44 (1984)). The attenuation doctrine applies where the search was the "but for" cause for the discovery of the evidence but the

"connection" between the unlawful act and the evidence is "so attenuated as to dissipate the taint." Murray, 487 U.S. at 536-37.

a. The Independent Source Doctrine

(U) The independent source doctrine allows trial courts to admit evidence "obtained in an unlawful search if officers independently acquired [the evidence] from a separate, independent source." Strieff, 136 S. Ct. at 2061 (citing Murray, 487 U.S. at 537). The "exclusionary rule has no application where the Government learned of evidence from an independent source." Segura, 468 U.S. at 805 (citations omitted). Such an exception is necessary because facts obtained through an illegal act do not "become sacred and inaccessible." Id. (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). Rather, "if knowledge of them is gained from an independent source they may be proved like any others." Id.

(U) The independent source exception applies when evidence is "actually found by legal means through sources unrelated to the illegal search." United States v. Ramirez-Sandoval, 872 F.2d 1392, 1396 (9th Cir. 1989). In those situations, the evidence is not even considered a "fruit" of the poisonous tree because "its discovery through independent legal means [did] not result from the [] illegal conduct." Id. at 1396. Thus, that evidence is not derived from the unlawful source.

(U) For example, in Segura, the Supreme Court held that evidence discovered during a subsequent, lawful search of an apartment should not be suppressed as the "fruit" of an earlier, warrantless entry into the same apartment because officers obtained a warrant following the initial entry based entirely upon information

"unrelated to the initial entry." Segura, 468 U.S. at 799 (citing Silverthorne, 251 at 392). The Court found that "whether the initial entry was illegal or not is irrelevant" to the admissibility of evidence seized from the subsequent entry because "none of the information on which the warrant was secured or derived from or related in any way to the initial entry." Id. at 813-14. By contrast, the Ninth Circuit suppressed evidence obtained from search warrants following an illegally wiretap because the probable cause support the search warrants was based on summaries of conversations intercepted from an illegal wiretap. United States v. Spagnuolo, 549 F.2d 705, 711-712 (9th Cir. 1997). Thus, where information obtained from an unlawful source is not used to obtain subsequent legal process, the evidence derived from the later legal process is not considered "derived" or "tainted" by the unlawful act.

(U) Although the officers observed items during the initial entry, none of these details were included in the information submitted to secure the warrant. Segura, 468 U.S. at 799. Instead, the warrant was based entirely on information obtained before the initial entry and through source reporting. Id. Thus, the Court concluded that the officers had an "independent source" for the discovery and seizure of the challenged evidence and that the "valid warrant search was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the [initial] entry." Id. at 814-15.

(U) In Murray, the Supreme Court extended Segura's holding to encompass situations in which the government first learns of evidence through unlawful means but then later acquires the same information

or evidence through a lawful, independent source. Murray, 487 U.S. at 541-44. The Court found that evidence first obtained through an unlawful act is not "tainted" and need not be suppressed if the government later acquired the same evidence through an independent source or act unrelated to the unlawful act. The Court reasoned, "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one . . . there is no reason why the independent source doctrine should not apply." Id. at 542. Thus, evidence is admissible where the unlawful act does not "prompt" the subsequent police action and information obtained from the unlawful action is not used to obtain or direct the subsequent action. Id. at 542.

(U) Similarly, the Ninth Circuit, in reviewing a tax evasion conviction based, in part, on an illegal wiretap, reasoned:

> Evidence need not be suppressed merely because it would not have come to light but for the illegal wiretap. The district court must seek to discover what kind of direction and impetus the illegal wiretap gave to the [] investigation: did anything seized illegally, or any leads gained from that illegal activity, tend significantly to direct the investigation toward the specific evidence sought to be suppressed. Under this test, the government should have the opportunity to show that, even though the information in the wiretap may have been a factor in the decision to "target" [the defendant], the evidence which it intends to introduce at trial was obtained from source sufficiently independent of the wiretap.

United States v. Cales, 493 F.2d 1215, 1215-16 (9th Cir. 1974). While the court declined to rule on the admissibility of the evidence -- the case was remanded to the district court for additional factual findings -- it held that the government should have the opportunity to establish that, while the information in the wiretap may have been a "factor" in investigating the defendant, the evidence was obtained

from other sources "sufficiently independent" of the wiretap. Id. at 1216.

b. (U) The Inevitable Discovery Doctrine

(U) The inevitable discovery doctrine allows for the admission of illegally obtained evidence where the government can prove that the evidence would inevitably have been discovered through lawful means. Nix, 467 U.S. at 443-44. In Nix, the Court ruled that evidence of the location and condition of a victim's body was admissible in the defendant's murder trial even though the evidence was obtained from an unlawful interrogation because a police-directed search of the area had been initiated before the interrogation began would "inevitably have discovered the body." Id.

(U) In applying this exception, the Ninth Circuit clarified that the inevitable discovery doctrine does not "require" that a "previously initiated, independent" act or investigation had already been undertaken; rather, the government "can meet its burden by establishing that, by following routine procedures, the police would inevitably have uncovered the evidence." Ramirez-Sandoval, 872 F.2d at 1989. The government need only show that "the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search". United States v. Boatwright, 822 F.2d 862, 864-65 (9th Cir. 1989); see also United States v. Martinez-Gallegos, 807 F.2d 868, 870 (9th Cir. 1987) (evidence of defendant's illegal reentry uncovered from statements defendant made in violation of his Miranda rights would have inevitably been discovered from reviewing defendant's immigration file); United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986)

(routine inventory search after arrest would have inevitably discovered cocaine found in defendant's bag during a warrantless search). Thus, even if the unlawful act predated the subsequent, lawful discovery of the evidence, so long as the government can establish that it would have (regardless of the unlawful act) discovered the evidence, than the subsequently discovered evidence is not "derived" or tainted from the unlawful act.

c. (U) The Attenuation Doctrine

(U) The "attenuation doctrine" exception applies when the "connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance" Strieff, 136 S. Ct. at 2061. The attenuation doctrine is akin to a proximate cause inquiry; although the evidence can be traced in a strict causal sense to a particular unlawful act, there comes a "point at which the detrimental consequences of an illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." United States v. Leon, 468 U.S. 897, 911 (1984).

(U) In evaluating whether the connection between an antecedent Fourth Amendment violation and subsequently discovered evidence is sufficiently attenuated to "purge" the "taint," courts are to consider three factors: (1) "the temporal proximity" of the illegal conduct and the evidence in question; (2) "the presence of intervening circumstances," and (3) "the purpose and flagrancy of the official misconduct." Brown v. Illinois, 422 U.S. 590, 603-04, (1975).

(U) Most recently, the Supreme Court applied the attenuation doctrine to find that evidence obtained during an unlawful stop was "sufficiently attenuated" by the officer's discovery of a "pre-existing arrest warrant." Strieff, 136 S. Ct. at 2062-64. During the unlawful traffic stop, an officer discovered the driver was subject to a pre-existing arrest warrant. Id. at 2060-62. The officer arrested the driver and, during a search incident to arrest, discovered drug-related evidence on the driver's person. Id.

(U) Applying the three-factor test outlined in Brown, the Court found that while the "temporal proximity" factor weighs in favor of suppression (only a few minutes elapsed between the initiation of the unlawful stop and the discovery of the drug evidence), the remaining two factors weighed in the government's favor. Id.[1] The arrest warrant was valid and "predated" the officer's investigation, was "entirely unconnected with the stop," and the officer was "obligated" to execute the warrant after its discovery. Id. at 2062. With respect to the third factor, the Court found that the officer made merely "good-faith mistakes" and there was no indication "of any systemic or recurrent police misconduct." Id. at 2063. The Court concluded that the pre-existing arrest warrant was a "critical

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[1] (U) A short time lapse between the unlawful act and discovery of the evidence does not automatically mean that the evidence ultimately obtained was "derived from" the original surveillance and this factor rarely proves dispositive. See Strieff, 136 S. Ct. at 2062-64; see also United States v. Carter, 573 F.3d 418, 425 (7th Cir. 2009) (finding attenuation even though "very little time" (about two hours) separated an illegal search from the evidence); United States v. Parker, 469 F.3d 1074, 1078 (7th Cir. 2006) (finding attenuation even though only a "matter of minutes" separated the two events).

intervening circumstance that is wholly independent of the illegal stop." Id.

(A) (U) The Significantly Directs Standard

(U) In the Ninth Circuit, the "proximate cause analysis" "will depend on the precise role the illegal seizure in fact played in the subsequent discovery. United States v. Bacall, 443 F.3d 1050, 1057 (9th Cir. 1971). Derivative evidence is tainted and must be suppressed when an illegal act "significantly directs the investigation" that leads to the discovery of such evidence. United States v. Johns, 891 F.2d 243, 244-46 (9th Cir. 1989).

(U) For example, in Johns, the Ninth Circuit held that drug evidence recovered from a premises identified following the surveillance of an individual identified from an illegal stop was "tainted" and inadmissible. Id. The drug evidence, the court reasoned, was discovered as a "direct result" of an illegal stop because the stop was the "impetus for the chain of events" and was "too closely and inextricably linked to the discovery for the taint to have disputed." Id.

(U) Similarly, in Gorman, the Ninth Circuit upheld the suppression of evidence obtained from a second traffic stop, finding that it "followed directly in an unbroken causal chain of events" from a first, unlawful traffic stop. 859 F.3d at 716-18. The "causal connection" between the first unlawful detention and search of a vehicle was the "impetus for the chain of events leading to" the second stop that uncovered the "tainted evidence." Id. at 717.

(U) Of particular significance to the Gorman Court was the fact that the officer who conducted the first stop "significantly

directed" the second stop by calling a neighboring city's sheriff's office to request that the agency re-stop the vehicle. Id. at 710. The court described the second stop as "entirely a product" of the first stop because it was "directly and deliberately planned and intended" by the first officer. Id. at 718. The court concluded that the first officer's "gamesmanship is precisely what the Constitution proscribes." Id. at 719. See also, Chamberlin, 644 F.2d at 1269 (evidence obtained following an unlawful detention is inadmissible because the unlawful act "added considerable impetus to the investigation[] and tended significantly to direct the investigation" that led to the tainted evidence).

(B) (U) Tips and Leads do not "Taint" Investigations

(U) Tips and leads arising from an unlawful source or act do not generally "taint" a subsequent investigation or discovery of evidence. A tip or lead "is simply not enough to taint an entire investigation." Smith, 155 F.3d at 1063 (citing Hoonsilapa v. INS, 575 F.2d 735, 738 (9th Cir. 1978). Judge Duniway framed the inquiry in United States v. Bacall:

> Where the evidence sought to be suppressed was discovered through utilization of some legally obtained leads, as well as some illegally obtained leads, the substantiality of the legally obtained leads may influence the determination whether the evidence ought to be suppressed. And if the illegally obtained leads were so insubstantial that their roles in the discovery of the evidence sought to be suppressed "must be considered de minimis," then suppression is inappropriate.

Bacall, 443 F.2d at 1056; see also United States v. Friedland, 441 F.2d 855, 859 (2d Cir), cert. denied, 404 U.S. 867 and 404 U.S. 914 (1971) (General tips from an unlawful "bug" that a defendant was "the

sort of person who would bear watching" are not sufficient to "immunize him from investigation of different criminal activities and from prosecution on the basis of facts about them learned in a different way."); United States v. Watson, 950 F.2d 505, 508 (8th Cir. 1991) ("[w]here a law enforcement officer merely recommends investigation from a particular individual based on suspicious arising serendipitously from an illegal search, the causal connection is sufficiently attenuated so as to purge the later investigation of any taint from the original illegality."); United States v. Hassanshahi, 75 F. Supp. 3d 101, 112-113 (D.D.C. 2014) (finding attenuation where, the court assumed arguendo, that the government had unlawfully obtained defendant's telephone number, agents then conduct multiple investigative steps over a four-month period; and noting that a telephone number constitutes "only the slimmest of leads.").

(U) Thus, where unlawful conduct provides little useful information to the government and does not direct the government's investigation, subsequently obtained evidence is not "tainted" by the original information. For instance, in Smith, the Ninth Circuit held that incriminating evidence against a software executive was "sufficiently attenuated" from an initial tip from the executive's colleague who unlawfully intercepted a voicemail. 155 F.3d at 1060-63. The court concluded that provision of the unlawful interception to the government did not lead "directly to any of the evidence used against the defendant at trial" or otherwise "significantly direct" the government toward the evidence it obtained. Id. at 1062-63 (internal citations omitted). Rather, the tip -- including the

content of the unlawfully intercepted voicemail -- provided very little useful information. Id. It was the government's months'-long investigation that uncovered the evidence it presented against defendant. Thus, the court concluded that "the nexus between the intercepted voicemail message and the lion's share of the evidence independently gleaned from the [government's] investigation . . . is sufficiently attenuated." Id. at 1063.

(C) Preexisting Government Records Attenuate a Subsequent "Taint"

(U) Unlawfully obtained information need not "taint" evidence already in the government's possession where the unlawful act merely provides a "missing link" that elucidates the significance of the evidence. In United States v. Crew, the Supreme Court held that "the exclusionary rule does not . . . reach backward to taint information that was already in the official hands prior to any illegality." 445 U.S. 463, 475 (1980). There, a defendant moved to suppress an eyewitness's in-court identification of defendant following his unlawful arrest for robbery. Id. at 474-75. The Court rejected that argument, finding that the unlawful arrest merely "link[ed] together" the evidence the police had gathered prior to defendant's arrest (defendant's identity and witness descriptions matching defendant) and the post-arrest witness identification. Id.; see also Strieff, 136 S. Ct. at 2062-64 (pre-existing arrest warrant sufficiently attenuated evidence from an unlawful stop).

(U) Similarly, the Sixth Circuit declined to suppress bank records previously in the government's possession where an unlawful search alerted the government to the relevant and usefulness of the

information. United States v. Fontana, 666 F.3d 985, 987-89 (6th Cir. 2012). The court reasoned, "[t]here is a difference between evidence that the Government obtains because of knowledge illegally acquired, and evidence properly in the Government's possession that it learns the relevance of because of the knowledge illegally acquired." Id. The Seventh Circuit reached a similar conclusion, finding that a photo-array identifying a defendant was sufficiently attenuated from an illegal search of the defendant's apartment where the officer's found a photograph of the defendant that matched a witnesses' description of the perpetrator. United States v. Carter, 573 F.3d 418, 423-25 (7th Cir. 2009). The court concluded that, although the unlawful search alerted the officers to defendant's probable involvement in the crime, the photo-array the officers used to identify the defendant was sufficiently attenuated from the unlawful search because the officers used a preexisting photograph of defendant pulled from a government database. Id.

B. (U) LEGAL STANDARDS GOVERNING SELECTIVE PROSECUTION CLAIMS

1. (U) Selective Prosecution is not an Affirmative Defense to Criminal Charges

(U) A "selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." United States v. Armstrong, 517 U.S. 456, 464 (1996).

(U) So long as the prosecutor has "probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charges to file or

bring before the grand jury, generally rests entirely in [the prosecutor's] discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Absent "clear evidence" that the prosecutor has brought the case for reasons forbidden by the constitution "courts presume that [prosecutors] have properly discharged their official duties." Armstrong, 517 U.S. at 464 (1996). 517 U.S. at 464 (citing United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926).

(U) Therefore, defendants bear a "demanding" burden to mount a selective prosecution claim. Armstrong, 517 U.S. at 463. As the Supreme Court explained, the "Attorney General and the United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." Armstrong, 517 U.S. at 464 (citing Wayte v. United States, 470 U.S. 598, 607 (1985)). That discretion is rooted in Article II of the Constitution, which grants the president and the president's delegates the responsibility to "take Care that the Laws be faithfully executed." Armstrong, 517 U.S. at 464 (citing U.S. Const., Art. II, § 3; 28 U.S.C. §§ 516, 517).

(U) Of course, a prosecutor's discretion is not limitless. Prosecutorial discretion is "subject to constitutional constraints." United States v. Batchelder, 442 U.S. 114, 125 (1979). The Due Process Clause of the Fifth Amendment imposes one such constraint – that the "decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" Armstrong, 517 at 464 (citing Oyler v. Boles, 368 U.S. 448, 456 (1954)).

(U) To overcome the strong presumption that a prosecutor has not violated equal protection, a defendant raising a selective

prosecution claim must demonstrate by "clear evidence to the contrary" that: (1) the prosecution had a "discriminatory effect"; and (2) that the prosecutor was "motivated by a discriminatory purpose." Armstrong, 517 U.S. at 465. Both prongs must be met. United States v. Turner, 104 F.3d 1180, 1184 (9th Cir. 1997)

a. Establishing Discriminatory Effect

(U) To establish a "discriminatory effect" based on suspect classes like race, nationality, or religion, the claimant must show "that similarly situated individuals of a different race [or other suspect class] were not prosecuted." Armstrong, 517 U.S. at 465; see also Wayte, 710 F.2d at 1387. Such evidence is typically introduced in the form of statistical or empirical studies showing that persons of different races or other suspect classes were not prosecuted for the same offense. For example, the Supreme Court invalidated a San Francisco ordinance prohibiting the operation of laundries in wooden buildings upon the plaintiff's demonstration that the authorities denied 200 Chinese subject permits but granted permits to 80 non-Chinese applicants "under similar conditions." Armstrong, 517 U.S. at 1487 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373 (1996)).

(U) Absent "clear" evidence that the government did not prosecute "other similarly situated" persons of a different race or suspect class, however, a claimant will not be able to advance beyond the first prong. See, e.g., Bourgeois, 964 F.2d 935, 941 (9th Cir. 1992) (affirming district court's denial of defendant's selective prosecution claim where defendant provided only "general" allegations that the government "must have known" other non-black felons who

possessed firearms but were not prosecuted); Turner, 104 F.3d at 1184 (finding defendant's reliance on a report "based on statically unimpressive number of federal defendants" and "newspaper anecdotes and hearsay" to be insufficient to prove the first prong); United States v. Gentile, 782 Fed. Appx. 559, 559-61 (9th Cir. 2019) (not reported) (upholding denial of defendant's selective prosecution claim because claimant failed to provide "any statics showing that similarly situated defendants [are not prosecuted]").

b. Establishing Discriminatory Intent

(U) To establish "discriminatory intent" the claimant must show that the "government undertook a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." Turner, 104 F.3d at 1184 (citing Wayte, 470 U.S. at 608). Simple "awareness" of a discriminatory effect is not sufficient to prove discriminatory intent. Id.

(U) A defendant cannot impute the purported "discriminatory intent" of law enforcement agents onto the prosecutor. United States v. Gomez-Lopez, 62 F.3d 304, 306 (9th Cir. 1994) ("the proper focus in discriminatory prosecution cases is on the ultimate decision-maker."). Courts examine the prosecutor's decision to bring charges against the defendant, not the law enforcement agents' investigation of the defendant. United States v. Erne, 576 F.2d 212, 216017 (9th Cir. 1978); see also United States v. Hastings, 126 F.3d 310, 314 (4th Cir. 1997) ("We will not impute the unlawful biases of the investigating agents to the person ultimately responsible for the prosecution."); United States v. Spears, 159

F.3d 1081, 1087 (7th Cir. 1999) (holding that "it is well settled that the actions of an investigating agency will not be imputed to a federal prosecutor").

(U) Claimants have established that the "prosecution is based on an impressible motive," Wayte, 710 F.2d at 1387, by demonstrating that the prosecutor's decision to bring charges was based at least in part on the defendant's membership in a suspect class. For example, a leader of a political organization that represented African-Americans successfully challenged his conviction for voter fraud by introducing a statement made by the state's justice department spokesman explaining that the voting fraud investigations were part of a "new policy . . . brought on by the arrogance on the part of the blacks' in these [black-majority] counties." United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), vacated on other grounds, 836 F.2d 1312 (1988) (internal citations omitted).

(U) An "impermissible motive" does not exist if the the defendant's prosecution was the result of a "neutral, nonracial, law enforcement decision." Turner, 104 F.3d at 1185. For example, the Turner Court found that the government had a legitimate, "permissible motive" in prosecuting five black defendants with crack cocaine distribution as part of a crackdown on violent street gangs. 104 F.3d at 1184-66. The court held "defendants have shown no more than the consequences of the investigation of violent street gangs, not that they were targeted because of race." Id. at 1185. A claim cannot succeed, the court explained, by demonstrating a "discriminatory effect"; rather the movant must show that the prosecution was "motivated by a discriminatory practice." Id. at

1184 (citing Wayte, 470 U.S. at 608); see also Bourgeois, 964 F.2d at 941-42 (claimant failed to establish an impressable motive where the government presented "credible" evidence that it targeted for prosecution two gangs with primarily black and Hispanic membership because those gangs were "often armed, violent and involved in drug trafficking").

2. (U) Claimants Must Meet a High Threshold to Seek Discovery to Support Selective Prosecution Claims and Cannot Rely upon Federal Rule of Criminal Procedure 16's "Material" to the Defense Provision

(U) A claimant "may" obtain discovery to support a selective prosecution claim if he firsts makes an "appropriate threshold showing" to overcome the "background presumption" that United States Attorneys are "properly discharging their official duties and not acting with a racial bias contrary to the commands of the Constitution." Turner, 104 F.3d at 1184 (citing Armstrong, 517 U.S. at 463). To do so, a defendant must presents "some evidence" tending to show that the prosecutorial policy (1) had a discriminatory effect and (2) was motivated by a discriminatory purpose. Armstrong, 517 U.S. at 468. This high threshold for demanding discovery is necessary because, as the Supreme Court explained, responding to such demands "divert[s] prosecutors' resources," "may disclos[e] the government's prosecutorial strategy," and infringes on "one of the core powers of the Executive Branch of the Federal Government, the power to prosecute." Id. at 467-68.

(U) Moreover, because a selective prosecution claim is not a "defense" to the criminal charges, defendants may not rely upon Federal Rule of Criminal Procedure 16's "material to preparing the

defense" provision to demand discovery. Rule 16(a)(1)(E)(i) provides that, upon defendant's request, the government must permit the defendant to inspect and copy information within the government's possession, custody, or control that is "material to the preparing the defense." Fed. R. 16(a)(1)(E)(i). Because a selective prosecution claim is not "a defense" to criminal charges, Rule 16's materiality provision is unavailable. Turner, 104 F.3d at 1184 (9th Cir. 1997) (citing Armstrong, 517 U.S. at 462-63).

(U) Both the Supreme Court and the Ninth Circuit have specifically rejected defendants' attempts to rely on Rule 16's "material to preparing the defense" provision. In Armstrong, the Supreme Court announced, "Rule 16[] authorizes defendants to examine Government documents material to the preparation of their defense against the government's case in chief; but not the precreation of selective prosecution claims." Armstrong, 517 U.S. at 463 (emphasis added). The Court reasoned:

> While it might be argued that as a general matter, the concept of a "defense" includes any claim that is a "sword," challenging the prosecution's conduct of the case, the term may encompass only the narrower class of "shield" claims, which refute the Government's arguments that the defendant committed the crime charged. . . . Because respondent's [reliance on Rule 16's material to the defense provision] creates the anomaly of a defendant's being able to examine all Government work product except the most pertinent, we find their construction implausible.

Armstrong, 517 U.S. at 462-63; see also Turner, ("In order to be entitled to discovery to establish a defense of selective prosecution, a defendant cannot rely upon [Rule 16's material to the defense provision]").

(U) The Ninth Circuit elaborated on the Armstrong discovery standard and held that "to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of the government actors." Bourgeois, 964 F.2d at 939. Adopting such an admittedly "high threshold," was warranted, the court explained, for two reasons: (1) "courts are ill equipped to assess a prosecutor's charging decisions"; and (2) "court oversight of prosecutorial decisions could undermine effective law enforcement." Id.[2]

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[2] (U) In 2018, the Ninth Circuit carved out a narrow exception to the Armstrong standard for obtaining discovery to mount a selective prosecution claim. United States v. Sellers, 906 F.3d 848 (9th Cir. 2018). Where a defendant mounts a selective enforcement claim, i.e. that law enforcement agents (not the prosecutor) targeted a defendant because of his membership in a suspect class like race or religion, and the enforcement action occurred during a "stash house reverse-sting" operation, the Armstrong standard for obtaining discovery is "relaxed." Id. at 853-55. Such a relaxation is warranted in that limited circumstance, the court explained, because in these operations "no independent crime is committed, the existence of the crime is entirely dependent on law enforcement approaching potential targets, and any comparative statistics can only be derived by the government". Id. at 853. While the standard for discovery is relaxed -- the court failed to articulate a specific standard to govern these cases -- the court emphasized that the requirements for prevailing on a selective enforcement claim are nevertheless the same as those required under Armstrong.