UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2006-CR-215

v.

LAWRENCE BUTLER,

Defendant.

LAWRENCE BUTLER'S PRETRIAL MOTIONS

NOW COMES the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves the court as follows:

I. MOTION TO DISCLOSE CONFIDENTIAL INFORMANTS

To disclose whether any codefendants are cooperating witnesses and also to disclose the identity of all confidential informants who had contact with the defendant during the investigation of this case. Additionally, for an order compelling the government to disclose the criminal records of the informants and any promises or other incentives offered to the informants in exchange for their cooperation.

(See attached Memorandum of Law)

II. MOTION FOR BILL OF PARTICULARS AS TO THE CONDUCT OF LAWRENCE BUTLER THAT THE GOVERNMENT BELIEVES ESTABLISHES THAT HE WAS A MEMBER OF THE CONSPIRACY

To order the government to provide Butler with a Bill of Particulars as to the conduct on the part of Butler that the government contends made Butler a part of the conspiracy alleged in the Indictment.

(See attached Memorandum of Law)

III. TO SUPPRESS THE FRUITS OF THE SEARCH THAT OCCURRED AT 3369 N. PALMER STREET ON MAY 17, 2005

To suppress the fruits of the search conducted at 3369 N. Palmer St., Milwaukee, on May 17, 2005 for the reason that the officers made a warrantless entry into the home without probable cause combined with exigent circumstances and the warrant that was later obtained was obtained through the use of the illegally seized evidence.

The undersigned has conferred with Asst. United States Attorney Erica O'Niel concerning this motion and following are the agreed upon facts and the disputed facts:

A. Statement of Agreed Upon Facts

1. That on May 17, 2005 Milwaukee Police received information from a confidential informer that the occupants of 3369 N. Palmer St., Milwaukee were selling heroine from that home.

2. That on May 17, 2005 at approximately 1:30 p.m. a squad of Milwaukee Police Officers went to that address and surrounded the house. The police did not have a warrant. Instead, the officers planned to conduct a "knock and talk" with the residents.

3. After one minute of knocking and loudly announcing themselves as police officers, an officer stationed at the back of the house saw an unknown black male wearing a white tee-shirt throw out of the kitchen window what appeared to be a plastic baggie with tan powder .

4. That the officer who saw the baggie thrown out the window suspected that the tan powder was heroin and communicated these events to the officers in the front of the house.

5. That three officers then gained forcible entry through the front door "for the purpose of preventing the destruction of narcotics evidence."

6. That at approximately 4:30 p.m. on May 17, 2005 the officers obtained a warrant to search 3369 N. Palmer St. The affidavit filed in support of the warrant application included information obtained by the police officers after they made the warrantless entry into the house.

7. None of the occupants of the residence admitted to residing at or having control of the premises.

B. Statement of Disputed Facts

8. Whether Lawrence Butler was an overnight guest at 3369 N. Palmer St., Milwaukee on May 16 and 17, 2005.

9. Whether the police searched 3369 N. Palmer St. before or after they obtained the search warrant.

C. Statement of Legal Issues

10. Whether the police possessed probable cause to arrest the occupants in the house combined with exigent circumstance at the time they made the warrantless entry into the house.

11. Whether the later issuance of a search warrant cured the defect of the search which was allegedly conducted prior to the issuance of the warrant."

D. Statement of Standing and Need for Evidentiary Hearing.

12. The defendant, Lawrence Butler, hereby alleges and shows to the court that on May 17, 2005 he was an overnight guest at 3369 N. Palmer Street and, therefore, he had a reasonable expectation of privacy in the home. That this expectation of privacy is one that the community is prepared to recognize and, therefore, that Butler has standing to challenge the search.

13. The government does not contest Butler's standing to challenge the search.

The defendant hereby requests and evidentiary hearing for the purpose of establishing standing and for the purpose of resolving the disputed issues of fact.

Additionally, it is requested that the court permit the parties to file their legal memoranda *after* the evidentiary hearing.

IV. DISCOVERY RELATED MOTIONS

To make the following orders concerning discovery:

1. To extend the time for filing any additional pretrial motion required

concerning the issuance of a May 20, 2005 warrant to download information off of a cellular telephone believed to belong to Butler. The police reports suggest that a warrant was obtained; however, the application and the warrant are not contained in the discovery materials. Counsel has conferred with Asst. United States Attorney regarding this issue and it is likely to be informally resolved; however, in the event an additional motion is required an extension is necessary.

2. To order the government to produce a set of the discovery materials at the Dodge Detention Center. As of January 22, 2007 when counsel last conferred with Butler, Butler claimed that no discovery materials were available at the Dodge Detention Center.

(No memorandum of law attached)

Dated at Milwaukee, Wisconsin, this 1st day of February, 2007.

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Attorneys for the Defendant
/s/ Jeffrey W. Jensen
State Bar No. 01012529

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

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MEMORANDUM OF LAW IN SUPPORT OF LAWRENCE BUTLER'S PRETRIAL MOTIONS

I. THE COURT SHOULD ORDER THE GOVERNMENT TO DISCLOSE THE IDENTITY OF CONFIDENTIAL INFORMANTS IMMEDIATELY.

The discovery materials provided by the government in this case are riddled with "black outs" of the identity of what appears to be numerous confidential informants. In almost every instances, the informant appears to be intimately involved in the alleged heroin distribution operation. As will be set forth in more detail below, because these informants are plainly "transactional witnesses" they must be identified. It is not proper that the government disclose the identity of only those informants they plan to call as witnesses at trial. Nor is it appropriate to allow the government to withhold the identity of the informants until thirty days before trial.

The defendant's right to disclosure of confidential informants was first established in ***Roviaro v. United States***, 353 U.S. 53, 60, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957) and the law has changed very little in the fifty years since that decision. In determining whether to reveal an informant's identity, a district court must balance

> the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Id. at 62. The government's limited privilege of withholding the identity of an informant gives way once the defendant proves that the disclosure of the informant's identity "is relevant and helpful" to his defense "or is essential to a fair determination of a cause." *Id*.

Naturally, the government always emphasizes the "relevant and helpful to the defense" prong of the analysis. This is because a defendant will almost never be able to establish that the informant's information would be helpful to the defense. All the defendants ever know about confidential informants is the *inculpatory* information that they provide to the police as set forth in affidavits in support of search warrant applications and similar documents. Rarely, if ever, do agents record information from informants that is not helpful to the government. Moreover, if an informant's information is *exculpatory* the government has an independent obligation to disclose the information under ***Brady v. Maryland***, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)

There is a second prong to the ***Roviaro*** analysis, though. The informants must also be identified if their disclosure is "essential to a fair determination of the cause." Typically, this prong is met if the informant is found to be a "transactional witness." An informant is a transactional witness when he or she was an active participant in the events leading to an arrest *Id*. at 60. This is because where an informant is a transactional witness the defendant ought to be afforded the same opportunity as the government to interview the person and decide whether this person's testimony is necessary. This is a fundamental precept of due process. Butler has a fundamental right to prepare his defense secure from governmental intrusion. ***Weathisford v. Bursey***, 429 U.S. 545 (1977); ***United States v. Kilrain***, 566 F.2d 979 (5th Cir.); ***United States v. Woods***, 544 F.2d 242 (6th Cir. 1976). Governmental intrusion into defense preparation may operate to deny the defendant effective assistance of counsel, particularly when the government seeks to make use of information gained from such inappropriate infiltration.

Here, what appear to be two different informants identify Butler as a "worker" (see Appendix A). Moreover, another information claims to have lived with Butler in an apartment in Chicago during a period when Butler was selling heroin. Obviously, if these statements are true, the informants are intimately involved in the operation. That is, they are transactional witnesses and must be identified.

A. The government's routine offer to identify those informants it intends to call at trial is not sufficient.

Typically, in response to a motion such as this the government offers to identify, thirty days before trial, those informants it intends to call at trial. This offer is not sufficient for several reasons- primarily because it stands to reason that the government will call only those informants that propose to offer testimony consistent with the government's theory of the case.[1] Any informant whose testimony does not support the government's theory will not be called. These people, of course, are the very sort of witnesses that the defense is looking for during their preparation for trial. However, the government's intrusion into the process makes these potential witnesses unavailable to the defense.

The net result is a version of events severely and unfairly canted in favor of the government's theory. In a very real sense, then, disclosure of all confidential informants who are "transactional witnesses" is required in order for there to be a "fair determination" of the cause.

This is particularly true since this is a conspiracy prosecution. One might easily imagine a case in which disclosure of all transactional witnesses might not be necessary. An example would be a possession of cocaine with intent to distribute case, involving a single defendant who was caught with a kilogram of cocaine in his basement, where the police were led to the defendant based on information provided by a drug customer of the defendant. The customer would properly be characterized as a "transactional witness" but it is obvious that the customer's testimony is not helpful to the defendant nor is that person's testimony necessary for a fair determination of whether the the defendant possessed the kilogram with intent to deliver.

In the present case, though, the primary issues will be whether there was an agreement among two or more people to work together to sell herion (i.e. was there a conspiracy?) and who belonged to that conspiracy. Thus, persons who were present at meetings, or who knew members of the conspiracy, or who were victims of crimes committed by person believed to be part of the conspiracy, all possess information that is critically important to the determination of the nature of the conspiracy and the names of the individuals who were part of it.

B. Thirty days before trial is not sufficient.

The government's routine offer to identify the informants a mere thirty days

1 It is quite possible that the government would call no confidential informants as witnesses at the trial. In many cases, by the time the matter is called for trial, there are so many "co-operating defendants" that it is entirely unnecessary for the government to call any of the original confidential informants.

before trial is wholly inadequate.

Firstly, the government never explains why, if it is appropriate to identify an informant under the law, it is better and fair to do so shortly before trial as opposed to immediately. In other words, a confidential informant must be identified if he has information that is helpful to the defense or is necessary for a fair determination of the cause. What, then, is the point of waiting until thirty days before trial before giving the defendant the evidence that is helpful to his defense? Is it so as to minimize just how helpful the information will actually be to the defendant by giving the defense attorney little time to prepare? Is it to give the government time to obtain the testimony "co-operating defendants" in the hope that the defendant, in the face of an avalanche of snitches, will be persuaded to plead guilty and never even need the identity of the informant? Neither of these possibilities seems laudable. But if the court is going to consider permitting the government to wait to disclose the informants the government should at least explain why this is necessary.

Additionally, this is a case that the government has been investigating for, perhaps, in excess of a year. During this period the United States Attorney has has the assistance of numerous law enforcement agencies and, perhaps, hundreds of police officers, police detectives, and federal agents.

Yet, the government suggests that it is reasonable to for the defense to prepare its case in thirty days.

Certainly, many things can be done to prepare the defense without knowing the identity of the informants; however, once the informants are identified there is much to be done in order learn what they have to say and to secure their presence at trial. The odds are good that many of the informants are incarcerated in prison. Thus, counsel must make arrangements and then travel to whatever prison holds the informant and interview him. If the testimony is helpful, orders to produce must be drafted, signed by the court, and served on the prison. And this all must be done in the final days before trial when counsel is busy with other last-minute preparations in addition to his regular practice of law. If any related documents, such as business records or medical records must be obtained, the task becomes virtually impossible.

Therefore, the court should order that the government identify all confidential informants who are transactional witnesses immediately.

II. THE COURT SHOULD ORDER THE GOVERNMENT TO PROVIDE A BILL OF PARTICULARS CONCERNING ANY EVIDENCE THAT BUTLER WAS A PART OF THE CONSPIRACY ALLEGED.

The government has provided defense counsel with discovery disks. These disks contain some six hundred pages of police reports relating to various "debriefings" by various snitches and police reports concerning a few undercover buys and seizures of drugs by police What the indictment and the discovery materials fail to inform the defendant of is the evidence that the government claims to possess that establishes that Butler became a part of the conspiracy.

For example, an "informant" was shown a photograph of Butler and the informant identified him as a "worker" (in the heroin organization). Never do the snitches describe what they saw that led them to believe the Butler was a "worker". Therefore, Butler asks the court to order the government to provide him with a Bill of Particulars explaining what evidence there is to establish that Butler was part of any conspiracy to deliver heroin.

Rule 7(f), F.R.Crim.P. provides:

> Bill of Particulars. (f) The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Even though no bill of particulars may be necessary if the information sought by a defendant has been provided in the discovery materials, the district court still possesses the discretion to grant a bill of particulars. See, e.g., ***United States v. Bortnovsky***, 820 F.2d 572, 574 (2d Cir. 1987). A bill of particulars may be appropriate where the government indicts numerous defendants in counts that span many years. *See* ***United States v. Barnes***, 158 F.3d 662, 665-66 (2d Cir. 1998) (defendant, who was indicted with over thirty others in "bare bones" narcotics conspiracy charge spanning three years, "was entitled to be otherwise apprised of the conduct that he was alleged to have undertaken" in furtherance of the conspiracy).

In this case it is practically impossible for defense counsel to meaningfully assist Butler in preparing a defense. Firstly, the "evidence" appears to be the opinions of various informants- and these informants are not identified and they do not describe any behavior on the part of Butler that led them to the conclusion that he was a "worker".

This difficulty is somewhat beside the point, though, because even if Butler was involved in drug transactions, what evidence is there that the crimes were committed

on behalf of the alleged conspiracy?

For these reasons the court should order the government to provide Butler with a Bill of Particulars setting forth the evidence that the government intends to introduce to establish that Butler was a part of the conspiracy.

Dated at Milwaukee, Wisconsin, this 1st day of February, 2007.

LAW OFFICES OF JEFFREY W. JENSEN
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

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APPENDIX TO LAWRENCE BUTLER'S PRETRIAL MOTIONS

A. Report of a "debriefing" of a confidential informant

B. Second report of a debriefing of a confidential informant

REPORT OF INVESTIGATION (Continuation)	1. File No. [redacted]	2. G-DEP Identifier [redacted]
	2. File Title [redacted]	
4.		
5. Program Code HID100	6. Date Prepared 06-24-2005	

"TONYA", "LIL C", "SHELDON", "BIG DOG", "INTEGRITY", "TJ", "TYRONE" and "TEDDY". [redacted] identified a photograph of Joseph DAVIS as OLD MAN JOE. [redacted] identified a photograph of Rotonia LITTLA as TONYA. [redacted] identified a photograph of Sheldon BROWN as SHELDON. [redacted] identified a photograph of Edward McCULLOUGH as LIL C. [redacted] identified a photograph of Jessie McKINNEY as BIG DOG. [redacted] identified a photograph of Tavaris WALLACE as TJ. [redacted] identified a photograph of Tyrone DAVIS as TYRONE. [redacted] identified a photograph of Lawrence BUTLER as a worker but could not recall his name.

3. Sheldon BROWN would bag up raw heroin into $10 amounts. Edward McCULLOUGH would drop off packs of heroin and collect money. TEDDY sold packs of heroin late at night.

4. The sellers would pick up packs of heroin at JOHNSON's house at 2447 N. 28th St., Milwaukee, WI. Both JOHNSON and McCULLOUGH would distribute packs of heroin. The packs of heroin were usually located in a jacket in a closet in JOHNSON's bedroom. In addition, blenders and scales were kept in the pantry.

5. [redacted] saw McCULLOUGH about every other day. McCULLOUGH drove a tan Chrysler. [redacted] saw BROWN about every other day as well. BROWN was often in a car with Joseph DAVIS or in a white Grand Am. BROWN also dropped off packs to the workers.

6. Joseph DAVIS drove a beige Buick LaSabre and helped drop off packs as well as pick up money.

7. [redacted] believes that each pack contained at least 25 to 26 individual bags of heroin that were sold for $10. A worker could keep $50 to $60 off of each packs that were sold.

8. JESSE brought up heroin from Chicago on at least 2 occasions that [redacted] knows of. [redacted] identified a photograph of Jessie BROWN as JESSIE. Jessie BROWN drove a 1999 to 2000 tan Grand Prix to Chicago with his wife "BOOGIE".

REPORT OF INVESTIGATION

1. Program Code	2. Cross File / Related Files	3. File No.	4. G-DEP Identifier
HID100		[redacted]	[redacted]
5. By: TFA Carol M. Starr At: Milwaukee D.O.	☐ ☐ ☐ ☐ ☐	6. File Title [redacted]	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:		8. Date Prepared 07-21-2006	

9. Other Officers: SA Ellen Roy

10. Report Re: 2006-07-19 Interview of [redacted]

DETAILS

1. On 07-19-2006 at 10:45 a.m., TFA Starr and SA Roy interviewed [redacted] at the Prairie du Chien Correctional Institution, Prairie du Chien, WI regarding his knowledge of and participation in the Maurice DAVIS heroin trafficking organization.

2. [redacted] stated that [redacted] had lived in Milwaukee for 3 to 6 months prior to his arrest (05-17-2005). [redacted] had been recruited by Tomaine DAVIS to sell heroin in Milwaukee. Tomaine DAVIS lived in Chicago and would come to Milwaukee to pick up money and drop off packs of heroin. Tomaine DAVIS brought up 20-30 grams of heroin at a time. [redacted] lived in a house on N. Palmer St. with "LOW KEY". "LOW KEY" has been identified as Lawrence BUTLER. The residence on N. Palmer St. has been identified as 3369 N. Palmer. [redacted] stated that Tomaine DAVIS' uncle, "BLUE", rented the house on N. Palmer St. [redacted] thought "BLUE's" real name might be Kenneth HALL. "BLUE" has been identified as Kelvin HALL. Tomaine DAVIS also stayed in the house on N. Palmer St. when he was in Milwaukee. Tomaine DAVIS had a cell phone that he would use as a customer phone. Heroin customers would call the phone and Tomaine DAVIS would then dispatch workers to meet the customers. Workers included "JOE BOB", "BLACK", "T.Y.", "LIL C", "TEDDY", "T", "TOYA" and "AL". "JOE BOB" has been identified as Joseph DAVIS, "T.Y." has been identified as Tyrone DAVIS, "LIL C" has been identified as

11. Distribution:	12. Signature (Agent)	13. Date
Division Chicago-DIG	TFA Carol M. Starr	07-21-2006
District	14. Approved (Name and Title)	15. Date
Other HQS:SARI	David L. Spakowicz HIDTA GS	07-24-06

DEA Form -6 (Jul. 1996)

DEA SENSITIVE
Drug Enforcement Administration

1 - Prosecutor