

1 Terri Wood
OSB 88332
2 730 Van Buren Street
Eugene, Oregon 97402
3 Attorney for Defendant
4
5
6

7 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY

8
9 STATE OF OREGON,
10 Plaintiff,
11 -VS-
12 XX,
13 Defendant

CASE No. XXXXXX

DEFENDANT'S REQUESTED DISCOVERY
AND BRADY MATERIALS; AND,
ALTERNATIVE EX-PARTE MOTION
FOR SUBPOENAS DUCES TECUM IN
ADVANCE OF TRIAL

14
15
16
17 COMES NOW the defendant and makes written demand upon the Multnomah County
18 District Attorney, pursuant to ORS 135.815, 135.825 and 135.845, and the Fourteenth
19 Amendment of the United States Constitution, and such other authorities as are cited herein
20 and in the Defendant's Memorandum of Law in support of his discovery requests, incorporated
21 by reference herein, to forthwith disclose the following material information within its
22 possession or control, or which may at any time hereafter come into its possession or control
23 while this cause is pending; and, the defense further requests the Court, pursuant to ORS
24 135.865, to order inspection of, or grant other appropriate relief, as to any of the materials
25 requested herein that have not been provided by the State by [DATE CERTAIN]; or,
DEFENDANT'S REQUESTED DISCOVERY

1 alternatively, Defendant moves, pursuant to ORS 136.580(2), for the Court to direct the
2 defense to issue subpoenas duces tecum for such records or documents demanded herein
3 which the Court finds are outside the scope of statutory discovery rights, requiring such
4 records or documents to be produced before the Court prior to trial to be inspected and copied
5 by the parties' attorneys:

6 1. The names and addresses of persons intended to be called as witnesses at any
7 stage of the trial, including anticipated impeachment and rebuttal witnesses, together with all
8 relevant written or recorded statements or memorandum of any oral statements of such
9 persons, including memorandum or recorded statements of witnesses prepared by the District
10 Attorney or his agents.

11 2. Any written or recorded statements or memorandum of any oral statements made
12 by the defendant, or made by co-defendants, if any; and all oral statements of the defendant
13 and any codefendant to any government agent, even if unrecorded in written or electronic
14 media.

15 3. Any reports or statements of experts made in connection with this particular case,
16 including results of physical or mental examinations and of scientific tests, experiments or
17 comparisons which the District Attorney intends to offer in evidence at the trial.

18 4. Any books, papers, documents, photographs or tangible objects which the District
19 Attorney intends to offer in evidence at the trial, including for impeachment or during rebuttal,
20 or which were obtained from or belonged to the defendant.

21 5. If actually known to the District Attorney, any record of prior criminal convictions of
22 persons whom the District Attorney intends to call as witnesses at the trial.

23 6. A written copy of any record of prior criminal convictions of the defendant.

24 7. All original notes and electronic recordings, now in existence or hereafter made, of
25 police officers and/or investigators on behalf of the State, including staff of SCF and

DEFENDANT'S REQUESTED DISCOVERY

1 C.A.R.E.S. Northwest, relating to this case, including any agent's underlying rough notes of
2 the statements requested in items 1 and 2 above.

3 8. The occurrence of a search or seizure, the circumstances of that search or seizure,
4 any relevant material or information obtained thereby including a list of the items seized; and
5 the circumstances surrounding the acquisition of any statements made by the defendant to
6 any witness or other person. ORS §135.825(1) & (2).

7 9. The description of any prior similar or bad act the State will seek to introduce at trial.

8 10. Any and all exculpatory evidence which the State may have in its possession or
9 control, including but not limited to the following items:

10 11. Any impeachment material from the personnel files of each law enforcement agent,
11 or any other state agent, including staff of SCF and C.A.R.E.S. Northwest, who will testify in
12 the case, including any evidence that the agent has been accused of making a false statement
13 or engaging in any deceptive conduct; if the prosecutor is uncertain about what to disclose, the
14 court is requested to conduct a further examination *in camera*. See *United States v. Henthorn*,
15 931 F.2d 29 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1588 (1992).

16 12. All notes or other writings or documents used by a prospective State witness
17 before the grand jury. *United States v. Wallace*, 848 F.2d 1464, 1470 (9th Cir. 1988).

18 13. The names and addresses of all percipient witnesses interviewed by the State
19 whom the State does not intend to call at the trial. *United States v. Cadet*, 727 F.2d 1453,
20 1469 (9th Cir. 1984).

21 14. The arrest and conviction record of each prospective State witness. *United States*
22 *v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (criminal records of witnesses must be disclosed
23 even if contained in witness's probation file), *cert. denied*, 109 S.Ct. 1170 (1989); *Perkins v.*
24 *Lefevre*, 691 F.2d 616 (2nd Cir. 1982). The State is required to search both national and local
25 criminal record files. See *United States v. Perdomo*, 929 F.2d at 970-71.

DEFENDANT'S REQUESTED DISCOVERY

1 15. Any evidence that a criminal case has been dismissed against any prospective
2 State witness while the case against Mr. Defendant was under investigation or otherwise
3 pending. *See United States v. Anderson*, 881 F.2d 1128, 1138-39 (D.C. Cir. 1989).

4 16. Any evidence that any prospective State witness has any criminal charge pending
5 against him. *United States v. Fried*, 486 F.2d 201 (2nd Cir. 1973), *cert. den.* 416 U.S. 983
6 (1975); *United States v. Maynard*, 476 F.2d 1170, 1174 (D.C. Cir. 1973)(pending indictment
7 relevant to bias and motive of witness).

8 17. Any evidence that any prospective State witness is under investigation by federal
9 or state authorities. *United States v. Chitty*, 760 F.2d 425, 428 (2nd Cir.), *cert. den.*, 474 U.S.
10 945 (1985).

11 18. Any evidence of express or implicit understandings, offers of immunity, special
12 treatment while in custody, or of past, present, or future compensation between the State or
13 any of its agents and any prospective State witness or any friend or member of the witnesses'
14 family. *See Giglio v. United States*, 405 U.S. 150 (1972) (agreement not to prosecute); *United*
15 *States v. Schaffer*, 789 F.2d 682, 689 (9th Cir. 1986) (moneys paid for ongoing undercover
16 cooperation in another case); *United States v. Butler*, 567 F.2d 885, 889 (9th Cir. 1978)
17 (prosecutor's "assurances" of future benefits); *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th
18 Cir. 1986)(implicit understanding must be disclosed even if no "promise" and even if
19 conditional)..

20 19. Any evidence that any prospective witness, or attorney for the witness, has applied
21 to, or requested from, the State any consideration or benefit including but not limited to any
22 plea bargain, dismissal of any charge, sentence reduction or early parole, or copies of police
23 reports or other information regarding defendant, whether or not the State agreed to such a
24 request. *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989); *Brown v. Dugger*, 831 F.2d 1547,
25 1558 (11th Cir. 1986).

DEFENDANT'S REQUESTED DISCOVERY

1 20. Any evidence of any discussion about, or advice concerning, any plea bargain or
2 requested benefit between the State and any prospective witness. *United States v. Kojayan*, 8
3 F.3d 1315 (9th Cir. 1993)(conviction reversed and case remanded to consider dismissal as
4 sanction for government's failure to disclose deal between witness and government, which
5 witness government chose not to call at trial); *Haber v. Wainwright*, 756 F.2d 1520, 1523-24
6 (11th Cir. 1985) (government "advice" to witness must be disclosed); *Campbell v. Reid*, 594
7 F.2d 4, 7 (4th Cir. 1979) (prosecutor's statement to the witness that he "would do the right
8 thing" must disclosed to the defense even if the witness is unaware of its exact meaning);
9 *Dubose v. Lefevre*, 619 F.2d 973, 978- 79 (2nd Cir. 1980) (same).

10 21. The full scope of any witness' past cooperation with the State including but not
11 limited to all monies, benefits and promises received in exchange for cooperation. *United*
12 *States v. Shafer*, 789 F.2d 682-688-89 and n. 7 (9th Cir. 1988)); *United States v. Eduardo-*
13 *Franco*, 885 F.2d 1002, 1010 (2nd Cir. 1989) (evidence of past services highly relevant to bias
14 and interest).

15 22. All statements of any prospective witness relevant to his testimony or relevant to
16 impeachment or bias. See *Kyles v. Whitely*, 115 S.Ct. 1555, 1569 (1995)(reversible error not
17 to disclose evidence of misidentification by crucial witness); *United States v. Brumel-Alvarez*,
18 991 F.2d 1452 (9th Cir. 1992) (informant's recantation of earlier statement to D.E.A. had to be
19 disclosed as Jencks Act as it bore on credibility); *United States v. Tincher*, 907 F.2d 600 (6th
20 Cir. 1990) (reversible error for prosecutor to withhold grand jury testimony of witness that
21 contradicted his trial testimony).

22 23. Any evidence that any prospective witness has made an inconsistent statement to
23 the State or any of its agents with respect to his proposed testimony. See *Kyles v. Whitely*,
24 115 S.Ct. at 1569 (reversible error not to disclose evidence of misidentification by crucial
25 witness); *United States v. Isgro*, 974 F.2d 1091 (9th Cir. 1992) (gross misconduct where

DEFENDANT'S REQUESTED DISCOVERY

1 prosecutor to failed to disclose prior grand jury testimony of witness which was inconsistent
2 with his trial testimony); *McDowell v. Dixon*, 858 F.2d 945, 949 (4th Cir. 1988), *cert. denied*,
3 109 S.Ct. 1172 (1989) (reversible error to withhold victim's prior inconsistent statement to
4 police about description of attacker); *Chavis v. North Carolina*, 637 F.2d 213, 223 (4th Cir.
5 1980) (contradictory statements of witness must be disclosed); *Powell v. Wiman*, 287 F.2d
6 275, 279-80 (5th Cir. 1961)(same).

7 24. Any evidence that any prospective State witness has made a statement
8 inconsistent with or contradictory to any statement by any other person whether or not a
9 prospective witness. See *United States v. Minsky*, 963 F.2d 870, 874-77 (6th Cir. 1992)(error
10 not to disclose witness's statement to F.B.I. contradicted by third party); *Hudson v. Blackburn*,
11 601 F.2d 785, 789 (5th Cir. 1979)(statement of police officer refuting witness' statement that he
12 identified defendant at lineup); *United States v. Hibler*, 463 F.2d 455, 460 (9th Cir. 1972)
13 (statement of police officer casting doubt on story of witness); *Hudson v. Whitley*, 979 F.2d
14 1058 (5th Cir. 1992) (statement of witness identifying another person as killer).

15 25. Any evidence that a witness has engaged in crimes even though he has not been
16 formally charged or convicted of those crimes. See *United States v. Osorio*, 929 F.2d 753 (1st
17 Cir. 1991) (prosecutor "using a witness with an impeachable past has a constitutionally derived
18 duty to search for and produce impeachment information requested regarding the witness");
19 *Powell v. Wiman*, 287 F.2d 275, 279- 80 (5th Cir.1961) (admission of witness to prosecutor that
20 he engaged in several crimes should have been disclosed); *United States v. Boffa*, 513 F.
21 Supp. 444 (D.C. Del. 1980) (prior bad acts of witness discoverable); *United States v. Burnside*,
22 824 F. Supp. 1215 (N.D. Ill. 1993) (reversible error not to disclose ongoing illegal drug use by
23 cooperating witnesses). See also *United States v. Ray*, 731 F.2d 1361 (9th Cir. 1984) (criminal
24 conduct occurring after execution of plea agreement constitutes evidence of bias or motive).

25
DEFENDANT'S REQUESTED DISCOVERY

1 26. Any evidence that any prospective State witness has ever made any false
2 statement to law enforcement authorities regarding any matter. *United States v. Bernal-Obeso*,
3 989 F.2d 331, 337 (9th 1993)(informant's lie to DEA about his criminal record); *United States v.*
4 *Brumel-Alvarez*, 991 F.2d at 1465 (D.E.A. agent's opinion of informant credibility); *United*
5 *States v. Dimas*, 3 F.3d 1015, 1018 (7th Cir. 1993) (evidence that DEA agent faced disciplinary
6 proceedings for having backdated report); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th
7 Cir. 1988) (probation file listing instances of the witness lying to authorities).

8 27. Any evidence that any witness has a tendency to lie or exaggerate his testimony.
9 *Brumel- Alvarez*, 991 F.2d at 1465 (D.E.A. agent's negative view of informant's credibility);
10 *United States v. Strifler*, 851 F.2d at 1202 (must disclose probation file of witness showing
11 tendency to lie or over- compensate).

12 28. Any evidence that any prospective witness has consumed alcohol or drugs prior to
13 witnessing or participating in the events that gave rise to his testimony or any time prior to
14 testifying in court. See *United States v. Butler*, 481 F.2d 531, 534-535 (D.C. Cir. 1973) (drug
15 use impairs memory, judgment, and credibility); *Burnside*, 824 F. Supp. at 1215 (reversible
16 error to fail to disclose witnesses drug use because "illegal drug use by the cooperating
17 witness was relevant to the witnesses' abilities to recollect and relate events...and clear
18 inducements from which a factfinder could infer witnesses wanted to stay on government
19 prosecutor's good side").

20 29. Any medical, psychological or psychiatric evidence tending to show that any
21 prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired.
22 See *United States v. Lindstrom*, 698 F.2d 1154, 1163-68 (11th Cir. 1983) (psychiatric records
23 relevant to credibility); *Chavis v. North Carolina*, 637 F.2dat 224 (psychiatric records reflecting
24 on the competency or credibility of witness); *Butler*, 481 F.2d at 534-535 (drug use); *United*
25 *States v. McFarland*, 371 F.2d 701, 705 (2nd Cir.) (prior hospitalizations of witness for mental

DEFENDANT'S REQUESTED DISCOVERY

1 illness), *cert. denied*, 387 U.S. 906 (1966). *Powell v. Wiman*, 287 F.2d 275, 279 (5th Cir. 1961)
2 (same).

3 30. Any evidence that a prospective State witness is biased or prejudiced against the
4 defendant or has a motive to falsify or distort his or her testimony, including but not limited to
5 the plans or intent of any prospective State witness to file a civil lawsuit for damages against
6 the defendant.. See *Striffler*, 851 F.2d at 1202 (motive to inform discoverable).

7 31. Any impeaching or bad character evidence relating to any witness. *United States*
8 *v. Becerra*, 992 F.2d 960 (9th Cir. 1993).

9 32. Any evidence that a prospective State witness has not passed a polygraph
10 examination or had inconclusive results. See *Carter v. Rafferty*, 826 F.2d 1299, 1305 (3rd Cir.
11 1987), *cert. denied*, 484 U.S. 1011 (1988); *United States v. Lynn*, 856 F.2d 430, 432-33 (1st
12 Cir. 1988).

13 33. The full scope of any witness' association or affiliation with the State and its
14 agencies, including local law enforcement agencies and SCF

15 34. Any evidence that the State or its agents view or have ever viewed any potential
16 State witness as not truthful. *United States v. Brumel-Alvarez*, 991 F.3d 1452 (9th Cir. 1992).

17 35. Any physical evidence, medical records, counseling records, or other documents
18 tending to exculpate the defendant in whole or in part, tending to mitigate punishment, or
19 tending to impeach a State witness. *Brady v. Maryland*, 373 U.S. 83 (1963) (accomplice
20 statement that he, not defendant was actual shooter mitigates punishment of defendant); see
21 also *Miller v. Pate*, 386 U.S. 1 (1967) (reversible error not to disclose evidence that clothing
22 was covered with paint, not blood); *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995)
23 (government had duty to disclose results of company research which would have been useful
24 in impeaching government witnesses); *Ballinger v. Kerby*, 3 F.3d 1371, 1376 (10th Cir. 1993)
25 (due process violated by failure to produce possibly impeaching photos of crime scene which

DEFENDANT'S REQUESTED DISCOVERY

1 would have buttressed defense that witness could not have seen out of windows in order to
2 identify defendant); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995)(new trial granted
3 where prosecutor failed to correct his misstatement of fact which prejudiced defendant); *United*
4 *States v. Poole*, 379 F.2d 648 (7th Cir. 1967) (medical exam showing no evidence of sexual
5 assault).

6 36. The commencement and termination date of the grand jury that indicted the
7 defendant. *In Re Grand Jury*, 903 F.2d 180 (3d Cir. 1990).

8 37. The testimony of any grand jury witness, once that witness has testified on direct
9 at trial. *State v. Hartfield*, 290 Or 583 (1981)(Tape recording of grand jury witness testimony
10 must be disclosed after witness testifies on direct for the
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 State); ORS 132.220 (Grand juror may be compelled to testify for purpose of determining
2 whether witness' grand jury testimony was consistent with trial testimony).
3

4 DATED this _____ day of _____, 2004.
5
6

7 _____
8 TERRI WOOD, OSB #
9 ATTORNEY FOR DEFENDANT
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DEFENDANT'S REQUESTED DISCOVERY