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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. KIRK GREGORY DENINO, Defendant.	Case No. CR 04-189-S-EJL **PROCEDURAL ORDER**

In order to provide for the just determination of every criminal proceeding, the Board of Judges for the District Court for the District of Idaho has adopted a uniform Procedural Order to be used in criminal proceedings. United States Magistrate Judges are authorized to enter the Procedural Order at the time of the arraignment of a defendant pursuant to 28 U.S.C. § 636 (b)(1)(A).

The Procedural Order shall be construed to secure simplicity in procedure, fairness in the administration of justice, and elimination of unjustifiable expense and delay under the provisions of Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 12, Motions and Defenses; Fed. R. Crim. P. 16, Discovery; Fed. R. Crim. P. 17.1, Pretrial Conferences; and govern the submission of pretrial briefs and jury instructions.

The Procedural Order does not create any rights and/or obligations, nor is it intended to create any such rights, that are contrary to established case law, federal statutory law, the Federal Rules of Evidence ("Fed. R. Ev.") or the Federal Rules of Criminal Procedure.

I.

DISCOVERY

THEREFORE, IT IS HEREBY ORDERED THAT:

1. As to each of the following discovery requests, when so requested by the defendant, the attorney for the government shall within seven (7) calendar days from the date of the arraignment on the indictment, disclose to the defendant and make available for inspection, copying, or photographing all of the following which are currently within the possession, custody, or control of the government. As to material not currently in the possession of the government, but through the exercise of due diligence may become known to the attorney for the government, such material shall be produced as soon as practicable after its discovery, but at a minimum for the defendant to make effective use of it at trial:

REQUESTED:

A. Upon request of a defendant, that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged; and the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial; and where the defendant is a corporation, partnership, association, or

labor union, the foregoing statements of any witness before a grand jury who: (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.
Fed. R. Crim. P. 16(a)(1)(A). YES/NO

B. Upon request of a defendant, a copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. Fed. R. Crim. P. 16(a)(1)(B). YES/NO

C. Upon request of the defendant, books, papers, documents, photographs, tangible objects, buildings or places or copies or portions thereof which are within the possession, custody or control of the government and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial or were obtained or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(C). YES/NO

D. Results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government the existence of which is known or by the exercise of due diligence may become known to the attorney for the government and which are material to the preparation of the defense or intended for use by the government as evidence in chief at trial. Fed. R. Crim. P. 16(a)(1)(D). YES/NO

E. A written summary of testimony the government intends to use under Fed. R. Ev. 702, 703 or 705 during its case in chief at trial which summary must describe the witnesses opinions, the bases and the reasons therefore and the witnesses' qualifications. Fed. R. Crim. P. 16(a)(1)(E). YES/NO

F. Evidence of other crimes, wrongs, or acts sought to be

admitted under Fed. R. Ev. 404 (b). YES/NO

2. If the defendant has requested disclosure under Fed. R. Crim. P. 16(a)(1)(C), (D), or (E), (¶ ¶ 1 (C), (D) or (E) *supra*), upon compliance with such request by the government, the defendant shall within fourteen (14) days from the date of the arraignment, disclose to the government and make available for inspection, copying, or photographing all of the following which are currently in the possession, custody or control of the defendant. As to material not currently within the possession or custody of the defendant, but through the exercise of due diligence may become know to the defendant, as soon as practicable after discovery and at a minimum to make effective use of it at trial.

REQUESTED:

A. Books, papers, documents, photographs, tangible objects, or copies or portions thereof which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial. Fed. R. Crim. P. 16(b)(1)(A). AEL YES/NO

B. All results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness's testimony. Fed. R. Crim. P. 16(b)(1)(B). AEL YES/NO

C. A written summary of testimony the defendant intends to use under Fed. R. Ev. 702, 703 and 705 as evidence at trial which summary must describe the opinions of the witnesses, the bases and reasons therefore and the witnesses' qualifications. Fed. R. Crim. P. 16(b)(1)(C). AEL YES/NO

3. Upon written motion properly filed and served and a sufficient showing (*in camera* if appropriate) the court may at any time order that the discovery or inspection

provided for by this order be denied, restricted or deferred, or make such other order as is appropriate.

4. Unless objected to by the government at the time of the arraignment, all documentation submitted to the court in support of or in connection with any search warrant issued in connection with this case, and with regard to any such search warrant material filed under seal, such order of seal is hereby withdrawn as to the defendant and such materials shall be deemed unsealed as to the defendant. The attorney for the government, as well as the Clerk of Court, shall make available for inspection and copying by counsel for the defendant any and all such search warrant material including but not limited to: applications for search warrants (whether granted or denied), all affidavits, declarations and materials in support of such search warrants, all search warrants and all search warrant returns.

Government objects: **YES/NO** AUC

5. The Court strongly encourages the government to produce any information currently in its possession and described in the following paragraphs within seven (7) calendar days of the date of the arraignment on the indictment, in conjunction with the material being produced under Part I, paragraph 1 of this Procedural Order. As to any materials not currently in the possession of the government, including information that may not be exculpatory in nature at the time of the arraignment but as the case proceeds towards trial may become exculpatory because of subsequent events, then the government shall, as soon as practicable and at a minimum for the defendant to make effective use of it at trial, disclose the information. If the government has information in its

possession at the time of the arraignment, but elects not to disclose this information until a later time in the proceedings, the court can consider this as one factor in determining whether the defendant can make effective use of the information at trial.

A. Disclose all material evidence within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Aqurs*, 427 U.S. 97 (1976) and *Kyles v. Whitley*, 514 U.S. 419 (1995) and their progeny.

B. Disclose the existence and substance of any payments, promises of immunity, leniency, preferential treatment or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 362 U.S. 264 (1959), and their progeny.

C. Disclose the criminal record of any and all prior convictions of any witness who will testify for the government at trial that may be admissible under Fed. R. Ev. 609.

D. Disclose whether a defendant was identified in any lineup, show up, photo spread or similar identification proceeding, and make available any pictures utilized or resulting therefrom and the names of all identifying witnesses.

E. Government investigators are to be instructed to preserve all rough notes of interviews in those circumstances where legal authority imposes such an obligation. If the defendant would be entitled to examine the rough notes of a government investigator under existing law, the court encourages the government to provide the notes to the defendant in a timely manner so the attorney for the defendant may have sufficient opportunity to review the notes and at a minimum to make effective use of the material at trial, without the trial being unreasonably delayed. In the event the government is uncertain as to whether certain rough notes must be turned over, the material shall be promptly submitted to the court for a *in camera* inspection.

F. The government shall comply with the provisions of 18 U.S.C. § 2518 (8)(d) by notifying the defendant if he was an aggrieved person, as defined by 18 U.S.C. § 2510(11), of any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

G. Copies of all latent finger or palm prints or handwriting exemplars obtained during the investigation of the case.

6. The United States is hereby authorized, pursuant to Fed. R. Crim. P. 6(e), to disclose grand jury materials to the defense counsel, defense investigators, defense expert witnesses, a witness who testified before the grand jury and whose grand jury transcript is being used for trial preparation, and the defendant. This limited disclosure allows only the attorneys for the government, the defendant, defendant's attorney, those specified above and other individuals authorized pursuant to a Fed. R. Crim. P. 6(e)(3) Order, to have access to grand jury materials. Any disclosure to individuals or organizations other than those specifically identified is prohibited without a court order allowing such disclosure.

Defense attorneys, as officers of the court, shall act as custodians of any grand jury information disclosed under this Procedural Order and the obligation to preserve and protect the confidentiality of this information shall continue even after conclusion of the criminal case. In the event the defense attorney does not desire to act as a custodian of this information and continuously maintain the confidentiality of the grand jury information, he shall return the grand jury material to the government following the conclusion of the case.

7. Defense investigators are to be instructed to preserve all rough notes of interviews in those circumstances where legal authority imposes such an obligation. *See United States v. Nobles,* 422 U.S. 225, 230-232 (1975). If the government would be entitled to examine the rough notes of a defense investigator under existing law, the court encourages the defendant to provide the notes to the government in a timely manner so the attorney for the government may have sufficient opportunity to review the notes and at a minimum to make effective use of the material at trial, without the trial being

unreasonably delayed. In the event the defendant is uncertain as to whether certain rough notes must be turned over, the material shall be promptly submitted to the court for a *in camera* inspection.

II.

DEFENSES

IT IS FURTHER HEREBY ORDERED that the defendant shall provide the following notices of certain defenses to the government within twenty-eight (28) days from the date of arraignment:

1. If the defendant intends to rely on the defense of insanity, or if the defendant intends to introduce expert testimony relating to a mental disease or defect, or any other mental condition of the defendant, the defendant must file written notice of such intention within twenty-eight (28) days from the date of arraignment. Fed. R. Crim. P. 12.2.B.

2. If the defendant intends to claim a defense of actual or believed exercise of public authority on behalf of law enforcement, the defendant must file a written notice of such intention within twenty-eight (28) days from the date of arraignment. Fed. R. Crim. P. 12.3.

3. Pursuant to this Procedural Order the government can state whether or not it will exercise its option to require the defendant to give notice whether a defense of alibi will be offered at trial. For the purposes of this demand, the government relies upon the indictment or information and materials to be provided by this Procedural Order to give notice of the time, date and place where the alleged offense was committed.

Within 28 days after such demand has been made, the defendant will file a notice which will state the specific place or places at which the defendant claims to have been at

before the seventh (7th) day following the filing of such response. An additional copy of all pretrial motions, memoranda, responses and replies and other supporting documentation shall be submitted as a judge's copy to the Clerk of the Court at the time of filing the original document.

If a party has no opposition to the motion or application, the court shall be promptly notified with the filing of a notice of non-objection. Dist. Idaho Loc. Crim. R. 12.1(b). In the event an adverse party fails to file any responsive documents provided to be filed under this order in a timely matter, such failure may be deemed by the court to constitute a consent to the sustaining of said pleading or the granting of said motion or other application.

2. That unless specific objection to the chain of custody or authenticity of any document, scientific evidence, photograph, book, paper or other tangible object disclosed by the parties and to be used or introduced at trial is made by pretrial motion, it shall be deemed that the requirement of chain of custody and/or authenticity for the introduction of such evidence at trial is waived unless cause can be shown to the contrary by the objecting party.

3. That pretrial statements, requested voir dire, and requested jury instructions shall be submitted to the court on or before the seventh (7th) day preceding the trial date, together with copies as required by Dist. Idaho Loc. Crim. R. 30.1. Proposed jury instructions shall also be provided to the judge's chambers on 3-1/2" disks in WordPerfect format.

4. Within fourteen (14) days of receiving a written summary of testimony under Fed. R. Ev. 702, 703, or 705, the party shall notify the Court if any scientific methodology or other specialized knowledge is going to be objected to or challenged by either party

under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kuhmo Tire v. Carmichael,* 526 U.S.137 (l999). The court will make a determination if a hearing is necessary regarding the admissibility of the scientific evidence/testimony and will notify the parties if a hearing is scheduled.

5. Recognizing that the Court can not require that the parties exchange witness lists prior to trial, the Court would strongly encourage voluntary disclosure by counsel as follows:

A. That on or before the seventh (7th) day preceding the trial date the United States may provide to the defendant a witness list and shall provide an exhibit list and description of exhibits together with a copy of exhibits which exhibit list shall indicate all exhibits that have been stipulated for admission by the parties.

B. That within five (5) days from the date the United States complies with the foregoing paragraph the defendant may provide to the United States a witness list and shall provide an exhibit list and description of exhibits together with a copy of the exhibits which exhibit list shall indicate all exhibits that have been stipulated for admission by the parties.

6. That prior to preparation of exhibit lists to be exchanged, counsel shall contact the courtroom deputy clerk to determine the method for listing and numbering trial exhibits. LaDonna Garcia is the deputy clerk to the Honorable B. Lynn Winmill and may be contacted at (208) 334-9021, Carol Vaughn is the deputy clerk to the Honorable Edward J. Lodge and may be contacted at (208) 334-9022. The Court will be provided a copy of the exhibit lists no later than five (5) days prior to the date of trial and witness lists the day of trial.

IV.

PLEA NEGOTIATIONS AND PRETRIAL CONFERENCE

1. In order to manage the Court's calendar and conduct a fair and expeditious trial in those cases that will not be disposed by entry of a plea of guilty to the charge(s) by

by the Court. No admissions or stipulations of fact made at the pretrial conference will be used against the defendant unless reduced to writing and signed by the defendant and the defendant's attorney.

2. Pursuant to Dist. Idaho Loc. Crim. R. 11.1, the parties shall make every reasonable effort to complete all plea negotiations before the scheduled pretrial conference. In particular, the attorney for the government is encouraged to provide in plea negotiations a requirement that any offer of a negotiated plea made by the government to the defendant must be accepted by the defendant prior to the pretrial conference, but in no event less than fourteen (14) days prior to the scheduled commencement of trial. The Court recognizes that in some limited and unusual cases the parties may not complete plea negotiations prior to the scheduled conference, but this would clearly be the exception and both counsel shall promptly notified the Court if they are a experiencing difficulties in plea negotiations and provide, if requested, sworn affidavits from counsel why they are not in compliance with this Order.

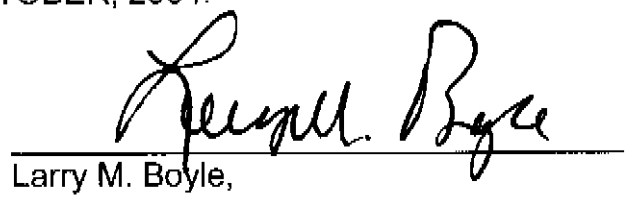
3A. The pretrial conference shall be set by Judge Lodge's Chambers.

V.

TRIAL DATE

The jury trial in this case is scheduled to commence on the **13th day of DECEMBER, 2004, at 9:30 am**, and will continue for 4 days before the Honorable U.S. District Judge, Edward J. Lodge, in Boise, Idaho.

DATED THIS 25th DAY OF OCTOBER, 2004.



Larry M. Boyle,
Chief United States Magistrate Judge

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United States District Court
for the
District of Idaho
October 26, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:04-cr-00189

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

Aaron N Lucoff, Esq. 1-208-334-1413
US ATTORNEY'S OFFICE
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FEDERAL DEFENDER'S OFFICE
350 N 9th St #301
Boise, ID 83702

_____ Chief Judge B. Lynn Winmill
✓ Judge Edward J. Lodge
✓ Chief Magistrate Judge Larry M. Boyle
_____ Magistrate Judge Mikel H. Williams

Visiting Judges:
_____ Judge David O. Carter
_____ Judge John C. Coughenour
_____ Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 10-26-04

BY: Jill Angelo
(Deputy Clerk)