## SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

**Criminal Division – Felony Branch**

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| **UNITED STATES OF AMERICA****v.** | **:****:****:****:****:****:****:****:****:** | **Case No.****Hon. Michael Ryan****Trial Date: April 15, 2014** |

**MOTION TO COMPEL DEA-RELATED DISCOVERY OR IN THE ALTERNATIVE TO DISMISS**

C , through undersigned counsel, pursuant to the Fifth and Sixth Amendments to the United States Constitution and Superior Court Rule of Criminal Procedure Rule 16, respectfully moves this Court to compel previously requested discovery related to the narcotics allegedly seized in this case or, in the alternative, to dismiss this case. Mr.

requests a hearing on this Motion.

In support of this Motion counsel states:

1. Mr. is charged by indictment with one count of Unlawful Distribution of a Controlled Substance, in violation of D.C. Code § 48-904.01(a)(1) as well as Offenses Committed During Release, in violation of D.C. Code § 23-1328(a)(1).
2. On December 26, 2013, the government provided Mr. Ferguson Evans, former counsel for Mr. , with DEA forms 113, 7, and 86 concerning the laboratory analysis of the alleged narcotics involved in this case. The DEA forms 113 and 86 are both largely illegible.
3. On January 17, 2014 the day that undersigned counsel was appointed to replace Mr.

Ferguson Evans as counsel to Mr. , undersigned counsel served the government

with initial discovery and preservation requests. See Exhibit A*.* Those requests

specifically requested the DEA-related materials Mr. now requests the Court to compel.

1. On January 24, 2014, undersigned counsel served the government with a more detailed Rosser letter, stating, inter alia, the following:

**Discovery Requests Relating to the Evidence Seized in this Case, If Analyzed by the DEA**, Rule 16(a)(1)(C), (D), and (E)

On January 17, 2014, I served Government counsel with a two-page supplemental discovery letter setting forth detailed requests that are specific to the charge(s) in this case pertaining to allegations involving controlled substances. At this point, I have no intention of stipulating to the alleged results of the drug analysis. I hereby reiterate each of the requests set forth in that letter. Additionally, I ask that you please provide the following:

* + **Case file.** Please provide a complete copy of the chemist’s case file, including all records created by the Drug Enforcement Agency (“DEA”), the Metropolitan Police Department (“MPD”), or any other agency that participated in the testing of the alleged controlled substances in this case. These materials should include bench notes, including that of the drug extraction process, memoranda, DEA-7 reports, DEA-113 reports, chemist worksheets, evidence reports, chain-of-custody reports, reports of equipment calibration checks, negative and positive control data, chromatographs, mass spectra, infrared spectra, communication logs, contamination logs, diagrams, and photographs of evidence and results of any color tests and microchemical crystal tests.
	+ **Chain of custody.** Please provide copies of all records that document the collection and handling of physical evidence, from the initial point of collection to the current disposition.
	+ **Statistical information.** Please provide the ranges of “expected results,” including any gas and/or liquid chromatography retention times and peak heights, mass spectroscopy mass-to-charge ratios, UV-Vis and IR absorption peaks and shoulders, thin layer chromatography retention factors of, drug standards, internal standards, solvents, and any other analytes used to interpret the data from each of the tests performed in this case.
	+ **Protocols.** Please provide a copy of all handbooks, guidelines, protocols and training materials used by each laboratory that conducted testing in this case. These materials should include:
		- Quality control procedures governing the handling and examination of evidence samples.
		- Quality assurance procedures employed by the laboratory to monitor and document its performance, including but not limited to internal and external auditing, proficiency testing, and document control procedures.
		- Standard operating procedures for each of the methods used to examine the substances in the above-captioned case (e.g., organic extractions, gas chromatography (GC); mass spectrometry (GC/MS); infrared spectrometry (IR)), including procedures for collection of analytical samples from evidentiary materials, i.e., for collection of representative aliquots.
	+ **Validation studies.** Please provide the results of validation studies and calibration curves for each method used to analyze evidence. (If the laboratory did not perform a formal validation study for the determination of controlled substances using the subject methods, provide a copy of empirical results verifying the laboratory’s ability to meet the desired performance characteristics for each testing method that was externally validated, including explicit reference to the original validation record used by the laboratory.)
	+ **Reagents and materials.** Please provide source, preparation, and usage records for any and all reagents or other materials used during testing, including but not limited to the quality control test results of the certified standard on the day the testing for this case was done; the date each reagent was made; HPLC graphs and UV spectra for all reagents; “as prepared” and “as determined” values for all negative and positive controls; records that demonstrate traceability for standards and reference materials used for calibration and quality-control purposes during casework testing.
	+ **Instruments and equipment.** Please provide the make and model of any instruments or equipment used during testing of the alleged controlled substances in this case, as well as manuals and instructions provided by the manufacturer, validation studies pertaining to laboratory equipment, documentation of maintenance of laboratory equipment, and corrective action logs pertaining to laboratory equipment.
	+ **Laboratory production data.** Please provide laboratory production data for the tests performed in the subject case (gas chromatography (GC); mass spectrometry (GC/MS); infrared spectrometry (IR)), including specifics of the instruments and columns, temperature ramping programs, solvent gradient programs, internal and external controls and solvents that were used, the total spectral ranges observed, the total chromatography run times, and the number of tests performed.
	+ **Audits and accreditation.** Please provide copies of any audit reports for the

period beginning one year prior to the testing performed in the above-captioned case to the present, as well as copies of all certificates of accreditation for the laboratory where the testing was conducted.

* + **Personnel.** Please provide background information about each person involved in conducting or reviewing the controlled substance analysis in this case, including a job description, current resume, copies of all proficiency examinations and their results, and any performance evaluations.
	+ **Field test kit.** I request that you allow me to inspect and photograph the field test kit that was used in this case, and any material that was tested in the kit.

I hereby request permission for myself and an expert retained by the defense, to inspect the facility where testing of the alleged controlled substances was conducted in this case. See Super. Ct. Crim. R. 16(a)(1)(C) (“Upon request of a defendant the prosecutor shall permit the defendant to inspect tangible objects, buildings or places. .

. which are in the possession and control of the government, and which are material to the preparation of the defendant’s defense…”). Specifically, I request that you permit us to inspect those portions of the laboratory where the evidence in this case was or will be stored, handled or analyzed, and whatever instruments were or will be used to analyze the evidence in this case. If there are any DEA procedures that need to be followed in order to gain access to the laboratory, please inform me of those procedures at your earliest opportunity.

See Exhibit B at 6-8.

## The letter also noted, “The government has disclosed what appears to be a packet including a DEA-113 and DEA-86, however the handwriting on it is illegible. I hereby request a copy of the form in which the handwriting is legible or, alternatively, a legible transcription of the forms.” Id. (emphasis in original).

1. On February 24, 2014, undersigned counsel emailed AUSA Jason Park to repeat its request for discovery, and the aforementioned DEA-related discovery in particular. See

Exhibit C.

1. On February 25, AUSA Park responded that he was no longer the assigned attorney, that AUSA L’Shauntee Robertson would be handling the case, and that she was copied on the

email containing my discovery requests.

1. On February 27, 2014, AUSA Robertson provided undersigned counsel with a recorded radio run, authentication event chronology, and booking photographs of Mr.

and Mr. Hunter.

1. On February 27, 2014, undersigned counsel emailed AUSA Robertson to repeat his outstanding discovery requests and to inform her that he would be filing a motion to compel DEA-related discovery. See Exhibit D.
2. On February 27, AUSA Robertson responded, “I am aware of the government’s discovery obligations, and reiterate that discovery is ongoing.” See id.
3. On March 6, AUSA Robertson provided counsel with certain additional documents contained in the DEA analyst’s “file.” Those documents did not address the majority of defense counsel’s outstanding requests for discovery.
4. The documents sought by undersigned counsel are discoverable under Rule 16 for the reasons outlined in the Memorandum below. As such, the government is required to provide the requested discovery.
5. Mr. therefore respectfully requests this Honorable Court to compel the government to produce the request drug related discovery pursuant to Rules 16(a)(1)(C), 16(a)(1)(D), and 16(a)(1)(E) or, in the alternative, to dismiss this case as an appropriate sanction for the government’s failure to comply with its obligations under Rule 16.
6. Mr. requests a hearing on this Motion.

**MEMORANDUM OF POINTS AND AUTHORITIES**

1. **Rule 16 and the Fifth and Sixth Amendments to the United States Constitution Require the Government to Produce the Requested DEA-Related Material.**
	1. **Rule 16(a)(1)(C) and (D) require the government to produce the requested materials related to the testing of the substance allegedly recovered in this case.**

The requested materials are discoverable under Superior Court Criminal Procedure Rule 16(a)(1)(C) and (D). Rule 16(a)(1)(C) provides, in pertinent part, that the government must give the Defendant access to documents and tangible objects “material to the preparation of the defense.” Rule 16(a)(1)(D) requires the government to provide any results or reports of “scientific tests or experiments” which are material to the preparation of the defense. In discussing whether an item is “material to the preparation of the defense,” the D.C. Court of Appeals has noted that “[i]n general, our decisions have interpreted that requirement of Rule 16 liberally. It looks only to ‘the potential value of the evidence’ to competent defense counsel.” Washington v. United States, 768 A.2d 580, 583 (2001) (citing Wiggins v. United States, 386

1. 2d 1171, 1174 (D.C. 1978)). The question is “whether there exists a reasonable indication that the requested evidence will either lead to other admissible evidence, assist the defendant in the preparation of witnesses or in corroborating testimony, or be useful as impeachment or rebuttal evidence.” Id. (citing United States v. Curtis, 755 A.2d 1011, 1015 (D.C. 2000). “The threshold

showing of materiality is not a high one.”) Id.

In this case, the data underlying the DEA’s conclusions, including the spectral analysis, is material to the preparation of Mr. ’s defense. Whether the recovered substance is actually a controlled substance is an element of the offense of Unlawful Distribution of a Controlled Substance—Cocaine, and is therefore one of the material issues in this case. See D.C.

Code § 48-904.01(a). The DEA’s identification of controlled substances involves the use of techniques including gas chromatography/mass spectrometry (“GC/MS”), infrared spectroscopy (IR), and gas chromatography with a flame ionization detector (GC/FID). The machinery used

in conjunction with this technique produces computer data, including gas chromatographs and mass spectra (“spectral analyses”), which constitute the “raw data” that a chemist uses to form conclusions about the identity of the substances in question. When the raw data is interpreted by the chemist, the chemist transcribes his conclusions, based on the raw data, onto the DEA-7 form and the accompanying DEA-86 worksheet.

In this case, there is a clear relationship between (a) the underlying spectral analysis and other testing and evaluation procedures and (b) the central issue – whether or not the substance in question is in fact a controlled substance. Without the complete spectral analyses that result from the GC/MS test, gas chromatography/mass spectrometry (“GC/MS”), infrared spectroscopy (IR), and gas chromatography with a flame ionization detector (GC/FID), which underlie the chemist’s conclusions, the defense cannot determine whether the chemist’s conclusions are supported by the data or whether they can be impeached through cross–examination. See

Washington, 768 A.2d. at 583-84 (ruling that the chemist’s worksheets are material to the

preparation of the defense and therefore discoverable). See also Exhibits E and F (Affidavit and

Supplemental Affidavit of Heather Harris). Thus, in this case, the requested evidence is essential to both cross-examining the government’s chemist and preparing and calling a defense expert witness. Without the raw data and other information necessary to evaluate the integrity of the raw data, it is impossible to test the chemist’s conclusions regarding the chemical make-up of the tested substance via expert testimony or cross-examination.

It is important to recognize that neither chemists nor their equipment are infallible,[1](#_bookmark0) and

challenging the government chemist’s conclusions is a legitimate and essential part of Mr. ’s defense. The Supreme Court noted in Melendez-Diaz v. Massachusetts:

1 See, e.g., Carmen Drahl, Chemist Charged in Crime Lab Scandal, CHEMICAL & ENGINEERING NEWS, Oct. 8, 2012, <http://cen.acs.org/articles/90/i41/Chemist-Charged-Crime-Lab-Scandal.html>(last viewed Feb. 12, 2013)

Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1. And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” A forensic analyst responding to a request from a law enforcement official may feel pressure-or have an incentive-to alter the evidence in a manner favorable to the prosecution.

129 S. Ct. 2527, 2536 (2009) (internal citations omitted).

The National Academy of Sciences Report, referred to in Melendez-Diaz, 129 S. Ct. at

2536, was the product of an independent Forensic Science Committee composed of forensic scientists, other scientists, and legal experts, to review the forensic sciences. The National Academy of Sciences Report provides guidelines for laboratory reports:

As a general matter, laboratory reports generated as the result of a scientific analysis should be complete and thorough. They should contain, at minimum, “methods and materials,” “procedures,” “results,” “conclusions,” and, as appropriate, sources and magnitudes of uncertainty in the procedures and conclusions (3.g. levels of confidence). Some forensic science laboratory reports meet this standard of reporting, but many do not. Some reports contain only identifying and agency information, a brief description of the evidence being submitted, a brief description of the types of analysis requested, and a short statement of the results (e.g., “the greenish, brown plant material in item #1 was identified as marijuana”), and they include no mention of methods or any discussion of measurement uncertainties . . . In other words, although appropriate standards exist, they are not always followed. Forensic reports, and any courtroom testimony stemming from them, must include clear characterizations of the limitations of the analysis, including measures of uncertainty in reported results and associated estimated probabilities where possible.

(describing arrest of forensic chemist for tampering with drug evidence in criminal cases, forging colleagues’ signatures, and faking her academic credentials). See also George Hunter, Detroit Shuts Down Error-Plagued Crime Lab*,* DETROIT NEWS, Sept. 26, 2008; Roma Khanna & Steve McVicker, Police Lab Tailored Tests to Theories, Report Says: Investigators Hope to Establish Whether Mistakes Were Deliberate*,* HOUSTON CHRON., May 12, 2006, at A1; Deborah Hastings, Memo: Chemist May Have Altered Evidence*,* MOBILE REG., Apr. 21, 2004, at A5; at 1A; Steve Mills & Maurice Possley, Report Alleges Crime Lab Fraud: Scientist Is Accused of Providing False Testimony*,* CHI. TRIB., Jan. 14, 2001, at A1; Ruth Teichroeb, Rare Look Inside State Crime Labs Reveals Recurring Problems*,* SEATTLE POST-INTELLIGENCER, July 22, 2004, at A1.

National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 21-22 (Aug. 2009), *available at* https://[www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf) (last visited Feb. 28, 2014).

This kind of detail is necessary in order to allow the defense to recognize and confront potential errors. Chemists who face burdensome caseloads may incorrectly transcribe the results of tests onto their worksheets. Chemists may also mix or confuse samples. Thus, the need for the DEA’s underlying data and documentation is apparent: without it, it is impossible to expose errors in calculation and testing results.

The government’s failure to provide complete underlying data, including the mass spectra of the internal standard compounds, also prevents the defense from retaining an expert to re- examine the DEA chemist’s decisions about the chemical composition of the suspected material. Heather Harris, an expert consulted by the defense, has stated that she is unable to render an opinion about the accuracy of the government’s conclusions because she has not been provided with the necessary data. See Exhibit E at 4 and Exhibit F at 2.

In addition, the government’s failure to provide the complete data underlying the DEA’s conclusion prevents the defense from making a determination regarding independent testing. A review of the data may reveal discrepancies, calculation errors, or conclusions based on data that does not support those conclusions. If so, these findings may indicate that independent testing is necessary.

Notably, the D.C. Council has found these sorts of materials to be so significant that it requires by statute that the newly constructed D.C. Consolidated Forensic Laboratory disclose to defense much of the information requested here:

1. If the records [of a forensic analysis] pertain to a criminal prosecution, the Department shall provide the prosecutor with 2 identical sets of records, one for the government and one for the defense.
2. For the purposes of this subsection, the term ‘records’ shall include:
	1. Lab notes and bench notes;
	2. Worksheets, graphs, and charts;
	3. Photographs;
	4. Raw data;
	5. Reports;
	6. Statistical information used to calculate probabilities or uncertainty;
	7. Any logs related to the equipment or materials used in testing;
	8. Any written communications or records of oral communications regarding a specific individual case between the department and any person not employed by the Department, except as otherwise prohibited by law; and
	9. Proficiency test results for individual examiners involved in the analysis.

D.C. Code § 5-1501.06(h)(2), (3) (2011). While of course not legally binding on the DEA laboratory in Largo, MD, where the materials in the instant case were analyzed, the Forensic Science Act’s mandate for the D.C. Consolidated Forensic Laboratory to disclose such materials recognizes their materiality in criminal cases and reflects a decision by the legislature that defendants should have access to them.

At present, the government has refused to enable defense to examine the underlying computer printouts that formed the basis of the chemist’s opinion as well as other documents related to the drug testing in this case. The government has thus hampered the defense’s effort to effectively cross-examine the DEA chemist and present affirmative defense that the allegedly seized material is not narcotics. This constitutes a violation of Rule 16 as well as the Fifth and Sixth Amendments to the United States Constitution, and the Court should intervene.

## Rule 16(a)(1)(C) and (D) Require that the Government Produce Materials Relating to Lab Equipment, Protocols, and Internal Audits

The requested materials that relate to lab equipment, lab audits, and lab protocols are evidentiary and relevant. The reliability of the analysis performed by the chemist in this case

obviously depends on whether the testing machinery was functioning properly, which can be determined by inspection of documents relating to validation testing, maintenance, and corrective action. See Exhibit E at 3 Similarly, the chemist’s ability to determine the identity of

suspected drugs depends on his or her skill, which can be determined by inspection of proficiency examinations and performance evaluations. See Exhibit F at 3.

The validity of the chemist’s conclusions also depends on the protocols and procedures used and the integrity of the laboratory as a whole. See Exhibit E at 2. Even a skilled chemist

using properly functioning machinery will not be able to reach sound conclusions if he or she uses unreliable techniques or conducts tests in an environment that does not adequately protect against contamination of evidence samples. See Exhibit E at 3. Standard operating procedures

are also necessary to determine whether the laboratory performs the testing in accordance with the principles and procedures generally accepted in the scientific community, and to determine whether the chemist in this case actually followed the procedures required by the DEA. See

Exhibit E and Exhibit F. The requested materials are therefore material to the preparation of the

defense, since they relate to the accuracy of the chemist’s conclusions that the substances at issue are in fact controlled substances – a fact the government will have to prove beyond a reasonable doubt in order to prevail at trial. Without these materials the defense is unable to prepare for cross-examination, or prepare an expert to testify about the quality and reliability of the testing completed by the DEA.

In recognition of these items’ materiality, the D.C. City Council requires by statute that the Consolidated Forensic Laboratory make public, inter alia, “all accreditation documents; all

[training manuals, standard operating procedures, protocols, procedures to avoid bias, and maintenance standards for equipment].” D.C. Code §§ 5-1501.06(i), 5-1501.04(b) (2011). Again,

while not binding, the City Council’s mandate that the District’s own laboratory meet a certain level of transparency sets a benchmark. This Court should interpret Rule 16 to hold the DEA laboratory—utilized in prosecutions occurring in the very same city—to no less of a standard.

## Rule 16(a)(1)(C) Requires the Government to Permit Defense Counsel and Its Expert to Visit the Laboratory at Which the Materials in this Case Were Tested.

Rule 16(a)(1)(C) states “Upon request of the defendant, the prosecutor shall permit the defendant to inspect . . . buildings or places . . . which are within the possession, custody or control of the government, and which are material to the preparation of the defendant’s defense.” The Drug Enforcement Agency laboratory facility is a building, within the custody or control of the government. Cf. Jackson v. United States, 768 A.2d 580, 584 n.3 (D.C. 2001) (finding DEA

chemist’s C.V. “within the custody or control of the government.”). Moreover, the space in which the alleged narcotic material is stored, tested, and examined is undoubtedly material to preparation of a defense to the extent that, for example, an unsecure facility could create chain of custody problems and unclean facilities may facilitate contamination. See, e.g., National

Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 21- 22 (Aug. 2009). The National Academy of Science notes,

In addition to the inherent limitations of the measurement technique, a range of other factors may also be present and can affect the accuracy of laboratory analyses. Such factors may include deficiencies in the reference materials used in the analysis, equipment errors, environmental conditions that lie outside the range within which the method was validated, sample mix-ups and contamination, transcriptional errors, and more.”).

Academy of Sciences at 21-22 (Aug. 2009). Moreover, visiting the laboratory is essential to any expert’s ability to meaningfully evaluate the validity of the DEA analyst’s conclusions. See Exhibit F at 3. Thus, the Court should order the government to permit

defense counsel and an expert to inspect the building in which the alleged narcotics at

issue in this case were tested.

## The Court Should Compel the Government to Provide the Documents Consistent with D.C. Sup. Ct. R. Crim. Pro. 16(a)(1)(E).

D.C. Sup. Ct. R. Crim. Pro. 16(a)(1)(E) requires that:

“At the Defendant’s request, the government shall disclose to the Defendant a written summary of the testimony of any expert witness that the government intends to use during its case in chief at trial….This summary must describe the expert witnesses’ opinions, the bases and the reasons therefore, and the witnesses’ qualifications.”

Thus, the plain language of Rule 16(a)(1)(E) indicates that the government must provide a written summary of expert testimony, and the expert witnesses’ opinions and the bases and reasons for those opinions.

Case law affirms that expert notice must be detailed and complete in order to comply with Rule 16. See Ferguson v. United States, 866 A.2d 54 (D.C. 2005). In Murphy-Bey v. United

States, 982 A.2d 682 (D.C. 2009), the Court upheld a trial court decision to exclude expert

testimony on the basis of a Rule 16 violation. The Court held that two different letters that attempted to provide expert notice did not comply with Rule 16. The second letter read as follows: “Dr. Norris will be able to offer an opinion that while under the influence of the illegal drug crack cocaine and coupled with the psychotic schizophrenic drugs, a person would be frantic, nonsensical, agitated, overly hyper, and in a state of mania.” Id. at 687. The Court held

that even this second letter did not comply with Rule 16, noting “[t]his purported disclosure comes closer to summarizing Dr. Norris's expected testimony and her opinions, but it clearly still does not provide the bases and reasons for those opinions, nor any details of them ” Id. at

689.

In this case, the government has not provided the defense with the data upon which its analyst will rely. The government’s analyst will offer opinions that rely on laboratory protocols,

validation studies, properly functioning machinery, and data produced by the equipment utilized in this case. The Court should therefore order the government to produce this data.

## Alternatively, the Court Should Dismiss This Case as a Sanction for the Government’s Failure to Comply with Its Rule 16 Obligations

Alternatively, the Court should dismiss the case against Mr. as a sanction for the government’s failure – despite repeated and timely requests by defense counsel – to comply with its obligations under Rule 16. Undersigned counsel has been requesting this material since January 17, 2014. The government nonetheless has failed to produce the material, even though other courts have routinely ordered its disclosure in other cases. See, e.g.*,* April 13, 2011 Order

by Judge Milliken in United States v. Eric Mendoza, 2010 CMD 13112 (holding that “anything

that pertains to the analysis of suspected controlled substances that was created in the context of this case and is contained in the DEA file should be susceptible to review by the defense” and that “’those bits of paper spit out by a machine, those things related to the actual analysis of the suspected controlled substance’ are discoverable under Rule 16 and shall be turned over to the defendant upon request”) (Exhibit G); March 7, 2012 Order by Judge Cushenberry in United

States v. Alonzo Johnson, 2012 CMD 22739 (ordering the government to provide the raw data,

stating that it is “unquestionable” that the requested reports are material to the defense’s case and noting that the Court “expects the United States to comply with this order in future narcotics related cases before this court.”) (Exhibit H); May 15, 2012 Order by Judge Milton C. Lee in In

re I.R., 12 DEL 203 (ordering production of, inter alia, “chain-of custody [*sic*] reports . . .

equipment calibration and maintenance checks including validation studies and corrective actions logs, negative and positive control data, contamination logs, standard operation procedures, quality control and assurance measures.”).

Dismissal is an appropriate sanction for the government’s failure in this case. Sup. Ct.

Crim. Pro. R. 16(d)(2) states: “If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this Rule, the Court may enter an order . . . as it deems just under the circumstances.” In other words, “the range of available sanctions is extremely broad, the only real limitation being that a sanction must be ‘just under the circumstances.’” Davis v. United States, 623 A.2d 601, 605 (D.C. 1993). In fashioning

sanctions for failure to make proper disclosure under Rule 16, “among the factors which the trial court must consider and weigh are: (1) the reasons for the nondisclosure; (2) the impact of the nondisclosure on the trial of the particular case; and (3) the impact of the particular sanction on the proper administration of justice in general.” Lee v. United States, 385 A.2d 159, 163 (D.C.

1978) (internal citations omitted).

The requested discovery relating to the DEA analysis is precisely the kind of evidence that requires early disclosure. Defense counsel needs sufficient time to review the data, consult with a defense expert, and, if necessary, make arrangements for an expert witness to rebut the conclusions of the analyst called by the government. By refusing to disclose the requested materials, the government has created the very situation that Rule 16 seeks to prevent: inefficiency and delay at the expense of Mr. , who remains incarcerated.

The government’s failure to provide the requested discovery in this case is unlikely to change unless motivated by external forces. The granting of a continuance would provide no such motivation, as the government has already had over two months to obtain the requested discovery and yet has failed to do so. Thus, the harsher sanction of dismissal is necessary to have the appropriate impact on government policies and ensure that the government begins to provide this material to the defense promptly and consistently.

\* \* \*

WHEREFORE, for the foregoing reasons, and for such other reasons as may appear at a hearing on this Motion, Mr. requests that this Court compel the government to produce the requested discovery and order the government to permit counsel and an expert to inspect the DEA laboratory in Largo, MD, at which the alleged narcotics in this case were analyzed. In the alternative, Mr. requests the Court to dismiss this case.

Respectfully submitted,

Jeffrey D. Stein

Counsel to C

Public Defender Service 633 Indiana Avenue, NW Washington, DC 20004

(202) 824-2425

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading has been served by email to the Office of the United States Attorney, Attention: L’Shauntee Robertson, Esq., 555 Fourth Street, N.W., Washington, DC 20530, on this 16th day of March, 2014.

Jeffrey Stein

## SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

**Criminal Division – Felony Branch**

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| **UNITED STATES OF AMERICA****v.****C ,****Defendant** | **:****:****:****:****:****:****:****:****:** | **Case No.****Hon. Michael Ryan****Trial Date: April 15, 2014** |

**ORDER**

This matter comes before the Court on Mr. ’s Motion to Compel DEA-Related Discovery; it is this day of , 2014, hereby ORDERED that Mr. ’s Motion be Granted. The government shall provide the defense with the following discovery by

 , 2014:

1. the DEA Case file, including bench notes, memoranda, legible versions all DEA-7 reports, evidence reports, chain-of-custody reports, reports of equipment calibration checks, negative and positive control data, chromatographs, mass spectra, infrared spectra, communication logs, contamination logs, diagrams, and photographs of evidence and results of any color tests and microchemical crystal tests;
2. chain of custody documents;
3. statistical information,
4. protocols, including standard operating procedures, handbooks, guidelines, and training materials;
5. validation studies;
6. source, preparation, and usage records for any and all reagents or other materials used during testing;
7. information regarding instruments and equipment, including validation studies, corrective action logs, and maintenance information;
8. laboratory production data for the tests performed in the subject case;
9. copies of all certificates of accreditation for the DEA Mid-Atlantic Laboratory, and copies of any audit reports for the period beginning one year prior to the testing performed; and
10. personnel information about each person involved in conducting or reviewing the controlled substance analysis in this case, including a job description, current resume, copies of all proficiency examinations and their results, and any performance evaluations.

Additionally, defense counsel and an expert shall be permitted to inspect the DEA laboratory in Largo, MD, at which the alleged narcotics in this case were analyzed

The Honorable Michael Ryan

D.C. Superior Court

# Defendant’s Exhibit A: Initial DEA Discovery Requests, Served on January 17, 2014

**Defendant’s Exhibit B: Rosser Letter, Including DEA Discovery Requests, Served on January 21, 2014.**

**Defendant’s Exhibit C: Email to AUSA Jason Park, Including DEA Discovery Requests, Sent February 24, 2014**

**Defendant’s Exhibit D: Email to AUSA L’Shauntee Robertson, Including DEA Discovery Requests, and Ms.**

**Robertson’s Response**

**Defendant’s Exhibit E: Affidavit of Heather Harris,**

**M.A., J.D.**

**Defendant’s Exhibit F: Supplemental Affidavit of Heather Harris, M.A., J.D.**

**Defendant’s Exhibit G: Order by Hon. Stephen Milliken, Granting Defense Motion to Compel DEA**

**Discovery**

**Defendant’s Exhibit H: Order by Hon. Judge Cushenberry, Jr., Granting Motion to Compel DEA**

**Discovery**

**Defendant’s Exhibit I: Order by Hon. Judge Lee, Granting Motion to Compel DEA Discovery**