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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DANNY FABRICANT,	)	CV 14-8124-RSWL
	)	CR 03-01257-RSWL-1
	)	
Petitioner,	)	<b>ORDER re: Petitioner's</b>
	)	<b>Application for</b>
v.	)	<b>Appointment of</b>
	)	<b>Investigator [CR1015,</b>
UNITED STATES OF AMERICA,	)	<b>CV5], Application for</b>
	)	<b>Leave to Conduct</b>
	)	<b>Discovery [CR1016,</b>
Defendant.	)	<b>CV6], and First § 2255</b>
	)	<b>Discovery Motion</b>
	)	<b>[CR1017, CV7]</b>

Currently before the Court is Petitioner Danny Fabricant's ("Petitioner") three related discovery requests [CR1015/CV5, CR1016/CV6, CR1017/CV7] ("Requests") in which Petitioner requests discovery and the appointment of an investigator in connection with Petitioner's recently filed 28 U.S.C. § 2255 motion. Petitioner's Ex Parte Application for Leave to Conduct Discovery [CR1016, CV6] requests leave pursuant to Rule 6 of the Rules Governing 28 U.S.C. § 2255 Proceedings

1 ("Rule 6") to conduct the discovery specified in  
2 Petitioner's First Section 2255 Discovery Motion  
3 [CR1017, CV7]. Petitioner's related Ex Parte Request  
4 for the Appointment of Investigator Lee Cole [CR1015,  
5 CV5] requests government-funded investigative services  
6 pursuant to 18 U.S.C. § 3006A(e). The Government  
7 opposes [CR1033, CV20] all three Requests.

8 The Court, having considered all papers submitted  
9 pertaining to these Requests, **NOW FINDS AND RULES AS**  
10 **FOLLOWS:** Petitioner's Requests [CR1015/CV5, CR1016/CV6,  
11 CR1017/CV7] are **DENIED**.

#### 12 I. BACKGROUND

13 In September 2008, Petitioner was re-tried before a  
14 jury and convicted [682] of distribution of  
15 methamphetamine, conspiracy to distribute  
16 methamphetamine, and possession with intent to  
17 distribute methamphetamine, in violation of 21 U.S.C.  
18 §§ 841, 846. On December 17, 2009, this Court  
19 sentenced Petitioner to life imprisonment [848, 849].  
20 On January 30, 2013, the Ninth Circuit affirmed  
21 Petitioner's convictions and sentence, United States v.  
22 Fabricant, 506 F. App'x 636, 638 (9th Cir. 2013), and  
23 on October 15, 2013, the U.S. Supreme Court denied  
24 certiorari, 134 S. Ct. 450 (Mem.) (2013).

25 On October 21, 2014, Petitioner filed a Motion to  
26 Vacate, Set Aside, or Correct Sentence pursuant to 28  
27 U.S.C. § 2255 [CR1011, CV1]. On the same day,  
28 Petitioner filed the three present discovery requests,

1 an Ex Parte Application for Appointment of Investigator  
2 Lee Cole [CR1015, CV5], an Ex Parte Application for  
3 Leave to Conduct Discovery [CR1016, CV6], and a First  
4 Section 2255 Discovery Motion [CR1017, CV7]. The  
5 Government timely filed its Opposition [CR1033, CV20]  
6 opposing all three requests on December 18, 2014.  
7 Petitioner timely filed his Reply [CR1034, CV21] on  
8 January 12, 2015.

## 9 II. DISCUSSION

### 10 A. Legal Standard

#### 11 1. Rule 6

12 Rule 6(a)<sup>1</sup> allows a district court to authorize a  
13 party to conduct discovery after the party has filed a  
14 § 2255 motion with the district court. Rules Governing  
15 Section 2255 Proceedings, rs. 1, 6(a) (2010). In a  
16 Section 2255 proceeding, the “habeas petitioner does  
17 not enjoy the presumptive entitlement to discovery of a  
18 traditional civil litigant.” Larkin v. Yates, No. CV  
19 09-2034-DSF (CT), 2009 WL 2049991, at \*13 (C.D. Cal.  
20 July 9, 2009) (citing Bracy v. Gramley, 520 U.S. 899,  
21 903-05 (1997)). Rather, discovery is available to a  
22 Section 2255 movant “only in the discretion of the  
23 court and for good cause shown.” Id. (citing Rich v.  
24 Calderon, 187 F.3d 1064, 1068 (9th Cir. 1999)); Rules  
25 Governing Section 2255 Proceedings, r. 6(a) (2010).

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26  
27 <sup>1</sup> Rule 6(a) states that “[a] judge may, for good cause,  
28 authorize a party to conduct discovery under the Federal Rules of  
Civil Procedure and may limit the extent of discovery.” Rules  
Governing Section 2255 Proceedings, rs. 1, 6(a) (2010).

1 Good cause exists where "specific allegations give  
2 the court a reason to believe that the petitioner may,  
3 if the facts are fully developed, be able to  
4 demonstrate that he is entitled to relief." Easley v.  
5 MacDonald, No. CV 12-09989 DDP (AN), 2013 WL 6834638,  
6 at \*1 (C.D. Cal. Dec. 23, 2013) (citing Smith v.  
7 Mahoney, 611 F.3d 978 (9th Cir. 2010)). Rule 6(a)  
8 discovery is not appropriate when the movant's  
9 discovery requests are mere "fishing expeditions" to  
10 investigate speculation or to "'explore [the movant's]  
11 case in search of its existence.'" Calderon v. U.S.  
12 Dist. Ct. N. Dist. Cal., 98 F.3d 1102, 1106 (9th Cir.  
13 1996); Barno v. Hernandez, No. 08cv2439-WQH, 2011 WL  
14 2039702, at \*1 (S.D. Cal. May 25, 2011).

15 2. 18 U.S.C. § 3006A(e)

16 The Criminal Justice Act ("CJA"), codified at 18  
17 U.S.C. § 3006A, authorizes, in some circumstances,  
18 government funds for investigative services for  
19 indigent petitioners "seeking relief under section . .  
20 . 2255 of title 28." 18 U.S.C. § 3006A(a)(2), (e); see  
21 Guide to Judiciary Policy, Vol. 7, Pt. A, Ch. 3 ("CJA  
22 Guidelines") § 310.10.30(a)-(b) (2013); Harris v.  
23 United States, No. CV12-4709-VBF, 2012 WL 7845578, at  
24 \*1 (C.D. Cal. Aug. 20, 2012). Section 3006A(e) allows  
25 for court-ordered authorization of government funds for  
26 investigative services "upon request" by "[c]ounsel for  
27 a person who is financially unable to obtain  
28 investigative . . . services necessary for adequate

1 representation" after the court makes an "inquiry in an  
2 ex parte proceeding, that the services are necessary  
3 and that the person is financially unable to obtain  
4 them." 18 U.S.C. § 3006A(e)(1). When a *pro se* movant  
5 requests government-funded investigative services under  
6 § 3006A(e), the CJA Guidelines require two threshold  
7 determinations that the movant is "eligible for  
8 representation" under the CJA and that the movant's  
9 case is "one in which the interests of justice would  
10 have required the furnishing of representation." CJA  
11 Guidelines § 310.10.30(a)-(b); see In re Smith, 586  
12 F.3d 1169, 1172 (9th Cir. 2009).

## 13 **B. Discussion**

### 14 1. Petitioner's Request for Leave to Conduct 15 Discovery Pursuant to Rule 6(a)

#### 16 a. *Petitioner's Request*

17 Petitioner's Request for Leave to Conduct Discovery  
18 [CR1016, CV6] and First § 2255 Discovery Motion  
19 [CR1017, CV7] jointly request discovery of the  
20 following material pursuant to Rule 6(a):

21 (1) copies of all Operation Dequiallo ("OpDeq")  
22 Electronic Evidence Recordings ("EE Recordings")  
23 and copies of any related transcripts of those  
24 Recordings, First § 2255 Discovery Mot. 1;

25 (2) any reports or writings memorializing all  
26 Federal and State law enforcement contacts made  
27 with the family of Cynthia Garcia, id. at 6;

28 (3) a photograph, preferably 5 inches by 7 inches,

1 of ATF agent John Ciccone taken in 2002 or 2003,  
2 id. at 8;

3 (4) unredacted copies of all OpDeq investigation  
4 reports or memorandums, id. at 8-9;

5 (5) a copy of James Richie's testimony in the 2006  
6 Las Vegas Hells Angels trial, United States v.  
7 Acosta, et al., No. CR-03-542-JCM-PAL, and a copy  
8 of the discovery documents in that case related to  
9 monies paid to informant James Richie, First § 2255  
10 Discovery Mot. 10;

11 (6) any documents supporting ATF agent John  
12 Ciccone's testimony in Petitioner's retrial on  
13 September 23, 2008, that informant Michael Kramer  
14 was "authorized" to own, possess, and/or carry  
15 firearms, or a letter stating that the Los Angeles  
16 U.S. Attorney's Office and former Assistant U.S.  
17 Attorney Rodrigo A. Castro-Silva "had no knowledge  
18 of, and did NOT 'Authorize,' Informant Michael  
19 Kramer's ownership, possession or carrying of  
20 firearms . . . during 2002 or 2003," id. at 11;

21 (7) the "[i]dentities of all persons present at a  
22 home on Avenue San Luis, in Woodland Hills, CA,  
23 during the 12/03/2003 execution of Federal Search  
24 Warrant 03-2589M," id. at 13.

25 Petitioner seeks this discovery material because he  
26 believes the evidence would impeach ATF informant  
27 Michael Kramer ("Kramer") and ATF Agent John Ciccone  
28 ("Agent Ciccone"), both of whom testified against

1 Petitioner at Petitioner's retrial. Id. at 1-14;  
2 Opp'n 2:10-12. Petitioner requests the above discovery  
3 to show that informant Kramer engaged in various bad  
4 acts such as distribution and use of methamphetamine,  
5 assault, theft, frequenting "stripper bars," and  
6 murder. First § 2255 Discovery Mot. 3-10, 13-16.

7 Petitioner also requests the above discovery  
8 material to impeach Agent Ciccone. Id. at 7, 11-13.  
9 Petitioner speculates that "there is a good  
10 probability" Agent Ciccone "contacted the family [of  
11 murder victim Cynthia Garcia] and lied to them about  
12 Kramer's involvement [in the murder], to get them to  
13 agree not to file a Wrongful Death lawsuit." Id. at 7.  
14 Petitioner also speculates that Agent Ciccone falsely  
15 testified in Petitioner's retrial that informant  
16 Kramer, a felon, was "authorized" to carry firearms  
17 while acting as an undercover Hells Angels ATF  
18 informant. Id. at 11-13. Finally, Petitioner alleges  
19 that the false testimony of an informant in an  
20 unrelated 2006 Las Vegas Hells Angels case impeaches  
21 Agent Ciccone because Agent Ciccone "sat quietly [sic]"  
22 while the informant lied on the stand. Id. at 10-11.

23 b. *Analysis*

24 A Section 2255 movant is not entitled to discovery,  
25 but the court may, in its discretion and for "good  
26 cause," grant a § 2255 movant leave to conduct  
27 discovery pursuant to Rule 6(a). Rules Governing  
28 Section 2255 Proceedings, r. 6(a) (2010); United States

1 v. Kalfsbeek, No. 2:05-cr-0128, 2013 WL 129409, at \*2  
2 (E.D. Cal. Jan. 9, 2013). Good cause exists where  
3 "specific allegations give the court a reason to  
4 believe that the petitioner may, if the facts are fully  
5 developed, be able to demonstrate that he is entitled  
6 to relief."<sup>2</sup> Easley, 2013 WL 6834638, at \*1 (citing  
7 Smith v. Mahoney, 611 F.3d 978, 996 (9th Cir. 2010)).  
8 The "good cause" analysis requires an analysis of "the  
9 essential elements of Petitioner's underlying claim" in  
10 order to "determine whether the petitioner has shown  
11 'good cause' for appropriate discovery to prove his  
12 claim." Nedley v. Runnels, No. 03-5237, 2007 WL  
13 841788, at \*11 (N.D. Cal. Mar. 20, 2007).

14 Petitioner's discovery requests relate to two  
15 underlying claims in Petitioner's § 2255 Motion: Brady  
16 due process violations and newly discovered impeachment  
17 evidence. 2255 Mot. Mem. P&A, ECF No. CR1013, CV3.

18 i. *Legal Standard for § 2255 Motion*

19 "Under § 2255, the sentencing court is authorized  
20 to discharge or resentence a defendant if it concludes  
21 that it 'was without jurisdiction to impose such  
22 sentence, or that the sentence was in excess of the  
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25 <sup>2</sup> "Good cause" does not exist, and leave to conduct  
26 discovery under Rule 6(a) is not appropriate, when the movant's  
27 requested discovery is a mere "fishing expedition" to investigate  
28 speculative claims or to search for the existence of possible  
claims. Calderon v. U.S. Dist. Ct. N. Dist. Cal., 98 F.3d 1102,  
1106 (9th Cir. 1996) ("Federal habeas court must allow discovery  
. . . only where a factual dispute, if resolved in the  
petitioner's favor, would entitle him to relief.'").



1 maximum authorized by law, or is otherwise subject to  
2 collateral attack.'" United States v. Addonizio, 442  
3 U.S. 178, 184 (1979); see 28 U.S.C. § 2255(a). Here,  
4 Petitioner's discovery requests relate to claims of  
5 Brady violations and "newly discovered evidence," both  
6 of which can only be construed as collateral attacks to  
7 Petitioner's sentence.

8 Collateral attacks on final judgments may prevail  
9 only within "narrow limits." Addonizio, 442 U.S. at  
10 185. A valid "collateral attack" under Section 2255 is  
11 limited to "constitutional error" or "a fundamental  
12 defect which inherently results in a complete  
13 miscarriage of justice," rendering the "proceeding  
14 itself irregular and invalid." Id. at 185-86; see Trap  
15 v. United States, Nos. 12cv1205 BEN/10cr912 BEN, 2013  
16 WL 2444123, at \*3 (S.D. Cal. June 3, 2013) ("To warrant  
17 relief under § 2255, a prisoner must allege a  
18 constitutional, jurisdictional, or otherwise  
19 'fundamental defect which inherently results in a  
20 complete miscarriage of justice [or] an omission  
21 inconsistent with the rudimentary demands of fair  
22 procedure.'" (quoting United States v. Timmreck, 441  
23 U.S. 780, 783-84 (1979)).

24 ii. Brady Claims

25 In Brady, "the Supreme Court held that '[t]he  
26 suppression by the prosecution of evidence favorable to  
27 an accused upon request violates due process where the  
28 evidence is material either to guilt or to punishment,

1 irrespective of the good faith or bad faith of the  
2 prosecution.' " Runningeagle v. Ryan, 686 F.3d 758, 769  
3 (9th Cir. 2012) (quoting Brady v. Maryland, 373 U.S.  
4 83, 87 (1963)). Because a Brady violation "violates  
5 due process where the evidence is material," a Brady  
6 violation can be a cognizable § 2255 claim. Id.

7 To prove a Brady violation, the "defendant must  
8 prove three elements": (1) the evidence is favorable to  
9 the accused because it is exculpatory or impeaching;  
10 (2) the evidence was suppressed by the State, either  
11 willfully or inadvertently; and (3) prejudice resulted  
12 from the State's failure to disclose the evidence.

13 Benn v. Lambert, 283 F.3d 1040, 1052 (9th Cir. 2002);  
14 see Runningeagle, 686 F.3d at 769. Evidence is  
15 prejudicial, or "material," "when there is a  
16 reasonable probability that, had the evidence been  
17 disclosed, the result of the proceeding would have been  
18 different.'"<sup>3</sup> Runningeagle, 686 F.3d at 769; Benn, 283  
19 F.3d at 1052. "A 'reasonable probability' is a  
20 probability sufficient to undermine confidence in the  
21 outcome." United States v. Alvarez, 86 F.3d 901, 904  
22 (9th Cir. 1996); Benn, 283 F.3d at 1052.

23 Here, Petitioner's discovery request for the OpDeq

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25 <sup>3</sup> "'[M]ateriality' in the constitutional sense" cannot be  
26 established by "mere speculation." Barker v. Fleming, 423 F.3d  
27 1085, 1099 (9th Cir. 2005) (rejecting petitioner's Brady claim  
28 based on a "theory woven largely of threads [the petitioner had]  
created himself," and concluding that a "'mere possibility that  
an item of undisclosed information might have helped the defense,  
or might have affected the outcome of the trial'" was not  
"materiality" for Brady or constitutional purposes).

1 materials could be construed as a Brady violation, as  
2 Petitioner asserts that the OpDeq materials contain  
3 evidence that could have impeached informant Kramer,  
4 who testified against Petitioner at his retrial. See  
5 First § 2255 Discovery Mot. 1-6, 8-10; see, e.g., id.  
6 at 4-5 (Petitioner stating that he intends to use the  
7 OpDeq recordings "to identify and locate impeachment,  
8 etc. evidence, that was hidden by the Government").  
9 Petitioner claims the OpDeq evidence would show that  
10 Kramer engaged in various bad acts such as frequenting  
11 strip clubs, assaulting people, murdering people,  
12 stealing, and snorting methamphetamine. Id. at 1-6.

13 The OpDeq material Petitioner requests is  
14 "favorable" to Petitioner because it could impeach a  
15 government witness, informant Kramer. But even  
16 assuming the evidence was "suppressed" by the State,  
17 which is disputed,<sup>4</sup> the evidence is not "material."

18 As the Government points out, "Petitioner presented  
19 significant evidence to impeach Kramer's credibility at  
20 Petitioner's retrial," including Kramer's participation  
21 in the Cynthia Garcia murder and Kramer's involvement  
22 in other illegal activity such as assault and

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24 <sup>4</sup> In the Government's Opposition, the Government claims that  
25 it did make available to the defense for inspection all  
26 investigative reports related to Petitioner's retrial. Opp'n  
27 8:17-27. The Government explains that the Court had issued an  
28 Order of non-disclosure of investigative reports for any  
unrelated investigations. Id. Petitioner, in his Reply, argues  
that the "Government is not being entirely truthful" about the  
disclosure, because only Petitioner's co-counsel Kennedy, and not  
Petitioner himself, was allowed to look at the reports. Reply 10.

1 distribution and use of methamphetamine while working  
2 for ATF. Opp'n 7:13-27 (quoting Sept. 26, 2008, Tr. at  
3 114-126). Upon review of the retrial transcripts, the  
4 evidence Petitioner seeks from the OpDeq material is  
5 cumulative of the evidence offered by the defense in  
6 Petitioner's retrial. As such, there is no "reasonable  
7 probability" that the impeaching, but cumulative,  
8 evidence in the OpDeq material would have changed the  
9 outcome of the jury's guilty verdict. Furthermore,  
10 though Kramer was an important government witness, the  
11 Court agrees that the Government "presented ample other  
12 evidence of petitioner's guilt," including recordings  
13 of Petitioner's drug transactions, Petitioner's own  
14 statements and other witness statements describing  
15 Petitioner's drug trafficking business, and the  
16 methamphetamine found during a search of Petitioner's  
17 residence. Opp'n 7:28-8:14. As such, the OpDeq  
18 evidence does not rise to the level of materiality for  
19 Brady purposes. See Runningeagle, 686 F.3d at 769.

20 Petitioner's request for all investigation reports  
21 or any other writings related to the government's  
22 contact with the family of murder victim Cynthia Garcia  
23 is, for the same reasons as those stated above, not  
24 "material." To the extent Petitioner requests this  
25 evidence to impeach informant Kramer, the evidence is  
26 cumulative, as the retrial jury was already aware of  
27 Kramer's participation in the Garcia murder, as well as  
28 Kramer's potential for bias due to the substantial

1 leniency and benefits Kramer received from ATF and  
2 other government agencies for Kramer's work as an  
3 informant. See, e.g., United States v. Kohring, 637  
4 F.3d 895, 908 (9th Cir. 2011) (stating that evidence  
5 must be "more than 'merely cumulative' to be material  
6 under Brady/Giglio").

7       Petitioner also seeks to use the Garcia-related  
8 material to impeach testifying Agent Ciccone by showing  
9 that Agent Ciccone lied to the Garcia family about  
10 Kramer's involvement with the Garcia murder to prevent  
11 the family from bringing a civil wrongful death action  
12 against Kramer. First § 2255 Discovery Mot. 7. Such  
13 evidence is arguably speculative, see Barker, 423 F.3d  
14 at 1099, but, regardless, is not "material." The  
15 retrial jury knew that ATF made efforts to protect  
16 informant Kramer's identity so as not to "jeopardiz[e]  
17 the whole operation" and that the government gave  
18 Kramer substantial benefits, including immunity or  
19 leniency for Kramer's illegal actions. See, e.g.,  
20 Sept. 24, 2008, Tr. at 39-40, 53-60, 65-69, 72-74. But  
21 even so, evidence that Agent Ciccone lied to the family  
22 of murder victim Cynthia Garcia about Kramer's  
23 involvement in the murder, while having some  
24 impeachment value against Agent Ciccone, is not strong  
25 enough impeaching evidence to result in a "reasonable  
26 probability" that, had the evidence been disclosed to  
27  
28

1 the jury, the outcome would have been different.<sup>5</sup> See  
2 Barker, 423 F.3d at 1096. Furthermore, the Government  
3 offered strong evidence of Petitioner's guilt that did  
4 not depend on Agent Ciccone's credibility, such as the  
5 methamphetamine found at Petitioner's residence,  
6 Petitioner's own recorded statements and actions, and  
7 the incriminating testimonies of other witnesses like  
8 Special Agent David Hamilton and Special Agent  
9 Christopher White.

10 Petitioner's other discovery requests are arguably  
11 not subject to Brady, but even if they are, the  
12 requested discovery is not "material" for the same  
13 reasons as those stated above: the cumulative nature of  
14 the evidence, the existence of strong independent  
15 evidence of Petitioner's guilt, and the evidence's weak  
16 impeachment value.

17 *iii. Newly Discovered Evidence Claims*

18 Petitioner's requested discovery material, if not  
19 supporting Petitioner's Brady violation claims, support  
20 Petitioner's § 2255 claims of newly discovered  
21 impeaching evidence. 2255 Mot. Mem. P&A I 5-1 to 5-3.  
22

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23 <sup>5</sup> The cumulative impeaching effect of this evidence against  
24 both Agent Ciccone and informant Kramer does not rise to the  
25 level of "materiality" due to the strong evidence of Petitioner's  
26 guilt that did not depend on Kramer's or Agent Ciccone's  
27 testimonies, but primarily due to the cumulative nature of the  
28 evidence and the weak impeachment value of the evidence. See  
Barker, 423 F.3d at 1094 (noting that the Supreme Court requires  
that the materiality of withheld evidence be analyzed  
cumulatively).

1 A mere "evidence-based claim," such as newly  
2 discovered impeaching evidence, that does not rise to  
3 the level of "an independent constitutional violation,"  
4 "is not cognizable under § 2255." United States v.  
5 Berry, 624 F.3d 1031, 1038 (9th Cir. 2010). Rather,  
6 the "proper device for such a claim is Federal Rule of  
7 Criminal Procedure 33, which allows a prisoner to move  
8 for a new trial based on newly discovered evidence."<sup>6</sup>  
9 Id.; see Fed. R. Crim. P. 33(b)(1). Here, Petitioner  
10 cannot prevail under either § 2255 or Rule 33.

11 None of the discovery material requested by  
12 Petitioner supports "an independent constitutional  
13 violation" beyond possible Brady violations, which have  
14 already been discussed and rejected above. Berry, 624  
15 F.3d at 1038. Petitioner seeks merely to impeach  
16 government witnesses, and such an "evidence-based  
17 claim," without more, is not cognizable under § 2255.  
18 Id. Petitioner cannot prevail under Rule 33 because  
19 Petitioner's § 2255 Motion construed as a Rule 33  
20 Motion is untimely, and the Government has not waived  
21 that defense.<sup>7</sup>

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23 <sup>6</sup> The Ninth Circuit has directed that, as long as the  
24 petitioner's Rule 33 claims are within the time limit required by  
25 Rule 33, "a motion under § 2255 that raises evidence-based claims  
26 should be treated as a motion for a new trial." Berry, 624 F.3d  
27 at 1038-39.

28 <sup>7</sup> Rule 33 requires the motion to "be filed within 3 years  
after the verdict or finding of guilty." Fed. R. Crim. P.  
33(b)(1). Petitioner's guilty verdict was rendered on September

1           Petitioner has thus failed to establish "good  
2 cause" for his discovery requests and, as such, the  
3 Court **DENIES** Petitioner's Ex Parte Application for  
4 Leave to Conduct Discovery [CR1016, CV6] and First  
5 Section 2255 Discovery Motion [CR1017, CV7].

6           2. Petitioner's Request for the Appointment of  
7           Investigator Pursuant to 18 U.S.C. § 3006A(e)

8           a. *Petitioner's Requests*

9           Petitioner seeks the appointment of an investigator  
10 named Lee Cole pursuant to 18 U.S.C. § 3006A(e). Req.  
11 Appointment Investigator 1, ECF No. CV5, CR1015.

12           Petitioner explains that the appointment of  
13 Investigator Cole is necessary to:

- 14 (1) locate "documentary evidence," id. at 1-2;  
15 (2) "[l]ocate, interview, obtain declarations from and  
16 (later) arrange the testimony of (at least) the below  
17 named . . . persons, who have relevant impeachment  
18 information about the informant formerly known as  
19 Michael Kramer," by showing that Kramer spent time at a  
20 strip club, assaulted people at the strip club, snorted  
21 methamphetamine, sold someone "military explosive,"  
22 carried firearms, murdered a women, stole items from a

23 \_\_\_\_\_  
24  
25 26, 2008. Dckt. # CR683. Petitioner's § 2255 Motion was filed  
26 on October 21, 2014, and even with the prison mailbox rule's  
27 earlier date of October 7, 2014, Petitioner's Motion is not  
28 timely under Rule 33. Rule 33's time limit can be waived if the  
government fails to raise that defense, but here, the Government  
preserved the defense by opposing an untimely Rule 33 motion in  
its Opposition. Opp'n 9:13-21; see Berry, 624 F.3d at 1038-39.



1 house, stole a man's wallet, assaulted a man with a  
2 baseball bat, and stole money from ATF, id. at 2-7.

3 b. *Analysis*

4 When a *pro se* movant is requesting government-  
5 funded investigative services, the CJA Guidelines  
6 require two threshold determinations that the movant is  
7 both "eligible for [legal] representation" under the  
8 CJA and that the movant's case is "one in which the  
9 interests of justice would have required the furnishing  
10 of representation."<sup>8</sup> CJA Guidelines § 310.10.30(a)-(b).

11 A person, such as Petitioner, "seeking relief under  
12 section . . . 2255" is "eligible for representation"  
13 under the CJA. 18 U.S.C. § 3006A(a). To determine  
14 whether appointment of counsel is in the "interests of  
15 justice,"<sup>9</sup> a court evaluates "the likelihood of success  
16 on the merits as well as the ability of the petitioner  
17 to articulate his claims *pro se* in light of the  
18 complexity of the legal issues involved." United

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19  
20 <sup>8</sup> There is no constitutional right to the appointment of  
21 counsel in a habeas proceeding. Harris v. United States, at \*1  
22 (C.D. Cal. Aug. 20, 2012) (citing Brown v. Vasquez, 952 F.3d  
1164, 1168 (9th Cir. 2001)).

23 <sup>9</sup> See Kiehle v. Ryan, No. CV-11-00352-PHX-GMSO, 2013 WL  
24 5718949, at \*3 (D. Az. Oct. 18, 2013) ("It is important to  
25 reiterate that . . . the interests of justice are only a  
26 prerequisite to the court's discretionary power to appoint  
27 counsel. The only time a court is required to appoint counsel in  
28 habeas petition is when it is necessary under the circumstances  
in order to prevent a due process violation, or under the statute  
and rules discussed above. In all other cases it is left to the  
court's sound discretion whether to appoint counsel if the  
interests of justice so require.").

1 States v. Ives, 67 F.3d 309, at \*1 (9 th Cir. 1995)  
2 (unpub. op.) (quoting Weygandt v. Look, 718 F.2d 952,  
3 954 (9th Cir. 1983) (per curiam)). The Court finds  
4 that appointing representation for Petitioner would not  
5 be in the interests of justice, as Petitioner is more  
6 than capable of articulating his claims *pro se* and has  
7 not shown a likelihood of success on the merits,  
8 especially for those claims for which Petitioner  
9 requests an investigator. Petitioner has filed, since  
10 his confinement, numerous "motions with accompanying  
11 memoranda of points and authorities with supporting  
12 affidavits" that show his sufficient ability to  
13 research and understand the law and to assert his  
14 intended claims. United States v. Ellsworth, 547 F.2d  
15 1096, 1098 (9th Cir. 1976). Because it would not be in  
16 the "interests of justice" to furnish Petitioner with  
17 representation,<sup>10</sup> Petitioner's Application [CR1015, CV5]  
18 for federally-funded investigative services pursuant to  
19 18 U.S.C. § 3006A(e) is **DENIED**.<sup>11</sup> See 18 U.S.C.

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21 <sup>10</sup> Because this threshold determination automatically  
22 precludes Petitioner's § 3006A(e) request, the Court need not  
23 hold an "ex parte proceeding" to determine "that the services are  
24 necessary and that the person is financially unable to obtain  
25 them." 18 U.S.C. § 3006A(e)(1).

26 <sup>11</sup> See also, Martinez v. Campbell, No. CIV 06-0831 ALA HC,  
27 2007 WL 2389821, at \*1 (E.D. Cal. Aug. 20, 2007); see also  
28 Covarrubias v. Gower, No. C-13-4611 EMC (pr), 2014 WL 342548, at  
\*2 (N.D. Cal. Jan. 28, 2014) ("Without permission to conduct  
discovery [pursuant to Rule 6(a)], a reasonably competent counsel  
would not hire an investigator to assist in such discovery."  
(referring to United States v. Rodriguez-Lara, 421 F.3d 932 (9th

1 3006A(a)(2)(b); CJA Guidelines § 310.10.30(b).

2 **V. CONCLUSION**

3 Based on the foregoing analysis, the Court **DENIES**  
4 Petitioner's three discovery-related Requests: Ex Parte  
5 Application for Appointment of Investigator Lee Cole  
6 [CR1015, CV5], Ex Parte Application for Leave to  
7 Conduct Discovery [CR1016, CV6], and First Section 2255  
8 Discovery Motion [CR1017, CV7]. The lodged discovery  
9 requests [14][22] shall not be propounded.

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11 **IT IS SO ORDERED.**

12 DATED: February 25, 2015

RONALD S.W. LEW

**HONORABLE RONALD S.W. LEW**  
Senior U.S. District Judge

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28 Cir. 2005)).