

1 Evan A. Jenness (Calif. Bar No. 136822)  
Evan@JennessLaw.com  
2 2115 Main Street  
Santa Monica, California 90405  
3 Telephone: (310) 399-3259

4 William J. Genego (Calif. Bar No. 103224)  
wgenego@gmail.com  
5 Nasatir, Hirsch, Podberesky Khero & Genego  
2115 Main Street  
6 Santa Monica, California 90405  
7 Telephone: (310) 399-3259

8 Counsel for Defendant  
9 [Client]

10 **United States District Court**  
11 **Northern District of California**

13 UNITED STATES OF AMERICA,	)	NO. CR [Case No.]
14 Plaintiff,	)	[Client]’s Motion for Production of
15 v.	)	Handwritten Notes; Exhibits
16 [Client],	)	Date: Friday, August__, 2011
17 Defendant.	)	Time: 10:30 a.m.
18	)	Place: _____
19 _____	)	

20  
21  
22  
23  
24  
25  
26  
27  
28

1 [Client], through counsel, hereby moves this Court for an order directing  
2 that the government produce all handwritten notes of law enforcement agents'  
3 interviews of potential witnesses. Handwritten notes are no different from other  
4 materials for purposes of the government's obligations to disclose *Brady/Giglio*  
5 materials and under Rule 16 of the Federal Rules of Criminal Procedure. The  
6 parties have met and conferred without reaching any agreement on the  
7 production of handwritten notes, and none have been produced to date. The  
8 government has stated that its practice is *not* to review all handwritten notes of  
9 witness interviews, a practice which the defense submits is insufficient to  
10 discharge the government's obligations and likely to lead to discovery violations.  
11 Accordingly, the defense seeks a ruling that all handwritten notes be disclosed,  
12 in order to ensure discoverable materials in them are not withheld from the  
13 defense.

14 This motion is based on Northern District of California Local Criminal  
15 Rule 16-2; the accompanying memorandum of points and authorities,  
16 Declaration of Counsel and exhibits; all files and records in this case; and such  
17 further evidence and argument as may be presented by the defense in support of  
18 this motion.

19 Dated: July \_\_, 2011 Signed: /s/ *Evan A. Jenness*

21 Dated: July \_\_, 2011 Signed: /s/ *William J. Genego*

22 Attorneys for [Client]  
23  
24  
25  
26  
27  
28

1 **TABLE OF CONTENTS**

2 MEMORANDUM OF POINTS AND AUTHORITIES ..... 1

3

4 I. INTRODUCTION ..... 1

5 II. RELEVANT FACTS ..... 2

6 III. ARGUMENT ..... 4

7

8 A. Handwritten Notes are No Different From Other Forms of  
9 Information With Respect to the Government’s  
Discovery Obligations ..... 4

10 B. The Government’s Protocol With Respect to Handwritten Notes is  
11 Likely to Lead to Discovery Violations ..... 5

12 C. The Government’s Obligation to Produce Handwritten Notes  
13 Extends to All Participants in the Prosecution of [Client], Whether  
14 Federal or State ..... 6

15 D. The Volume of Discovery, Complexity of the Charges,  
16 and Delayed Filing of Charges, Warrant the Immediate Disclosure  
17 of All Discovery Materials, Including Handwritten Notes ..... 7

18 IV. CONCLUSION ..... 8

19

20

21

22

23

24

25

26

27

28

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Benn v. Lambert*,  
4 283 F.3d 1040 (9th Cir), *cert. denied*, 537 U.S. 942 (2002) . . . . . 6

5 *Brady v. Maryland*,  
6 373 U.S. 83 (1963) . . . . . 4, 5, 6

7 *Kyles v. Whitley*,  
8 514 U.S. 419 (1995) . . . . . 5, 6

9 *United States v. Alzate*,  
10 47 F.3d 1103 (11th Cir. 1995) . . . . . 6

11 *United States v. Bryan*,  
12 868 F.2d 1032 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989) . . . . . 6

13 *United States v. Camargo-Vergara*,  
14 57 F.3d 993 (11th Cir. 1995) . . . . . 6

15 *United States v. Giglio*,  
16 405 U.S. 150 (1982) . . . . . 4

17 *United States v. Hanna*,  
18 55 F.3d 1456 (9th Cir. 1995) . . . . . 6

19 *United States v. Harris*,  
20 543 F.2d 1247 (9th Cir. 1976) . . . . . 7

21 *United States v. Kohring*,  
22 637 F.3d 895 (2011) . . . . . 4

23 *United States v. Riley*,  
24 189 F.3d 802 (9th Cir. 1999) . . . . . 7

25 *United States v. Shakur*,  
26 543 F. Supp. 1059 (S.D.N.Y.1982) . . . . . 6

27 *United States v. Zuno-Arce*,  
28 25 F. Supp. 2d 1087 . . . . . 5

1 *United States v. Zuno-Arce*,  
2 44 F.3d 1420 (9th Cir. 1995), *cert. denied*, 516 U.S. 945 (1995) . . . . . 5

3 **STATUTES**

4 18 U.S.C. § 3500 . . . . . 4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 [Client] seeks an order compelling the government to produce all  
5 handwritten notes of interviews of potential witnesses. The parties have met and  
6 conferred on several occasions, and the government has declined to produce these  
7 materials.<sup>1</sup> Government counsel has stated that its practice is to *not* review all  
8 handwritten notes of witness interviews for purposes of determining whether  
9 they contain discovery, but to review only some of them while it is preparing  
10 government witnesses to testify, or otherwise preparing for trial. Decl., ¶ 6. This  
11 protocol is insufficient to ensure all discovery materials are produced to the  
12 defense. Indeed, it seems calculated to ensure discovery violations because  
13 government counsel do not even review all notes of witness interviews, and  
14 therefore could not know whether or not they contain discoverable information.  
15 Because the government’s selective reviews are done in the course of preparing  
16 the government’s trial witnesses (*i.e.*, witnesses favorable to the government),  
17 and the government is not likely to prepare unfavorable witnesses for trial, the  
18 practice also appears calculated to ensure that government counsel will never  
19 even look at the notes of interviews of the witnesses who are the most likely to  
20 have provided law enforcement with *Brady/Giglio* information. In sum, the  
21 government’s protocol ensures that the discovery most useful to the defense is  
22 likely to be withheld. Regardless of the probability of a material discovery  
23 violation, this type of “wilful blindness” approach to discovery is inconsistent with  
24 well-established law, and viewed particularly critically by the Ninth Circuit.  
25  
26  
27  
28

---

<sup>1</sup> See Exh A, Declaration of Counsel (“Decl.”), at ¶¶ 2-6, 11.

1 II.

2 RELEVANT FACTS

3 On October 10, 2010, the defense first requested the production of  
4 handwritten notes. See Exh B. During a meet and confer on December 10, 2010,  
5 government counsel stated that it would "not voluntarily produce" handwritten  
6 notes of witness interviews, and then stated, "it's a fluid issue and we will get  
7 back to you by Wednesday" (December 15, 2010). Decl., ¶ 3. Government counsel  
8 had no change of position during a meet and confer on December 15, 2010. Decl.,  
9 ¶ 4. The defense again raised the issue during a meet and confer on July 18,  
10 2011. Decl., ¶ 6. Government counsel declined to produce handwritten notes of  
11 witnesses interviews unless counsel "come across some which are discoverable."  
12 Decl., ¶ . In response to defense counsel's question, "do you review all  
13 handwritten notes to determine if they contain discovery?," government counsel  
14 stated, "we follow our office policy," and "we review some but not all handwritten  
15 notes," and produce only those deemed discoverable "as [the government]  
16 prepare[s] witnesses or prepare[s] for trial." Decl., ¶ 6.

17 On July 22, 2011, the defense sent a further written request for handwritten  
18 notes, and detailed the defense's position and supporting authority. See Exh C;  
19 Decl., ¶ 7.

20 Law enforcement agents' handwritten notes of witness interviews typically  
21 contain *Brady/Giglio* information that is not reflected in law enforcement agents'  
22 typewritten reports of the same interviews. Decl., ¶ 8. This information includes  
23 such things as (a) information supporting potential defenses (issues that may not  
24 have appeared material at the time the agent prepared his or her typewritten  
25 report); (b) information undermining the credibility of government witnesses  
26 (including such matters as indicia of uncertainty, bias, prior dishonesty or other  
27 matters bearing on credibility); (c) discrepancies between handwritten notes and  
28 agents' type-written reports, thereby suggesting potential law enforcement bias,

1 credibility or competence issues; (d) omissions from typewritten reports of  
2 material investigative information reflected in handwritten notes; and/or (e)  
3 identifying information regarding potential defense witnesses (also information  
4 which may not have appeared material at the time that the agent prepared his or  
5 her typewritten report). Decl., ¶ 8. Contemporaneously prepared handwritten  
6 notes usually are a more accurate reflection of witnesses' statements than law  
7 enforcement agents' typewritten reports of witness interviews. Decl., ¶ 9.

8        Belated production of discovery materials impedes efficient defense trial  
9 preparation. It also can materially prejudice a defendant where delayed  
10 production (a) precludes the defense from conducting a thorough investigation of  
11 relevant matters, or procuring additional materials or witnesses related to the  
12 late-disclosed information, and/or (b) diverts the attention of the defense from  
13 planned trial preparation activities. Decl., ¶ 10. The delayed production of  
14 handwritten notes is particularly prejudicial because of the time that may be  
15 required to review them because of legibility issues. Decl., ¶ 10.

16        No handwritten notes of witness interviews have been produced to date in  
17 this case. Decl., ¶ 11. Because government counsel's stated position is *not* to  
18 review all handwritten notes, without the Court's intervention, there is no  
19 assurance that handwritten notes containing *Brady/Giglio*, Rule 16 or Jencks Act  
20 materials will be disclosed. Indeed, the government's stated practice to produce  
21 only those handwritten notes deemed discoverable "as [the government]  
22 prepare[s] witnesses or prepare[s] for trial" (Decl., ¶ 6) appears particularly likely  
23 to give rise to material prejudice to the defense. The Court's intervention is  
24 sought to avoid such prejudice and enable the defense to efficiently and  
25 effectively prepare for trial.  
26

27  
28  
**III.**  
**ARGUMENT**



1 **A. Handwritten Notes are No Different From Other Forms of Information**  
2 **With Respect to the Government’s Discovery Obligations**

3 Rule 16 of the Federal Rules of Criminal Procedure and Title 18 U.S.C. §  
4 3500 do not contain any exception for handwritten notes.<sup>2</sup> Indeed, they are no  
5 different from other forms of discovery. Where witnesses have made statements  
6 exculpating [Client] or undermining the credibility of prosecution witnesses, they  
7 must be produced under *Brady v. Maryland*, 373 U.S. 83 (1963) and *United*  
8 *States v. Giglio*, 405 U.S. 150 (1982). All handwritten notes of any testifying law  
9 enforcement agents are statements within the meaning of the Jencks Act, and  
10 thus required to be produced. *See* 18 U.S.C. § 3500. Notes of interviews of  
11 witnesses who will be testifying are also Jencks Act statements. Differences  
12 between handwritten notes and agents’ memoranda reflecting witness interviews  
13 may be used to impeach agents’ credibility.

14 As the Ninth Circuit has made clear in *United States v. Kohring*, 637 F.3d  
15 895 (2011) (reversing conviction based on *Brady/Giglio* violations where  
16 prosecutors failed to disclose materials, *including handwritten notes of FBI*  
17 *interviews of witnesses*, which were relevant to cross-examination), handwritten  
18 notes must be treated no differently from other materials for discovery purposes.  
19 The government’s stated protocol with respect to handwritten notes – and its  
20 failure to produce any notes to date - are at odds with this clear law.  
21

22  
23  
24  
25  
26  
27  
28 <sup>2</sup> *See also* Deputy Atty. Gen’l Ogden, Memo for Department  
Prosecutors (January 4, 2010) (“Ogden Discovery Memo”) (“the format of the  
information does not determine whether it is discoverable.”).

1 **B. The Government’s Protocol With Respect to Handwritten Notes is Likely to**  
2 **Lead to Discovery Violations**

3 Given that government counsel’s policy is to *not* review all handwritten  
4 notes, it is clear that its obligations to produce discovery materials will not be  
5 discharged. By only reviewing notes in connection with its preparation of  
6 government witnesses for trial, or other government trial preparations,  
7 government counsel’s practice seems calculated to ensure *Brady/Giglio* materials  
8 will be withheld since the government is unlikely to prepare witnesses for trial  
9 who will exculpate [Client] or impeach government witnesses. Regardless of the  
10 probability of a discovery violation, well-established authority makes clear that  
11 the government’s “willful blindness” protocol regarding handwritten notes is  
12 inconsistent with the law.<sup>3</sup> Indeed, the Ninth Circuit has taken a particularly  
13 dim view of this type of practice, stating in *United States v. Zuno-Arce*, 44 F.3d  
14 1420, 1427 (9th Cir. 1995):

15 “Exculpatory evidence cannot be kept out of the hands of the defense  
16 just because the prosecutor does not have it, where an investigating  
17 agency does. That would undermine *Brady* by allowing the  
18

---

19 <sup>3</sup> Prosecutors have “a duty to learn of any favorable evidence known to  
20 the others acting on the government’s behalf in the case,” including law  
21 enforcement agents. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). “[T]he  
22 prosecution’s responsibility for failing to disclose known, favorable evidence  
23 rising to a material level of importance is inescapable.” *Id.* Whether such  
24 evidence is known by the prosecutors themselves is irrelevant. *See id.; see also*  
25 *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995) (“it is the  
26 government’s, not just the prosecutor’s, conduct which may give rise to a *Brady*  
27 violation”), *cert. denied*, 516 U.S. 945 (1995). For example, “[t]he obligations of  
28 the United States Attorney’s Office in Los Angeles are institutional and do not  
depend upon the knowledge of the individual prosecutor who is conducting the  
trial.” *United States v. Zuno-Arce*, 25 F. Supp. 2d 1087, 1116 (C.D. Cal. 1998)  
(citing *Giglio*). Courts “impute to the prosecutor the knowledge of other  
government officials operating on behalf of the prosecution team.” *Zuno-Arce*,  
25 F. Supp. 2d at 1116 (citing *Kyles*, 514 U.S. at 437-38).

1 investigating agency to prevent production by keeping a report out of  
2 the prosecutor's hands until the agency decided the prosecutor ought to  
3 have it, and by allowing the prosecutor to tell the investigators not to  
4 give him certain materials unless he asked for them.”

5 Production of law enforcement agents' handwritten notes is necessary to  
6 safeguard against the miscarriage of justice that otherwise may result from the  
7 government's stated practices in this case.<sup>4</sup>

8 **C. The Government's Obligation to Produce Handwritten Notes Extends to All**  
9 **Participants in the Prosecution of [Client], Whether Federal or State**

10 This case has been investigated by agents of the U.S. Department of  
11 Agriculture, the California Department of Food & Agriculture, and possibly other  
12 federal and state agents. Handwritten notes by all such agents should be  
13 preserved and produced. *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir.)  
14 (“The prosecutor will be deemed to have knowledge of and access to anything in  
15 the possession, custody or control of any federal agency participating in the same  
16 investigation of the defendant.”), *cert. denied*, 493 U.S. 858 (1989); *United States*  
17 *v. Hanna*, 55 F.3d 1456 (9th Cir. 1995) (prosecutor should have learned of *Brady*  
18 material even if it was not in her possession); *United States v. Shakur*, 543 F.  
19 Supp. 1059, 1060 (S.D.N.Y.1982) (federal prosecutors must turn over all *Brady*  
20 material uncovered by local prosecutors because of the “cooperative activity”  
21 between the two offices); *United States v. Harris*, 543 F.2d 1247, 1251-53 (9th  
22

---

23 <sup>4</sup> See *Kyles*, 514 U.S. 419 (reversible error where prosecution failed to  
24 turn over material and favorable evidence, sufficient to change result of case);  
25 *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) (reversing conviction  
26 where prosecutor withheld exculpatory evidence); *United States v.*  
27 *Camargo-Vergara*, 57 F.3d 993 (11th Cir. 1995) (reversible error where  
28 prosecutor failed to disclose defendant's post-arrest statement); *Benn v.*  
*Lambert*, 283 F.3d 1040 (9th Cir) (reversible error where prosecutor suppressed  
exculpatory evidence affecting witness's veracity), *cert. denied*, 537 U.S. 942  
(2002).

1 Cir. 1976) (agents must preserve original notes taken by agents during  
2 interviews with prospective government witnesses or with an accused; agency's  
3 practice of routinely destroying rough interview notes taken by agents after the  
4 information contained in the notes was incorporated in a more formal report is  
5 improper); *United States v. Riley*, 189 F.3d 802 (9th Cir. 1999) (intentional  
6 destruction of notes of interview with informant violated Jencks Act).<sup>5</sup> .

7 **D. The Volume of Discovery, Complexity of the Charges, and Delayed Filing of**  
8 **Charges, Warrant the Immediate Disclosure of All Discovery Materials,**  
9 **Including Handwritten Notes**

10 The belated production of discovery materials is particularly prejudicial to  
11 the defense in cases, such as this, which involve a large volume of discovery and  
12 complex issues. Decl., ¶¶ 10, 12. Effectively allocating defense time and  
13 resources is impaired by delays in the production of discovery. Decl., ¶ 10.  
14 These problems are particularly aggravated with respect to handwritten notes  
15 because it often is time-consuming to review such materials. Decl., ¶ 10.  
16 Delayed production of discovery materials in this case, including handwritten  
17 notes, creates the potential for particularly significant prejudice because (a) law  
18 enforcement has interviewed a large number of witnesses, and (b) the  
19 government's delay in filing charges has impaired the defense's ability to  
20 efficiently locate potentially relevant witnesses. Decl., ¶ 12.  
21  
22  
23  
24

---

25 <sup>5</sup> *See also* U.S. Attorney's Manual § 905.001 ("It is the obligation of  
26 federal prosecutors . . . to seek all exculpatory and impeachment information  
27 from all members of the prosecution team. Members of the prosecution team  
28 include federal, state, and local law enforcement officers and other government  
officials participating in the investigation and prosecution of the criminal case  
against the defendant.").

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IV.  
CONCLUSION

For the reasons stated herein, the prosecution should be directed to produce forthwith all handwritten notes of witness interviews by all federal and state agents who have participated in the investigation and prosecution of this case.

Dated: July \_\_, 2011                      Signed:  /s/ *Evan A. Jenness* \_\_\_\_\_

Dated: July \_\_, 2011                      Signed:  /s/ *William J. Genego* \_\_\_\_\_

Attorneys for [Client]

## DECLARATION OF EVAN A. JENNESS

I, Evan A. Jenness, hereby declare as follows:

1. I am counsel herein for [Client]. This declaration is submitted in support of the accompanying motion for production of handwritten notes by the government.

2. On October 10, 2010, I first requested the production of handwritten notes by the government in this case. See Exh B. The government did not respond to the request, or produce handwritten notes in discovery subsequently produced.

3. On December 10, 2010, I initiated a meet and confer with government counsel regarding discovery. Co-counsel William J. Genego was also present. AUSA \_\_ stated that the government would "not voluntarily produce" handwritten notes of witness interviews. AUSA \_\_ then stated, "it's a fluid issue and we will get back to you by Wednesday" (December 15, 2010).

4. On December 15, 2010, I initiated a meet and confer with government counsel regarding discovery, including the production of handwritten notes. Government counsel had no change of position.

5. Additional productions of discovery materials following December 15, 2011 did not include handwritten notes.

6. During a telephonic meet and confer between myself, co-counsel William J. Genego, and government counsel on July 18, 2011, I again raised the issue of the defense's request for the production of handwritten notes. Government counsel stated that handwritten notes of witnesses interviews would not be produced unless "we come across some which are discoverable." I then asked, "do you review all handwritten notes to determine if they contain discovery?" AUSA \_\_ stated, "we follow our office policy." AUSA \_\_ stated, "we review some but not all handwritten notes," and indicated that the government produces those deemed discoverable "as [the government] prepare[s] witnesses or

1 prepare[s] for trial." Counsel did not clearly respond to my subsequent question:  
2 "how do you know that handwritten notes are not discoverable if you do not even  
3 review them?"

4 7. On July 22, 2011, I sent a further written request for handwritten  
5 notes, and detailed the defense's position and supporting legal authority. *See*  
6 Exh C.

7 8. I have practiced exclusively in the field of criminal defense law for  
8 over 20 years, including 8 years as a Deputy Federal Public Defender. I have  
9 handled many dozens of federal 'white collar' criminal cases, including many in  
10 which federal law enforcement has interviewed dozens of witnesses. In the many  
11 cases that I have handled in which handwritten notes of witness interviews were  
12 produced (with and without court orders), it has been my experience that  
13 handwritten notes typically evidence *Brady/Giglio* materials not present in law  
14 enforcement agents' typewritten reports of the interviews. This information  
15 includes such things as (a) information supporting potential defenses; (b)  
16 information undermining the credibility of government witnesses (including such  
17 matters as indicia of uncertainty, bias, prior dishonesty or other matters bearing  
18 on credibility); (c) discrepancies between handwritten notes and agents' type-  
19 written reports, thereby suggesting potential law enforcement bias, credibility or  
20 competence issues; (d) omissions from typewritten reports of material  
21 investigative information reflected in handwritten notes; and/or (e) identifying  
22 information regarding potential defense witnesses.

23 9. Based on my extensive personal experience comparing handwritten  
24 notes of witness interviews with agents' reports of the interviews, I am of the  
25 firm opinion that handwritten notes are a more accurate reflection of witnesses'  
26 statements than law enforcement agents' typewritten reports of witness  
27 interviews.

28 10. Belated production of discovery materials impedes efficient defense

