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11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA	)	No. CR 05-1046(C)-DSF
	)	
14 Plaintiff,	)	<u>GOVERNMENT'S SURREPLY TO</u>
	)	<u>DEFENDANT ANTHONY PELLICANO'S</u>
15 v.	)	<u>FIRST MOTION FOR DISCOVERY;</u>
	)	<u>EXHIBITS</u>
16 ANTHONY PELLICANO et al.,	)	
	)	Date: May 22, 2006
17 Defendants.	)	Time: 8:30 a.m.
	)	

18  
19 Plaintiff United States of America, by and through its  
20 counsel of record, Assistant United States Attorneys Daniel A.  
21 Saunders and Kevin M. Lally, hereby submits its surreply to  
22 defendant Anthony Pellicano's First Motion for Discovery. This  
23 surreply is based on the attached memorandum of points and  
24 authorities, the files and records of this case, and such  
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1 additional evidence and argument as may be presented at the  
2 hearing on defendant's motion.

3 DATED: May 8, 2006

4 Respectfully submitted,

5 GEORGE S. CARDONA  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 On March 20, 2006, defendant Anthony Pellicano ("defendant")  
5 filed a motion seeking discovery of a number of specific items  
6 that he contended were relevant to contesting his pretrial  
7 detention and the validity of a November 19, 2002 search warrant,  
8 as well as supporting a potential motion for preindictment delay.  
9 On April 3, 2006, the government filed its response, stating that  
10 a number of the items sought by defendant had already been  
11 produced and explaining why other discovery requests were  
12 irrelevant and/or unauthorized by discovery rules. After  
13 initially taking his motion off calendar, defendant then filed a  
14 reply on April 25, 2006, supported by the declaration of Steven  
15 F. Gruel. In his reply, defendant makes no effort to respond to  
16 the government's challenges to his initial requests. Instead,  
17 defendant's reply seeks several categories of discovery "[i]n  
18 addition to [his] previous motion." (Reply at 6). The  
19 government responds to those new requests herein.

20 In his reply, defendant also raises a number of attacks on  
21 the integrity of the government and its attorneys and agents.  
22 The government maintains, as it did in its previously filed  
23 response, that a discovery motion is not the appropriate vehicle  
24 to raise such allegations. Defendant having now raised a new  
25 series of misconduct claims and elaborated on prior ones,  
26 however, the government responds herein to the extent necessary  
27 to demonstrate the invalidity of defendant's related discovery  
28

1 requests. The government reserves further response for any  
2 pertinent motions that defendant might file.

3 **II.**

4 **ARGUMENT**

5 Defendant's reply includes an exposition of the government's  
6 obligations under Brady v. Maryland, 373 U.S. 83 (1963), and  
7 Giglio v. United States, 405 U.S. 150 (1972). The government  
8 assures defendant and the Court that it is aware of its legal and  
9 ethical obligations, has executed them faithfully, and will  
10 continue to do so. With respect to Brady, the government  
11 represents that it is not aware of any exculpatory information  
12 regarding defendant in connection with any of the charges in the  
13 indictment. As for Giglio, which requires the government to  
14 disclose information that could be used to impeach government  
15 witnesses, defendant's request is premature until the government  
16 has decided what witnesses it will call at trial. The government  
17 has already turned over approximately 10,000 pages of discovery,  
18 including witness statements, that may include impeachment  
19 information. Additional Giglio materials, including plea,  
20 cooperation, and immunity agreements, criminal histories, and  
21 other impeachment information, will be disclosed when the  
22 government has identified its witnesses prior to trial.

23 Beyond this general request, defendant's reply seeks four  
24 categories of discovery: (1) impeachment material pertaining to  
25 FBI Special Agent ("SA") Ornellas, including "the agent's  
26 testimony and the government's notes, memoranda and pleadings  
27 pertaining to his testimony in United States v. Johnny Azzo"; (2)  
28 discovery of "any and all materials, reports, interviews, and

1 testimony associated with" a grand jury subpoena directed to  
2 defendant's business in May 2002; (3) a number of items relating  
3 to potential witness Sandra Carradine, including government notes  
4 and reports, prison recordings, and the return of defendant's  
5 property in Ms. Carradine's, her lawyer's, or the government's  
6 possession; and (4) materials relating to any search warrants  
7 associated with, or statements made by, Alex Proctor and Steven  
8 Seagal. The government will address each of these requests in  
9 turn.

10 A. Discovery Relating to United States v. Azzo

11 Mr. Gruel alleges in his declaration that SA Ornellas  
12 "embellished, or provided troubling or false sworn testimony" at  
13 a 2003 sentencing hearing in the case of United States v. Johnny  
14 Azzo, No. CR 92-399-MRP. Defendant requests SA Ornellas'  
15 testimony and the government's notes, memoranda and pleadings  
16 pertaining to that testimony. SA Ornellas' testimony and the  
17 government's related pleadings are attached hereto. The  
18 government opposes production of its internal notes and  
19 memoranda, which are protected from disclosure by Federal Rule of  
20 Criminal Procedure 16(a)(2).

21 In response to defendant's allegation, and based on a review  
22 of the record, the government presents this summary of the issues  
23 pertaining to SA Ornellas in the Azzo case.

24 1. Azzo's Motion for Reduction of Sentence

25 Defendant Johnny Azzo was convicted of drug offenses after a  
26 trial in September 1993. In May 1994, United States District  
27 Judge Mariana R. Pfaelzer sentenced Azzo to a term of 60 months  
28 imprisonment and granted him bail pending appeal. In June 1996,

1 the Ninth Circuit affirmed Azzo's conviction. After Judge  
2 Pfaelzer continued Azzo's surrender date and while Azzo's motion  
3 for a post-sentencing downward departure was pending, Azzo fled  
4 the jurisdiction, and a bench warrant was issued. Azzo remained  
5 a fugitive until his arrest on January 10, 2003.

6 After his apprehension, Azzo renewed his 1998 motion for a  
7 post-sentencing departure, based in part on his claims of prior  
8 substantial assistance to the government. Azzo contended that,  
9 in the summer of 1998, prior to becoming a fugitive for nearly  
10 five years, he had made a tape of a discussion that he had with a  
11 drug dealer named "Victor" and had provided the tape to SA  
12 Ornellas.<sup>1</sup> When AUSA Julie Werner-Simon asked SA Ornellas about  
13 this tape in May 2003, SA Ornellas told her, based on his  
14 recollection and his negative check of the FBI ELSUR tape  
15 database, that he had no knowledge of the tape. (Exh. A, ¶¶ 5,  
16 10(b)). On July 21, 2003, however, prior to that day's  
17 evidentiary hearing on Azzo's departure motion, SA Ornellas told  
18 Special Assistant United States Attorney ("SAUSA") John Webb that  
19 he had recently discovered a tape that Azzo had provided to him  
20 in 1998. (Id., ¶ 9). SA Ornellas explained to SAUSA Webb that  
21 the tape had been located when another FBI agent had checked a  
22 different FBI evidence database. (Id., ¶ 10(b), (c)).

23 At the evidentiary hearing on July 21, 2003, SA Ornellas  
24 testified about the existence of the tape, and Judge Pfaelzer  
25 directed that the tape be produced to defense counsel. (Exh. B

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26  
27 <sup>1</sup> SA Ornellas was not the case agent in the Azzo  
28 prosecution. He was put in contact with Azzo in 1998 when Azzo  
claimed to have information pertaining to organized crime.

1 at 23-24, 39-40). On July 28, 2003, the Court held another  
2 hearing at which the government asked for a continuance to  
3 explore whether the newly discovered tape recording warranted the  
4 filing of a motion for downward departure. (Exh. C at 6). On  
5 August 18, 2003, a further hearing was held at which Judge  
6 Pfaelzer reimposed defendant Azzo's 60-month sentence. The Court  
7 stated that it did not "have the grounds to say after all this  
8 period of time that Mr. Azzo's sentence should be altered based  
9 on extensive cooperation or valuable cooperation [with] the  
10 government." (Exh. E at 8). The Court further declined to find  
11 that the government had acted in bad faith in connection with  
12 defendant's cooperation efforts.<sup>2</sup> (Id. at 10).

13 On January 14, 2005, the Ninth Circuit again affirmed Azzo's  
14 sentence, finding that Azzo had failed to show that the  
15 government's refusal to file a Rule 35 motion was based on an  
16 unconstitutional motive. United States v. Azzo, 120 Fed. Appx.  
17 133 (9th Cir. 2005) (unpublished).

18 2. SA Ornellas' Contacts With the United States Attorney's  
19 Office About the Azzo Tape

20 During the course of the above proceedings, a collateral  
21 issue emerged as to whether SA Ornellas had told AUSA Werner-  
22 Simon about Azzo's self-made tape recording five years earlier in  
23 1998. That issue, which had no bearing on the matters before the  
24 Court (i.e., the extent and value of Azzo's professed

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25  
26 <sup>2</sup> In a rambling monologue before reimposition of  
27 sentence, defendant Azzo claimed to have provided the FBI with  
28 information about Osama bin Laden and the planned September 11  
attacks in 1998, three years before the attacks. (Exh. E at 10-  
17).

1 cooperation), was first raised in a declaration filed by SAUSA  
2 Webb in connection with the government's response to Azzo's  
3 departure motion. In that declaration, SAUSA Webb wrote that SA  
4 Ornellas had told him prior to the July 21, 2003 evidentiary  
5 hearing that "he never told AUSA Werner-Simon, the Azzo trial  
6 prosecutor, about the existence of the tape because he forgot  
7 about the tape after defendant fled from this jurisdiction in  
8 1998." (Exh. A, ¶ 10(a)).

9 At the evidentiary hearing on July 21, 2003, SA Ornellas  
10 testified to Azzo's cooperation efforts, including the recently  
11 located tape recording that Azzo had provided to him in the  
12 summer of 1998. (Exh. B at 17-24). When asked if he had ever  
13 told AUSA Werner-Simon about the existence of the tape, SA  
14 Ornellas replied, "Yes. I notified Julie Werner-Simon, on August  
15 18th of '98, that [Azzo] had provided a recording to me, and it  
16 was not under the direction of the FBI." (Id. at 25). SA  
17 Ornellas testified that he recalled the date because that was the  
18 date on his memo for opening the file. SA Ornellas further  
19 testified that he had not told or reminded AUSA Werner-Simon  
20 about the tape when he spoke to her in April 2003. (Id. at 26).

21 At the hearing on July 28, 2003, AUSA Alka Sagar stated that  
22 she had spoken to AUSA Werner-Simon and that "it is her  
23 contention that contrary to what the agent testified to, she did  
24 not know about the existence [of] the tape." (Exh. C at 3).

25 On August 15, 2003, SAUSA Webb lodged a 13-page proposed  
26 order regarding, inter alia, Azzo's claims of substantial  
27 assistance and motion for downward departure. That proposed  
28 order included the following proposed findings:

1 AUSA Webb's declaration also reports that SA  
2 Ornellas stated to Webb on July 21, 2003, immediately  
3 prior to the hearing, that he never told AUSA Werner-  
4 Simon, the Azzo trial prosecutor, about the existence  
5 of the tape. This is contrary to what the agent  
6 testified to on the same date a short time later.

7 Although the point about whether the trial  
8 prosecutor had been told in 1998 or 2003 about the  
9 existence of the Azzo self-made tape is not significant  
10 or material to THIS COURT's determination of whether to  
11 grant a post-sentencing downward departure motion, THIS  
12 COURT FINDS THAT AUSA Webb's declaration is credible  
13 and consistent with AUSA Werner-Simon's "update as to  
14 defendant's cooperation" filed May 15, 2003, CR 216,  
15 which recounts her communications with law enforcement  
16 on this case. THIS COURT FINDS that SA Ornellas'  
17 testimony that he had, in 1998, told AUSA Werner-Simon  
18 about the existence of the Azzo tape, is not credible  
19 and is contrary to what he told AUSA Webb just prior to  
20 the hearing.

21 (Exh. D at 8-9).

22 At the final hearing on August 18, 2003, SAUSA Webb  
23 requested that the Court include in the record the findings  
24 contained in the government's proposed order. Judge Pfaelzer  
25 declined, stating, "I haven't got the basis to enter all these  
26 findings." (Exh. E at 4, 8). SAUSA Webb's lodged proposed order  
27 was never approved or issued by Judge Pfaelzer, and therefore was  
28 never filed and does not appear on the docket report. Instead,  
the Court issued a minute order on August 18, 2003 reimposing the  
same sentence, followed by a two-page order on August 21, 2003  
finding that "there is nothing in the record which would cause or  
necessitate the government to have filed a U.S.S.G. § 5K1.1 or a  
Rule 35 motion in the instant case and that the government has  
acted in good faith in not filing such a post-sentencing motion."  
(Exh. F). Accordingly, there was never any finding by Judge  
Pfaelzer that SA Ornellas had testified falsely or lacked  
credibility in any way.

1           3.    SA Ornellas' Testimony and the Government's Files in  
2                    the Azzo Case Are Not Henthorn/Giglio Material and Have  
3                    No Relevance to This Case

4           Under United States v. Henthorn, 931 F.2d 29 (9th Cir.  
5 1991), the United States has an obligation to review the  
6 personnel files of federal law enforcement officers who are  
7 called to testify at a criminal trial to determine whether a file  
8 contains information "of perjurious conduct or like dishonesty"  
9 that may be used to impeach the credibility of the witness. In  
10 accordance with procedures adopted by the Department of Justice  
11 to comply with Henthorn, the United States Attorney's Office  
12 ("USAO") has asked the FBI to review the personnel file of SA  
13 Ornellas for any evidence of perjurious conduct, acts of  
14 dishonesty, or other exculpatory information, including  
15 unsubstantiated allegations. As of the date of this filing, the  
16 FBI has informed the USAO that no responsive information exists.

17           Clearly, Henthorn and Giglio do not require that the  
18 government produce to the defense its files in every prior case  
19 in which the agent testified, even where that testimony may have  
20 been in conflict with other testimony. Some indication that the  
21 agent's prior testimony was the result "of perjurious conduct or  
22 like dishonesty" is required. In this case, the Azzo record does  
23 not even disclose any clear conflict between SA Ornellas'  
24 testimony at the July 21, 2003 evidentiary hearing and SAUSA  
25 Webb's declaration about what SA Ornellas told him prior to that  
26 hearing. SAUSA Webb's assertion that "SA Ornellas stated that he  
27 never told AUSA Werner-Simon . . . about the existence of the  
28 tape because he forgot about the tape after defendant fled from  
this jurisdiction in 1998" (Exh. A, ¶ 10(a)) suggests that SA

1 Ornellas may well have understood SAUSA Webb's question to refer  
2 to his conversations with AUSA Werner-Simon in 2003, not in 1998:  
3 it would not have made sense for SA Ornellas to say he had not  
4 told AUSA Werner-Simon about the tape because he had forgotten  
5 about it after defendant fled if he understood SAUSA Webb to be  
6 asking about conversations before defendant fled. Moreover, even  
7 assuming arguendo that SA Ornellas was incorrect about his 1998  
8 conversation with AUSA Werner-Simon,<sup>3</sup> there is no basis for  
9 believing that his testimony on this immaterial matter was  
10 attributable to deliberate falsehood rather than innocent  
11 misrecollection of events that occurred five years earlier. In  
12 this regard, it is noteworthy that the government's proposed  
13 order stated only that SA Ornellas' testimony was "not credible"  
14 and not that it was knowingly or intentionally false: there are  
15 a number of wholly innocent bases on which a witness' testimony  
16 may be found not to be credible, including failure of  
17 recollection. See 9th Cir. Crim. Jury Instr. 3.9 (Credibility of  
18 Witnesses).

19 In the Azzo case, an AUSA faced with what he apparently  
20 perceived as a conflict between his declaration and an agent's  
21 testimony asked the Court to make a finding that he was credible  
22 and the agent was not. The court rejected the AUSA's proposed  
23 findings, stating that it lacked the basis to adopt them. Given  
24 the possibility -- indeed, the likelihood -- of miscommunication  
25 or misrecollection as evidenced by the record, it is not

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27 <sup>3</sup> The USAO takes no position herein as to whether SA  
28 Ornellas' or AUSA Werner-Simon's recollection regarding their  
five-year-old conversation was accurate.

1 surprising that Judge Pfaelzer, who presided over the hearing and  
2 heard SA Ornellas' testimony, declined to transform a simple  
3 discrepancy (particularly on a matter that SAUSA Webb correctly  
4 recognized as "not significant or material" to the issue before  
5 the Court) into an adverse credibility finding as to a veteran  
6 FBI agent with an unblemished 27-year (now 30-year) record.

7 In the end, the matter about which defendant seeks discovery  
8 in this case amounted to, at most, a conflict between the  
9 testimony of an agent and the recollection of an AUSA on a matter  
10 wholly immaterial to any issue that was before the Azzo Court.  
11 What was relevant in Azzo was that the tape existed, the tape was  
12 turned over to the defense, and the Court found it not to warrant  
13 a reduction in sentence: whether and when SA Ornellas had  
14 previously told the AUSAs on the case about the tape was at best  
15 a collateral matter that could have had no bearing on the outcome  
16 of the proceedings. SA Ornellas' testimony on that issue had no  
17 conceivable relevance to the Azzo case, and certainly has none to  
18 the Pellicano case.

19 Even should SA Ornellas testify at trial, SAUSA Webb's  
20 conclusory assertion about his credibility on a collateral issue  
21 -- which the Court declined to adopt -- would not be admissible  
22 to impeach SA Ornellas. Specific instances of conduct of a  
23 witness other than conviction of a crime may, in the court's  
24 discretion, be inquired into on cross-examination of the witness  
25 only if the conduct concerns his or her character for  
26 truthfulness or untruthfulness. Fed. R. Evid. 608(b). Such "bad  
27 acts" may not, however, be proved by extrinsic evidence. Id.  
28 The government respectfully submits that the facts surrounding SA

1 Ornellas' testimony in the Azzo case are far too inconclusive and  
2 immaterial to have any impeachment value under Rule 608(b).

3 For the same reasons, the government also believes that  
4 evidence regarding the Azzo matter would be inadmissible under  
5 Federal Rule of Evidence 403, which provides for the exclusion of  
6 evidence -- even if relevant -- when its probative value is  
7 outweighed by the danger of unfair prejudice, confusion of the  
8 issues, potential to mislead the jury, or considerations of undue  
9 delay or waste of time. The trial in this case will focus on the  
10 evidence against the defendants in this case, not whether a  
11 prosecutor in an unrelated case several years ago did or did not  
12 have a basis for forming a subjective belief -- as to which the  
13 district court expressly declined to make a finding -- that SA  
14 Ornellas was not credible on a wholly immaterial matter. To open  
15 up the collateral Azzo matter for inquiry, cross-examination and  
16 rehabilitation would constitute an excursion into side issues  
17 that have nothing to do with this case, would distract the jury's  
18 focus from the evidence, and would needlessly prolong the trial.<sup>4</sup>

19 Accordingly, the government does not believe that its files  
20 in the Azzo case contain any information "of perjurious conduct  
21 or like dishonesty" that could be used to impeach SA Ornellas'  
22 credibility, and respectfully submits that defendant's discovery  
23 request should be denied. Alternatively, should the Court find  
24 it necessary, the government can submit the materials to the  
25  
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27 <sup>4</sup> The government anticipates filing at the appropriate  
28 time a motion in limine to preclude any evidence or questioning  
regarding the Azzo case under Rules 608(b) and 403.

1 Court for an in camera review. See United States v. Cadet, 727  
2 F.2d 1453 (9th Cir. 1984).

3 B. Discovery Relating to May 1, 2002 Grand Jury Subpoena

4 Defendant next requests "any and all materials, reports,  
5 interviews, and testimony associated with" a grand jury subpoena,  
6 dated May 1, 2002, that was served on Pellicano Investigative  
7 Agency in connection with a separate investigation. The date of  
8 that subpoena preceded by approximately two months the June 2002  
9 threat against reporter Anita Busch, which in turn provided the  
10 basis for the search warrant executed on defendant's offices in  
11 November 2002.

12 Defendant asserts that discovery relating to the subpoena is  
13 relevant to show that the November 2002 search of his office "was  
14 a subterfuge to look for something else." (Reply at 7).  
15 Defendant fails even to address the case law cited by the  
16 government demonstrating that such a "subterfuge," even if it  
17 existed (which it did not), is legally irrelevant to the validity  
18 of a search warrant. (Government's Response at 5-6). The  
19 government reiterates that the November 2002 search was based on  
20 probable cause to believe that defendant was involved in the  
21 threat against Anita Busch. Discovery relating to any law  
22 enforcement interest in defendant that might or might not have  
23 existed as a result of prior, separate investigations is simply  
24 not relevant to this case, and defendant's request should be  
25 denied.

26 C. Discovery Relating to Sandra Carradine

27 Defendant continues to suggest, as he did in his initial  
28 motion, that the government acted improperly in obtaining

1 information from his girlfriend Sandra Carradine. This  
2 allegation is baseless. The Supreme Court "has held repeatedly  
3 that the Fourth Amendment does not prohibit the obtaining of  
4 information revealed to a third party and conveyed by [the third  
5 party] to Government authorities, even if the information is  
6 revealed on the assumption that it will be used only for a  
7 limited purpose and the confidence placed in the third party will  
8 not be betrayed." United States v. Miller, 425 U.S. 435, 443  
9 (1976); see United States v. Jacobsen, 466 U.S. 109, 117 (1984)  
10 ("It is well-settled that when an individual reveals private  
11 information to another, he assumes the risk that his confidant  
12 will reveal that information to the authorities, and if that  
13 occurs the Fourth Amendment does not prohibit governmental use of  
14 that information."); id. at 122-23 (stating the "rule" that the  
15 "Government may utilize information voluntarily disclosed to a  
16 governmental informant, despite the criminal's reasonable  
17 expectation that his associates would not disclose confidential  
18 information to the authorities"); United States v. White, 401  
19 U.S. 745, 749 (1971) ("[H]owever strongly a defendant may trust  
20 an apparent colleague, his expectations in this respect are not  
21 protected by the Fourth Amendment when it turns out that the  
22 colleague is a government agent regularly communicating with the  
23 authorities."); id. at 752 ("[T]he law permits the frustration of  
24 actual expectations of privacy by permitting authorities to use  
25 the testimony of those associates who for one reason or another  
26 have determined to turn to the police.").

27 When defendant communicated information to Ms. Carradine  
28 (including death threats against several individuals), he took

1 the risk that she in turn would communicate that information to  
2 the government. Defendant's communications with Ms. Carradine  
3 were not protected by any privilege, and his subjective  
4 expectations of privacy in those communications is wholly  
5 irrelevant to their unprotected status. There is simply no  
6 "girlfriend privilege" recognized under the law. Accordingly,  
7 defendant's repeated claim that the government engaged in  
8 prosecutorial misconduct by receiving "detailed and confidential  
9 information" that he voluntarily disclosed to Ms. Carradine is  
10 unsupportable.

11 Nor is there any merit to defendant's claim that the  
12 government somehow violated his attorney-client privilege through  
13 its contacts with Ms. Carradine. Apart from the fact that  
14 defendant purported to be representing himself during most of the  
15 period in question, the attorney-client privilege is waived by  
16 voluntary disclosure of a privileged communication to a third  
17 party. Weil v. Investment/Indicators, Research & Management,  
18 Inc., 647 F.2d 18, 24 (9th Cir. 1981). Thus, any communications  
19 with counsel that defendant chose to disclose to Ms. Carradine  
20 would no longer be privileged.<sup>5</sup> Even so, the government  
21 stringently avoided learning the content of any attorney-client  
22 communications from Ms. Carradine.<sup>6</sup> (Exh. G, H).

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23  
24 <sup>5</sup> Indeed, to the extent that Mr. Gruel apparently claims  
25 to have provided Ms. Carradine with information relating to his  
26 representation of defendant (Gruel Decl. ¶ 10), he may have  
27 violated his own client's privilege.

28 <sup>6</sup> Defendant's claim that "[t]he government's discovery  
reveals that defendant Carradine provided agent Ornellas with Mr.  
Pellicano's correspondence to several attorneys" (Gruel Decl.,  
¶ 8) is misleading. The correspondence to which defendant refers

1 Turning to defendant's specific discovery requests in this  
2 area (Reply at 8), the government has already exceeded its Jencks  
3 Act discovery obligations by producing a number of FBI reports  
4 relating to Ms. Carradine's statements and cooperation. Should  
5 Ms. Carradine testify at trial, the government will produce  
6 additional material, including additional Jencks Act statements,  
7 her plea agreement, and other potential Giglio material.

8 Defendant has shown no basis to ask for the government's notes  
9 and internal memoranda regarding Ms. Carradine, and the  
10 government opposes that request. See Fed. R. Crim. Proc.

11 16(a)(2). Defendant also has made no showing of relevance or  
12 discoverability of "a list of all state and federal government  
13 agents who participated in or were provided information from  
14 Sandra Carradine gathered by her from Mr. Pellicano" or "all  
15 methods used to 'wall off' the Carradine information from the  
16 prosecution team in this case." As shown above, the information  
17 provided by Ms. Carradine was not protected by any privilege, and

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18  
19 was not between defendant and his own counsel or potential  
20 counsel, but between defendant and counsel for other subjects of  
21 the investigation who were requesting an opportunity to meet with  
22 him to discuss their own clients' situations. (Bates Nos. 284-  
23 90). Such communications are no more privileged than defendant's  
24 correspondence with any non-attorney.

25 Similarly, defendant misrepresents the facts when he claims  
26 that Ms. Carradine obtained information from him regarding a  
27 "possible defense witness." (Gruel Decl., ¶ 6). The individual  
28 referenced by defendant was not a percipient witness to anything  
in this case and was not identified by defendant as a defense  
witness, but only as a person to whom defendant wanted to talk  
regarding the government's efforts to crack his encryption  
program. (Bates No. 281). Moreover, as shown above, any  
communication that defendant had with Ms. Carradine about this  
individual was not protected by any privilege.

1 thus there was no reason to "wall off" the prosecution team from  
2 anything.

3 With regard to defendant's request for all Bureau of Prisons  
4 ("BOP") recordings of conversations between defendant and Ms.  
5 Carradine (as well as a separate request for BOP recordings of  
6 conversations between defendant and anyone), the government has  
7 certain responsive recordings and intends to produce them in  
8 discovery. Should defendant wish to obtain additional recordings  
9 that are not in the government's possession, he has the ability  
10 to subpoena them from the BOP.

11 Finally, defendant asks for "the return to Mr. Pellicano of  
12 all materials, documents, correspondence, personal property, and  
13 legal material in the possession of Carradine, her attorney or  
14 the government." Prior to the hearing on this motion, the  
15 government will have returned to Ms. Carradine's counsel  
16 originals or copies (in the event that originals must be retained  
17 for evidentiary purposes) of all materials belonging to defendant  
18 that Ms. Carradine has provided to the government. If defendant  
19 seeks return of his property from Ms. Carradine or her attorney,  
20 he should resolve that issue with them.

21 D. Discovery Relating to Alex Proctor and Steven Seagal

22 Defendant's final new request in his reply brief is for all  
23 evidence, including search warrants and statements, relating to  
24 Alex Proctor and Steven Seagal. Defendant and Proctor are  
25 jointly charged in a pending state case with conspiracy and  
26 criminal threats in connection with the threat against Anita  
27 Busch, which initially was believed to have been perpetrated on  
28 behalf of defendant's client Seagal. Defendant is not charged

1 herein with any conduct relating to Proctor or Seagal, and the  
2 requested discovery is therefore irrelevant to this case.  
3 (Defendant is charged herein with wiretapping and illegally  
4 accessing information regarding Busch, and discovery relating to  
5 those charges has been and will continue to be produced.)  
6 Defendant's bald assertion that the requested information "is  
7 material to the defense of this case" (Gruel Decl., ¶ 15) does  
8 not substitute for a showing of relevance and discoverability.<sup>7</sup>  
9 Defendant should not be permitted to use this case as a vehicle  
10 to obtain early discovery in the state case, and his request  
11 should therefore be denied.

12 Moreover, the government believes that the true reason  
13 defendant seeks to obtain this information has nothing to do with  
14 legitimate trial preparation. As defendant's counsel has been  
15 informed, the government has obtained corroborated information  
16 that defendant recently conspired with known organized crime  
17 connections in Chicago to place a "hit" on Alex Proctor inside a  
18 federal prison in order to prevent Proctor from testifying  
19 against him.<sup>8</sup> The government believes that defendant is using  
20 this motion to try to find out what, if anything, Proctor has

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21  
22 <sup>7</sup> The only conceivable relevance to this case of the  
23 requested information relating to Proctor and Seagal would be to  
24 the extent that such information existed as of the date of SA  
25 Ornellas' November 2002 search warrant affidavit and should have  
26 been included in that affidavit. The government affirmatively  
27 represents that there are no statements or other information  
28 responsive to defendant's request that predate that affidavit.

26 <sup>8</sup> The government has not yet produced discovery regarding  
27 this matter because it is the subject of an ongoing investigation  
28 that might result in additional criminal charges. Should the  
Court find it appropriate in resolving this motion, the  
government can present its evidence for in camera review.

1 said about him not because it has any relevance to this case (it  
2 does not) but so defendant can determine whether Proctor is  
3 cooperating against him in connection with the state case. For  
4 this additional reason, defendant's discovery request should be  
5 denied.

6 **III.**

7 **CONCLUSION**

8 For the foregoing reasons, the government respectfully  
9 requests that the court deny defendant's discovery motion insofar  
10 as it seeks discovery that is not relevant to this case or to  
11 which defendant is otherwise not entitled at this time under Rule  
12 16 and applicable case law.

13 DATED: May 8, 2006

14 Respectfully submitted,

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