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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,	)	Case No. CR-05-00167 WHA
12 Plaintiff,	)	DEFENDANTS' JOINT
13 vs.	)	SUPPLEMENTAL BRIEF
14 REDACTED DEFENDANT NO. 1, et	)	REGARDING THE SIGNIFICANCE
15 al.,	)	OF THE GOVERNMENT'S REFUSAL
16 Defendants.	)	TO PRODUCE DRUG
	)	IDENTIFICATION DOCUMENTS
	)	Date: September 21, 2006
	)	Time: 1:30 p.m.
	)	Dept: Hon. William H. Alsup

17
18 Defendant Edgar Diaz, on behalf of himself and all other defendants, hereby files
19 this joint supplemental brief regarding the significance of the government's refusal to
20 produce drug identification documents, as indicated in the government's Supplemental
21 Daubert Filing in Response to This Court's Order Dated 9/7/06 (Doc. No. 759). (doc.
22 767). This supplemental brief is authorized by order of this Court dated September 13,
23 2006. (doc. 769).

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

1 In its filing on September 12, 2006, the government indicates that it will not obey
2 the first two parts of the Court's order. The government's excuse for non-compliance is as
3 follows: "After discussing the production of the ASCLD documents with Crime Lab
4 Manager James Mudge, the government was informed that these documents are kept
5 confidential by the Crime Lab. Tongring Declaration at ¶ 3. Therefore, the SFPD Crime
6 Lab has not disclosed these documents to the government, and the government is not able
7 to provide them to this Court." (doc. 767, p. 2).

8 The Tongring declaration elaborates that "Mr. Mudge has informed me that his
9 laboratory's policy is not to release these documents in the discovery process in criminal
10 cases..... According to Mr. Mudge, the SFPD Crime Laboratory, with the assistance of the
11 San Francisco District Attorney's Office (SFDA), has taken steps to ensure the
12 confidentiality of these documents. Most recently, during a state prosecution¹, the San
13 Francisco Public Defender's Officer unsuccessfully attempted to obtain the ASCLD
14 accreditation audit reports through discovery. Mr. Mudge informed me that on March 28,
15 2005, San Francisco Superior Court Judge Mary Morgan denied disclosure of the audit
16 reports after argument." (doc. 767, p. 2)

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

24 The government seems to be saying that it, or Mr. Mudge, or Judge Morgan is the
25 final arbiter of whether this Court's orders will be obeyed, and that Judge Morgan upheld a
26 claim of privilege in a decision rendered on March 28, 2005, a decision which the
27 government does not even bother to provide. Putting aside the obvious point that neither
28 the government nor state officials can override this court's orders, there is the additional

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

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

24 With respect to the third part of the Court’s order, the government’s pleading
25 asserts that “the declaration of Krista Tongring (Tongring Declaration) ... set(s) forth
26 the procedures utilized by the DEA for the identification of marijuana and cocaine.

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28 ¹ The *Morgan* case was decided in September 2004, so it did not involve the specific
audit reports at issue in this case.

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

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

22 The government is obviously aware that this technician’s hearsay account is
23 damaging to the government’s position, because it seeks to downplay it with the statement
24 that “Mr. Duncan informed me that, although DEA policy requires the performance of a
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26 ² As indicated in the attached declaration of counsel, the defendants have made their own
27 efforts to learn of the DEA’s procedures, but the only document they have been able to obtain, a
28 372 page 1993 DEA *Laboratory Operations Manual* does not address drug testing protocols.
Because this manual is too large to be filed as an electronic exhibit, it will be manually filed as a
separate Exhibit 5.

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Dated: September 18, 2006

Respectfully submitted,

MICHAEL N. BURT
TONY TAMBURELLO

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

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DECLARATION OF COUNSEL IN
SUPPORT OF DEFENDANTS' JOINT
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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.
3. Before Mr. Diaz's motion to exclude the drug identification evidence (doc. 634) was filed I made efforts to obtain the drug testing protocols of the Drug Enforcement Administration. I was unsuccessful in those efforts. I assumed that the government would reference those protocols in their opposition, and when they did not, I suspected that the DEA protocols actually supported the defendants' position, so I raised that issue at the

1 hearing of the motion on August 30, 2006.

2 4. Following this Court's order for production of "documentation of DEA
3 procedures for identification of marijuana and cocaine" (doc. 759) and the government's
4 recent refusal to produce any documentation other than the government's declaration filed
5 as doc.767-2, I made additional efforts to locate the protocols, including calls to the local
6 federal defender's office and other defense lawyers, a call to a former FBI lab analyst, and
7 inquiry of online resources. I finally located and purchased a copy of a 1993 version of the
8 DEA's *Laboratory Operations Manual* from the National Association Criminal Defense
9 Lawyers. I read this 373 page *Manual* in its entirety. Unfortunately, the *Manual* deals with
10 administrative matters, not drug testing protocols, as indicated in Exhibit 5 to be filed
11 manually. The *Manual* references a separate *Drug Testing Manual* which I was unable to
12 obtain from any source. I believe that this second *Manual* is currently in the possession of
13 the DEA, that it is readily accessible to government counsel upon request, and, based on
14 the government's refusal to produce it in this case, that it is highly supportive of
15 defendants' position.

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

18 Executed in San Francisco, California on September 18, 2006.

19 /s/ Michael Burt

20 MICHAEL BURT

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