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7 Attorney for Defendant  
8 ERIC MCDAVID

9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA, )  
13 Plaintiff, )

14 v. )

15 ERIC MCDAVID, )  
16 Defendant. )

Case No. CR.S-06-0035-MCE

**DEFENDANT'S MOTION TO REVEAL  
IDENTITY OF CONFIDENTIAL  
INFORMANT**

DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO REVEAL  
IDENTIFY OF THE TESTIFYING  
"CONFIDENTIAL INFORMANT  
ANNA"; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
THEREOF; REQUEST FOR  
EVIDENTIARY HEARING.

Date: February 6, 2007  
Time: 8:30 A.m.  
Judge: Hon. Morrison C.  
England

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21 **TO: MCGREGOR SCOTT, United States Attorney, and Assistant  
22 United States STEVEN R. LAPHAM:**

23 **PLEASE TAKE NOTICE THAT** at the above date and time, or  
24 as soon thereafter as the matter may be heard, defendant,  
25 through his attorney, will and hereby does move for an order  
26 disclosing the identity of, and information concerning,  
27 "confidential source/confidential informant" identified as

28 Mot.reveal id of informant

1 "CS" and/or "Anna" throughout the discovery and most  
2 particularly in the criminal complaint.

3 **MOTION**

4 Defendant Eric mcDavid moves the Court for an order  
5 disclosing the true name, date of birth, current and former  
6 addresses, driver's license numbers, and social security  
7 number of the informant described as "CS" and "cooperating  
8 source" and "Anna" in the discovery provided to defendant and  
9 in the criminal complaint in this case. The government  
10 discovery provides that this informant will testify at the  
11 upcoming trial.

12 The informant's statements to law enforcement in or  
13 about June of 2005, at the latest, started the present  
14 investigation; audio and video taping of the defendant by law  
15 enforcement was started based upon the informant's work. The  
16 discovery does not show in any instance where anyone from law  
17 enforcement had any contact whatsoever with this defendant up  
18 until the moment of his arrest during the investigative  
19 period, other than the "cs" known as "Anna." "Anna"'s word  
20 was used to set up all audio and video surveillance, as well  
21 as obtain a criminal complaint and subsequent search warrant.  
22 Anna's word was used to get warrants to seize computers and e  
23 mail accounts and other documents.

24 The discovery provides repeatedly that she will testify  
25 at trial.

26 Defense counsel asks that the Court order immediate  
27 disclosure of the following by the United States and that  
28 they affirmatively seek out from any agency which maintains

1 any of the requested material.

2 Pursuant to the October 19, 2006 Memorandum from the  
3 Deputy Attorney General, issued to all U.S. Attorney's that  
4 date, the U.S. Attorney's Manual at 9-5000 is amended  
5 immediately to require and direct all U.S. Attorney's to  
6 disclose evidence from the "Prosecution Team." The  
7 "Prosecution Team: It is the obligation of federal  
8 prosecutors, in preparing for trial, to **seek** all exculpatory  
9 and impeachment information from **all the members** of the  
10 prosecution team, members of the prosecution team include  
11 federal, state, and local law enforcement officers and other  
12 government officials **participating in the investigation** and  
13 prosecution of the criminal case against the defendant.  
14 Kyles, 514 US at 437." (Italics added for emphasis).

15 This is certainly consistent with the applicable law  
16 United States v. Perdomo, 929 F.2d 967 (3<sup>rd</sup> Cir. 1991)  
17 (conviction vacated and remanded where criminal background  
18 information on key prosecution witness, contained in local  
19 records, is information that is readily available to the  
20 prosecution for Brady purposes; case decided well before the  
21 same mandate in Kyles v. Whitley 514 U.S. 419 (1995).

22 Defendant seeks immediate production of the following:

23 (1) Copies of all police reports and other writings of  
24 any kind, including rough notes, regarding the informant's  
25 activities in this case and in any other case during the two  
26 (2) calendar years preceding the investigation of this case,  
27 which started in at least June of 2005 (thus, for all of the  
28 above described informant's activities beginning in June of

1 2003);

2 (2) The case numbers and names of any other criminal  
3 prosecutions in which the informant has been used as a  
4 confidential informant;

5 (3) The case numbers and names of any trials or  
6 evidentiary hearings at which the confidential informant has  
7 testified concerning: her own prior criminal activity;  
8 payments or rewards provided to or promised to her by the  
9 government; or other law enforcement-related matters;

10 (4) Any ledger, sheet, or other document that details  
11 money paid the confidential informant or her family in this  
12 or other cases in which the informant assisted the  
13 government, and the purpose of each such payment;

14 (5) Any information, whether or not memorialized in  
15 writing, about promises of immunity or leniency, preferential  
16 treatment or other inducements made to the confidential  
17 informant, or to a family member, friend, or associate of the  
18 informant, or to a percipient witness, in exchange for the  
19 informant's cooperation, including the dismissal or reduction  
20 of charges, assisting in matters of sentencing, or promises  
21 or expectancies regarding payments for expenses or testimony  
22 or eligibility for any award or reward;

23 (6) Information or records concerning notification of  
24 potential prosecution or investigation made by the government  
25 to the informant or any member of his or her family;

26 (7) FBI rap sheet, NCIC printout and any other records  
27 available to the government reflecting the arrest and  
28 conviction history of the informant;

1 (8) Information concerning prior misconduct by the  
2 confidential informant both in the performance of her role as  
3 an informant and in roles other than her role as an  
4 informant, including: any prior refusal of the informant to  
5 testify or assist the government; any prior allegation that  
6 the informant made false statements in connection with a  
7 criminal investigation; any other misconduct that reflects on  
8 the lack of candor, truthfulness, or law-abidingness of the  
9 informant, such as uncharged criminal conduct or fraud; and

10 (9) Any government agency files or other information  
11 revealing matters relevant to the informant's credibility,  
12 mental health, physical health, drug or alcohol use, or other  
13 dependency.

14 This motion rests on the files and records of this case  
15 and the attached Memorandum of Points and Authorities.  
16 Additional evidence or argument may be offered at or before  
17 the hearing.

18 This motion is based on the United States Constitution,  
19 the Federal Rules of Criminal Procedure, the Points and  
20 Authorities submitted in support, and such argument and  
21 evidence of counsel at the hearing on the motion.

22 Respectfully submitted

23 DATED: December 19, 2006.

24  
25 MARK J. REICHEL  
26 ATTORNEY AT LAW  
Attorney for defendant

27 /S/ Mark Reichel  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 SUPPORTING FACTS<sup>1</sup>

3 This case was primarily begun by an informant who used  
4 the name "Anna," and was initially supervised by FBI Agent  
5 Ricardo Torres with the Philadelphia FBI in June of 2005.  
6 Prior to that time, the informant was working for the FBI as  
7 far back as 2003. This case ended in the arrest of the  
8 defendant, in the presence of the informant, in January of  
9 2006.

10 Troubling is the fact that the discovery provides that  
11 the informant was granted approval for "Otherwise Unlawful  
12 Activity" so that she could engage in felony criminal  
13 behavior while working on this case, in December of 2005.

14 The FBI's overall use of informants was the subject of a  
15 very well publicized and *sharply critical* September 11, 2005  
16 Department of Justice *internal audit* entitled U.S. Department  
17 of Justice, Office of Inspector General, "FBI's Compliance  
18 with the Attorney General's Investigative Guidelines."<sup>2</sup> The

19 \_\_\_\_\_  
20 <sup>1</sup> The factual background comes from the discovery provided by the  
21 government, defense investigation conducted to date, and the  
22 anticipated testimony and evidence to be submitted at the hearing of  
the motion.

23 Familiarity with the facts is assumed and the government's version  
is succinctly stated in the Criminal Complaint, incorporated herein by  
reference.

24 <sup>2</sup> "F.B.I. Found to Violate Its Informant Rules " New York Times,  
25 September 13, 2005.

26 WASHINGTON, Sept. 12 - The Federal Bureau of Investigation has  
27 often violated internal guidelines in its handling of confidential  
informants, the Justice Department's inspector general concluded  
28 Monday.

1 report, after redacting for sensitive information identified  
2 by the FBI, was released to the public and is available in  
3 pdf format at [www.usdoj.gov/oig/special/0509/final.pdf](http://www.usdoj.gov/oig/special/0509/final.pdf).<sup>3</sup>

4 The following day, the FBI issued a press release which  
5 stated "The FBI welcomes the Office of the Inspector  
6 General's (OIG) report and assessment of our compliance with  
7 four sets of Attorney General Guidelines that govern  
8 important aspects of our investigative activity. The OIG  
9 found the FBI was generally compliant with the guidelines. *It*  
10 *also found, however, a significant number of instances of*  
11 *administrative non-compliance with the Confidential Informant*  
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14 In nearly 9 of every 10 cases reviewed by the inspector general,  
15 guidelines on the handling of confidential informants were  
16 violated in ways that risked compromising investigations,  
17 according to a 301-page report by the office of Glenn A. Fine, the  
18 inspector general at the Justice Department....But F.B.I. agents  
19 sometimes allowed criminal informants to engage in criminal  
20 activities without getting needed approval from supervisors or  
21 lawyers for such operations, failed to report unauthorized illegal  
22 activity, or approved such illegal activity only retroactively,  
23 the review found.

19 Bureau supervisors were often unfamiliar with the rules that  
20 applied to the handling of confidential informants - a reflection,  
21 the inspector general's report said, of "inadequate training at  
22 every level." And when violations were found, bureau agents and  
23 supervisors were often not held accountable for missteps, the  
24 review found....In 2001, Janet Reno, then the attorney general,  
25 imposed toughened requirements on the F.B.I.'s use of informants  
26 in the wake of several embarrassing episodes - most notably, its  
27 handling of the Boston gangster James Bulger, who fled in 1995  
28 after a bureau agent tipped him off to a pending indictment  
against him..."

26 <sup>3</sup>A finding at page 7 of the Report is "We found significant  
27 problems in the FBI's compliance with Guidelines' provisions. Those  
28 violations occurred mainly in suitability reviews; *the cautioning of*  
*informants about the limits of their activities; the authorization of*  
*otherwise illegal activity; documentation and notice of unauthorized*  
*illegal activity by informants; and the deactivation of informants. In*  
total, we found one or more Guidelines compliance errors in 87 percent  
of the informant files we examined. (Emphasis added.)

1 *Guidelines...*" (Italics added.) The press release then went  
2 on state to how the FBI is working to change these problem  
3 areas.

4 In May of 2006, in the U.S. Senate, Inspector General  
5 Glenn A. Fine then went on to advise the Senate Committee  
6 that his audit had found a disturbing instance of significant  
7 non-compliance by the FBI agents with the Attorney General  
8 Guidelines on the use of informants, which can often led to  
9 compromised FBI prosecutions.<sup>4</sup>

10  
11 <sup>4</sup> Testimony of Glenn A. Fine, Department of Justice Inspector  
12 General, United States Senate Committee on the Judiciary "FBI  
Oversight" May 2, 2006

13 Mr. Chairman, Senator Leahy, and members of the Committee on the  
14 Judiciary:

15 Thank you for inviting me to testify about the Office of the  
16 Inspector General's (OIG) oversight work related to the Federal  
Bureau of Investigation (FBI)...  
17 Since the Committee's last FBI oversight hearing, the OIG also  
18 completed its examination of the FBI's compliance with four sets  
of Attorney General Guidelines that govern the FBI's principal  
19 criminal investigative authorities with respect to investigations  
of individuals and groups, and its use of confidential informants,  
20 its undercover operations, and its warrantless monitoring of  
verbal communications (also known as consensual monitoring). The  
21 Attorney General Guidelines provide guidance on the opening of FBI  
investigations, the permissible scope of investigations, and the  
law enforcement techniques the FBI may use. The Guidelines were  
22 last revised in May 2002.

23 In sum, while the OIG found many areas in which the FBI complied  
with the Attorney General Guidelines, **the OIG also found**  
24 **significant non-compliance with the Guidelines governing the**  
**operation of confidential informants, failure to notify FBI**  
**Headquarters and DOJ officials of the initiation of certain**  
25 **criminal intelligence investigations, and failure to consistently**  
**obtain advance approval prior to the initiation of consensual**  
26 **monitoring.**

27 **Specifically, the OIG found one or more Guidelines violations in**  
**87 percent of the confidential informant files we examined. The**  
28 **OIG review determined that required approvals for the use of**  
**informants were not always obtained, assessments designed to**  
**assess the suitability of individuals to serve or continue as**



1 Therefore, it is obviously imperative that the defense  
2 be immediately provided the routine material requested in  
3 this case regarding this informant.

4 **LEGAL AUTHORITY**

5 Under the Due Process Clause of the Fourteenth  
6 Amendment, criminal prosecutions must comport with prevailing  
7 notions of fundamental fairness. The Supreme Court has long  
8 interpreted this standard of fairness to require that  
9 criminal defendants be afforded a meaningful opportunity to  
10 present a complete defense. California v. Trombetta, 467 U.S.  
11 479, 485 (1984).

12 To safeguard this right, the courts have developed "what  
13 might loosely be called the area of constitutionally  
14 guaranteed access to evidence." Id. The purpose of such a  
15 doctrine is to deliver "exculpatory evidence into the hands  
16 of the accused, thereby protecting the innocent from  
17 erroneous conviction and ensuring the integrity of our  
18 criminal justice system." Id.

19 Within this framework lies a defendant's  
20 constitutionally protected right to request and obtain from  
21 the prosecution evidence that is either material to his or  
22 her guilt or relevant to his or her punishment. Brady v.  
23 Maryland, 373 U.S. 83, 87-88 (1963); United States v.

24  
25  
26 **confidential informants were not made or were incomplete,**  
27 **documentation of required instructions to informants were missing,**  
28 **descriptions of "otherwise illegal activity" by informants were**  
**not sufficient, and required notifications to FBI Headquarters or**  
**U.S. Attorneys' Offices were not made or documented. The OIG**  
**report noted that Guidelines violations can jeopardize DOJ**  
**prosecutions of criminals and also can lead to civil liability**  
**claims against the government...** (Bold added for emphasis.)

1 Williams, 10 F.3d 1070 (4th Cir. 1993) (assuming arguendo  
2 that Brady material must be turned over to the defense prior  
3 to trial). Even absent a request, the prosecution has a  
4 constitutional duty to turn over exculpatory evidence that  
5 would raise a reasonable doubt about the defendant's guilt.  
6 Id. This Brady right generally requires disclosure of  
7 evidence requested by the defendant when such evidence is:  
8 (1) material; 24 (2) exculpatory; 25 (3) relevant; 26 (4)  
9 unavailable to the defense from other sources; 27 and (5)  
10 under the actual or imputed knowledge or control of the  
11 prosecution. Failing to disclose such evidence is a  
12 constitutional violation whether done in good or bad  
13 faith.

14 In Roviaro v. United States, 353 U.S. 53 (1957), the  
15 Supreme Court held that the informer's privilege is a limited  
16 one, and identified three situations where the privilege was  
17 inapplicable: first, "where the disclosure of a  
18 communication will not tend to reveal the identity of an  
19 informer"; second, where "the identity of the informer has  
20 been disclosed to those who would have cause to resent the  
21 communication"; and, third, "[w]here the disclosure of an  
22 informant's identity, or of the contents of his  
23 communication, is relevant and helpful to the defense of an  
24 accused, or is essential to a fair determination of a cause."  
25 Roviaro, 353 U.S. at 60. In these situations, the trial  
26 court must order disclosure of the informant's name and  
27 address or, if the government withholds the information,  
28 dismiss the action. Roviaro, 353 U.S. at 61, 65, fn. 15. In

1 Roviario's case, the government conceded that it should have  
2 disclosed the informant's identity with respect to count one,  
3 which charged a sale of heroin to the informant. Roviario,  
4 353 U.S. at 58. As to count two, charging possession of  
5 heroin, the Supreme Court held that disclosure was required  
6 because the testimony of the informant, who was a material  
7 eyewitness, "was highly relevant and might have been helpful  
8 to the defense." Roviario, 353 U.S. at 63.

9 Since the decision in Roviario, the Ninth Circuit has had  
10 many occasions to apply the principles set forth in Roviario  
11 to particular circumstances. In United States v. Amador-  
12 Galvan, 9 F.3d 1414 (9th Cir. 1993), two defendants were  
13 charged and convicted of conspiracy to possess with intent to  
14 distribute over 5 kilograms of cocaine, and possession with  
15 intent to distribute over 5 kilograms of cocaine. 9 F.3d at  
16 1416. Before trial, the defendants moved to disclose the  
17 identities of four non-witness government informants. 9 F.3d  
18 at 1416-1417. That motion was denied without an in camera  
19 hearing. 9 F.3d at 1417.

20 The Ninth Circuit reversed, finding that the district  
21 court abused its discretion in failing to hold an in camera  
22 hearing to determine whether the informants in fact had  
23 information that would have been relevant and helpful to the  
24 defendants. Amador-Galvan, 9 F.3d at 1417. The court  
25 reasoned that one or more of the four informants might have  
26 provided evidence weakening the government's case, either by  
27 eyewitness testimony or by providing information which might  
28 have led to a firsthand source or by providing circumstantial

1 evidence. 9 F.3d at 1417. The court concluded that any such  
2 evidence would clearly be "relevant and helpful" to the  
3 defense. 9 F.3d at 1417.<sup>5</sup>

4 The defendant here clearly demonstrates the due process  
5 right to disclosure of the informant's name and identifying  
6 information as (1) the informant holds significant relevant,  
7 material and possibly exculpatory information; (2) the  
8 informant is otherwise unavailable to the defense; (3) the  
9 informant was an active participant in the crime; and (4)  
10 there is a small government interest in maintaining  
11 confidentiality—they have asserted at all times that she will  
12 testify.

13 Disclosure of the informant's identity and identifying  
14 information, sought herein, is required under Roviaro.

15 The defendant needs this information immediately so as  
16 to try to interview her in preparation for trial, at the  
17 least, let alone prepare important pre trial motions.  
18 Investigation of the informant must also be performed.

19 The Ninth Circuit requires disclosure where the  
20 testimony of the informant is necessary to guarantee a  
21 defendant's right to a fair trial. In United States v.  
22 Ordonez, supra, the Ninth Circuit reversed defendants'  
23 convictions and remanded for a de novo in camera hearing on  
24 the disclosure of the confidential informant's identity. 737  
25 F.2d at 810. The defendants in Ordonez sought the identity

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27 <sup>5</sup>United States v. Sharp, 778 F.2d 1182, 1186 n.5 (6th Cir. 1985)  
28 (noting that disclosure is usually required when an informant is an  
"active participant in the events underlying the defendant's potential  
criminal liability" and usually not required when the informant is a  
"mere tipster or introducer");

1 of an informant whose information "triggered" the  
2 investigation against them. 737 F.2d at 807. The district  
3 court found that the informant's testimony would have been  
4 helpful to the defense but denied the defense request for  
5 disclosure. Id. at 808. The Ninth Circuit remanded for a  
6 new hearing because it was not clear from the record before  
7 the Court whether or not the District Court had properly  
8 applied the Roviaro balancing test. Id. at 809.

9 In remanding, the Court provided guidance to the  
10 district court on the conduct of the in camera proceedings.  
11 737 F.2d at 809-810. Recognizing the "extraordinary  
12 safeguards provided by the Confrontation Clause, and the  
13 adversary system which results from a reliance on in camera  
14 proceedings that are conducted in the absence of the  
15 defendant and his counsel," the court stated that the  
16 procedure chosen by the district Court should provide a  
17 "substantial equivalent" to defendant's rights guaranteed by  
18 the Fifth and Sixth Amendments. 737 F.2d at 809. The Court,  
19 therefore, suggested alternative procedures to guarantee  
20 defendant's rights, including permitting defense counsel to  
21 be present without his client during the course of the in  
22 camera proceedings. 737 F.2d at 810.

23 The defense has met the "minimal threshold showing" that  
24 disclosure would be relevant to at least one defense --  
25 namely, a pre-trial motion to suppress evidence and/or  
26 dismiss for outrageous government misconduct, and all of the  
27 other numerous motions on file with the court pre trial.  
28 Spires, 3 F.3d at 1238, citing U.S. v. Sai Keung Wong, 886

1 F.2d 252, 256 (9<sup>th</sup> Cir. 1989). Furthermore, the informant's  
2 privilege does not apply in this situation because, for the  
3 reasons stated above, the informant's identity and the  
4 contents of her communication with the FBI agents, will  
5 undeniably be "relevant and helpful to the defense of the  
6 accused." Roviaro, 353 U.S. at 60; Kiser, 716 F.2d at 1271.

7  
8 **CONCLUSION**

9 For the above reasons, the defendant respectfully  
10 requests that the government be directed to disclose the true  
11 identity of the informant and to disclose the information  
12 requested in this motion immediately.

13 Respectfully submitted

14 DATED: December 19, 2006.

15  
16 MARK J. REICHEL  
17 ATTORNEY AT LAW  
18 Attorney for defendant

19 /S/ Mark Reichel  
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