

1 GERAGOS & GERAGOS

2 A PROFESSIONAL CORPORATION
3 LAWYERS

4 644 SOUTH FIGUEROA STREET
5 LOS ANGELES, CALIFORNIA 90017-3411

6 TELEPHONE (213) 625-3900

7 FACSIMILE (213) 625-1600

8 MARK J. GERAGOS Bar No. 108325
9 GEORGE W. BUEHLER Bar No.060701
10 MARK M. KASSABIAN Bar No. 156595
11 Attorneys for Defendant
12 BRENT R. WILKES

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 vs.
18 KYLE DUSTIN FOGGO, AND BRENT ROGER
19 WILKES,
20 Defendants.

21 Case No.: 07CR0329-LAB
22 MEMORANDUM OF POINTS AND
23 AUTHORITIES IN SUPPORT OF
24 MOTION OF DEFENDANT BRENT
25 WILKES TO DISMISS INDICTMENT
26 BASED ON OUTRAGEOUS
27 GOVERNMENT CONDUCT AND
28 VIOLATIONS OF RULE 6(E)
Date: May 14, 2007
Time: 2:00 p.m.
Courtroom: 9 (2nd Floor)
Judge: Hon. Larry A. Burns

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 From the filing of the indictments in this case the government has repeatedly
4 emphasized the need for secrecy, so much so as to impinge the due process rights of the
5 defendants. The government has invoked the Classified Information Procedures Act to
6 maintain the confidentiality of allegedly sensitive information. This same United States
7 Attorney's Office, however, flagrantly ignored its own obligation to maintain the secrecy
8 of the grand-jury proceedings leading to the indictments here, using repeated and
9 strategically-placed leaks to reporters to manipulate the grand-jury process, and to use the
10 grand jury as a weapon in its bureaucratic skirmishes with its Justice Department
11 overseers in Washington, D.C.

12 Before indictments were returned against Mr. Wilkes, news articles cited
13 government officials as the source of secret grand-jury material. Those government leaks
14 to reporters disclosed secret matters before the grand jury violating of Federal Rule of
15 Criminal Procedure 6(e), including the targets of the grand jury, the nature and focus of
16 the investigation, and the likelihood that an indictment would be returned and when.
17 During the grand jury proceedings, counsel for Mr. Wilkes regularly received phone calls
18 from reporters relaying specific information about the pending indictments. The reporters
19 had even seen drafts of the indictments weeks before the indictments were returned.

20 The government's illegal disclosure of secret grand jury matter to the press was not
21 accidental or haphazard. It was part of a deliberate campaign by the former United States
22 Attorney, Carol Lam, to use Mr. Wilkes and the other defendants here in her political
23 squabble with the Justice Department's main office in Washington D.C. The United
24 States Attorney used the leaks to create a public atmosphere that compelled the grand jury
25 to return indictments and present Main Justice with a *fait accompli*, a gesture of defiance
26 by Carol Lam as she was forced out of office.

27 The irony here is rich. Alleging political corruption, the United States Attorney
28 used the defendants here as pawns as she indulged in political squabbles with her

1 superiors. Supposedly enforcing the law, the United States Attorney embarked on a
2 campaign of illegality by repeatedly disclosing grand jury secrets. This conduct is too
3 gross to avoid sanction. The Court should dismiss the indictments here against Mr.
4 Wilkes. At the very least, the Court should order discovery and an evidentiary hearing
5 into the government's leaks, and its manipulation of the grand-jury process.

6 **II. STATEMENT OF FACTS**

7 As early as April of last year, reported were leveling tawdry accusations against
8 Mr. Wilkes based on leaks by "people with knowledge of the investigation," and by
9 "[p]eople close to the case" disclosing prosecutorial strategy. (Declaration of Mark J.
10 Geragos ("Geragos Decl.") Ex. 2, p. 2.)

11 In the weeks leading up to the grand jury indictments in this matter, defense
12 counsel received numerous telephone calls and messages from reporters who conveyed
13 what was obviously secret grand-jury information. Because of the many messages and
14 published articles, Mr. Wilkes's counsel, Mark Geragos, contacted two of the assigned
15 prosecutors in this matter and expressed dismay over these illegal leaks of Grand Jury
16 information. On February 1, 2007 he memorialized one of these conversations in a letter
17 sent to the U.S. Attorney's office. (Geragos Decl. ¶ 3, Ex. 1.)

18 At the same time the print reporters were disclosing to defense counsel detailed
19 knowledge of the draft indictments, and stating that government officials were showing
20 them copies of draft indictments, a television reporter informed Mr. Geragos that an
21 attorney at the Justice Department main offices in Washington D.C. ("Main Justice") had
22 disclosed that Main Justice believed that it could no longer exercise its normal
23 supervisory role because the leaks of the indictment "would now make any action taken
24 by Main Justice appear to be political". (Geragos Decl. ¶ 5.)

25 A few days before the indictments were unsealed, a local reporter telephone Mr.
26 Geragos, informing him that the United States Attorney would ask the Grand Jury to issue
27 the indictments against Mr. Wilkes the following day, and described, in detail, the
28 contents of those indictments. In response to a question by Mr. Geragos, about the timing

1 of the indictments, the reporter said that United States Attorney, Carol Lam, wanted the
2 indictments issued and announced before her departure date the following Thursday, two
3 days later. (Geragos Decl. ¶ 6.)

4 At least six reporters telephoned defense counsel or Mr. Wilkes with secret grand
5 jury information that could only have come from the government. Indeed, the North
6 County Times quoted a government official in a January 31, 2007 story as saying, “I
7 know we are so close” to issuing indictments. (Geragos Decl. Ex. 2, p. 8.) The ousting of
8 Carol Lam by Main Justice appears to have driven the timing of the indictment, with the
9 *Wall Street Journal* reporting that “Carol Lam, the U.S. attorney in San Diego who has
10 been asked to resign by the Justice Department, requested that prosecutors on the case
11 wrap up the investigation and bring charges before she officially steps down Feb. 15.”
12 (Geragos Decl. Ex. 2, p. 5.)

13 That article proved to be right, the grand jury returned indictments February 13.

14 **III. ARGUMENT**

15 **THE COURT SHOULD DISMISS THE INDICTMENTS AGAINST MR. WILKES**

16 **BECAUSE OF OUTRAGEOUS GOVERNMENT CONDUCT.**

17 **A. The Government Violated Rule 6(e) by Disclosing Secret Grand Jury Matters** 18 **To Reporters.**

19 The Supreme Court has “consistently recognized that the proper functioning of our
20 grand jury system depends upon the secrecy of grand jury proceedings.” *Douglas Oil Co.*
21 *v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). Rule 6(e) of the Federal Rules of
22 Criminal Procedure places strict controls on the disclosure of grand jury information. The
23 rule’s purpose is to protect the secrecy of grand jury proceedings by proscribing attorneys
24 for the government from disclosing any “matter occurring before the grand jury.” Fed. R.
25 Crim. Proc. 6(e)(2)(B). Among the reasons for cloaking grand jury proceedings is “to
26 insure the utmost freedom to the grand jury in its deliberations” and “to protect [the]
27 innocent accused who is exonerated from disclosure of the fact that he has been under
28 investigation.” *Id.* at 219 n.10 (quoting *United States v. Procter & Gamble Co.*, 356 U.S.

1 677, 681-82 n.6 (1958).

2 To establish a prima facie violation of Rule 6 based upon news reports of grand
3 jury inquiries, it must be shown that (1) the reports contain information about ‘matters
4 occurring before the grand jury’ and (2) the information came from a person on whom
5 Rule 6(e) imposes the obligation of secrecy. Fed. R. Crim. Proc. R. 6(e)(2); *United States*
6 *v. Eisenberg*, 711 F.2d 959, 964 (11th Cir. 1983). “[I]n assessing the what and who of
7 disclosure at the prima facie case stage, the court must assume that all statements in the
8 news report are correct. . . . [This] assumption is a necessary safeguard to the enforcement
9 of Rule 6(e).” *In re Grand Jury Investigation Lance*, 610 F.2d 202, 219 (5th Cir. 1980)
10 (footnote omitted).

11 It is beyond dispute that it was disclosed to reporters who the grand jury was
12 investigating, the nature and focus of the investigation, and the likelihood that an
13 indictment would be returned and when. (Geragos Decl. ¶¶ 3-7.) It is further beyond
14 dispute that the source of the leaks were government officials. The articles cited as
15 sources “two federal officials,” “another official who is with a different agency but
16 familiar with the case,” and “two government officials familiar with the investigation.”
17 (Geragos Decl. Ex. 2, pp. 8-13.)

18 Case law provides a common-sense approach to determining the source of illegal
19 grand-jury leaks. If it looks as if the leaks are coming from the government, one can infer
20 that they are. In determining whether the origins of these sources implicate sources
21 prohibited by Rule 6(e), “it is necessary to consider the nature of the material disclosed.
22 In some instances, it is reasonable to infer from the nature of the disclosures that the
23 ‘sources’ referred to in the article are included within those enumerated in Rule 6(e).”
24 *United States v. Marcello*, 508 F. Supp. 586, 597 (E.D. La. 1981). “For example, if an
25 article reports that following the presentation of specified evidence at a future time, the
26 grand jury plans to return an indictment against named persons, the attribution of such
27 information to ‘sources close to the investigation’ might, without more, suffice to
28 establish a prima facie case of a Rule 6(e) violation by the attorneys conducting the

1 investigation. The nature of the disclosure is such that it discloses the likely source.” *See*
2 *also In re Grand Jury Investigation Lance*, 610 F.2d 202, 218-19 (5th Cir. 1980).

3 Given the nature of the information revealed in the news articles, there can be no
4 doubt that the leaks were government-initiated. The information disclosed, such as what
5 was going to be proposed to the grand jury and when the indictments would be returned,
6 not to mention the circulation of drafts of the indictments, are information that was solely
7 within the government’s control. *See, e.g., In re United States*, 441 F.3d 44, 61 (1st Cir.
8 2006) (“The court found that the media reports established there were leaks; that the
9 articles indicated that the source of the information was someone covered by the secrecy
10 rule, such as “a federal source”; and that the nature of the leaked information indicated
11 that the government was the source.”).

12 The government-initiated leaks to the news media violated the secrecy
13 obligations imposed by Rule 6(e). *See In re Grand Jury Investigation Lance*, 610
14 F.2d 202, 218 (5th Cir. 1980) (“Disclosures which expressly identify when an indictment
15 would be presented to the grand jury, the nature of the crimes which would be charged,
16 and the number of persons who would be charged run afoul of the secrecy requirements
17 codified in Rule 6(e). It is not necessary for the article to expressly implicate the Justice
18 Department as the source of the disclosures if the nature of the information disclosed
19 furnishes the connection.”) (footnotes omitted); *United States v. Koubriti*, 305 F. Supp. 2d
20 723, 731 (E.D. Mich. 2003) (stating that a nationally televised report, *the day before* the
21 grand jury returned an indictment, which included language that was similar to the
22 forthcoming indictment, arguably violated Rule 6(e)).

23 **B. The Government’s Disclosures Of Secret Grand-Jury Material Constitute**
24 **Outrageous Government Conduct Requiring Dismissal.**

25 The government’s wilful and deliberate violation of its secrecy obligations under
26 Rule 6(e) is outrageous government conduct in violation of the Fifth Amendment Due
27 Process Clause. The conduct of the government violates the Fifth Amendment if it was
28 “so excessive, flagrant, scandalous, intolerable, and offensive, as to violate due

1 process.” *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996) (quoting *United*
2 *States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993)). The governmental conduct
3 must be “shocking to the universal sense of justice.” *United States v. Dudden*, 65 F.3d
4 1461, 1466 (9th Cir. 1995). Although this is a high standard, courts should nevertheless
5 dismiss an indictment on these grounds when “the prosecutor's behavior has exceeded the
6 limits of acceptability.” *United States v. Samango*, 607 F. 2d 877, 884 (9th Cir. 1979).
7 “Whether outrageous government misconduct exists turns on the totality of the
8 circumstances” and “every case must be resolved on its facts.” *United States v.*
9 *Marshank*, 777 F. Supp. 1507, 1523 (N.D. Cal. 1991).

10 “Outrageous government conduct is not a defense, but rather a claim that
11 government conduct in securing an indictment was so shocking to due process values that
12 the indictment must be dismissed.” *United States v. Montoya*, 45 F.3d 1286, 1300 (9th
13 Cir. 1995); *see also United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004). Although
14 dismissal on these grounds is rare, *United States v. Myers*, 692 F.2d 823, 847 (2d Cir.
15 1982), “[d]ismissal is appropriate when the investigatory or prosecutorial process has
16 resulted in a violation of a federal constitutional or statutory right and no lesser remedial
17 action is available.” *United States v. Doe*, 125 F.3d 1249, 1257 (9th Cir. 1997) (citing
18 *United States v. Barrera-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991)).

19 “The Ninth Circuit has distinguished between the government’s ‘passive tolerance’
20 of misconduct and ‘conscious direction’ by government agents, suggesting that the former
21 is less egregious and therefore tempers the outrageousness of any government
22 misconduct.” *Marshank, supra*, 777 F. Supp. at 1523 (citing *United States v. Simpson*,
23 813 F.2d 1462, 1468 (9th Cir. 1987)). The court has explained, however, that the
24 government’s active collaboration to build a case against a defendant shows “a complete
25 lack of respect for the constitutional rights of the defendant . . . and an utter disregard for
26 the government’s ethical obligations.” *Id.* at 1524.

27 Here, the government’s conduct was far more egregious than “passive tolerance”
28 of impropriety. The evidence shows that government officials were the driving force in

1 the leaks, serving as the primary sources of this secret information to reporters. Even the
2 prosecutors here acknowledge that the leaks in this case were outrageous:

3 MR. FORGE: It's embarrassing. It's reprehensible and inexcusable. And I
4 don't in any way question why defense counsel on both coats
5 would be so upset about this. It is not the way the
6 government should be handling this.

7 (RT 24:7-10).

8 "In federal criminal proceedings, the right to indictment by an unbiased grand jury
9 is guaranteed by the fifth amendment." *United States v. Serubo*, 604 F.2d 807, 816 (3d
10 Cir. 1979) (citing *Costello v. United States*, 350 U.S. 359, 363 (1956)). The government-
11 initiated leaks in this case effectively denied Mr. Wilkes this right. The standard for
12 prejudice established by the U.S. Supreme Court is that dismissal of an indictment is
13 appropriate "if it is established that the violation substantially influenced the grand jury's
14 decision to indict," or if there is 'grave doubt' that the decision to indict was free from the
15 substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S.
16 250, 256 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor,
17 J., concurring)). "Under either test of prejudice, the disputed conduct must occur before
18 the grand jury and must affect its charging decision." *United States v. Vosburgh*, 1998
19 U.S. App. LEXIS 31350, (9th Cir. 1998).

20 The leaked media accounts of the ongoing investigation of Mr. Wilkes, his alleged
21 involvement in the crimes charged, and the highly politicized atmosphere surrounding the
22 indictments would be returned against him inevitably had a detrimental impact on the
23 impartiality of the grand jury. The pre-indictment publicity infringed upon the
24 independence of the grand jury and interfered with the "grand jury's ability to exercise
25 independent judgment." *Bank of Nova Scotia, supra*, 487 U.S. at 253 (quoting *United*
26 *States v. Kilpatrick*, 821 F.2d 1456, 1474 (10th Cir. 1987)).

27 Since the violations occurred prior to the indictments being returned, it is highly
28 likely that the media leaks improperly influenced the grand jury to return an indictment

1 against Mr. Wilkes. The conduct here directly affected the grand jury process and casts
2 grave doubt on the grand jury's impartiality. Indeed, this Court has itself expressed that
3 the leaking of information has been prejudicial to Mr. Wilkes:

4 THE COURT: There's been leaking so far. It's been prejudicial, I
5 think, to the defendants.

6 (RT 33:13-14).

7 Even if the conduct does not amount to a due process violation, the court may
8 nevertheless dismiss the indictment pursuant to its supervisory powers. *United States v.*
9 *Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991) (dismissing the indictment on Fifth and
10 Sixth Amendment grounds and pursuant to the court's supervisory powers). The court
11 may exercise its supervisory powers to "remedy the violation of recognized rights, to
12 deter illegal conduct, and 'to preserve judicial integrity.'" *Id.* (quoting *United States v.*
13 *Garza-Juarez*, 992 F.2d 896, 905 (9th Cir. 1993)).

14 Of particular concern is the evidence that Carol Lam was using the grand-jury
15 investigation here in her dispute with Main Justice. As has been reported, Ms. Lam was
16 forced out of office February 15 by officials at Main Justice and the White House. At
17 least one news report states that Ms. Lam's rapidly-approaching departure from office
18 was a driving force in the indictments being issued. Certainly, if the issuance of the
19 indictments against Mr. Wilkes was part of the political squabble between Ms. Lam and
20 Main Justice, that would be more than sufficient to satisfy the standards for outrageous
21 government conduct, and require dismissal.

22 **C. In the Alternative The Court Should Permit Discovery And An Evidentiary**
23 **Hearing To Determine The Source Of The Leaks.**

24 In the event the Court declines to dismiss the indictments against Mr. Wilkes, the
25 Court should order an evidentiary hearing to allow Mr. Wilkes the opportunity to conduct
26 an investigation so that he can make the allegations of outrageous government conduct
27 more definite. The Court can then determine whether terminating sanctions are
28 appropriate in this case.

1 Rule 6(e)(7) specifically authorizes the court to punish knowing violations of Rule
2 6 as a contempt of court. *See* Fed. R. Crim. Proc. R. 6(e)(7). “A prima facie case to
3 secure a hearing on whether to impose contempt sanctions upon government attorneys . . .
4 does not require as strong a showing” as that required when requesting other forms of
5 relief, such as dismissal of the indictment. *In re Grand Jury Investigation Lance*, 610
6 F.2d 202, 219 (5th Cir. 1980). *See, e.g., id.* at 207 (“[T]he evidence of newspaper articles
7 and television reports, which discussed the actions of the grand jury and the scope of its
8 inquiry and which attributed the information to Justice Department sources, made a
9 sufficient prima facie showing of a violation of Rule 6(e) to require an evidentiary
10 hearing on [defendant’s] motion . . .”).

11 In light of the numerous news articles submitted to this Court which cite
12 government officials as the source of the grand jury leaks and the government’s failure to
13 rebut the charges of misconduct, Mr. Wilkes has made a sufficient prima facie showing of
14 Rule 6(e) violations by government officials to warrant an evidentiary hearing on the
15 matter.

16 **IV. CONCLUSION**

17 For the foregoing reasons, this Court should dismiss the indictments against Mr.
18 Wilkes for outrageous government conduct. In the alternative, this Court should order
19 that an evidentiary hearing be held to allow Mr. Wilkes the opportunity to further
20 investigate the source of the leaks and for the Court to determine if sanctions should be
21 imposed on the government.

22
23 Respectfully submitted,

24 DATED: April 23, 2007

GERAGOS & GERAGOS
A Professional Corporation

25
26 / s/ Mark J. Geragos
27 By: _____
28 MARK J. GERAGOS
Attorneys for Defendant
BRENT R. WILKES