

From: Winn, Peter A. (OPCL)
Subject: Follow Up -- June 19 Meeting at DOJ
To: srprivacy@ohchr.org
Sent: June 20, 2017 6:29 PM (UTC-04:00)

Dear Prof. Cannataci,

Thank you for taking the time to meet with us yesterday. We appreciate your interest in the details of the U.S. governmental privacy legal and administrative regime and your commitment to getting the facts right. The U.S. privacy legal regime is complex and the underlying factual context has already been the subject of a considerable amount of misinformation. To that end, we commend your willingness to share with us a draft of your preliminary findings so that we can identify any factual inaccuracies before making them public. As I noted, we may agree or disagree with your ultimate conclusions, but a robust civic discourse is impossible when the facts are wrong. When I was wearing a different hat as the General Counsel of the PCLOB, the Board vetted both its Section 215 and Section 702 Reports for factual accuracy prior to their publication. No one ever regretted that decision. In the meantime, should any questions arise during your visit please don't hesitate to call me or email me at the contact information below and I will do my best to get you an answer.

Below are links to resources that you may find useful in preparing your preliminary findings and comprehensive report. Most of these were on the list I provided you yesterday, but I have added a few more based on our conversation which reflect some of the efforts the U.S. government is making to provide greater transparency to ensure that laws, guidelines, and policies are accessible and understandable.

- An overview of the U.S. law enforcement, surveillance, and privacy framework is contained in a recent U.S. submission in a proceeding in Ireland, publicly available at: <https://www.justice.gov/civil/page/file/947821/download>. The Schrems brief (which you were provided a hard copy), states at par. 64 that the US uses search warrants to obtain the content of emails, even when an email has been in storage for more than 180 days, although the statute permits compulsion with process other than a search warrant. The brief cites the Warshak decision to which the US has generally conformed its practice. The Special Rapporteur's February 2017 report commented on a bill that would have amended ECPA to require a warrant regardless of the age of the email, but failed to note that the government had already conformed its practice in this way.
- Presidential Policy Directive 28 (PPD-28) is key to understanding the U.S. government's treatment of the personal information of non-United States Persons in connection with its intelligence activities. It is available at: <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities>.
- A large number of interesting documents, including opinions by the Foreign Intelligence Surveillance Court, targeting and minimization procedures for the 702 program, as well as a host of other important factual and legal materials, are now public on an ODNI website, "IC on the Record," available at: <https://icontherecord.tumblr.com/>.
- Implementing procedures for PPD-28 with respect to the treatment of non-U.S. persons' data may be found at: <https://icontherecord.tumblr.com/ppd-28/2015/privacy-civil-liberties>; <https://fas.org/irp/nsa/nsa-ppd-28.pdf>; <https://www.fbi.gov/file-repository/ppd-28-policies-procedures-signed.pdf/view>; <https://www.defense.gov/Portals/1/Documents/pubs/DoD-Compliance-with-Section-4-of-Presidential-Policy-Directive-28.pdf>.
- Annual progress reports on the efforts of U.S. intelligence agencies, including the NSA, CIA, and FBI, to implement PPD-28, are available at: <https://icontherecord.tumblr.com/search/ppd-28>.
- Declassified decisions of the Foreign Intelligence Surveillance Court are also available at: <http://www.fisc.uscourts.gov/>.

- The independent Privacy and Civil Liberties Oversight Board (PCLOB)'s Enabling Statute is available at: https://www.pclob.gov/library/42USC2000ee-PCLOB_Enabling_Statute-2.pdf. That statute authorizes the PCLOB to exercise oversight as well as advice, and the Board's procedures permit advice to be provided by individual Board Members. For more information about the advice function, see: https://pclob.gov/library/Policy-Advisory_Function_Policy_Procedure.pdf.
- The July 2, 2014 Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, prepared by PCLOB, is available at: <https://pclob.gov/library/702-Report.pdf>.
- The January 23, 2014 PCLOB Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court, which led to the enactment of the 2015 USA FREEDOM Act, ending the bulk data collection program, highlighting the critical role the U.S. Congress plays in the U.S. system of oversight, is available at: https://pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf.
- The 2008 AG's Guidelines for Domestic FBI Operations are available at: <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.
- The 2017 CIA Guidelines (approved by the AG pursuant to EO 12333) are available at: <https://www.cia.gov/about-cia/privacy-and-civil-liberties/CIA-AG-Guidelines-Signed.pdf>, and explanatory materials are available at: <https://www.cia.gov/about-cia/privacy-and-civil-liberties/Detailed-Overview-CIA-AG-Guidelines.pdf>.
- 2016 Department of Defense Guidelines (approved by the AG pursuant to EO 12333) (DOD Manual 5240) are available at: <http://dodsioo.defense.gov/Portals/46/DoDM%20%205240.01.pdf?ver=2016-08-11-184834-887> (which apply to the NSA, as it is a component of the Department of Defense).

You may also want to review materials available on the website of the Federal Privacy Council, the principal interagency forum for U.S. agencies to collaborate and work to improve privacy protections across the Federal Government. The Council's [website](https://www.fpc.gov) contains a virtual "law library" that identifies and links to U.S. laws that contain privacy controls: <https://www.fpc.gov/law-library/>.

I have also included a link to the site that describes my role as the Acting DOJ Chief Privacy and Civil Liberties Officer, and the Office of Privacy and Civil Liberties, of which I am the Director: <https://www.justice.gov/opcl>. The site provides dozens of published Privacy Act System of Records Notices, Privacy Impact Assessments, reports provided to Congress and the public, templates of privacy compliance documents, DOJ [privacy policies and guidance](#) (for example, policy guidance on the [use of cell-site simulator technology](#)) and other resources. You can also find the on-line and searchable version of the DOJ Privacy Act of 1974 Overview, which I provided to you in hard copy yesterday: <https://www.justice.gov/opcl/overview-privacy-act-1974-2015-edition>.

Thank you again for taking the time to meet with us. We look forward to continuing what I hope to be a productive long-running dialogue.

Peter

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From: John Selby
Subject: Nice to meet you at the Data Commissioners' Conference yesterday
To: Harman-Stokes, Katherine M. (OPCL)
Sent: September 27, 2017 10:54 PM (UTC-04:00)
Attached: Request to USCC Ron Parallel Construction.pdf

Dear Katherine,

It was great to meet you last night - I really enjoyed talking with you on the junk cruise around HK's Victoria harbour.

During our discussion, I mentioned to you the concept of parallel construction. You asked me for some references to that activity, which I've attached and linked to below (some were blocked by the Great Firewall of China, so I used archive.org for them):

<https://web.archive.org/web/20130819111440/http://news.yahoo.com/exclusive-u-directs-agents-cover-program-used-investigate-091643729.html>

<https://arstechnica.com/tech-policy/2013/08/us-drug-agency-gets-intel-from-nsa-then-lies-about-its-origins-to-build-cases/>

FOIA request regarding DEA training on parallel construction: <https://www.muckrock.com/foi/united-states-of-america-10/dea-policies-on-parallel-construction-6434/> (link "Responsive Documents" to the 87mb of DEA files is at the bottom of that page)

Kind regards,

John

VIA ELECTRONIC COMMUNICATION

Chief Commissioner Martin Castro
United States Commission on Civil Rights
1331 Pennsylvania Ave., NW, Suite 1150
Washington, DC 20425

**Request to the United States Commission on Civil Rights
to investigate disproportionate impacts of “Parallel Construction”
on communities of color**

October 23, 2015

Request prepared by: Sean Vitka
X-Lab Fellow

Email:

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I. Introduction

Parallel Construction is a broadly defined practice in which law enforcement conceals and/or recreates the origin of an investigation. It was first widely reported by Reuters in August 2013.¹ The term is derived from government documents that reveal guidance on the deliberate masking and falsification of investigative history in order to erase investigations’ origins.²

According to the report, the Special Operations Division (SOD), a unit of the Drug Enforcement Administration (DEA), distributes information in partnership with two dozen other agencies, including the Federal Bureau of Investigations (FBI), the Central Intelligence Agency (CIA), the National Security Agency (NSA), and the Department of Homeland Security (DHS). Information distributed through this partnership has been used to spark domestic, non-national security related investigations.³ The information and its source are not merely concealed by the government in order to avoid legal challenges and judicial review of controversial surveillance methods. Instead, as described in the Reuters report, “[a]gents are instructed to then use ‘normal investigative techniques to recreate the information provided by SOD.’”⁴ In other words, investigators are told to find a second source for the same information, allowing the government to use evidence in court without ever facing legal scrutiny of its true sources and methods.

Parallel Construction and similar masking techniques create a permeable barrier whereby

¹ See John Shiffman & Kristina Cooke, *Exclusive: U.S. directs agents to cover up program used to investigate Americans*, REUTERS, Aug. 5, 2013, <http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805>

² See *id.* (“After an arrest was made, agents then pretended that their investigation began with the traffic stop, not with the SOD tip, the former agent said. The training document reviewed by Reuters refers to this process as ‘parallel construction.’”)

³ See *id.*

⁴ *Id.*

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information collected under national security authorities can secretly become the basis for domestic prosecution. Successful masking, in turn, renders both the information sharing and the process of disguising investigations’ origins uncontestable. Authorities’ use of information collected on standards more relaxed than the Fourth Amendment requires and then using them for prosecutions without providing notice to defendants eliminates defendants’ opportunity to challenge the legality of that collection and its use against them. The inability to challenge evidence that is masked in such a deliberate manner is of particular concern to the United States Commission on Civil Rights (USCCR) because law enforcement principally uses it in the context of criminal investigations disproportionately targeted at communities of color.

II. The United States Commission on Civil Rights should investigate Parallel Construction

Parallel Construction is designed to mask tips coming from sensitive sources, such as the surveilling technologies, the legal entities conducting the surveillance, and the participation of foreign partners operating under different legal frameworks. The goal is to keep secret, even from the court, the original source of incriminating evidence. Thus, this practice requires further investigation to ensure that putative criminals are protected against exploitative law enforcement investigations, especially in the context of communities already subject to disproportionate law enforcement targeting.

a. Parallel Construction has short-circuited judicial review and the adversarial process in criminal prosecutions

Parallel Construction is designed to evade detection by concealing or creating an alternative history of how an investigation began, even if the true history would otherwise reveal

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that the prosecution is improper. This is precisely why further, independent examination of Parallel Construction is necessary.

In some cases, law enforcement is expressly instructed to lie about how the government obtained information. Guidance on one mass surveillance program, named Hemisphere, specifically instructs agents to conceal when evidence was acquired through it.⁵ The guidance states that “[a]ll requestors are instructed to never refer to Hemisphere in any official document. If there is no alternative to referencing a Hemisphere request, then the results should be referenced as information obtained from an AT&T subpoena.”⁶ This comports with the statements of Robert Litt, General Counsel to the Office of the Director of National Intelligence, during a panel discussion in 2015, when he argued it would be legal for the Intelligence Community to use Parallel Construction to mask evidence that originated through bulk collection.⁷ Litt defined Parallel Construction in the context of confidential informants and specifically argued that the prosecution has the discretion to determine whether evidence is sufficiently attenuated from a tip by, for instance, the NSA, and in turn whether the court or defendant must be notified.⁸ He proceeded to refer to this as standard fruit of the poisonous tree analysis.⁹ When asked if the standards around the fruit of the poisonous tree doctrine apply in the context of bulk surveillance, Litt responded “Why wouldn’t they?” and confirmed that at least

⁵ See Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, THE NEW YORK TIMES, Oct. 16, 2013, <http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html>

⁶ *Synopsis of the Hemisphere Project*, THE NEW YORK TIMES, Sep. 1, 2013, <http://www.nytimes.com/interactive/2013/09/02/us/hemisphere-project.html#p12>

⁷ Government Surveillance and Transparency, (2015), available at <http://www.c-span.org/video/?325913-1/discussion-surveillance-transparency> at 1:05:05.

⁸ *See id.*

⁹ *See id.*

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“sometimes” neither the judge nor the defendant knows of the existence of the tip – much less the identity of the entity providing it.¹⁰ He further described such determinations as “routine.”¹¹

Conversely, sometimes Parallel Construction entails explicit concealment rather than a falsified backstory. In one case in Baltimore, a police officer refused to reveal how the Defendant was tracked, subsequently resulting in the judge threatening him with contempt of court.¹² In response, the officer cited a “nondisclosure agreement” with the FBI.¹³ Rather than reveal how the evidence was collected, according to The Baltimore Sun, the prosecution “withdrew key evidence,” including the Defendant’s cell phone, thereby inhibiting the defense from further challenging the constitutionality or legality of the evidence’s collection.¹⁴ While the officer denied using a StingRay, which is a proprietary name for a cell site simulator, public records requests reveal that to acquire a StingRay, as the Baltimore Police Department did in 2009, a law enforcement agency must sign a nondisclosure agreement with the FBI.¹⁵ Cell site simulators mimic the cell towers used by all nearby cell phones and, in turn, become intermediaries between cell phones and cell towers -- thereby allowing law enforcement to intercept and track any cell phone that connects to the cell site simulator. This is the most transparent bound of Parallel Construction -- where law enforcement simply conceals

¹⁰ *Id.*

¹¹ *Id.*

¹² See Justin Fenton, *Judge threatens detective with contempt for declining to reveal cellphone tracking methods*, THE BALTIMORE SUN, Nov. 17, 2014, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-stingray-officer-contempt-20141117-story.html>

¹³ See *id.*

¹⁴ *Id.*

¹⁵ See *Re: Acquisition of Wireless Collection Equipment/Technology and Non-Disclosure Obligations*, Dec. 12, 2012, https://muckrock.s3.amazonaws.com/foia_files/nda_redacted.pdf; see also MuckRock, *Before deploying StingRays, police departments must sign nondisclosure agreement with FBI*, BEACON, Sep. 22, 2014, <https://www.beaconreader.com/muckrock/before-deploying-stingrays-police-departments-must-sign-nondisclosure-agreement-with-fbi>

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investigative history, but does not appear to recreate it or mislead the defendant or court.

However, deception may not even be deliberate on the part of the prosecutors. In at least one instance, agents lied to a prosecutor about the origin of evidence:

In a Florida drug case he was handling, the prosecutor said, a DEA agent told him the investigation of a U.S. citizen began with a tip from an informant. When the prosecutor pressed for more information, he said, a DEA supervisor intervened and revealed that the tip had actually come through the SOD and from an NSA intercept. The prosecutor never filed charges in the case because he lost confidence in the investigation, he said.¹⁶

In a narrow set of cases, judges may actually review applications for the collection or admission of evidence derived from controversial surveillance techniques. However, judges may still lack the ability to robustly review these techniques given other courts’ similar proceedings being sealed, unclear and outdated law governing such surveillance, differences between the application and the surveillance that is ultimately conducted, and a lack of adversarial proceedings.¹⁷

The above cases make clear that Parallel Construction short-circuits judicial review and the adversarial process. USCCR must investigate the practice.

b. Parallel Construction disproportionately affects communities of color

Parallel Construction is most likely to be used in cases where a tip comes from an undercover or secret source, which in turn strongly suggests that Parallel Construction is most

¹⁶ <http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805>

¹⁷ See Jennifer Valentino-Devries, *Sealed Court Files Obscure Rise in Electronic Surveillance*, THE WALL STREET JOURNAL, June 2, 2014, <http://www.wsj.com/articles/sealed-court-files-obscure-rise-in-electronic-surveillance-1401761770>, e.g. “Congress can’t regulate what it can’t see,” says Stephen Smith, a Houston magistrate judge who has written extensively on electronic surveillance. “In fact, it’s difficult for me to find out what’s going on in another district if the case is sealed.”

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likely to be used with drug and international terrorism investigations -- the intersections of intelligence and prosecution. This is supported both by the cases and programs discussed above, as well as by how information masked by Parallel Construction passes through the government.¹⁸ For instance, the DEA is the parent agency of SOD -- and also ran at least one bulk telephone metadata collection program for decades.¹⁹ Similarly, the agencies connected to SOD also suggest that Parallel Construction’s nexuses are drugs and terrorism.²⁰ As an example, the NSA has no prosecutorial arm, is primarily focused on intelligence collection, but nonetheless is part of SOD’s information sharing system.²¹

Drug enforcement and terrorism investigations are in turn loci of unequal targeting of people of color. Drug law enforcement has long been known as a hotbed of unequal and racially biased activity.²² This is no different in the post-9/11 era of mass surveillance.²³ For instance, while marijuana usage is similar between white and black populations, according to research by the American Civil Liberties Union, “Blacks are 3.73 times as likely to be arrested for marijuana possession.”²⁴ Meanwhile, leaked information about mass surveillance points to a system with decided racial bias. As reported by The Intercept, Dearborn, Michigan, with only 96,000 residents, is the second-most represented city on the watch list of “known or suspected terrorists”

¹⁸ See Shiffman, *supra* note 1.

¹⁹ Brad Heath, *U.S. Secretly Tracked Billions of Calls for Decades*, USA TODAY, Apr. 8, 2015, <http://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/>

²⁰ See Shiffman, *supra* note 1.

²¹ See *id.*

²² See e.g., American Civil Liberties Union, *The Drug War Is the New Jim Crow*, Jul./Aug. 2001, available at <https://www.aclu.org/drug-war-new-jim-crow>

²³ See e.g., Nick Wing, *Marijuana Prohibition Was Racist From the Start. Not Much Has Changed.*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist_n_4590190.html

²⁴ American Civil Liberties Union, *The War on Marijuana in Black and White*, June 2013, available at <https://www.aclu.org/report/war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white>

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-- second only to New York City.²⁵ Despite this, Dawud Walid, executive director of the Michigan chapter of the Council on American-Islamic Relations, told *The Intercept*: “To my knowledge, there have been no Muslims in Dearborn who have committed acts of terrorism against our country.”²⁶ However, 40 percent of Dearborn’s population is of Arab descent.²⁷ Indeed, this targeting was stated explicitly by an FBI field office in Detroit, which, in seeking permission to conduct even more surveillance in Michigan, wrote that “[b]ecause Michigan has large Middle-Eastern and Muslim population[sic], it is prime territory for attempted radicalization and recruitment by these terrorist groups.”²⁸ Local law enforcement targeting also continues, and threatens to infringe on the civil rights of communities of color through Parallel Construction. The NYPD operated an infamous “Demographic Unit,” which, according to *The New York Times*, “dispatched plainclothes detectives into Muslim neighborhoods to eavesdrop on conversations and built detailed files on where people ate, prayed and shopped.”²⁹ Today, according to the Brennan Center, “NYPD officers are still infiltrating mosques and other community spaces, coercing informants to spy on their own communities, and adhering to a misguided theory of ‘conveyor-belt radicalization’ to identify potential terrorists.”³⁰ The FBI has

²⁵ See Jeremy Scahill & Ryan Devereaux, *Watch Commander: Barack Obama’s Secret Terrorist-Tracking System, by the Numbers*, Aug. 5, 2014, *THE INTERCEPT*, <https://theintercept.com/2014/08/05/watch-commander/>

²⁶ *Id.*

²⁷ *Id.*

²⁸ Federal Bureau of Investigation, *Case ID #: 806H-DE-104073*, July 6, 2009, available at <https://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf>; see also Jerry Markon, *ACLU says FBI uses racial profiling against Muslims, other minorities*, Oct 20, 2011, *THE WASHINGTON POST*, https://www.washingtonpost.com/politics/aclu-says-fbi-uses-racial-profiling-against-muslims-other-minorities/2011/10/20/gIQAN3Ob1L_story.html

²⁹ Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, Apr. 15, 2014, *THE NEW YORK TIMES*, <http://www.nytimes.com/2014/04/16/nyregion/police-unit-that-spied-on-muslims-is-disbanded.html>

³⁰ Meghan Koushik, *NYPD Targeting of New York Muslims Continues*, Aug. 20, 2014, *BRENNAN CENTER FOR JUSTICE BLOG*, <https://www.brennancenter.org/blog/nypd-targeting-new-york-muslims-continues>

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similar programs that disproportionately target Latinos and Muslims.³¹ Requesters can provide more research on the racial biases that are part and parcel with drug and terrorist investigations upon request by the Commission.

The Reuters report revealed that the SOD’s role as a clearinghouse is profound and poses a unique risk to frequently targeted communities:

Today, the SOD offers at least three services to federal, state and local law enforcement agents: coordinating international investigations such as the Bout case; distributing tips from overseas NSA intercepts, informants, foreign law enforcement partners and domestic wiretaps; and circulating tips from a massive database known as DICE.

The DICE database contains about 1 billion records, the senior DEA officials said. The majority of the records consist of phone log and Internet data gathered legally by the DEA through subpoenas, arrests and search warrants nationwide.³²

The potential impact of these programs, in particular on already targeted communities, would be unprecedented.

The use of Parallel Construction therefore threatens to critically exacerbate drug and terrorist investigations’ existing, disproportionate impact on communities of color by incentivizing mass, invasive surveillance and adding a fundamentally different set of legal rules to investigations and prosecutions.

c. There is national uncertainty, confusion, and alarm regarding Parallel Construction

³¹ See Marcy Wheeler, *FBI in Detroit Profiles Muslims and Arabs in Spite of 12 Whites Engaged in Terrorism*, Oct. 21, 2011, EMPTYWHEEL, <https://www.emptywheel.net/2011/10/21/fbi-in-detroit-profiles-muslims-and-arabs-in-spite-of-12-whites-engaged-in-terrorism/>

³² See Shiffman, *supra* note 1.

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In the years since the Edward Snowden leaks, few processes have remained as opaque to the public as Parallel Construction and other intelligence sharing activities. Because of how little is known, Parallel Construction’s relationship to intelligence collected by the Intelligence Community and to other sharing practices is unknown. This has crippled the public’s ability to engage the issue.

In the initial Reuters report, perceptions of the program were in diametric opposition depending on the observers’ proximity to the programs. One Harvard Law professor and former federal judge, Nancy Gertner, told Reuters that she had “never heard of anything like this at all,” and that “[i]t sounds like they are phonying up investigations.”³³ James Felman, a vice chairman of the criminal justice section of the American Bar Association similarly called it “outrageous” and “indefensible.”³⁴ Meanwhile, one anonymous senior DEA official told Reuters that “Parallel [C]onstruction is a law enforcement technique we use everyday,” and that “[i]t’s decades old, a bedrock concept.”³⁵ However, “the Department of Justice, which oversees the DEA, declined to comment.”³⁶

Indeed, this confusion continues to this day, and is inhibiting the ability of the public to have critical conversations about civil liberties and Parallel Construction’s impact on Americans’ civil rights. In August 2014, The Intercept published a lengthy investigation into ICREACH, yet another intelligence-sharing program run by the NSA, with participation from both the DEA and

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

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FBI.³⁷ Reporter Ryan Gallagher found continuing evidence of this confusion and concern:

A key question, according to several experts consulted by The Intercept, is whether the FBI, DEA or other domestic agencies have used their access to ICREACH to secretly trigger investigations of Americans through a controversial process known as ‘parallel construction.’³⁸

Further, Parallel Construction makes even after-the-fact review of law enforcement investigations extremely difficult. This became a point of contention during one Supreme Court case focused on Section 702 of the FISA Amendments Act, *Clapper v. Amnesty International USA*. There, petitioners sought to challenge mass government surveillance conducted under Section 702, codified at 50 USC § 1881a, but the Supreme Court ultimately held, 5-4, that they lacked standing due to the petitioners’ reliance on a “speculative chain of possibilities that does not establish that their potential injury is certainly impending or is fairly traceable to § 1881a.”³⁹ However, this decision was informed by the Solicitor General’s assertion that other petitioners would satisfy standing -- namely defendants against whom Section 702 evidence would be used at trial, which, he argued, would come with notification. Indeed, this was expressly stated in the majority opinion: “if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition.”⁴⁰ However, upon reviewing his own claims, the Solicitor General later learned that at least national security prosecutors were not giving such notice, and since then an internal debate within the

³⁷ See Ryan Gallagher, *The Surveillance Engine: How the NSA Built Its Own Secret Google*, THE INTERCEPT, Aug. 25, 2014, <https://firstlook.org/theintercept/2014/08/25/icreach-nsa-cia-secret-google-crisscross-proton/>

³⁸ *Id.*

³⁹ *Clapper v. Amnesty Int’l*, 133 S. Ct. 1140, 1141 (2013).

⁴⁰ *Id.* at 1154.

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DOJ about how much notice is necessary continues.⁴¹ This attracted the attention of three Senators, who wrote the Solicitor General, urging him to correct the record.⁴² However, even expanded notice from the Department of Justice would apply specifically to evidence that the DOJ determines is derived from Section 702 surveillance -- not necessarily the evidence that has a trail recreated via Parallel Construction, where collection was conducted pursuant to other authorities, or where the DOJ has, on its own and without judicial review, determined the evidence is too far attenuated to be considered derived from the surveillance.

The public and the courts cannot adequately understand the impact of Parallel Construction on communities of color without a clearer understanding of how collected intelligence is ultimately shared among domestic law enforcement and national security agencies and how it is in turn utilized in the courts. But if this technique is targeted at crimes used by law enforcement to disproportionately target communities of color, it threatens to impose a different legal standard with dire consequences on them.

III. Conclusion

This request is principally concerned with discovering facts about investigative and prosecutorial techniques predisposed to ethnic and racial bias. One former federal prosecutor

⁴¹ See Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, THE NEW YORK TIMES, Sep. 1, 2013, <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html>

⁴² See Ron Wyden et al., *Udall, Wyden, Heinrich Urge Solicitor General to Set Record Straight on Misrepresentations to U.S. Supreme Court in Clapper v. Amnesty*, Nov. 21, 2013, <https://www.wyden.senate.gov/news/press-releases/udall-wyden-heinrich-urge-solicitor-general-to-set-record-straight-on-misrepresentations-to-us-supreme-court-in-clapper-v-amnesty> (“In *Clapper v. Amnesty*, the government represented to the Court that it provides notice to a defendant of evidence obtained or derived under the FAA, a statement that was then incorporated into the majority opinion in the case. It has become clear, however, that this was not actually the policy practiced in the Justice Department and that the government misrepresented its policy and practice to the Court.”).

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described the illusory nature of these programs’ legal authorities to Reuters, referencing the alleged uses of shared information in domestic drug prosecutions: ““You can’t game the system,” said former federal prosecutor Henry E. Hockeimer Jr. ‘You can’t create this subterfuge. These are drug crimes, not national security cases. If you don’t draw the line here, where do you draw it?’”⁴³ What the public does know about Parallel Construction confirms that it involves sharing, at a minimum, across the CIA, DEA, FBI, and NSA, that said sharing results in prosecutorial uses that present grave threats to defendants’ Constitutional rights, and that it is principally used in the context of drugs, gangs, and terrorism investigations -- all of which disproportionately target communities of color.⁴⁴

For the reasons described above, it is imperative that the USCCR investigate and publish more information about Parallel Construction.

Respectfully submitted,



Sean Vitka

October 23, 2015

X-Lab Fellow

(b) (6)

American-Arab Anti-Discrimination Committee
Arab American Institute
Bill of Rights Defense Committee
Council on American-Islamic Relations
Defending Dissent Foundation
Demand Progress
Fight for the Future

⁴³ *Id.*

⁴⁴ *See id.*

Request to USCCR re: impacts of “Parallel Construction”

Government Accountability Project
National Association of Criminal Defense Lawyers
National Security Counselors
OpenTheGovernment.org
Restore the Fourth
X-Lab

From: Winn, Peter A. (OPCL)
Subject: Recent Visit to Washington
To: (b)(6) Nathaniel Erskine-Smith
Cc: Harman-Stokes, Katherine M. (OPCL); (b)(6) Nathaniel Erskine-Smith
Sent: October 9, 2017 8:24 PM (UTC-04:00)

Dear MP Erskine-Smith:

Thank you for your kind email last Friday, where you followed up on our discussion last week about the role of privacy officers in the U.S. Government. Here are links to the Attorney General Guidelines that we discussed:

- The 2008 AG's Guidelines for Domestic FBI Operations are available at: <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.
- The 2017 CIA Guidelines (approved by the AG pursuant to EO 12333) are available at: <https://www.cia.gov/about-cia/privacy-and-civil-liberties/CIA-AG-Guidelines-Signed.pdf>, and explanatory materials are available at: <https://www.cia.gov/about-cia/privacy-and-civil-liberties/Detailed-Overview-CIA-AG-Guidelines.pdf>.
- 2016 Department of Defense Guidelines (approved by the AG pursuant to EO 12333) (DOD Manual 5240) are available at: <http://dodsioo.defense.gov/Portals/46/DoDM%20%205240.01.pdf?ver=2016-08-11-184834-887> (which apply to the NSA, as it is a component of the Department of Defense).

You may want to reach out to the CIA's Privacy and Civil Liberties Officer, [Benjamin \(Ben\) Huebner](#). The Office of the Director of National Security (ODNI) also maintains the "[IC on the Record](#)" website with declassified FISA opinions, transparency reports, and other important information.

The role of the Senior Agency Officials for Privacy (SAOPs) responsible for overseeing privacy programs in federal agencies are set forth in the following 2016 memorandum issued by the Office of Management and Budget (OMB), "[Role and Designation of Senior Agency Officials for Privacy](#)," OMB M-16-24. This memo requires each SAOP to hold "a central leadership position" that provides visibility into agency operations and enables the SAOP to "regularly engage" with agency leadership. SAOPs must have the skills, knowledge and expertise to direct the agency's privacy program, and the necessary authority to lead and direct it.

OMB has issued circulars that operationalize the privacy requirements on federal agencies. The most important of these is [OMB Circular A-130, "Managing Information as a Strategic Resource](#)," which compiles in Appendix II the key requirements for Federal Government privacy programs under the Privacy Act of 1974, Federal Information Security Modernization Act of 2014 (FISMA), and the e-Government act of 2002.

The [Federal Privacy Council](#) was established in 2016 as the principal interagency forum for U.S. agencies to collaborate and work to improve privacy protections across the Federal Government. The SAOPs of Cabinet-level and other mission critical agencies meet regularly to set the Council's strategic agenda and move forward on various objectives to improve privacy practices. The Council's [website](#) contains a virtual "law library" that identifies and links to U.S. laws that contain privacy controls: <https://www.fpc.gov/law-library/>.

For more information about the DOJ Chief Privacy and Civil Liberties Officer, who also serves as DOJ's SAOP and heads the Office of Privacy and Civil Liberties, see <https://www.justice.gov/opcl>. The site provides links to published Privacy Act System of Records Notices, Privacy Impact Assessments, reports provided to Congress and the public, DOJ [privacy policies and guidance](#) (for example, policy guidance on the [use of cell-site simulator technology](#)) and other resources. You can also find the on-line and searchable version of the DOJ Privacy Act of 1974 Overview, which I provided to you in hard copy: <https://www.justice.gov/opcl/overview-privacy-act-1974-2015-edition>.

With my best regards,

Peter

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From: (b)(6) Nathaniel Erskine-Smith [[mailto:\(b\)\(6\) Nathaniel Erskine-Smith](mailto:(b)(6) Nathaniel Erskine-Smith)]

Sent: Friday, October 06, 2017 11:56 AM

To: Winn, Peter A. (OPCL) <(b) (6)>; Harman-Stokes, Katherine M. (OPCL) <(b) (6)>

Subject: Recent Visit to Washington

Peter and Katherine,

I would like to extend our warm thanks for taking the time to meet. This learning tour was valuable and productive. Going forward, we're seeking to continue with the spirit of partnership and co-operation.

If there's anything we can do to help you from our end of things, don't hesitate to reach out.

Thanks again,

-Nate

For general updates, it's best to sign up to our email newsletter. If you're not signed up, please reply to this email to say "sign me up." It's a great way stay on top of our work in Ottawa and Toronto, and you may unsubscribe from our infrequent email at any time.

Email: (b) (6)

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Facebook: www.facebook.com/beynatemp

Twitter: www.twitter.com/beynate



Nathaniel Erskine-Smith

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BALAREZO LAW
CRIMINAL DEFENSE

October 17, 2017

Andrea Goldberg, Esq. *et al.*
Assistant United States Attorneys
United States Attorney's Office for the
Eastern District New York
271 Cadman Plaza East
Brooklyn, NY 11201

Re: *United States v. Joaquín Guzmán Loera*
Case No. 09-CR-0466(S-4)(BMC)

Dear Counsel:

I write to follow-up to my letter of September 19, 2017 (Doc. No. 141) wherein I requested discovery on behalf of my client, Joaquín Guzmán Loera. By this letter, and pursuant to Federal Rules of Criminal Procedure 16 and 26.2, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giles v. Maryland*, 386 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and all other applicable rules and statutes, I repeat my prior demands and specifically request the following:

Warrantless Wiretapping / Surveillance

Please identify in detail any evidence against Mr. Guzmán that was derived from eavesdropping through warrantless wireless surveillance by any party, person, entity, agency, and/or office, whether foreign or domestic.

This request includes any evidence obtained or derived from acquisition of foreign intelligence information conducted pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, 50 U.S.C. § 1881a as well as any evidence obtained from the Drug Enforcement Administration's Special Operations Division ("SOD")¹ and/or developed through the practice of "parallel construction."

Please produce all evidence obtained pursuant to the National Security Agency's "Prism" program, including all "metadata" pertaining to any telephone the government alleges

¹ Upon information and belief, the SOD is an unit of the DEA that includes partner agencies such as the Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, Internal Revenue Service, Department of Homeland Security and other government agencies. This request encompasses any other units similar to the SOD residing in any partner agency.

400 SEVENTH STREET NW STE 306 WASHINGTON, DC 20004

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was used or possessed by Mr. Guzmán.

Please identify and produce any evidence obtained through warrantless use of a GPS device or through the warrantless use of cell site/tower data.

Wiretap and / or Title III Intercepts and / or Foreign Intercepts

The request set forth in this section relates to both domestic and foreign wiretap intercepts. As a predicate to potential motions pursuant to Rule 12 of the Federal Rules of Criminal Procedure, please indicate whether any Title III wiretap interception, or interception authorized under the laws of a foreign country, occurred during the investigation of this case, and whether or not any leads were derived therefrom. Also provide all relevant applications for court orders and 10-day or other reports pertaining to electronic or video or telescopically enhanced surveillance or “pen register” operations, or to the affixing of any instrument to record the telephone number of any incoming or outgoing calls in connection with this case. Please include all court orders, interim reports by the government to the court, logs, tapes, digital recordings, transcripts, applications for, or orders extending, dates for notification of such surveillance, as well as all papers submitted to the court concerning sealing of surveillance tapes or records. If surveillance was accomplished without court order, so state, including dates, times, places, etc. of such surveillance. We also request all tapes and transcriptions of any and all one-party “consent” aural acquisitions related to this case.

Please provide all “line sheets” (contemporary synopses of the wiretap interceptions) produced in sequence in a single file for each wiretap, and identify which calls were believed to be “pertinent” and which, if any, were “minimized.” This information is necessary to determine whether the wiretaps were lawfully conducted.

Please provide all “Daily Reports” related to any intercepts. Experience has revealed that agents monitoring wiretaps prepare daily reports as to the number of pertinent calls, the number of “minimizations,” and any malfunctions or other irregularities. As with the “line sheets” requested above, this information is necessary to determine whether the wiretaps were lawfully conducted.

Please provide all Operating Procedures employed during the wiretaps. Experience has revealed that agents monitoring the wiretaps are given both an oral briefing on the procedures to be used and written operating procedures to be kept as a reference. As with the items requested above, this information is necessary to determine whether the wiretaps were lawfully conducted. Please provide transcripts of all intercepts, even if such are in rough form.

I also make the following specific additional demands:

Cell-Site Simulator Evidence

Please produce any and all information that was obtained as the result of the use of a “Triggerfish,” “cell-site simulator” or similar device; identify the locations, times and manner in which the device was used and make the device available for inspection.

Already-Produced Discovery

- a. Discovery Production 3 (Bates # 012 – 0215) – Please produce the original recording of these conversations, the dates of the conversations, the linesheets (if any), the identity of the parties involved and how the recordings were made.
- b. Discovery Production 4 (Bates No. 02648 – 03701) – Please produce the original recording of these conversations, the dates of the conversations, the linesheets (if any), the identity of the parties involved and how the recordings were made.
- c. Discovery Production 6 – Please produce color versions of the images that you have produced as black and white images; the dates and locations where the images were taken; the identity of the person(s) taking the image and describe the relevance of the images to this case.
- d. Discovery Production 7 – Please produce a new disc with accessible files. The current disc contains files that are not accessible in either Mac or PC format.
- e. Discovery Production 8 (Discs 2 & 3) – Please produce the original recording of these conversations, the dates of the conversations, the linesheets (if any), the identity of the parties involved and how the recordings were made.

Please contact me if you have any questions. Thank you in advance for your assistance.

Sincerely,



A. Eduardo Balarezo

Counsel for Joaquín Guzmán Loera



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

GMP:ANL/MPR
F. #2009R01065

*271 Cadman Plaza East
Brooklyn, New York 11201*

November 6, 2017

By Email and ECF

A. Eduardo Balarezo
400 Seventh Street, NW, Ste 306
Washington, DC 20004

(b) (6)

Re: United States v. Joaquin Archivaldo Guzman Loera
Criminal Docket No. 09-466 (S-4) (BMC)

Dear Counsel:

The government writes in response to your letters dated September 19, 2017 and October 17, 2017 requesting discovery in the above-captioned case. See Dkt. Nos. 141, 154. The government produced discovery to the defendant on March 8, 2017, April 10, 2017, May 5, 2017, June 7, 2017, July 21, 2017, September 19, 2017 and October 17, 2017. To date, it has produced more than 90,000 pages of documents, thousands of intercepted and recorded audio and electronic communications and dozens of videos. The government expects that the vast majority of its discovery production will be complete by mid-November 2017. Accordingly, the government has already produced documents responsive to many of your requests and will produce additional documents responsive to those requests shortly. Please see the responses to your specific requests for discovery below. The government also requests reciprocal discovery from the defendant.

I. Warrantless Wiretapping / Surveillance

You have requested that the government identify evidence against the defendant that “was derived from eavesdropping through warrantless wireless [sic] surveillance by any party, person, entity, agency, and/or office, whether foreign or domestic.” Dkt. No. 141 at 1-2. Your request specifically includes any evidence obtained or derived from: (1) acquisition of foreign intelligence information conducted pursuant to the Foreign Intelligence Surveillance Act (“FISA”), (2) the National Security Agency’s (“NSA”) “Prism” program, (3) the Drug Enforcement Administration’s (“DEA”) Special Operations Division (“SOD”) and/or the

practice of “parallel construction” and/or (4) warrantless collection of GPS location data or historical cell site/tower data.

The government addresses your specific requests below. Apart from those requests, based on its review of the evidence to date, the government is not aware of any intercepted or recorded electronic communications obtained without judicial authorization or the consent of a party to the communications, except that law enforcement officers obtained the electronic communications Bates-stamped 000044187-000053317 via a lawful warrantless search of a server located in a foreign country. As a result of this search, law enforcement officers obtained electronic communications of the defendant’s co-conspirators; they did not obtain any of the defendant’s electronic communications. The defendant thus does not have standing to move to suppress the electronic communications obtained pursuant to this lawful search. See United States v. Padilla, 508 U.S. 77, 81-82 (1993) (stating that “a defendant can urge the suppression of evidence . . . only if that defendant demonstrates that his Fourth Amendment rights were violated by the challenged search or seizure”) (emphasis in original); United States v. Lustyik, 57 F. Supp. 3d 213, 223 (S.D.N.Y. 2014) (“A person has no expectation of privacy in another person’s email account.”). Subject to the restrictions set forth below, if the government identifies any additional intercepted or recorded electronic communications obtained without judicial authorization or the consent of a party to those communications, the government will advise you of that information.

A. FISA and NSA Prism Program

You have requested any evidence obtained or derived from the NSA Prism program or from acquisition of foreign intelligence information conducted pursuant to FISA. See Dkt. No. 141 at 1-2; Dkt. No. 154 at 1-2. When the government “intends to enter into evidence or otherwise use or disclose” any “information obtained or derived from” electronic surveillance or a physical search conducted pursuant to FISA against an aggrieved person¹ in a criminal case, it must provide notice to that individual. 50 U.S.C. §§ 1806(c); 1826(d); 1881(e). The government’s notice obligations regarding its use of FISA information under §§ 1806, 1825, and 1881(e) apply only if the government (1) “intends to enter into evidence or otherwise use or disclose,” (2) “against an aggrieved person,” (3) in a “trial, hearing or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States,” (4) any “information obtained or derived from,” (5) an “electronic surveillance [or physical search] of the aggrieved person.” 50 U.S.C. § 1806(c); see also 50 U.S.C. § 1825(d); 50 U.S.C. § 1881e(a) (providing that information acquired pursuant to Title VII of FISA, 50 U.S.C. § 1881a, “shall be deemed to be information acquired from an electronic surveillance pursuant to title I [50 U.S.C. §§ 1801-1810] for purposes of”

¹ An “aggrieved person” is the target of the electronic surveillance or “any other person whose communications or activities were subject to electronic surveillance.” 50 U.S.C. § 1801(k). A person is also aggrieved if his or her “premises, property, information, or material is the target of the physical search” or “subject to physical search.” 50 U.S.C. § 1821(2).

50 U.S.C. § 1806). Where all five criteria are met, the government will notify the defense and the Court (or other authority) in which the information is to be disclosed or used that the United States intends to use or disclose such information. The Government has not provided notice of use of FISA in this case.

B. DEA SOD and the Practice of Parallel Construction

You have requested any evidence obtained or derived from the DEA's SOD and/or the practice of "parallel construction." See Dkt. No. 141 at 2; Dkt. No. 154 at 1. The government is aware of its discovery obligations and will evaluate whether such information exists and is discoverable.

C. GPS Device/Historical Cell Site Data

You have requested that the government "identify and produce any evidence obtained through warrantless use of a GPS device or through the warrantless use of cell site/tower data." Dkt. No. 141 at 2; Dkt. No. 154 at 2. To the extent that law enforcement officers obtained evidence through searches of persons other than the defendant during the course of this investigation, the defendant lacks standing to challenge those searches. See Padilla, 508 U.S. at 81-82; United States v. Baltes, No. 8:11-21 CR-282 (MAD), 2013 WL 11319002, at *3 (N.D.N.Y. Apr. 22, 2013) (holding that passenger in vehicle had no standing to challenge placement of GPS device on vehicle, because he had no protected property interest in vehicle). Similarly, to the extent law enforcement officers conducted searches of the defendant outside the United States, the Fourth Amendment does not apply to such searches, and the defendant has no basis to seek suppression of evidence derived therefrom. See United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990) ("At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application."); United States v. Coke, No. 07 CR 971 RPP, 2011 WL 3738969, at *4 (S.D.N.Y. Aug. 22, 2011) ("[W]here a defendant is not a United States citizen, and has no substantial, voluntary attachment to the United States, and the search at issue occurs abroad, the Fourth Amendment has no application." (internal quotation marks omitted)). Thus, because the defendant cannot challenge the admissibility of any evidence derived from the sources you describe, to the extent such evidence exists, it is not discoverable under Rule 16.

II. Wiretap and/or Title III Intercepts and/or Foreign Intercepts

You have requested various documents related to domestic and foreign wiretaps in this case. See Dkt. Nos. 141 at 2, 154 at 2. The government will provide inventory notice to the defendant pursuant to 18 U.S.C. § 2518(8)(d) of all Title III wiretap orders in which he was named and/or pursuant to which he was intercepted. See 18 U.S.C. § 2510(11) (defining "aggrieved person" to be "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed"). To the extent that the government intends to rely on intercepted communications obtained pursuant to any such wiretap order at trial, the government has produced or will produce documents discoverable

under Rule 16 related to that wiretap order. Specifically, the government has produced or will produce: (1) the application and affidavit in support the application for the wiretap order; (2) the order authorizing the interception; (3) the intercepted wire and/or electronic communications obtained pursuant to that wiretap order; (4) draft transcripts, translations and/or summaries of those wire and/or electronic communications, if available (pursuant to the parties' September 12, 2017 stipulation) and (5) the order sealing the intercepted communications at the conclusion of the authorized interception period. The remaining documents that you have requested with respect to Title III wiretaps, such as daily reports, ten-day reports and operating procedures, are not discoverable under Rule 16. See Fed. R. Crim. P. 16(a)(2); United States v. Pray, 734 F. Supp. 2d 158, 160 (D.D.C. 2010) (holding that periodic wiretap reports, as well as prosecutor's memos and notes regarding wiretap, are not discoverable under Rule 16).

With respect to the foreign wiretaps related to this case, the government has provided or will provide you with the following documents, to the extent that they are within the possession, custody or control of the government: (1) the intercepted wire and/or electronic communications obtained pursuant to that wiretap order and (2) draft transcripts, translations and/or summaries of those wire and/or electronic communications, if available (pursuant to the parties' September 12, 2017 stipulation).² The defendant lacks standing to seek to suppress the communications of other persons intercepted pursuant to foreign wiretap orders. Padilla, 508 U.S. 77 at 81-82; Lustyik, 57 F. Supp. 3d at 223. Additionally, the Fourth Amendment does not apply to the interception of the defendant's communications pursuant to foreign wiretap orders. See Verdugo-Urquidez, 494 U.S. at 274-75; see also United States v. Lee, 723 F.3d 134, 139, 142 (2d Cir. 2013) (stating that Title III does not apply outside United States and noting that neither government nor district court had duty to review legality, under foreign law, of applications for wiretap orders). Accordingly, the additional documents you have requested with respect to foreign wiretaps are not discoverable under Rule 16.

III. Brady/Giglio/3500 Material

You have requested nineteen categories of documents that you identify as Brady material. See Dkt. No. 141 at 3-5.³ The government has already represented that it is aware of, has complied with and will continue to comply with its obligations under Brady as soon as the character of such information is recognized. See May 26, 2017 Gov't Reply to Def. Motion to Compel, Dkt. No. 84 at 12; June 29, 2017 Mem. & Order, Dkt. No. 101 at 17. Such representations are sufficient to satisfy the government's Brady obligations. See United States v. Coppa, 267 F.3d F.3d 132, 145 (2d Cir. 2001) (noting that Brady and Giglio require

² Insofar as the government has already produced some foreign wiretap applications and orders in discovery, the government has provided those documents as a courtesy. The government is not obligated to produce such documents under Rule 16.

³ In your letter, your listed requests end at number twenty, but there was no request number 8. See Dkt. No. 141 at 4-5.

production of exculpatory and impeachment material in sufficient time for defense to use it effectively); United States v. Dolney, No. 04-CR-159 (NGG), 2005 WL 1076269, at *8 (E.D.N.Y. May 3, 2005) (denying motion to compel the production of Brady and Giglio material); United States v. Martinez-Martinez, No. 01 Cr. 307, 2001 WL 1287040, at *5 (S.D.N.Y. Oct. 24, 2001) (same). Portions of the evidence that you request are “at most impeachment material” but are not “sufficient to meet the standard of prejudice for . . . Brady” material. United States v. Gioeli, No. 08 Cr. 0240(BMC), 2013 WL 5502953, at *10 (E.D.N.Y. Oct. 1, 2013). Additionally, you request immediate disclosure of 18 U.S.C. § 3500 material under the guise of your request for Brady material. You are not entitled to the disclosure of Giglio and § 3500 material at this time. See, e.g., United States v. Nixon, 418 U.S. 683, 701 (1974) (“Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial”); Coppa, 267 F.3d at 145 (granting writ of mandamus to vacate district court decision to order early disclosure of § 3500 material, which did not constitute material Brady/Giglio evidence). As discussed infra, see Section XVI., the government will produce most Giglio and § 3500 material on a rolling basis in advance of trial.

IV. Evidence Seized / Search Warrants

You have requested evidence seized as a result of any law enforcement search conducted with or without a warrant, as well as any warrants associated with those searches. See Dkt. No. 141 at 6. The government has produced or will produce any evidence discoverable under Rule 16 that law enforcement officers seized as a result of a search conducted with or without a warrant. Additionally, the government has produced or will produce law enforcement reports detailing the date, time, location and items seized pursuant to any such search.⁴ Insofar as the defendant may have standing to challenge any of these searches, the government will produce warrants associated with such searches under Rule 16.⁵ See, e.g., United States v. Wilson, No. 15-CR-00142-EAW-MJR, 2017 WL 1456984, at *8 (W.D.N.Y. Apr. 25, 2017) (holding defendant had “no practical need for” sealed search warrants where he lacked standing to challenge search); United States v. Findley, No. 09-CR-267A SR, 2010 WL 4273919, at *3 (W.D.N.Y. Oct. 28, 2010) (“Absent standing to challenge the search warrant . . . , the defendant’s request [for production of search warrant] is denied without prejudice.”); United States v. Nunez, No. 89-CR-730, 1989 WL 161534, at *1 (S.D.N.Y. Dec. 22, 1989) (holding search warrant not material to preparation of defense where defendant had not shown privacy interest in premises searched). To that end, to the extent that the defendant claims a possessory interest or reasonable expectation of privacy in any of the

⁴ Although these law enforcement reports fall within the scope of 18 U.S.C. § 3500, as a courtesy, the government has elected to disclose certain reports related to seized evidence earlier than it is required to do so under the law. By producing these reports early, however, the government does not concede that the defendant is entitled to further early production of materials pursuant to 18 U.S.C. § 3500.

⁵ By producing the search warrant associated with a particular search, the government does not concede that the defendant has standing to challenge that search.

locations searched or evidence seized, please advise the government of the specific evidence and/or locations.

V. Tangible Objects

You have requested “the opportunity to inspect and copy as well as test, if necessary, all other documents and tangible objects.” Dkt. No. 141 at 7. As indicated in the government’s April 10, 2017 letter producing discovery, see Dkt. No. 60 at 2, you may examine the physical evidence discoverable under Rule 16, including original documents, when available, by arranging a mutually convenient time with the government.

VI. Documents

You have requested that the government produce documents that it intends to use at trial as evidence in its case-in-chief and documents material to the defense. See Dkt. No. 141 at 8-9. The government is aware of, and has complied with, its obligations to produce such documents under Rule 16(a)(1)(E). Indeed, the government has produced documents responsive to this request in its discovery productions in this case to date, and it will continue to do so.

As part of this request, you seek audio/video/digital recordings, whether in the possession of the United States or any other government, related in any way to the investigation and/or prosecution of the defendant. See Dkt. No. 141 at 8. However, the requested documents in the possession of other governments are by their very definition not within the government’s possession, custody or control under Rule 16(a)(1)(E)(i). The prosecution team in this matter does not include other governments. Therefore, the government is not obligated to turn over such documents under Rule 16(a)(1)(E)(i). See, e.g., United States v. Connolly, No. 1:16-CR-00370(CM), 2017 WL 945934, at *4 (S.D.N.Y. Mar. 2, 2017) (“Courts have typically required the prosecution to disclose under Rule 16 documents material to the defense that (1) it has actually reviewed, or (2) are in the possession, custody, or control of a government agency so closely aligned with the prosecution team so as to be considered part of the prosecution team.”) (citation omitted)).

VII. Arrest Reports, Notes and Dispatch Tapes

You have requested that the government “produce all arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding [the defendant’s] arrest or questioning.” Dkt. No. 141 at 8. Such reports, to the extent that they are in the possession, custody or control of the government, are § 3500 material, which is not discoverable at this time. See Fed. R. Crim. P. 16(a)(2); 18 U.S.C. § 3500.

Your request also includes “any rough notes records, report, transcripts or other documents” that contain the defendant’s statements or Brady material. Dkt. No. 141 at 8. The government is aware of, and has complied with, its obligations to produce the defendant’s statements pursuant to Rule 16(a)(1)(A)-(B). The government has produced and will continue

to produce the defendant's statements that are discoverable under Rule 16. Additionally, as discussed supra, see Section III., the government is aware of and will comply with its Brady obligations.

VIII. Defendant's Statements

You have requested "[a]ll written or recorded statements made by [the defendant], at any time and in any context, regardless of the government's intentions with respect to their use at trial." Dkt. No. 141 at 9. The government is aware of, and has complied with, its obligations to produce the defendant's statements pursuant to Rule 16(a)(1)(A)-(B). The government has produced and will continue to produce the defendant's statements that are discoverable under Rule 16.

IX. Criminal Record

As indicated in the government's April 10, 2017 letter producing discovery, see Dkt. No. 60 at 1, the government is not aware that the defendant has a criminal record in the United States. The government is aware that the defendant has a criminal history in Mexico; however, a copy of the defendant's prior criminal record from Mexico is not presently within the government's possession, custody or control.

X. Other Bad Acts, Wrongs or Acts

You have requested that the government "describe in full detail any allegations of uncharged conduct by [the defendant] that the government intends to introduce at trial." Dkt. No. 141 at 10. The government will provide "reasonable notice of the general nature of any such evidence that [it] intends to offer at trial." Fed. R. Evid. 404(b)(2).

You further request that the government advise you of "any allegations of misconduct that the government may seek to use for impeachment or other purposes at trial." Dkt. No. 141 at 10. If the defendant testifies at trial, the government will offer impeachment evidence in accordance with Federal Rules of Evidence 608 and 609.

XI. Grand Jury Issues

You have requested certain information related to the grand jury proceedings in this case. See Dkt. No. 141 at 10. Under Federal Rule of Criminal Procedure 6(e), you are not entitled to the materials requested. See Dkt. No. 101 (rejecting defendant's motion to compel grand jury materials under Rule 6(e)).

XII. Expert Testimony

You have requested that the government provide you with notice and certain other information regarding expert witnesses that it intends to call at trial. See Dkt. No. 141 at 10. The government is aware of, and will comply with, its obligations to provide expert notice under Rule 16(a)(1)(G) and Federal Rules of Evidence 702, 703 and 705. It will notify

you in a timely fashion of any expert that it intends to call at trial and provide you with a summary of the expert's opinion. In its April 14, 2017 and September 19, 2017 letters producing discovery, the government provided notice of certain experts that it intends to call and the substance of their expected testimony. See Dkt. No. 60 at 2; Dkt. No. 140 at 2-3. The government will provide the identity, qualifications and bases for the conclusions of each expert to you when they become available. As the government identifies additional experts, it will provide appropriate notice.

XIII. Reports of Scientific Tests or Examinations

You have requested that the government produce "reports of all tests and examinations conducted on the evidence in this case." Dkt. No. 141 at 11. The government is aware of, and has complied with, its obligation to produce reports of examinations and tests discoverable under Rule 16(a)(1)(F). The government has produced and will continue to produce reports of examinations and tests discoverable under Rule 16 to you.

XIV. Summary or Demonstrative Evidence

You have requested that the government "produce any chart, summary, or calculation" that it intends to introduce into evidence, as well as the documents upon which such charts, summaries and calculations are based. Dkt. No. 141 at 11. Pursuant to Federal Rule of Evidence 1006, the government will make these documents available to you at a reasonable time and place.

XV. Identifications

You have requested that the government "provide a description of any identification procedures . . . employed with regard to any potential government witness." Dkt. No. 141 at 11. The government will provide documentation of witness identifications of the defendant; however, it will use pseudonyms to identify each witness until the government discloses § 3500 material for that witness. The government is aware of and will comply with its obligation to produce exculpatory material or information under Brady and will provide any information responsive to this request regarding identification procedures. See Neil v. Biggers, 409 U.S. 188, 197 (1972).

XVI. Witnesses

You have requested that the government provide you with "the names and last known addresses/locations of all witnesses that the government intends to call in its case in chief." Dkt. No. 141 at 11. You further request that the government advise you if a witness will testify under a pseudonym, as well as the nature of that witness's testimony and the basis for the testimony under a pseudonym. See id. The government will provide you with the identity of its law enforcement witnesses and § 3500 material for such witnesses two months in advance of trial. The government will provide you with the identity of most of its lay and cooperating witnesses one month in advance of trial. Due to safety concerns related to particular witnesses, the government may delay disclosure of the identities of and § 3500

material for certain witnesses. See United States v. Fields, 113 F.3d 313, 324 (2d Cir. 1997) (holding that government generally not required to disclose identity of confidential informants) United States v. Russotti, 747 F.2d 945, 950 (2d Cir. 1984) (stating that informant's identity need not be disclosed unless "essential to the defense"); United States v. Cannone, 528 F.2d 296, 302 (2d Cir. 1975) (defense must make particularized showing for government's witness list that outweighs countervailing safety concerns). Additionally, the government may make a motion to the Court in advance of trial requesting that certain witnesses testify under pseudonyms. The government does not intend to disclose the addresses/locations of its lay and cooperating witnesses in this case, because of the safety concerns related to such a disclosure. The government will provide the names and contact information for the attorneys for lay and cooperating witnesses at the time it discloses the identities of those witnesses.

You have further requested various Brady/Giglio information related to the government's witnesses. See Dkt. No. 141 at 12. As discussed supra, see Section III., the government is aware of and will comply with its Brady/Giglio obligations.

XVII. Co-Conspirators

You have requested the names and addresses of the defendant's alleged co-conspirators; a copy of each co-conspirator's mug shot; and certain statements made by co-conspirators. These requests are overly broad and largely fall outside the scope of Rule 16. See United States v. Ojeikere, 299 F. Supp. 2d 254, 261 (S.D.N.Y. 2004) ("[D]emands for particular information with respect to where, when, and with whom the Government will charge the defendant with conspiring are routinely denied."). To the extent that these requests include information discoverable under Rule 16, the government will provide such information to you.

XVIII. Information Regarding Informants and Cooperating Witnesses

You have requested that the government provide you "all relevant information concerning any informants or cooperating witnesses involved in this case," including their identities and locations. Dkt. No. 141 at 13. The government has already addressed your request for the identity and location of the government's witnesses. See Section XVI. supra. To the extent this is a request for Brady/Giglio information, the government has already addressed this request as well. See Section III. supra.

XIX. Government Examination of Law Enforcement Personnel Files

You have requested that the government "examine the personnel files and any other files within its custody, care or control, or that could be obtained by the government, and that relate to all testifying officers and agents." Dkt. No. 141 at 13. As discussed supra, see Section III., the government is aware of and will comply with its Brady/Giglio obligations. In accordance with those obligations, the government will conduct a review of personnel files of all law enforcement officers who will testify at trial, to the extent such files are accessible to

the government. The government will produce the substance of any portions of law enforcement personnel files that contain Brady/Giglio material.

XX. Return of Personal Property

You have requested that the government arrange for the “return of all personal property, belongings and effects which were taken from [the defendant] at the time of his arrest or thereafter.” Dkt. No. 141 at 13. The government is not in possession, custody or control of any property taken from the defendant at the time of his various arrests in Mexico. To the extent you are requesting return of personal property in his possession at the time of his extradition to the United States from Mexico, the defendant did not have any personal property.⁶

XXI. Lost or Destroyed Evidence

The government is currently working to identify the status of all physical evidence in this case. Insofar as particular evidence has been lost or destroyed, the government has already notified or will notify you of that fact.

XXII. Preservation of Evidence

The government is in receipt of your request to preserve evidence and will make every effort to comply with it.

XXIII. Cell-Site Simulator

You have requested that the government “produce any and all information that was obtained as the result of the use of a ‘Triggerish,’ ‘cell-site simulator’ or similar device.” Dkt. No. 154 at 2. As discussed supra, see Section I.C., insofar as law enforcement officers obtained location data of persons other than the defendant during the course of this investigation, the defendant lacks standing to challenge such searches. See Padilla, 508 U.S. at 81-82; Baltes, 2013 WL 11319002 at *3. Likewise, to the extent law enforcement officers conducted searches outside the United States that yielded the defendant’s location data, the Fourth Amendment does not apply to such searches, and the defendant has no basis to seek suppression of that location data or evidence derived therefrom. See Verdugo-Urquidez, 494 U.S. at 274-75; Coke, 2011 WL 3738969, at *4. Accordingly, to the extent it exists, the information you seek is not discoverable under Rule 16.

⁶ The government returned the prison uniform that the defendant was wearing at the time of his extradition to Mexican authorities, per their request, immediately following the defendant’s arrival in the United States.

XXIV. Already Produced Discovery

You have requested that the government provide you with certain information related to documents that the government has already produced in discovery. See Dkt. No. 154 at 3. Set forth below are the government's responses to those specific requests.

- A. You have requested "the original recordings" of the documents Bates-stamped 00000012[0]-000000215, as well as the "dates of the conversations, the linesheets (if any), the identity of the parties involved and how the recordings were made." Id. The government produced the audio recordings that correspond to the draft summaries Bates-stamped 000000120-000000215 on April 10, 2017, in same production as the draft summaries. See Dkt. No. 60. The audio recordings are Bates-stamped 000000463. As indicated in the government's April 10, 2017 discovery letter, see id., the recordings are communications of the defendant and/or his associates. The government also has produced a spreadsheet Bates-stamped 000054046 containing the dates of the audio recordings. These communications were intercepted pursuant to foreign judicial orders authorizing the interception.⁷

- B. You have requested "the original recordings" of the documents Bates-stamped 000002648-000003701, as well as the "dates of the conversations, the linesheets (if any), the identity of the parties involved and how the recordings were made." See Dkt. No. 154 at 3. The government produced the audio recordings that correspond to the draft summaries Bates-stamped 000002648-000003701 on May 5, 2017, in same production as the draft summaries. See Dkt. No. 72. The audio recordings are Bates-stamped 000003880. The recordings are communications of associates of the defendant. The government also has produced a spreadsheet Bates-stamped 000054046 containing the dates of the audio recordings. These communications were intercepted pursuant to foreign judicial orders authorizing the interception.

- C. You have requested that the government produce color versions of the black and white images it produced on July 21, 2017. See Dkt. No. 154 at 3. On July 21, 2017, the government produced color versions of photographs that it had previously produced in black and white. See Dkt. No. 109 at 2-3. To the extent that you need additional copies of those color photographs, please contact us and provide the Bates-numbers of the particular photographs that you seek. You have also requested that the government identify the "dates and locations where the images were taken; the identity of the person(s) taking the image and

⁷ If you are requesting the production of the discs in evidence containing the original audio recordings, the government notes it is not required to produce those discs in discovery. See Fed. R. Evid. 1003. You may, however, inspect the original discs by contacting us to arrange a mutually convenient time.

describe the relevance of the images to this case.” See Dkt. No. 154 at 3. The government notes that it has provided law enforcement reports detailing the events surrounding particular seizures and that many of the photographs it has produced relate to those seizures.⁸ Insofar as you have questions regarding particular photographs, please contact us and provide the Bates-numbers of the particular photographs about which you have questions. The government will provide information about the photographs that is discoverable under Rule 16.

- D. You have requested that the government provide you a new disc containing the documents produced on August 11, 2017. The government has conferred with you about this issue in an attempt to resolve it. If you continue to have difficulty accessing the documents produced on August 11, 2017, please contact us.
- E. You have requested “the original recordings” of the documents Bates-stamped 000044187-000053316, as well as the “dates of the conversations, the linesheets (if any), the identity of the parties involved and how the recordings were made.” See Dkt. No. 154 at 3. The government produced the electronic communications that correspond to the draft translations Bates-stamped 000044187-000053316 on September 19, 2017, in same production as the draft translations. See Dkt. No. 140. The electronic communications are Bates-stamped 000053317. The recordings are communications of associates of the defendant. The dates of the communications are reflected in the electronic communications and draft translations. These communications were obtained pursuant to a lawful warrantless search conducted of a server located in a foreign country.

⁸ As noted supra, see Section IV., although these law enforcement reports fall within the scope of 18 U.S.C. § 3500, the government has elected to disclose certain reports earlier than it is required to do so under the law.

If you have any further questions or requests regarding discovery, please do not hesitate to contact us.

Very truly yours,

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