

1 construction of the Dakota Access Pipeline. (DAPL).

2 Demonstrations started against the DAPL workers and construction work in August
3 of 2016. By October, 2016 hundreds, then thousands of people came from around the
4 United States and the world, to protest the construction of the pipeline. Hundreds of law
5 enforcement personnel and professional news media descended upon North Dakota. The
6 events of the mass protests were covered by news media and social media world-wide.
7 Hundreds of hours of video of the protests was recorded by both law enforcement
8 personnel, including Federal as well as state and local law enforcement officers and agents,
9 as well as private media and civilians.

10 Law enforcement agencies came from across the United States in response to the
11 Morton County Sheriff's Department request for aid. The American Civil Liberties Union
12 obtained information from the Morton County Sheriff's Department and media accounts
13 showing that 76 different law enforcement agencies were involved in policing the Standing
14 Rock movement. The Sheriff's Department noted that it had received assistance from 24
15 counties, 16 cities and 9 different states. (Exhibit 1, article from ACLU Media Relations
16 listing all the city, county and state police departments and Sheriff agencies).

17 Many of those departments and agencies not only took part in police activities, but
18 also took digital photographs and videos of the protests, including those occurring on
19 October 27, 2016. Additionally, numerous federal agencies were involved as was law
20 enforcement air surveillance provided by helicopters and airplanes.

21 Mr. Giron was charged for his alleged activities at the 1806 highway on October 27,
22 2016, a day that civilian barricades were set up obstructing access to vehicles on Highway
23 1806. Numerous people were present that day at the site. Dozens of people were arrested,
24 either that day, or on future dates, as was Mr. Giron, and charged with state and federal
25 crimes for the events of October 27, 2016.

1 Counsel for Mr. Giron sent the government a series of letters requesting discovery.
2 The first letter was sent to the government on April 19, 2017. The government provided 69
3 pages of written discovery to counsel on April 24, 2017. The items requested in this motion
4 were not included in the first production of discovery. The defense sent a follow-up letter
5 requesting discovery on May 31, 2017. In response, the government produced a second
6 batch of discovery on June 1, 2017. That 74 page production included some color
7 photographs of the events at Highway 1806 on October 27, 2016, but no videos or any of
8 the other requested items.

9 The defense sent its third letter requesting discovery on June 20, 2017. To date, no
10 further discovery has been produced by the government, triggering the filing of the motion
11 to compel production of discovery. (Three discovery letters attached as Exhibit 2).

12 **II. SPECIFIC DISCOVERY REQUESTS**

13 The items the defendant seeks the Court to order produced are:

14 1) any and all videos and photographs of the October 27, 2016 incident of a road
15 blockage of Highway 1806 consisting of two manmade barricades, including but not limited
16 to, of a fire reported to have set at approximately 12:38 p.m. that day of one or both of the
17 barricades.

18 The defendant requests video and photographs of the scene from 7:00 a.m. to 7:00
19 p.m. on October 27, 2016, at Highway 1806 at the blockade and surrounding area. The
20 defense is requesting all videos and photographs “within the government’s possession,
21 custody or control” (as set for in R. 16(a)(1)(B)(I)), including, but not limited to, videos and
22 photographs showing Mr. Giron acting as a buffer trying to keep people from approaching
23 and adding items to the blockade and fire. For the photographs, the defense requests that the
24 photographs be provided in the form of actual photographs or JPEG files and not xeroxed
25 copies of photographs.

1 2) reports and documents concerning which police personnel and government
2 personnel were present at or near the barricades on Highway 1806 during the protest and
3 fire and/or authored by police personnel and federal agents who were at the scene and
4 observed the barricades and fire; 3) any and all photographs, videos and downloaded
5 content from www.inforum.com, mentioned at Bates stamped page 00007 provided in
6 discovery concerning Michael Giron. Any and all photographs gathered by the North
7 Dakota State and Local Intelligence Center (SLIC) from www.inforum.com and any other
8 websites and social media sites (as detailed in Discovery produced to the defense dated
9 April 24, 2017, Bates stamped pages 000015-16) (Exhibit 3, an excerpt of a document
10 produced to the defense in discovery, to be filed under seal); 4) a xeroxed copy of the entire
11 “notebook” taken from Mr. Giron on November 17, 2016, upon his arrest on a Santa
12 Barbara warrant (as detailed in Discovery produced to the defense dated April 24, 2017,
13 Bates stamped pages 000014); 5) a report of the examination of the contents of the
14 computer and the actual contents of any reports or documents actually recovered from the
15 computer and a mirror image of the hard drive of the seized computer provided on a
16 portable hard drive; and 6) any and all results of the any testing performed on the computer,
17 the backpack and the notebook recovered from my client; the recovered fuel can viewable
18 in the photograph reproduced at Bates page number 00097; and the lighter viewable in the
19 photographs reproduced at Bates page numbers 00105 & 00106, including testing for
20 fingerprints and DNA, as well as, any and all trace evidence, including chemical analysis,
21 burn pattern analysis, and any other arson related scientific testing performed on Mr.
22 Giron’s clothes, the fuel can, and the actual physical evidence at Highway 1806 (tires,
23 wood, asphalt, etc.).

1 **III. FEDERAL RULE OF CRIMINAL PROCEDURE 16 RIGHT TO**
2 **DISCOVERY IN FEDERAL CRIMINAL CASES.**

3 Federal Rule of Criminal Procedure 16 governs pretrial discovery in federal criminal
4 trials. Rule 16 generally creates five categories of information that the government must
5 disclose upon the request of a defendant:

- 6 1) The defendant's statements (Rule 16(a)(1)(A) and (B));
- 7 2) The defendant's prior record (Rule 16(a)(1)(D));
- 8 3. Documents and objects (Rule 16(a)(1)(E));
- 9 4. Reports of examinations and tests (Rule 16(a)(1)(F));
- 10 5. Expert witnesses (Rule 16(a)(1)(G)).

11 "Rule 16 establishes 'the minimum amount of discovery to which the parties are
12 entitled' [and] 'is not intended to limit the judge's discretion to order broader discovery in
13 appropriate cases.'" *United States v. Karake*, 281 F. Supp. 2d 302, 306 (D.D.C. 2003)
14 (quoting the Advisory Committee Note to Fed. R. Crim. Pro. 16). "[D]isputes should be
15 resolved in the defendant's favor, for the '[t]he language and the spirit of the Rules are
16 designed to provide to a criminal defendant, in the interests of fairness, the widest possible
17 opportunity to inspect and received such materials in the possession of the government as
18 may aide him in presenting his side of the case.'" *Id.* (quoting *United States v. Poindexter*,
19 727 F. Supp. 1470, 1473 (D.D.C. 1989).

20 **A. Documents and Objects Subject to Disclosure Under Rule 16(a)**

21 Rule 16(a)(1)(E) specifically states that, "Upon a defendant's request, the
22 government must permit the defendant to inspect and copy or photograph books, papers,
23 documents, data, photographs, tangible objects, buildings or places, or copies of portions
24 of any of these items, if the item is within the government's possession, custody and control

1 and:

- 2 (i) the item is material to preparing the defense;
- 3 (ii) the government intends to use the item in its case-in-chief; or
- 4 (iii) the item was obtained from or belongs to the defendant.”

5 The defense must make some showing of materiality. “This materiality standard
6 normally ‘is not a heavy burden’ [citation]; rather, evidence is material as long as there is
7 a strong indication that it will ‘play an important role in uncovering admissible evidence,
8 aiding witness preparation, corroborating testimony or assisting impeachment and
9 rebuttal.” *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Circuit 1993) (quoting *United*
10 *States v. George*, 786 F. Supp. 56, 58 (D.D.C. 1992). See also *United States v. Gaddis*, 877
11 F.2d 605, 611 (7th Cir. 1989).

12 Materiality under Rule 16 can also include inculpatory evidence or information. In
13 *United States v. Marshall*, 132 F.3d 63 (DC Cir. 1998), the government argued that it need
14 not turn over discovery under Rule 16 because the information tended to inculcate the
15 defendant. The Circuit rejected this reasoning: “The plain language of Rule 16(a)(1)c) does
16 not support the government’s interpretation. This rule covers evidence which is material ‘to
17 *the preparation of the defendant’s defense.*’ (emphasis added by Circuit)...The rule as
18 written does not compel the conclusion that inculpatory evidence is immune from
19 disclosure. Inculpatory evidence, after all, is just as likely to assist in ‘the preparation of the
20 defendant’s defense’ as exculpatory evidence. In other words, it is just as important to the
21 preparation of a defense to know its potential pitfalls as it is to know its strengths.”
22 *Marshall*, 132 F.3d at 67.

23 **B. Application to Rule 16(a) to Requests in This Case**

24 All of the information and items the defense is requesting under Rule 16 is

25 DEFENSE MEMORANDUM IN
26 SUPPORT OF MOTION TO COMPEL - 6

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1 information and items that will lead to uncovering admissible evidence, aiding witness
2 preparation, corroborating testimony or assisting impeachment and rebuttal.

3 *1. Any and all videos from 7:00 a.m. to 7:00 p.m. of the October 27, 2016*
4 *incident of a road blockage of Highway 1806 consisting of two manmade barricades before,*
5 *during and after a fire was set at approximately 12:38 p.m. at that location on that date.*

6 The request is tailored to a specific date, location and time. One of the issues in the
7 case is the identification of the person holding a container that appears to be lighter fluid.
8 The requested videos and photographs meet all the standards of materiality: they will help
9 uncover admissible evidence; aid in witness preparation; and corroborate or impeach
10 anticipated government witness testimony that Mr. Giron the (or one of the) people holding
11 a container of lighter fluid.

12 *2. Reports and documents concerning which municipal, local, state, county and*
13 *federal law enforcement personnel were present at or near the barricades on Highway 1806*
14 *on October 27, 2016, during the protest and fire and/or authored reports about said*
15 *incident.*

16 This request is again narrowly drawn to lead to highly important information to the
17 defense regarding witnesses and potential witnesses to the events at question and/or the
18 authors of reports directly related to the incident at question.

19 On June 1, 2017, the government produced a document titled,
20 "Incidence/Investigation Report" dated November 22, 2016, Case Number 2016-169109.
21 The authoring agency is named as "WHP." (Discovery produced on June 1, 2017, Bates
22 stamped pages 00076-77). (Exhibit 4, document containing blacked out material to be filed
23 under seal).

24 The report was incomplete (the defense was provided only page two of four and page

1 three of four). More troubling is that the author's name is blacked out, as are the names of
2 other law enforcement witnesses noted in the report. Not only are witness names blacked
3 out, descriptions of what the unknown author did are actually blacked out. This is
4 unacceptable under *Brady* and Rule 16.

5 This request clearly falls within the dictates of Rule 16(a)(1)(E), as the information
6 is "within the government's possession, custody or control" and is highly relevant and
7 material to the preparation of the defense, as it is impossible to prepare for trial not knowing
8 the name of agents' writing reports, not knowing what the law enforcement agent's actions
9 were on the date and time in question, and finally, not knowing what law enforcement
10 agents to potentially subpoena for trial because potential witness names are deleted.

11 *3. Any and all photographs, videos and downloaded content from www.inforum.com,
12 mentioned at Bates stamped page 00007 provided in discovery concerning Michael Giron.*

13 Previously produced discovery contains a federal Report of Investigation authored
14 by Resident Agent Steven M. Hall, concerning events occurring on October 27, 2016 at
15 Highway 1806. Paragraph 16 of the report (referring to two photographs contained in the
16 report) states that, "[a] photo that was later found online at www.inforum.com showed an
17 unknown individual pouring what appeared to be Coleman camping fuel in the area of the
18 straw bales." Additionally, the reports in discovery state that the "North Dakota State and
19 Local Intelligence Center (SLIC) began looking to try and identify the individual
20 photographed pouring Coleman camping fuel on the fire....[w]hile checking various social
21 media sites, and other pictures,.." (Discovery produced on April 24, 2017, Bates stamped
22 page 15).

23 The government in this prosecution is alleging that Mr. Giron is that individual.
24 While the government did provide some additional photographs in their second discovery

1 response of June 1, 2017, none of the photographs have any attribution information.
2 Additionally, counsel only has color reproductions of the photographs, not JPEG images or
3 high-resolution copies of the photographs.

4 Obviously, the government obtained photographs of the October 27, 2017, incident
5 at Highway 1806 on the internet at the website indicated. Counsel have attempted to locate
6 photographs on the website but have not been able to obtain the exact photograph provided
7 in discovery, possibly due to the passage of time.

8 Any additional photographs of the incident on Highway 1806, on October 27, 2016,
9 involving the blockades that the government agents including Resident Agent Steven Hall
10 obtained from the website are clearly “within the possession or control” of the government
11 and clearly relevant and material to this case and fall under the dictates of Rule 16(a)(1)(E).

12 *4 & 5. A xeroxed copy of the entire ‘notebook’ and a report of the examination of*
13 *the laptop and a mirror image of the hard drive of the laptop provided on a portable hard*
14 *drive which were both seized from Mr. Giron on November 17, 2016, upon his arrest.*

15 Mr. Giron was not arrested on October 27, 2016. He was arrested on a California
16 state court warrant on November 17, 2016. When arrested he was in possession of a
17 backpack that contained a personal notebook or journal and also a laptop computer. The
18 request is for a complete copy of both of these items and any documents produced regarding
19 a search of the items.

20 Rule 16(a)(1)(E) states that the defense is entitled upon request of any item “that was
21 obtained from or belongs to the defendant.” There is no materiality requirement attached
22 to this portion of the rule. The rule is written in the disjunctive, so the three separate
23 categories of items discoverable by the defense—items material to preparation of the defense;
24 items the government intends to use in its case-in-chief at trial; that the item was obtained

25 DEFENSE MEMORANDUM IN
26 SUPPORT OF MOTION TO COMPEL - 9

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1 from or belongs to the defendant—are all separate. Only category one requires a showing of
2 materiality.

3 Upon his arrest Mr. Giron was carrying a backpack containing the requested items.
4 The government is obligated under Rule 16(a)(1)(E) to provide copies of the entire contents
5 of the notebook and laptop computer.

6 6. Any and all results of any testing performed on the laptop computer, the backpack
7 and the notebook; the recovered Coleman fuel container; and the cigarette lighter recovered
8 from the scene viewable in photographs reproduced at Bates number 00105 & 00106,
9 including testing for fingerprints and DNA. Additionally, the defendant requests any and
10 all trace evidence, including chemical analysis, burn pattern analysis, and any other
11 scientific testing and/or analysis performed on Mr. Giron’s clothes, the fuel can, and the
12 actual physical evidence at Highway 1806 (tires, wood, asphalt, etc.).

13 Rule 16(a)(1)(F) concerns Reports of Examinations and Tests and states:

14 Upon a defendant’s request, the government must permit a defendant
15 to inspect and to copy or photograph the results or reports of any physical
16 or mental examination and of any scientific test or experiment if:

17 (i) the item is within the government’s possession, custody, or control;

18 (ii) the attorney for the government knows—or through due diligence could
19 know—that the item exists; and

20 (iii) the item is material to preparing the defense or the government intends
21 to use the item in its case-in-chief at trial.

22 The defense request falls within the clear parameters of section (F) of the rule. If the
23 government has performed any forensic testing of the computer; or performed any
24 fingerprint or DNA analysis of the notebook, laptop, Coleman fuel container and/or

1 cigarette lighter, the results of the testing are within the possession of the government and
2 material to this case.

3 **IV. CONCLUSION**

4 For all of the above reasons, Mr. Giron respectfully requests that pursuant to Fed. R.
5 Crim. Pro. 16(d)(2), this Court compel the government to respond promptly and fully to Mr.
6 Giron's requests as set forth above.

7 DATED this 6th day of September, 2017.

8 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties associated with this case.

s/Timothy R. Lohraff