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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 UNITED STATES OF AMERICA,	)	<b>Case No. CR-05-00167 WHA</b>
12 Plaintiff,	)	<b>DEFENDANTS' JOINT REPLY TO</b>
13 vs.	)	<b>GOVERNMENT'S MOTION TO</b>
14 REDACTED DEFENDANT NO. 1, et	)	<b>QUASH SUBPOENA FOR SAN</b>
15 al.,	)	<b>FRANCISCO POLICE DEPARTMENT</b>
16 Defendants.	)	<b>CRIME LAB RECORDS AND DRUG</b>
	)	<b>ENFORCEMENT AGENCY MANUAL</b>
	)	<b>Date: October 23, 2006</b>
	)	<b>Time: 8:00 p.m.</b>
	)	<b>Dept: Hon. William H. Alsup</b>

17  
18 Defendant Edgar Diaz, on behalf of himself and all other defendants, hereby files  
19 this joint reply to the Government's Motion to Quash Subpoena for San Francisco Police  
20 Department Crime Lab Records and Drug Enforcement Agency Manual [doc. 852] . This  
21 reply brief is authorized by order of this Court made in open court during proceedings  
22 conducted on August 18, 2006.

23 In its order dated September 7, 2006, this Court ordered s follows: "The  
24 government must file the following by NOON, SEPTEMBER 12, 2006: (1) letter  
25 dated June 28, 1995, regarding the 1995 audit of the SFPD Crime Lab, (2) 2005 audit  
26 report of the Crime Lab, and (3) documentation of DEA procedures for identification of  
27 marijuana and cocaine." (doc. 759).

28 In its filing on September 12, 2006, the government indicated that it would not obey

1 the first two parts of the Court’s order. The government’s excuse for non-compliance was  
2 as follows: “After discussing the production of the ASCLD documents with Crime Lab  
3 Manager James Mudge, the government was informed that these documents are kept  
4 confidential by the Crime Lab. Tongring Declaration at ¶ 3. Therefore, the SFPD Crime  
5 Lab has not disclosed these documents to the government, and the government is not able  
6 to provide them to this Court.” (doc. 767, p. 2).

7         The Tongring declaration elaborates that “Mr. Mudge has informed me that his  
8 laboratory’s policy is not to release these documents in the discovery process in criminal  
9 cases..... According to Mr. Mudge, the SFPD Crime Laboratory, with the assistance of the  
10 San Francisco District Attorney’s Office (SFDA), has taken steps to ensure the  
11 confidentiality of these documents. Most recently, during a state prosecution<sup>1</sup>, the San  
12 Francisco Public Defender’s Officer unsuccessfully attempted to obtain the ASCLD  
13 accreditation audit reports through discovery. Mr. Mudge informed me that on March 28,  
14 2005, San Francisco Superior Court Judge Mary Morgan denied disclosure of the audit  
15 reports after argument.” (doc. 767, p. 2)

16         In other words, the government asserted some type of state evidentiary privilege as  
17 an excuse for failing to comply with this Court’s order, but the specific privilege was  
18 never identified, nor was it explained how a state evidentiary privilege could overcome the  
19 lawful order of a federal district court judge for relevant information in a federal death  
20 penalty case, or why it is that the government has not waived the unnamed privilege by  
21 affirmatively relying on the 1995 and 2005 audit documents in their opposition to  
22 defendant’s motion.

23         The government seemed to be saying that it, or Mr. Mudge, or Judge Morgan is the  
24 final arbiter of whether this Court’s orders would be obeyed, and that Judge Morgan  
25 upheld a claim of privilege in a decision rendered on March 28, 2005, a decision which the  
26 government did not even bother to provide. Putting aside the obvious point that neither the  
27 government nor state officials can override this court’s orders, there was the additional  
28 problem that the government seriously misled the Court about Judge Morgan’s order in

1 the *Aguilar* case. The pertinent portion of the government’s pleading in that case was  
2 attached to defendants’ reply [ doc.775] as Exhibit 1 and the defendant’s pleading was  
3 attached thereto as Exhibit 2. This case involved Mr. Aguilar and several other  
4 consolidated defendants, and Judge Morgan’s ruling under the name of one of the  
5 consolidated defendants (*Sweigart*) was attached to doc. 775 as Exhibit 3, and her ruling in  
6 the Aguilar case was attached to doc. 780 as Exhibit 6. As can be seen from these exhibits,  
7 no issue of privilege or “confidentiality” was ever raised by the San Francisco District  
8 Attorney with respect to audit reports and Judge Morgan’s orders do not even mention  
9 such reports, let alone uphold a claim of privilege regarding them. Indeed, in another case  
10 decided shortly before the consolidated hearing referenced by the government, Judge  
11 Morgan specifically held that such audit reports were discoverable.(See, doc. 775, Exhibit  
12 4, Transcript of Proceedings in *People v. Jared Morgan*.)<sup>1</sup> No claim of privilege was  
13 raised in that case either, so it is patently false that “the San Francisco District Attorney’s  
14 Office (SFDA), has taken steps to ensure the confidentiality of these documents.” (doc.  
15 767, p. 2)

16 In its reply [doc. 775], defendants urged that the government was refusing to obey  
17 the first two parts of the Court’s order because it did not want to, not because it was  
18 prohibited from doing so because of some legitimate claim of privilege. Defendant urged  
19 that since the government was unjustifiably refusing to produce these documents, the  
20 appropriate sanction would be for the Court to grant defendants’ motion to exclude the  
21 drug identification evidence, or, at the very least, to find that in light of the government’s  
22 violation of the Court’s discovery order, the Court will find in defendants’ favor on the  
23 contested issue to which these documents relate, namely, that the drug testing procedures  
24 utilized by the San Francisco Police Department do not meet generally accepted standards  
25 for reliable identification of cocaine or marijuana.

26 With respect to the third part of the Court’s order, the government’s pleading  
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28 <sup>1</sup> The *Morgan* case was decided in September 2004, so it did not involve the specific  
audit reports at issue in this case.

1 asserted that “the declaration of Krista Tongring (Tongring Declaration) ... set(s) forth  
2 the procedures utilized by the DEA for the identification of marijuana and cocaine.  
3 Tongring Declaration at ¶¶ 5-7.” (doc. 767, p. 2). It is questionable whether this  
4 declaration, which relies on the hearsay account of a DEA “technican” of undisclosed  
5 credentials satisfies this Court’s order for “documentation” of DEA drug identification  
6 procedures.<sup>2</sup> But even if the government did comply with this part of the Court’s order,  
7 the Tongring declaration in no way supports the government’s position and is in fact  
8 highly supportive of defendants motion.

9         The declaration alleged that according to a DEA “technician” “[t]he testing  
10 procedures utilized by the DEA to determine whether a suspected controlled substance is  
11 positive for the presence of marijuana are as follows: microscopic and macroscopic  
12 examination of the suspected controlled substance, performance of the Duquenois-Levine  
13 color test, *and either the thin layer chromatography test or the gas chromatography (GC)*  
14 *test.*” (doc. 767, pp. 1-2)(emphasis added). The declaration further alleged that “[t]he  
15 testing procedures utilized by the DEA to determine whether a suspected controlled  
16 substance is positive for the presence of cocaine are as follows: *the GC tests and the*  
17 *Fourier transform-infrared spectroscopy (FT-IR) test.... The DEA laboratory has not*  
18 *utilized the microcrystalline tests for approximately 8-10 years.*” (Id.)(emphasis added)  
19 This technician thus supports defendants position, backed up by numerous authorities cited  
20 in defendants’ motion, that the procedures utilized by the SFPD in this case do not  
21 conform to generally accepted standards for reliable drug testing of marijuana or cocaine,  
22 since neither thin layer chromatography, nor gas chromatography, nor Fourier  
23 transform-infrared spectroscopy was used on any of the suspected drugs.

24         The government is obviously aware that this technician’s hearsay account is  
25 damaging to the government’s position, because it sought to downplay it with the

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27         <sup>2</sup> As indicated in the declaration of counsel attached to doc. 775, the defendants have  
28 made their own efforts to learn of the DEA’s procedures, but the only document they have been  
able to obtain, a 372 page 1993 DEA *Laboratory Operations Manual* does not address drug  
testing protocols. The manual itself was filed as a separate Exhibit 5.

1 statement that “Mr. Duncan informed me that, although DEA policy requires the  
2 performance of a chromatography test, the performance of the first three tests is sufficient  
3 under current industry standard to determine whether a particular substance is positive for  
4 the presence of marijuana.” (doc. 767-2). Regarding cocaine testing, the declaration  
5 vaguely alleged, without attribution to the DEA “technician”, that “[t]he debate regarding  
6 [cocaine] testing procedures is not an issue of reliability but reviewability.” As defendants  
7 pointed out in their reply, reviewability is obviously related to reliability, as the Court in  
8 *Daubert* recognized in its emphasis on peer review. The DEA is obviously part of “current  
9 industry standards” and it does not use the truncated procedure the government is claiming  
10 is all that is necessary for reliable testing of marijuana .

11         The government and this technician are suggesting that the DEA is needlessly  
12 performing thin layer chromatography, gas chromatography, and Fourier  
13 transform-infrared spectroscopy testing. This suggestion is simply not credible in the  
14 absence of cross examination of the technician or documentation of the government’s  
15 position through production of a credible witness and production of the actual DEA  
16 testing protocols. Significantly, the DEA technician is not on the government’s witness list  
17 for the upcoming *Daubert* hearing. This absence speaks volumes about whether this  
18 technician would actually support the outlandish assertions made in government counsel’s  
19 declaration. Production of the D.E.A. procedures manual will resolve once and for all a  
20 question this Court three times asked during the hearing on August 30, 2006, “what does  
21 the D.E.A. use ? ” (Reporter’s Transcript of Proceedings, August 30, 2006, p. 117, 123,  
22 129)(hereinafter “R.T.”). Production will also dispel any false notion that the D.E.A. is  
23 needlessly performing thin layer chromatography, gas chromatography, and Fourier  
24 transform-infrared spectroscopy testing.

25         Production of the “the letter dated June 28, 1995, regarding the 1995 audit of the  
26 SFPD Crime Lab” and the “2005 audit report of the Crime Lab,” is also necessary. At the  
27 hearing on August 30, 2006, this Court asked the key question, “what is our expert proof  
28 here that shows that...these crystalline tests that S.F.P.D. has been using for the definitive

1 confirmatory, that those are scientifically reliable tests ?” (R.T. p. 122). Ms. Tonring  
2 answered:

3 I base that on the fact that the Crime Lab was accredited by the  
4 Society of The Crime Lab Directors with those tests being in place, as well  
5 as the declaration of Francis Woo, who is an expert in the field and has been  
there for over 30 years doing these tests and has made a declaration as to  
their reliability.

6 R.T. 122

7 The defense pointed out that in regard to the American Society of Crime Laboratory  
8 Directors, that organization had specifically condemned the drug testing procedures of the  
9 S.F.P. D. in the 1995 audit report attached to defendant Diaz’s motion. (R.T. 107-108). In  
10 response, Ms. Tonring confidently asserted that

11 And there was an audit, and they did find issues. Those issues were taken care of,  
12 and in 2005, that same society accredited the crime lab with the SOP that you see  
13 before you...Th e crime lab was accredited with this particular SOP. They said this  
14 is fine, this is good, this is reliable, you’re using his SOP, you’re using these tests as  
your confirmatory tests, and this is how you are doing it, and we were accrediting  
you based on this.

15 R.T. 112-113)

16 She also asserted, quoting from a letter written by then Crime Laboratory Director  
17 Jim Norris that was attached to defendant’s motion that the critical comment in the audit  
18 was “in error and was subsequently retracted in a letter from the President of ASCLD  
19 dated June 28<sup>th</sup>, 1995.” (R.T. 118)

20 It was in response to this discussion that this Court ordered on September 7th that  
21 “[t]he government must file the following by NOON, SEPTEMBER 12, 2006: (1) letter  
22 dated June 28, 1995, regarding the 1995 audit of the SFPD Crime Lab, (2) 2005 audit  
23 report of the Crime Lab, and (3) documentation of DEA procedures for identification of  
24 marijuana and cocaine.” (doc. 759). When the government refused to obey the Court’s  
25 order, this Court subsequently ruled on September 26, 2006 that “[i]n light of that failure,  
26 defense counsel may subpoena Crime Lab Manager James Mudge or another appropriate  
27 witness and may subpoena the withheld documents, subject to motion to quash by the  
28 respondent.” [doc. 798]. The Court also ruled: “The Court has determined that a hearing is

1 necessary to determine the admissibility of the government’s drug identification  
2 expert-witness testimony. The hearing will not focus on the qualifications of the  
3 government’s experts individually. Instead, the hearing will focus on the methods used by  
4 the SFPD Crime Lab criminalists when they examined the marijuana and cocaine samples  
5 in this case. Each side should be prepared to present evidence and testimony regarding: (1)  
6 whether the Crime Lab’s methods can or have been tested; (2) the known or potential rate  
7 of error of those methods; (3) whether the methods have been subjected to peer review; (4)  
8 whether there are standards controlling the techniques’ operation; and (5) *the general*  
9 *acceptance of the methods within the relevant community.*” (Id.)(emphasis added). The  
10 Court subsequently granted defendant Diaz’s application to issue a subpoena for (1) the  
11 letter dated June 28, 1995, regarding the 1995 audit of the SFPD Crime Lab, (2) the 2005  
12 audit report of the Crime Lab, and (3) the current DEA laboratory protocols for  
13 identification of marijuana and cocaine [doc. 845].

14         In light of these Orders, and especially in light of the assertions made by  
15 government counsel during her argument on August 30, 2006, it is patently frivolous to  
16 claim, as the government now does in its motion to quash, that “these documents are not  
17 relevant to the issues to be addressed during the *Daubert* hearing scheduled for October 23  
18 and 24, 2006.” [doc. 852, p. 4]. It is true that the government is now claiming, contrary to  
19 what it so confidently argued to the Court on August 30, 2006, that “the ASCLD-LAB  
20 report is not an analysis of the propriety of the particular forensic methodologies (e.g., a  
21 micro-crystalline narcotic test versus an instrumental analysis) used by a crime laboratory  
22 within each broad discipline.” (Declaration of James Mudge, p. 3, para. 6). But in the next  
23 breath, Mr. Mudge also claims that “ASCLD-LAB requires that procedures used in a  
24 laboratory must be ‘generally accepted in the field or supported by data gathered and  
25 recorded in a scientific manner....*The fact that the Laboratory earned the accreditation*  
26 *Certificate in narcotics analysis demonstrates that the marijuana and cocaine analysis*  
27 *procedures meet or exceed this criteria.*” (Id.)(emphasis added). He also claims that he is  
28 “aware of a past informal review of SFPD Criminalistics Laboratory operations conducted

1 by inspectors from ASCLD-LAB.” (Id. at para. 10). He asserts that only “one inspector  
2 disagreed with the sole use of microcrystalline tests for the confirmation of controlled  
3 substances”, but that “[t]his stance by the Inspector was erroneous and was later  
4 overturned by ASCLD-LAB.” (Id.). The government cannot have it both ways. They  
5 cannot make assertions about the contents of the 1995 letter and the 2005 audit and then  
6 turn around and claim that these documents are privileged. As this Court has previously  
7 ruled, “[d]isclosure of privileged material waives the privilege as to all material on the  
8 same subject. Put differently, selective waivers on a single subject are not permitted.”  
9 [doc. 472, p. 2].

10 Additionally, there are other problems with the government’s motion to quash, as  
11 follows:

12 *A. Standing*

13 The government has taken the position that “the SFPD Crime Lab has not disclosed  
14 [the subpoenaed] documents to the government, and the government is not able to provide  
15 them to this Court.” (doc. 767, p. 2). It has also stated the “fact” that “the DEA is not  
16 involved on any level in this prosecution” [doc. 852, p. 7], so presumably the United States  
17 Attorney is not in possession of the DEA protocol manual. In any event, defendant’s  
18 subpoena is directed to the SFPD and the DEA, not the US Attorney. They are the  
19 “respondents” within the meaning of this Court’s order allowing a motion to quash by  
20 respondents. In other words, the US Attorney lacks standing to bring the present motion

21 “[C]ourts have regularly held that a [party]... lacks standing to object to a subpoena  
22 issued to a nonparty witness. These decisions turn on the principle that the person served  
23 with process is the proper party to allege error.” *United States v. Viltrakis*, 108 F.3d  
24 1159,1161 (9th Cir. 1997), citing *United States v. Miller*, 425 U.S. 435, 444, 96 S.Ct.  
25 1619, 1624-25, 48 L.Ed.2d 71 (1976); *California Bankers Ass'n v. Shultz*, 416 U.S. 21,  
26 52-54, 94 S.Ct. 1494, 1512-14, 39 L.Ed.2d 812 (1974); *In re Grand Jury Subpoenas Dated*  
27 *December 10, 1987*, 926 F.2d 847, 852 (9th Cir.1991)(“The subpoenas do not seek  
28 documents pertaining to [a party]. Neither are the subpoenas directed to him. Thus, he

1 lacks standing to challenge the subpoenas.”).

2 *B. Rule 16*

3         The government erroneously cites Rule 16(a)(2) as a bar to the production of the  
4 subpoenaed documents, but “Rule 16 , the general discovery provision, applies only to  
5 [parties]. Rule 17(c) was not intended to provide an additional means of discovery, but  
6 rather was meant to establish a liberal policy for the production, inspection and use of  
7 materials at the trial.” *In re Magnus, Mabee & Reynard, Inc.* 311 F.2d 12, 15 (2d. Cir.  
8 1962), citing, *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220-221, 71 S.Ct. 675,  
9 95 L.Ed. 879 (1951). As indicated in *Bowman*, “if the person upon whom the subpoena is  
10 served thinks it is broad or unreasonable or oppressive he may apply to the court to quash  
11 the subpoena.” (Id. at 220 n. 5)(emphasis added). Here, the subpoena was served on the  
12 DEA and the San Francisco Police Department, not the United States Attorney’s Office,  
13 which clearly lacks standing to move to quash the subpoena.

14         The government improperly invokes Rule 16 on behalf of non-parties as if it were a  
15 privilege, and yet, in its appeal before the Ninth Circuit the government is adamant that  
16 Rule 16 is a discovery provision, not a privilege provision. In a death penalty case, the  
17 government is not allowed to take inconsistent positions in this manner. See generally,  
18 *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), rev'd on other  
19 grounds, 523 U.S. 538, 566 (1998); *United States v. Bakshinian*, 65 F. Supp. 2d 1104,  
20 1109 (C.D. Calif. 1999). See also, Steven F. Shatz & Lazuli M. Whitt, *The California*  
21 *Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the*  
22 *Courts and the Defendants*, 36 U.S.F. L. Rev. 853 (2002); Anne Bowen Poulin,  
23 *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its*  
24 *Story Straight*, 89 Calif. L. Rev. 1423 (2001); Michael Q. English, Note: *A Prosecutor's*  
25 *Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy*  
26 *or a Due Process Violation?*, 68 Fordham L. Rev. 525 (1999). In the absence of a valid  
27 claim of privilege, there is no basis to quash the subpoena. Here, according to the  
28 government’s theory before the Ninth Circuit, there is none.

1 Even putting aside that Rule 16 has no application to non-parties, and assuming  
2 incorrectly that it does, the government's reliance on the Rule 16 cases it cites is flawed  
3 by the failure to consider controlling Ninth Circuit precedent. In *United States v.*  
4 *Cedano-Arellano*, 332 F.3d 568 (9th Cir.2003), cert. denied, *Cedano-Arellano v. U.S.*, 124  
5 S.Ct. 1119, 157 L.Ed.2d 945(2004), the Ninth Circuit held that it was reversible error  
6 under Rule 16(a)(1)(E) and 16(a)(1)(F) to deny to a drug defendant "a broad range of  
7 materials" relating to a narcotics detector dog that "alerted" on his gas tank, "including his  
8 handler's log, all training records and score sheets, certification records, and training  
9 standards and manuals." *Id.* at 570. The district court declined to compel general discovery  
10 on the dog, ruling that the government's obligations were as follows: (1) to establish the  
11 dog's reliability, if it intended to rely on the dog to establish reasonable suspicion for the  
12 subsequent search of the gas tank; (2) if the government did intend to put on evidence  
13 about the dog, to disclose all *Brady* material suggesting that the dog was not reliable; and  
14 (3) under Rule 26.2, to disclose to the defense any prior statements that the officer  
15 testifying about the dog's reliability had made. Otherwise, the district court concluded, if  
16 the requested material was not *Brady* material, the government had no obligation to  
17 disclose it. (*Id.*) The Ninth Circuit ruled:

18 Cedano-Arellano argues that the materials at issue were crucial to his ability to  
19 assess the dog's reliability, a very important issue in his defense, and to conduct an  
20 effective cross-examination of the dog's handler. We agree. For example, the  
21 handler testified that the dog had been certified several times and had achieved a  
22 much-better-than- passing score on the certification tests. We can see no reason  
23 why the certification documents, the production of which had been requested and  
24 about which the handler testified, should not have been disclosed.

25 The Ninth Circuit also ruled with respect to a narcotic dog's certification and  
26 training records that "the dog's training materials and records plainly do not fall within the  
27 scope of Rule 16(a)(2): they were not made in connection with investigating or  
28 prosecuting this or any other case, and most of them (with the possible exception of the  
training log) are not statements by prospective government witnesses. *Cf. United States v.*  
*Armstrong*, 517 U.S. 456, 462-63, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (characterizing  
Rule 16(a)(2) as precluding discovery of 'government work product in connection with

1 [the defendant's] case’).” 332 F. 3d at 790. See also, *Government of Virgin Islands*  
2 *v. Fahie*, 419 F. 3d 249, 257 (3<sup>rd</sup> Cir. 2005)(ATF gun trace report was not covered by Rule  
3 (a)(2) exemption because “the ATF Report was a computer-generated printout from a  
4 government database maintained for broader purposes than the prosecution” of defendant,  
5 the “ employees who maintain the database and who generated the ATF Report are not  
6 agents of the ...prosecutor”, and the report did not reveal any confidential information  
7 pertaining to the Government’s prosecution strategy.” See also docs. 367 and 472 (local  
8 police reports are not exempt from disclosure under Rule (a)(2) absent some proof of an  
9 agency relationship). Here, the 1995 letter, the 2005 audit, and the DEA manual were  
10 clearly not made “in connection with investigating or prosecuting the case.”

11 The cases cited by the government were previously cited to Judge Larson in the  
12 initial litigation in this case involving expert witnesses. Judge Larson ruled, in a portion of  
13 his opinion that has never been appealed by the government, that:

14 With respect to foundational material Judge Alsup’s Order stands as  
15 the law of this case. This Court reviewed *United States v. Iglesias*, 881 F.2d  
16 1519 (9th Cir. 1989), as well as several cases proffered by defense counsel.  
17 While the majority in *Iglesias* rendered a limited interpretation of Rule 16, the dissenting op  
18 cases, for example, *United States v. Cedano-Arellano*, 332 F.3d 568 (9th Cir.  
19 2003). See  
20 also *United States v. Yee*, 129 F.R.D. 629 (N.D. Ohio 1990); *United States v.*  
21 *Liquid Sugars, Inc.*, 158 F.R.D. 466 (E.D. California 1994) and *United States*  
22 *v. W.R. Grace*, 233F.R.D. 586 (D. Montana 2005); and *United States v.*  
23 *Siegfried*, 2000 WL 988164 (N.D. Ill.2000) - - all of which granted such discovery. The  
24 court in *Siegfried* pointed out that a pretrial motion for discovery may well be considered  
25 differently from a post-conviction claim of prejudicial error, which was the situation in  
26 *Iglesias*.

27 [doc. 306, p. 5]

28 In light of all these cases and rulings, it cannot be doubted that even if Rule 16  
applied, which it does not, the defendants would still have the right under Rule 16(a)(1)(E)  
and 16(a)(1)(F) to production of the documents requested herein. As in the cases cited by  
Judge Larson, the present subpoena to the SFPD merely seeks the predicate materials upon  
which Mr. Mudge’s expected testimony is based. Because the expert relied on this very  
material to form his opinions, and because disclosure of such material and the DEA

1 manual would be helpful and material to the defense efforts to discredit and cast doubt on  
2 the reliability and validity of the drug tests used in this case, the defendant is entitled to  
3 production of the requested material.

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**CONCLUSION**

For the above-stated reasons, defendant Edgar Diaz and all other defendants respectfully request that the government’s motion to quash be denied.

Dated: October 20, 2006

Respectfully submitted,  
MICHAEL N. BURT  
TONY TAMBURELLO

By /s/ Michael N. Burt  
Attorneys for Defendant  
EDGAR DIAZ

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EDGAR DIAZ

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, )  
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Plaintiff, )  
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vs. )  
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REDACTED DEFENDANT NO. 1, et )  
al., )  
 )  
Defendants. )  
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**Case No. CR-05-00167 WHA**  
**DECLARATION OF COUNSEL IN**  
**SUPPORT OF DEFENDANTS' JOINT**  
**REPLY TO GOVERNMENT'S**  
**MOTION TO QUASH SUBPOENA**  
**FOR SAN FRANCISCO POLICE**  
**DEPARTMENT CRIME LAB**  
**RECORDS AND DRUG**  
**ENFORCEMENT AGENCY MANUAL**  
**Date: October 23, 2006**  
**Time: 8:00 a.m.**  
**Dept: Hon. William H. Alsup**

I, Michael N. Burt, declare as follows:

1. Tony Tamburello and I have been appointed to represent defendant Edgar Diaz in the above-captioned case.

2. I have reviewed all factual assertions in this brief and I believe all of them to be true. To the extent that there are any factual errors, they are unintentional.

I declare under penalty of perjury that the foregoing statements are true and correct, except those matters stated on information and belief and those I believe to be true.

Executed in San Francisco, California on October 20, 2006.

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/s/ Michael Burt

MICHAEL BURT