

PLEASE TAKE NOTICE that on July 12, 2018, or as soon as the matter may be heard before the Honorable Nathanael Cousins, defendant CLIENT NAME, by and through counsel, will move for entry of an order pursuant to Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963), compelling the government to permit a defense expert to independently examine the drug evidence seized in this case. This motion is made on the ground that denying the defense the ability to independently examine the evidence would violate Rule 16(a)(1)(E) and *Brady*. This motion is based upon this notice of motion and motion, the attached memorandum of points and authorities, the case file and record, and such argument as may be presented at the hearing on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

Mr.NAME is charged with conspiracy to possess and distribution of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and (B). The government alleges that on August 3, 2016, and September 12, 2016, Mr.NAME sold 23.5 grams and 55.7 grams respectively of methamphetamine to a confidential informant. These are the only drug amount involved in the offense. As to count one, the government alleges Mr.NAME conspired to distribute the combined amounts of methamphetamine sold to the confidential informant. The August and September transactions and amounts are separately charged in counts two and three. As alleged in the indictment, Mr.NAME is subject to a ten-year mandatory minimum as to count one, a five-year mandatory minimum as to count two, and a ten-year mandatory minimum as to count three. The drugs seized in this case were tested by the DEA Laboratory and those results have been produced in discovery to the defense.

The defense has retained Forensic Chemist Bill Posey of Central Valley Toxicology, a DEA certified lab, to reexamine the drug evidence seized in this case. On May 29, 2018, consistent with the local practice in this and other cases, the defense provided the government with a proposed stipulation and protective order to permit the defense expert to retest and weigh the drug evidence seized in this case. The stipulation conformed with and was based on prior stipulations drafted by the United States Attorney's Office to fulfill its obligations in response to

defense requests under Rule 16 for drug evidence retesting. *See United States v. Anton Barragan Solorio*, CR 11-00571 WHA, Docket Item No. 57; *United States v. Aguilar*, 13-00688-LHK, Docket Item No. 22., attached hereto as Defense Exhibit A. Nonetheless, on June 25, 2018, the government advised the defense it would not stipulate to permit the defense to retest the seized drugs. Accordingly, the defense submits the instant motion and proposed order to permit the defense access to drug evidence for retesting, as provided for by Rule 16(a)(1)(E). For the reasons below, the defense respectfully request the court enter the attached proposed order filed herewith.

ARGUMENT

Under Rule 16(a)(1)(E), the government is required to produce documents or data “if the item is within the government's possession, custody, or control” and “the item is material to preparing the defense.” Specifically, Rule 16(a)(1)(E) provides:

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.”

Fed. R. Crim. P. 16(a)(1)(E). Here, the defense request clearly meets all these requirements. It is undisputed that the drugs are in the government’s possession, custody and control; the quantity of the drugs is central to the defense; there can be little doubt that the government intends to introduce the evidence in its case-in-chief; and the government alleges that the drugs were obtained from or belong to the defendant.

Moreover, in cases involving a controlled substance, part and parcel of the examination or inspection is the right of the accused to have an independent chemical analysis performed on the seized substance. *United States v. Butler*, 988 F.2d 537, 543 (5th Cir. 1993) (refusal to grant defendant's motion to compel government to produce samples of substance in controlled substance case so defendant could conduct independent chemical analysis was error); *see also United States v. Noel*, 708 F. Supp. 177 (W.D. Tenn. 1989) (defendants charged with unlawful

possession with intent to distribute cocaine were entitled to a sample of the alleged controlled substance for independent testing). Rule 16(a)(1)(E) and the case law are clear: the government must permit the defense access to the drug evidence for retesting. Here, the quantity of drugs is relevant, and undoubtedly will be offered in the government's case in chief, because it must be proved to a jury and will impact the charge – possessing 50 grams or more of a methamphetamine mixture with intent to distribute. Additionally, should Mr.NAME be convicted, his advisory guideline will be impacted by the purity of the substance. *See* USSG §2D1.1. Because both the weight and purity of the methamphetamine are critical factual issues with respect to whether Mr.NAME may be subject to a ten-year mandatory minimum, the defense requests that the Court enter an order to permit the defense to independently examine the drug evidence. The defense is admittedly puzzled by the government's unwillingness comply with Rule 16(a)(1)(E) and to enter into a stipulation that is identical to those prepared by the government in other cases. In the event that the court determines this issue may be resolved without a hearing or further argument, the defense respectfully asks that the Court enter the order filed herewith.

CONCLUSION

For the reasons set forth above, the defense respectfully requests that the Court order the government to make the drug evidence available as set forth in the proposed order.