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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, v. BRENT ROGER WILKES and JOHN THOMAS MICHAEL Defendants.	Case No. 07-CR-0330 (LAB) MEMORANDUM IN SUPPORT OF DEFENDANT JOHN THOMAS MICHAEL'S MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, TO DISQUALIFY, AND FOR OTHER RELIEF Date: September 4, 2007 Time: 2:00 p.m.

Defendant John Thomas Michael respectfully submits this memorandum in support of his motions: (1) to dismiss the superseding indictment, or, in the alternative, to preclude Thomas Kontogiannis from testifying and the government from

introducing any of his pretrial statements under Federal Rule of Evidence 801(d)(2)(E), in light of the government's outrageous conduct constituting misprision of felonies and providing an illegal gratuity to Kontogiannis (2) to disqualify either the United States Attorney's Office for the Southern District of California, all Assistant United States Attorneys currently assigned to the case, or AUSA Phillip Halpern alone due to the personal relationship and real-estate transaction between the Kontogiannis's family and AUSA Halpern's family; (3) to provide a bill of particulars with respect to Count 26 of the superseding indictment; (4) to compel the government to identify all Brady/Bagley/Giglio material and all trial exhibits; (5) to compel the government to provide a copy of the tape recording of his grand-jury testimony; (6) to compel the government to disclose specific evidence it intends to introduce under Federal Rule of Evidence 404(b); (7) to compel the government to make immediate expert-witness disclosure; and (8) to present evidence in support of dismissal of the superseding indictment in light of the government's blatant violations of Federal Rule of Criminal Procedure 6(e).

FACTUAL BACKGROUND

During the time frame referenced in the superseding indictment, Mr. Michael was the president, chief executive officer, and 30% owner of Coastal Capital Corporation ("Coastal"), a New York-based mortgage bank licensed to do business in over forty states. Lisa DiPinto (née Kontogiannis), daughter of Thomas Kontogiannis, was the executive vice president and 70% owner of Coastal.

Mr. Michael stands charged with one count of conspiracy to commit the following crimes in relation to former Congressman Randall Cunningham: honest-services mail fraud, bribery of a public official, money laundering, and engaging in unlawful monetary transactions in violation of 18 U.S.C. § 371 (Count 1); one count of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Count 20); three counts of engaging in unlawful monetary transactions in violation of 18 U.S.C. § 1957 (Counts 23-25); and a single count of obstruction of justice in violation of 18 U.S.C. § 1503 for allegedly giving false and misleading testimony before a grand jury, and causing to be provided to the grand jury documents that had been altered and created to distort transactions reflected in those same documents (Count 26).

a) Kontogiannis's Criminal Background

The government alleges that Thomas Kontogiannis was a coconspirator of Mr. Michael and of Brent Wilkes in a conspiracy to bribe former Congressman Randall Cunningham. In February 2007, Kontogiannis pled guilty to a single count of engaging in a monetary transaction in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957. The factual basis for Kontogiannis's guilty plea as detailed in his plea agreement with the government indicates that Kontogiannis's pled guilty to that single count in satisfaction of his role in efforts to bribe Cunningham. See Exhibit 1 at 1-6.

The guilty plea was Kontogiannis's third in connection with his roles in bribing government officials. In 1994, he pled guilty to conspiring with a Greek national employed by the United States Department of State in Athens, Greece, to commit immigration fraud, to make false statements in visa applications, to secure fraudulent visas, and to bribe a public official. According to the indictment to which he pled guilty, Kontogiannis, after receiving money from one of two confidential informants[1] and making arrangements with the corrupt State Department employee, secured an airline ticket and boarding pass

[1] The fact that Kontogiannis's indictment resulted from an undercover investigation involving two confidential informants working with the government clearly indicates that Kontogiannis had previously engaged in the same type of criminal activity.

for the informant in Kontogiannis's own name. Kontogiannis then traveled to Athens, where he received the balance of the illicit payment from the informant and provided the informant with a fraudulent passport and visa. See Exhibit 2 at 3-4 (¶¶ 5(c)-(f), 5(h)). With respect to the other confidential informant, Kontogiannis, after receiving payment, arranged for that informant to meet with the corrupt State Department official at the United States Embassy in Athens, where the official gave the informant a fraudulent student visa. See Exhibit 2 at ¶¶ 5(a)-(b), 5(g)).

Significantly, Kontogiannis received a reduced sentence based on his cooperation with the government, which had resulted in the filing of a letter on Kontogiannis's behalf by the government pursuant to U.S.S.G. § 5K1.1. The sentencing judge made clear that, but for the government's letter, he would have sentenced Kontogiannis to jail. See Exhibit 3 at 2-3. Instead, he sentenced Kontogiannis to three months' house arrest and five years' probation. See Exhibit 3 at 3.

At his 1994 sentencing, Kontogiannis insisted he had learned from the experience of being caught, prosecuted, and sentenced for his bribery scheme, telling the court: "I am very sorry, your Honor, for what happened. It has had a great affect [sic] on me." Exhibit 3 at 3.

Kontogiannis's epiphany was short-lived. While on federal probation, Kontogiannis orchestrated a multi-million dollar bid-rigging scheme by which Kontogiannis arranged for the illegal steering of contracts for the purchase and installation of computer equipment in the New York City public-school system. In 2000, Kontogiannis and several of the business entities he controls were indicted in 123-count indictment in Queens, New York, for the scheme. See Exhibits 4 and 5; Exhibit 6 at 9-10 (¶¶ 35-37). Among other things, as a reward for the school official's role in steering contracts to an entity he controlled over the course of several years, Kontogiannis was alleged to have given the official $50,000 in cash in a brown paper bag, see Exhibit 7 at 9 (¶ 50); to have issued checks totaling $45,000 through companies he controlled to the official's husband, see Exhibit 7 at 11 (¶¶ 60-61); to have issued checks totaling over $10,000 to pay the American Express bill of the official and her husband, see Exhibit 7 at 14 (¶¶ 82-83); and to have arranged for four sham mortgages between one of his companies and either the official or her husband as mortgagor to conceal the fact that four parcels of real property had been deeded by Kontogiannis's company to the official and her husband as bribes paid to the official. See Exhibit 7 at ¶¶ 84-85. See also Exhibit 5. Kontogiannis and three of his companies pled guilty for their roles in the scheme and were required to pay between $4.75 -

$4.85 million in restitution and forfeiture. See Exhibit 4 at 1-2; Exhibit 6 at 9 (¶¶ 35-37); Exhibit 8. It appears Kontogiannis's willingness to guarantee payment of a significant sum covering restitution and forfeiture played a key role in the Queens District Attorney's Office allowing him to plea to a misdemeanor and to avoid jail. See Exhibit 4.

As the government is well aware, the crimes for which Kontogiannis has been prosecuted hardly encompass the extraordinary breadth and volume of his criminal activity. For example, the government has alleged that Kontogiannis has engaged in extensive mortgage fraud, money laundering, tax fraud, and tax evasion. Indeed, as of the time that the FBI executed warrants at Kontogiannis's business offices and home in September 2005, Kontogiannis had not filed a income tax return since 2001. And in 2001, Kontogiannis, who, according to the FBI itself, controls scores of businesses and banks and uses all of them to further his criminal activity, filed a federal income-tax form on which he claimed to have an overall loss of more than $500,000. See, e.g., Exhibit 6 at 8-10 (¶¶ 32-33, 38), 59 (¶ 247), 65-67 (¶¶ 275-283).

According to the FBI, although Kontogiannis escaped criminal charges for the scheme, one of the companies he and his wife controlled, InterAmerican Mortgage Corporation, was required to reimburse the Department of Housing and Urban Development for

as much as $2 million for issuing fraudulent mortgages to nineteen people. See Exhibit 6 at 10 (¶ 38).

Kontogiannis was not shy about other types of fraud. For example, while Kontogiannis was on federal probation, he managed to obtain personal identifying information for an individual, proceeded to open at least ten credit-card accounts in a fictitious name, and then ran up thousands of dollars in unpaid charges. When the individual whose personal-identification information had been stolen by Kontogiannis discovered the scam after having a loan application of his own denied, Kontogiannis forged a power of attorney in the name of the fictitious individual and arranged for the accounts to be closed. See Exhibit 9.

b) The Unsealing of Kontogiannis's Plea Agreement and the Revelation of Exculpatory Information Regarding Mr. Michael

The government sought and obtained the sealing of Kontogiannis's plea agreement that remained in effect until June 11, 2007. Upon unsealing, Mr. Michael and the public learned for the first time that Kontogiannis did not claim in his plea agreement that Mr. Michael had knowingly participated in a bribe of Cunningham, information that is clearly exculpatory with respect to the charges against Mr. Michael. See Exhibit 1 at 2-6. In addition, whereas Cunningham's plea agreement specifies in considerable detail the terms of his cooperation with the

government, see Exhibit 10, Kontogiannis's plea agreement does not address the issue of cooperation notwithstanding the fact that Kontogiannis has been identified as cooperating against Mr. Michael.

c) Disclosure of Notes of a Law-Enforcement Debriefing of Randall Cunningham Reveals Additional Exculpatory Information

The discovery produced by the government in Mr. Michael's criminal case included an FBI 302 documenting an extensive debriefing of Cunningham that occurred over the course of two days less than a week before Mr. Michael was first indicted in February 2007. The 302 reflects that Cunningham was questioned in detail regarding his purchase of a residence in Rancho Santa Fe, see Exhibit 11 at 3-5, the transaction at the heart of the conspiracy count against Mr. Michael. See Superseding Indictment at ¶¶ 18(f), 133; 138. Mr. Michael's name, however, is not mentioned there or, for that matter, in any other part of the 302.

d) The Government Has Allowed Kontogiannis to Continue Engaging in Mortgage Fraud as a Benefit of His Cooperation

It is apparent from discovery, including extensive documentation and grand-jury testimony, that the government is well aware of Kontogiannis not only having engaged in massive mortgage fraud and tax evasion in violation of numerous federal

and state statutes, but that he continues to do so. The government's investigation indicates that Kontogiannis's typical mortgage fraud involved the following scenario. (With regard to the following narrative, see Exhibit 5 and Exhibits 12-19.)

Kontogiannis would have a loan application prepared in the name of a putative home purchaser, sometimes with the knowledge of the person (who might be paid a fee) and sometimes without the person's knowledge, for a property that Kontogiannis either had developed or had planned to develop. Fraudulent paperwork would be prepared related to, for example, income, assets, or appraisal. (Kontogiannis presumably would pay a kickback to the individual preparing these documents.) Applications would then otherwise be submitted for approval to various financial institutions in accordance with normal industry practices.[2] At closing, all title documentation (such as the mortgage and note, the uniform settlement statement (HUD-1 form), title-insurance paperwork, and affidavits pertaining to the purchaser's identity and intent of occupancy) would be fraudulently executed by a loan officer controlled by Kontogiannis. The settlement agent, using money that had been forwarded by the lender and placed in escrow, would issue checks to cover mortgage taxes, transfer taxes, recording fees, title

[2] Most of these loans originated through a mortgage bank ostensibly owned by Kontogiannis's wife, CIP Mortgage Corp. (formerly known as InterAmerican Mortgage Corp.) See Exhibit 18.

insurance, and lender fees, as well as the net proceeds (the balance of the loan money), all of which (with the exception, sometimes, of lender fees) would go to Kontogiannis-controlled entities, including companies ostensibly owned by one of Kontogiannis's daughters and controlled by Kontogiannis. The mortgage and note, however, would never be recorded, the taxes never paid, and title insurance never purchased. Instead, the funds that had been disbursed for these purposes would eventually be steered to another company ostensibly owned by one of Kontogiannis's daughters but controlled by Kontogiannis.

These fraudulent loans would ultimately be sold into the secondary-mortgage market to a lender who would be led to believe, based on the loan documentation provided by Kontogiannis's agent, that the loan had been sent for recording and that all taxes and recording fees had been paid. A Kontogiannis controlled financial-services company, typically Parkview Financial, Inc. ("Parkview"), would assume responsibility for making monthly payments on the loan. So long as timely payments were made, the loan would be viewed by the new owner as performing and, consequently, never questioned.

Kontogiannis's greed, however, did not stop there. He would then market the property to an end-user, whose financing was often out of Kontogiannis's control. Upon closing with the end-user, Kontogiannis would take a second bite from the

mortgage-fraud apple: in light of the fact that the first mortgage on the property had never been recorded, the settlement agent would release the net proceeds of the second loan directly to a Kontogiannis-controlled company without paying off the existing loan because the latter had never been recorded. For its part, the lender who had purchased the first mortgage would not know that the property had been sold again and that, consequently, its position in the chain of title had been compromised.

The volume of Kontogiannis's fraudulent loans as of June 1995 is shown by one of Parkview's bank-account statements. See Exhibits 12 and 13. The statement reveals mortgage payments on 140 different properties. One company alone had purchased over 100 of the loans in the secondary market, with an average loan amount of approximately $500,000. That publicly traded and federally chartered bank thus had approximately $50,000,000 in loans that were potentially worthless because, as a result of Kontogiannis's scams, none of the mortgages were recorded in primary position as the bank had assumed. That, in turn, meant that if any of the loans defaulted, the bank would not be able to foreclose on any real property and thereby recoup any of the losses. Needless to say, the impact of such losses would be profound both on the individual bank and on the shareholders of

the company. Even scarier, that bank may have since purchased many more such loans from Kontogiannis.

No bank still owning such a loan has any recourse to protect its position. It cannot record the mortgages because Kontogiannis has already sold the property to a third party who has taken possession and title. The lending institution cannot put in a claim with a title-insurance company because Kontogiannis never purchased the insurance in the first place. The only potentially effective avenues of recourse available would be to sue either the title abstract company involved in a given deal, Kontogiannis himself, or one of Kontogiannis's daughters.

With respect to taxes and fees, New York requires payment of a mortgages tax. Under New York law, if Kontogiannis closed 100 individual fraudulent loans in the amount of $500,000 each, he would have been required to pay over $900,000 in mortgage taxes. See N.Y.C. Administrative Code § 11-2601. New York also requires payment of a transfer tax that would have required Kontogiannis to pay approximately $500,000 more. See N.Y.C. Administrative Code § 11-2102.

Rather than require Kontogiannis to pay off the mortgages that have been sold into the secondary market (which might require him to liquidate most or all of his holdings), to record the mortgages that have yet to be sold into the secondary

market, to pay outstanding taxes, or even to reimburse recording fees (which would alert the secondary lending institutions of the problem), the federal government instead is allowing Kontogiannis simply to continue making monthly payments on the fraudulent mortgages.

e) Kontogiannis and his Daughter Used One of the Daughter's Accounts to Launder an Alleged Bribe Payment by Brent Wilkes

It is undisputed that Coastal issued two mortgages for a home purchased by Cunningham in Rancho Santa Fe, the first for $595,000 and the second for $500,000. According to the government, Cunningham subsequently demanded a bribe from Wilkes in the form of a $525,000 payment to cover the amount owed on the second mortgage. The government claims that Wilkes agreed and arranged a wire transfer in that amount to Parkview. See, e.g., Exhibit 6 at 36-37 (¶¶ 152-155). The same day that the $525,000 wire hit the Parkview account, $500,000 was transferred to a checking account of one of Kontogiannis's daughters, Annette Apergis, and her husband. See Exhibit 6 at 46 (¶ 191); Exhibit Exhibit 20; Exhibit 21. Six days later, $500,000 was transferred from Apergis's account to the account of another company controlled by Kontogiannis, namely, Bond & Walsh Construction Company. See Exhibit 21 and Exhibit 22.

f) The Relationship Between the Kontogiannis and Halpern Families

In late December 2006 or early January 2007, Kontogiannis boasted to Mr. Michael that he (Kontogiannis) had a "a common bond" with one of the prosecutors, Assistant United States Attorney ("AUSA") Phillip Halpern. Kontogiannis explained that AUSA Halpern used to live in New York and that Kontogiannis had been a neighbor and "good friend" of AUSA Halpern's uncle "for years." According to Kontogiannis, his daughter, Annette Apergis, had done a "big favor" for AUSA Halpern's uncle, and that that would help Kontogiannis "get things done." See Declaration of John T. Michael dated August 16, 2007 at ¶ 2.

In fact, Kontogiannis and his wife and family were neighbors of AUSA Halpern's uncle and aunt starting in 1989 until the uncle's death in November 2003. Kontogiannis and his wife lived, and still live, at the same home in Nassau County, and AUSA Halpern's uncle and aunt lived on the same street in a home separated from the Kontogiannis home by one lot. See Exhibit 23. The street where they lived is a privately owned and maintained street in Nassau County on Long Island, see Exhibit 23, where the average value of a home on the block is currently approximately $2.5 million. See Exhibit 24. Each of the seventeen homeowners on the street is a member of the same homeowners' association, and members hold meetings in each others' homes. After AUSA Halpern's uncle resigned as an officer of the homeowners'

association in February 2003, Kontogiannis's wife was elected president. See Exhibit 23.

g) The Purchase of the Halpern Home by Kontogiannis's Daughter

After the death of AUSA Halpern's uncle, Annette Apergis purchased the Halpern residence in Nassau County from the uncle's widow in June 2005. Apergis made a down payment of $88,750 using the same checking account she and her father had used to launder the alleged bribe money from Wilkes. See Exhibit 25 and 26. Significantly, when the check bounced upon being deposited due to insufficient funds, Apergis and Kontogiannis arranged for funds to be wired from Brookville Plaza Management, Inc., and Parkview to cover the check. See Exhibits 27 and 28. Apergis paid the balance due at closing with five bank checks. See Exhibit 29.

Since the government itself claimed in support of several of its search-warrant applications that Kontogiannis used all of his businesses and all of the bank accounts associated with them to commit and to conceal a multitude of crimes, and since Apergis herself derives the bulk of her income from business controlled by Kontogiannis himself, see, e.g., Exhibit 18, it appears in all likelihood that the proceeds of criminal activity were used to purchase the Halpern residence. That, in turn, means that Kontogiannis and his daughter in all likelihood

utilized the purchase of the Halpern residence to launder criminal proceeds.

In addition to the exhaustive investigation that the government did of the finances of Kontogiannis and his family, and the possibility, if not likelihood, that Kontogiannis referred to his relationship with AUSA Halpern's uncle and Apergis's purchase of the Halpern home during proffers with government representatives, there is additional reason to believe that the government has been well aware of at least the home purchase.

Attached as Exhibit 26 is a copy of Annette Apergis's North Fork bank account for the time period covering her down payment on the Halpern residence. That copy was made on August 6, 2007, from materials seized by the FBI from Kontogiannis's residence. The document contains no handwritten notations and includes a copy of the down-payment check that encompasses a portion of the page onto which it was copied.

Attached as Exhibit 30 is a copy of the same Apergis North Fork account statement that was received from the government in discovery on August 10, 2007. That copy reflects handwritten notations near the bank's entries for the down payment. It also includes a copy of the down-payment check identical in size to the one included within Exhibit 26.

Attached as Exhibit 25 is another copy of the down-payment check that also was received from the government in discovery on August 10, 2007. That copy is enlarged to at least 2½ times the size of the copies included within Exhibits 26 and 30.

h) The Halpern-Apergis Sale Was Not Recorded Before Kontogiannis Executed His Plea Agreement and Pled Guilty

Consistent with Kontogiannis's own practice of not recording deeds or mortgages to avoid paying various taxes and fees as discussed above, Apergis did not record the deed or any mortgage when she purchased the Halpern residence in June 2005. In fact, Apergis did not do so, and thus avoided paying relevant taxes and fees, until March 1, 2007. See Exhibits 31 and 32. The Halpern-to-Apergis transfer thus was not recorded until after Kontogiannis had cut his deal with the government and pled guilty on February 23, 2007. Until March 1, therefore, Nassau County records continued to identify AUSA Halpern's uncle as the owner of the home sold to Apergis in 2005.

ARGUMENT

POINT I

BY ALLOWING KONTOGIANNIS TO CONTINUE TO MAKE PAYMENTS ON FRAUDULENT MORTGAGES, THE GOVERNMENT IS ENGAGING IN MISPRISION OF FELONY AND PROVIDING AN ILLEGAL GRATUITY IN VIOLATION OF FEDERAL LAW. THE PRICE FOR SUCH MISCONDUCT SHOULD BE DISMISSAL OF THE SUPERSEDING INDICTMENT. IN THE ALTERNATIVE, THE COURT SHOULD PRECLUDE KONTOGIANNIS FROM TESTIFYING AND THE GOVERNMENT FROM INTRODUCING ANY OF HIS PRETRIAL STATEMENTS UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)(E)

As detailed above, rather than require Kontogiannis to pay off the mortgages that have been sold into the secondary market (which might require him to liquidate most or all of his holdings), to record the mortgages that have yet to be sold into the secondary market, to pay outstanding taxes, or even to reimburse recording fees (which would alert the secondary lending institutions of the problem), the federal government instead is allowing Kontogiannis simply to continue making monthly payments on the fraudulent mortgages. In doing so, the government is not simply allowing Kontogiannis to continue concealing his illicit deals and to avoid the monetary consequences of taking full responsibility for his criminal conduct, the government is itself breaking the law. Mr. Michael submits that the price for such misconduct should be dismissal of the superseding indictment. In the alternative, the Court should preclude Kontogiannis from testifying at trial and the government from introducing any of

his pretrial statements under Federal Rule of Evidence 801(d)(2)(E).

Each time Kontogiannis closed a fraudulent loan, he violated multiple federal and state laws. For example, the Real Estate Settlement Procedures Act ("RESPA")requires that a HUD-1 settlement form be prepared, which must be certified as true and accurate on penalty of felony prosecution under 18 U.S.C. § 1001. See 12 U.S.C. § 2603. It is also a separate felony to misstate or to misrepresent fraudulently information pertaining to a transaction for any HUD-insured loan. See 18 U.S.C. § 1010. RESPA also makes it a crime to give or to receive a fee or kickback for making mortgage-loan referrals or to split fees relating to a mortgage-loan closing other than for services actually performed. See 12 U.S.C. § 2607. It is a felony punishable by up to thirty years' imprisonment and a $1-million fine to execute or attempt to execute a scheme or artifice to defraud a financial institution. See 18 U.S.C. § 1344. With respect to New York Law, Section 430 of New York Real Property Law makes it a felony to procure any instrument of title through fraud.

Although the government may lawfully induce testimony with promises of possible leniency as well as certain other incentives, it may not, consistent with due-process principles and a defendant's right a fair trial induce or otherwise procure

testimony by turning a blind eye to the type and volume of criminal activity involved here. Indeed, Mr. Michael submits that the government's conduct in the present case runs afoul of at least two federal statutes. First, it is a crime punishable by up to three years' imprisonment when a person

> having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States.

18 U.S.C. § 4. Second, 18 U.S.C. § 201(c)(2) provides for up to two years' imprisonment for anyone who

> directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . or for or because of such person's absence therefrom.

There has been substantial litigation regarding the application of § 201 to federal prosecutors, and the upshot is this: federal prosecutors who offer witnesses leniency or the possibility of leniency -- or other traditional incentives -- do not run afoul of § 201(c), but they lose the cloak of protection provided to representatives of the sovereign when they offer atypical inducements to witnesses.

Judicial discussion of the applicability of § 201 to offers of leniency made to witnesses by federal prosecutors began

in earnest in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), rev'd en banc, 165 F.3d 1297 (10th Cir.), cert. denied, 527 U.S. 1024 (1999) which held that subsection (c)(2) is violated when a prosecutor promises leniency or the possibility of leniency in exchange for a witness's testimony. The court concluded that federal prosecutors are included within the ambit of the statute, and that promises of leniency are something of "value" to a witness.

The panel decision in Singleton was reversed by the Tenth Circuit sitting *en banc*, which held that federal prosecutors do not violate § 201 when they provide the type of incentive "normally" granted for testimony, which includes leniency. The court reasoned that because a prosecutor represents the sovereign, and "[s]tatutes of general purport do not apply to the United States unless Congress makes the application clear and undisputable," 165 F.3d at 1300, Congress would have used "clear, unmistakable, and unarguable language" had it intended to overturn the longstanding practice of granting leniency for testimony. Id. at 1302. The court made clear, however, that prosecutors are not immune from the strictures of § 201 when they provide atypical incentives to secure witness testimony:

> Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally

> exercised by the sovereign. A prosecutor who offers something other than a concession normally granted by the government in exchange for testimony is no longer the alter ego of the sovereign and is divested of the protective mantle of the government.

Id.

Other courts have adopted Singleton's reasoning and held that prosecutors may offer traditional incentives to witnesses, such as leniency, without running afoul of § 201. See, e.g., United States v. Ibarra-Zarate, 171 Fed. Appx. 554, 555 (9th Cir. 1999); United States v. Hunte, 193 F.3d 173, 174 (3d Cir. 1999), cert. denied, 528 U.S. 1128 (2000); United States v. Lara, 181 F.3d 183 (1st Cir. 1999), cert. denied, 582 U.S. 979 (1999). Likewise, courts agree that "the government's use of a paid informant's testimony does not violate the antigratuity statute." United States v. Harris, 210 F.3d 165, 167 (3d Cir. 2000)(citing United States v. Anty, 203 F.3d 305 (4th Cir.), cert. denied, 531 U.S. 853 (2000); United States v. Barnett, 197 F.3d 138 (5th Cir. 1999), cert. denied, 529 U.S. 1111 (2000); United States v. Albanese, 195 F.3d 389 (8th Cir.1999)). Cf. United States v. Hendrix, 482 F.3d 962 (7th Cir. 2007)(due process not offended by striking deal with confidential informant that benefits third party). In Harris, however, the Third Circuit rejected the government's argument that the court's restrictive interpretation of § 201(c) necessarily exempts government prosecutors entirely from the reach of that section:

> We disagree with the government that [United States v. Hunte] resolves the issue. In *Hunte* we merely held that "whoever" does not encompass the government when it is acting within some well-established authority -- in that case the government's power to use leniency or plea agreements in exchange for truthful testimony. Our reasoning in this case parallels that logic.

210 F.3d at 168. The Third Circuit court thus emphasized that it was not deciding "whether the antigratuity statute allows the government to pay a witness solely or essentially for favorable testimony, as distinct from paying a witness for collecting evidence and testifying about what was found." Id. (citing United States v. Condon, 170 F.3d 687, 689 (7th Cir. 1999), cert. denied, 526 U.S. 1126 (1999)). Cf. U.S. v. Lott, 310 F.3d 1231, 1245-46 (10th Cir. 2002), cert. denied, 538 U.S. 991 (2003) (leaving to "another day" whether a prosecutor violates § 201 when he or she pays a witness for testimony -- as opposed to reimbursing a witness for expenses).

Courts are generally in agreement with Singleton's warning that prosecutors lose their cloak of protection under § 201 when they offer atypical incentives to witnesses. For example, in United States v. Murphy, 193 F.3d 1 (1st Cir. 1999), the First Circuit agreed that prosecutors do not run afoul of § 201 by offering leniency to witnesses or by forestalling deportation, but added: "there are surely outer limits on what a prosecutor can do in offering benefits to a witness." Id. at 9.

Other courts, addressing the broader due-process issues implicated by testimonial incentives, have suggested limits on testimony induced, for example, by a reward contingent on conviction. The First Circuit has remarked that "[c]ourts have generally allowed paid informants to testify as long as the agreements are not contingent upon the conviction of particular persons." United States v. Palow, 777 F.2d 52, 54 (1st Cir.1985), cert. denied, 475 U.S. 1052 (1986). See also United States v. Cresta, 825 F.2d 538, 547 (1st Cir.1987). Likewise, in United States v. Estrada, 256 F.3d 466 (7th Cir. 2001), the court, though finding any error harmless in light of the overwhelming evidence of guilt, sharply criticized an incentive structure that provided a witness a 25% commission on moneys recovered as a result of the defendant's conviction. "Such an incentive structure does little to enhance overall confidence in the criminal justice system." Id. at 472.

We have found no cases that address the sort of incentive provided here -- quite likely because its impropriety is so obvious that few would think of offering it. But regardless of where the line is appropriately drawn on the outer limits of permissible prosecutorial largesse, they are easily exceeded when the prosecutor turns a blind eye to a cooperating witness's continuing criminality in the circumstances presented here. Such an incentive is repugnant to any rational system of

justice. It violates §§ 4 and 201(c) and the most basic tenets of due process and of ensuring a defendant's right to a fair trial. Certainly suggesting to a witness-informant explicitly or implicitly that his profitable unlawful conduct will be countenanced so long as he remains part of the government team is no less anathema to due-process principles than making a witness's reward contingent on the outcome of a case. See, e.g., United States v. Dailey, 759 F.2d 192, 201 n. 9 (1st Cir. 1985)("benefits made contingent upon subsequent indictments or convictions skate very close to, if indeed they do not cross, the limits imposed by the due process clause").

Once a particular prosecutorial practice is identified as abhorrent, attention must turn to the appropriate remedy. In some instances a putative witness's receipt of testimonial incentives, even improper ones, may adequately be addressed through disclosure and cross-examination, rather than through preclusion. See, e.g., United States v. Dawson, 425 F.3d 389, 393 -395 (7th Cir. 2005). Indeed, a prosecutor's violation of applicable rules of professional conduct does not necessarily require suppression of testimony. See United States v. Lowery, 166 F.3d 1119 (11th Cir. 1999), cert. denied, 528 U.S. 889 (1999). Yet, Mr. Michael submits that dismissal is an appropriate remedy where prosecutors have, in fact, violated not only § 201 through their direct or indirect grant of atypical

incentives to a witness, but have gone as far as to engage in misprision of felony in violation of 18 U.S.C. § 4.

In the alternative, Mr. Michael submits that the Court should suppress Kontogiannis's testimony. Suppression of even relevant and material testimony is a remedy invoked in a variety of circumstances, for example, to deter unlawful searches and seizures, see, e.g., Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961), to preclude unreliable identification testimony, Stovall v. Denno, 388 U.S. 293 (1967), to withhold from the jury involuntary confessions, see 18 U.S.C. § 3501, to prevent the use of immunized testimony, see Kastigar v. United States, 406 U.S. 441 (1972), and to avoid "unfair prejudice, confusion of the issues, or misleading the jury." FED. R. EVID. 403.

Testimony procured in whole or in part by the government's willingness to turn a blind eye to continuing illegality under the facts presented here should be precluded based on each of these rationales. Surely there is strong reason to discourage such a noxious practice, and preclusion of testimony so obtained is the most likely and effective way of doing so short of outright dismissal. See Elkins v. United States, 364 U.S. 206, 217 (1960)(purpose of the exclusionary rule is "to deter -- to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it"). Such

testimony is, as well, inherently unreliable since the incentive to lie created by such an out-sized inducement is overwhelming. And, certainly, testimony procured with what amounts to a multi-million dollar bribe risks unfair prejudice and confusion of the issues, and threatens to mislead the jury. Courts should not countenance testimony that has been bought and paid for by a prosecution team that has, in essence, put the witness above the law, and effectively immunized him from prosecution for his ongoing criminal conduct.

The Court, therefore, should preclude Kontogiannis from testifying and, in order to prevent the government avoiding the impact of preclusion, preclude the government from introducing any statements by Kontogiannis through another witness as coconspirator statements under Federal Rule of Evidence 801(d)(2)(E).

POINT II

THE COURT SHOULD DISQUALIFY THE UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF CALIFORNIA DUE TO THE PERSONAL RELATIONSHIP AND REAL-ESTATE TRANSACTION BETWEEN THE FAMILIES OF COOPERATING WITNESS AND ALLEGED COCONSPIRATOR THOMAS KONTOGIANNIS AND OF AUSA PHILLIP HALPERN. IN THE ALTERNATIVE, THE COURT SHOULD DISQUALIFY ALL AUSAS CURRENTLY ASSIGNED TO THE CASE OR, AT A MINIMUM, AUSA HALPERN.[3]

Thomas Kontogiannis is nothing short of a remorseless and manipulative sociopath who has demonstrated that he is simply incapable of obeying the law or of complying with court-imposed restrictions. His criminal activity ranges, conservatively, from bribery to multi-million-dollar mortgage fraud to identity theft. He does not hesitate to use even his wife and children to further and to conceal his criminal schemes. Yet each time he is caught, he manages to mitigate his punishment and, here, even to convince the government to allow him to continue committing fraud.

Particularly under the circumstances presented here, the relationship and real-estate dealings between Kontogiannis and his family on one hand and the family of one of the prosecutors on the other, combined with the government's willingness to turn a blind eye to Kontogiannis's ongoing and massive mortgage-fraud, raises grave concerns about, at the very least, the appearance of favoritism and of a prosecutor's office

[3] Counsel for Mr. Michael discussed this portion of Mr. Michael's motions with counsel for the government prior to filing.

all-too-willing to believe an individual who is so unworthy of belief. In order to ensure a fair trial for Mr. Michael and to maintain public confidence in the judicial system, the Court should exercise its supervisory authority by disqualifying from further participation in the prosecution of Mr. Michael the entire United States Attorney's Office for the Southern District of California. In the alternative, the Court should disqualify all prosecutors currently working on the case. At the very least, AUSA Halpern should be disqualified.

A district court's authority to disqualify attorneys derives from its "inherent power to 'preserve the integrity of the adversary process.'" Hempstead Video, Inc., v. Inc. Village of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005)(citation omitted). See also United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980)(a district court's power to disqualify an attorney "derives from its inherent authority to supervise the professional conduct of attorneys appearing before it"); Skidmore v. Warburg Dillon Read L.L.C., No. 99 Civ. 10525 (NRB), 2001 U.S. Dist. LEXIS 6101, at *6 (S.D.N.Y. May 11, 2001)(authority to disqualify an attorney stems from a court's "inherent supervisory authority 'to preserve the integrity of the adversary process'")(citation omitted). The Court's local rules provide:

> The United States District Court for the Southern District of California is committed

> to the highest standards of professionalism and expects those standards to be observed by lawyers who practice before it. Compliance with high standards of professionalism depends primarily upon understanding the value of clients, the legal system, the public, and lawyers of adhering to the voluntary standards. Secondarily, compliance depends upon reinforcement by peer pressure and public opinion, and finally, when necessary, by enforcement by the courts through their powers and rules already in existence. This code of conduct is not intended to be a set of rules that lawyers can use to incite ancillary litigation on the question whether the standards have been observed by an adversary, but the court may take any appropriate measures to address violations of the rules.

Rule 83.4 of the Civil Local Rules of Practice for the United States District Court for the Southern District of California (emphasis added).[4]

Courts should not hesitate to consider disqualification when presented with grounds to believe either that a defendant's right to a fair trial or the public's confidence in the judicial system could be adversely affected. Thus when a defendant

> raises a credible allegation of a prosecutor's conflict of interest or other relationship that would create the appearance of an improper motivation in the prosecution, the court must undertake a "'careful balancing' of proper considerations of judicial administration against the United States' right to prosecute the matter through counsel of its choice" in order to ensure that the interests of all involved are

[4] Pursuant to Local Civil Rules 1.1(c) and 1.1(e)(5) , the provisions of the Court's apply to criminal proceedings.

> properly protected. . . . These interests include the defendant's right to a fair trial free from improper prosecutorial motives, the governments interest in retaining its chosen counsel, and the court's interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system.

United States v. Vega, 317 F. Supp. 2d 599, 602-03 (D.V.I. 2004)(citations omitted). "A federal court's decision of whether to disqualify counsel 'must ultimately be guided by the goal of a trial process that lacks any hint of a taint.'" Solow v. Conseco, Inc., No. 06 Civ. 5988, 2007 U.S. Dist. LEXIS 40479, at *9 (S.D.N.Y. June 4, 2007)(quoting Skidmore v. Warburg Dillon Read L.L.C., 2001 U.S. Dist. LEXIS 6101, at *6)(emphasis added).

Courts are free to look to professional codes of conduct to inform its decision in a given case. See, e.g., Skidmore v. Warburg Dillon Read L.L.C., 2001 U.S. Dist. LEXIS 6101, at *6. Thus, for example, the Court can consider that federal law requires that the Department of Justice itself must disqualify an attorney "from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof," 28 U.S.C. § 528 (emphasis added), and that the United States Attorney's Manual provides recusal is required "where a conflict of interest exists or there is an appearance of a conflict of interest or loss of impartiality." United States Attorneys' Manual § 3-2.170. See also id. at § 3.2-220.

Similarly, the American Bar Association's Model Rules provide that a lawyer has a duty "to avoid not only professional impropriety but also the appearance of impropriety." ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6.

The case at bar presents the following circumstances:

- Kontogiannis's criminal activity speaks for itself: he a recidivist of the worst kind, absolutely incapable of conforming his behavior to societal norms or of complying with court orders;

- despite the sheer volume of his criminal activity, Kontogiannis was allowed to plead guilty to a single felony punishable by no more than ten years' imprisonment; moreover, he has been allowed to cooperate with the government in order to lower his sentence;

- the government has allowed Kontogiannis to continue engaging in mortgage fraud as a benefit of his cooperation; in doing so, the government has effectively committed misprision of felony;

- Kontogiannis's wife and children are not being prosecuted despite the fact that they were involved in and derived enormous and direct benefits from Kontogiannis's crimes;

- Kontogiannis's plea agreement contains exculpatory information with respect to the conspiracy account against Mr. Michael;

- Cunningham's plea agreement contains exculpatory information with respect to the conspiracy count against Mr. Michael;

- Kontogiannis and his family were neighbors of AUSA Halpern's uncle and aunt on an exclusive and privately owned and maintained street on Long Island;

> • Kontogiannis's daughter purchased the Halpern home using the same bank account she and Kontogiannis are alleged to have utilized to launder money used bribe Cunningham;
>
> • Kontogiannis's daughter in all likelihood purchased the Halpern home with the proceeds of criminal activity, which means the purchase was used to launder those monies;
>
> • the government in all likelihood has been well aware of the aformentioned facts related to the purchase of the Halpern home;
>
> • The Halpern-Apergis sale was recorded after Kontogiannis executed his plea agreement and pled guilty

These extremely unusual, if not bizarre, circumstances warrant disqualification of the United States Attorney's Office for the Southern District of California, as they raise grave concerns as to whether the prosecution of Mr. Michael has been affected by improper favoritism toward Kontogiannis, whether (1) to conceal the fact that Kontogiannis's cooperation came at the price of not requiring Kontogiannis to record outstanding mortgages and to pay mortgage taxes, transfer taxes, and recording fees, or to pay off the mortgages themselves; (2) to conceal the fact that, in light of Kontogiannis's criminal record and the true extent of his criminal activity, allowing Kontogiannis to plead guilty to only a single felony that ensures he faces no more than ten years' imprisonment even if he were to get no credit whatsoever for his cooperation reflects incredibly poor judgment and raises questions as to the government's

motivation for allowing him to cooperate in the first place, let alone to do so under such remarkably lenient terms; (3) to conceal the fact that Kontogiannis's cooperation came at the further price of allowing Kontogiannis's wife and children to avoid prosecution despite the fact that they were involved in and derived enormous and direct benefits from Kontogiannis's crimes; (4) to avoid public scrutiny of and embarrassment over the relationship between Kontogiannis and his family to the Halpern family, and the fact that Kontogiannis's daughter purchased the Halpern home with an account allegedly used to launder bribe money and with funds that likely were derived from Kontogiannis's criminal activity.

At the very least, the circumstances here reflect that the prosecutors are all too willing to believe an individual so unworthy of belief, and are more interested in vindicating their decision to use him as a cooperator than in seeking justice. In addition to the obvious harm to Mr. Michael, allowing the United States Attorney's Office to remain involved in this case would only undermine the public's confidence in the judicial system. The Court thus should disqualify the entire United States Attorney's Office for the Southern District of California. In the alternative, the Court should disqualify all prosecutors currently working on the case. At the very least, AUSA Halpern should be disqualified.

The court should order a hearing to determine (1) the full nature and extent of the relationship between the Kontogiannis families; (2) the nature and extent of implicit or explicit agreements between the government and Kontogiannis; (3) the extent to which Kontogiannis and his family continue to commit crimes; and (4) the government's knowledge of such continuing wrongdoing.[5]

POINT III

THE GOVERNMENT SHOULD BE ORDERED TO PROVIDE A BILL OF PARTICULARS CONCERNING COUNT 26, WHICH CHARGES OBSTRUCTION OF JUSTICE

The Court should direct that the government provide a bill of particulars identifying the allegedly "false and misleading testimony" the government claims Mr. Michael provided to the grand jury, as well as the allegedly "altered" and "distorted" documents the government contends he produced in response to grand-jury subpoenas. The requested particulars are required to permit Mr. Michael to adequately prepare for trial, and to later avoid double jeopardy.

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[5] The Court may also consider evaluating the government's conduct in terms of whether it was so outrageous that it violated due process. See, e.g., United States v. Stein, No. S1 05 Crim. 0888 (LAK), 2007 U.S. Dist. LEXIS 52053 (S.D.N.Y. July 16, 2007); United States v. Twigg, 588 F.2d 373 (3d Cir.1978); United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

Count 26 of the superseding indictment charges Mr. Michael with having obstructed justice between August 2, 2005, and August 12, 2005, in violation of 18 U.S.C. §§ 2 and 1503 by

> (1) providing false and misleading testimony to the grand jury regarding the source of the down payment for coconspirator Cunningham's purchase of the Arlington condominium; (2) providing false and misleading testimony to the grand jury concerning Cunningham's $500,000 second mortgage on his Rancho Santa Fe Home, including but not limited to, testimony about the issuance, servicing, sale, and payoff of the mortgage; and (3) causing to be provided to the grand jury, in response to subpoenas, documents that had been altered and created to distort the transactions that the documents purported to reflect.

The government should be required to provide the following particulars:

> 1. Identify the portions of Mr. Michael's grand-jury testimony alleged to be false and misleading regarding the source of the down payment for coconspirator Cunningham's purchase of the Arlington condominium;
>
> 2. Identify the portions of Mr. Michael's grand-jury testimony alleged to be false and misleading concerning Cunningham's $500,000 second mortgage on his Rancho Santa Fe Home; and
>
> 3. Identify the documents and portions of particular documents that are alleged to have been altered and created to distort the transactions that the documents purported to reflect.

Rule 7(f) of the Federal Rules of Criminal Procedure permits a defendant to request a bill of particulars to enable

him "to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." 1 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 129 (3d ed.1999)(citations omitted). The considerations informing the decision whether to grant a bill of particulars under Rule 7(f) were succinctly stated in United States v. Long, 706 F.2d 1044, 1054 (9th Cir. 1983):

> A motion for a bill of particulars is appropriate where a defendant requires clarification in order to prepare a defense. . . . It is designed to apprise the defendant of the specific charges being presented to minimize danger of surprise at trial, to aid in preparation and to protect against double jeopardy.

Id. at 1054 (citations omitted). See also United States v. Fort, 472 F.3d 1106, 1111 n.4 (9th Cir. 2007); United States v. Drebin, 557 F.2d 1316, 1325 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978); United States v. Woodruff, 50 F.3d 673, 676 (9th Cir. 1995), cert. denied, 522 U.S. 1082 (1998); Yeargain v. United States, 314 F.2d 881, 882 (9th Cir. 1963)

In determining whether a bill of particulars should be ordered in a specific case, a court should consider whether the defendant has been advised adequately of the charges through the indictment and all other disclosures made by the government. Here, Count 26 fails to specify at all which of Mr. Michael's statements before the grant jury were supposedly "false and

misleading"; nor does it identify the supposedly "altered" or "created" documents that the government claims he provided to the grand jury. Given the extraordinary number of documents produced to the grand jury, which included computer servers and hard drives, Mr. Michael currently is left to guess which documents and portions thereof are at issue.

In United States v. Peyton, 28 Fed.Appx. 655, 657, (9th Cir.), cert. denied, 537 U.S. 854 (2002), the Ninth Circuit reversed the defendant's convictions under several counts of the indictment in that case where the district court had denied a request for a bill of particulars, thereby "leaving [the defendant] confused as to why the evidence did not match the charges in the indictment." In Peyton, account numbers provided during discovery did not match account numbers provided in the indictment, and the defendant incorrectly assumed that these additional account numbers were not linked to the indictment. The court held the defense was prejudiced by the government's failure to particularize which account numbers were part of the charged crime. Id. at 657.

The particulars sought herein are unremarkable and readily producible, and are aimed at obtaining the most basic information regarding Count 26, namely, which portions of Mr. Michael's grand-jury testimony was allegedly false, and which documents did he allegedly alter or create. No reason exists for

the government to deny Mr. Michael the requested particulars other than to blind-side him.

For the foregoing reasons, the Court should direct the government to provide the requested particulars.

POINT IV

THE GOVERNMENT SHOULD BE REQUIRED TO IDENTIFY ALL BRADY/BAGLEY/GIGLIO MATERIAL AND ALL TRIAL EXHIBITS

As the Court is aware, the government is producing extraordinary volumes of the discovery being produced by the government is government. As previously noted, the discovery includes in excess of two million documents in either electronic or hard-copy format, most of which were obtained via the execution of twelve search warrants. See Docket No. 44, Declaration of Raymond R. Granger dated April 30, 2007, at ¶ 5 In addition, the amount of additional information stored on computers and other storage devices seized by the government is itself extraordinary. Review of the search-warrant returns indicates that government-seized evidence includes at least 96 computers; 20 computer servers; 51 additional hard drives; 5 central-processing units; over 150 floppy discs; over 290 compact discs; and 10 server backup tapes. In addition, there are several tapes of various types (video, microcassette, or digital). Id. at ¶ 11.

Particularly under these circumstances, the government should be required to identify at least ten days before jury selection all materials it intends to use as exhibits at trial, as well as all favorable or impeaching information within the holdings of Brady v. Maryland, 373 U.S. 83 (1963), United States v. Bagley, 473 U.S. 667 (1985), and Giglio v. United States, 405 U.S. 150 (1972). For example, in United States v. Locascio, Criminal No. 4:05-476-RBH, 2006 U.S. Dist. LEXIS 74036 (D.S.C. Sept. 27, 2006), where 3,000 patient files were at issue, the court directed pretrial identification of Brady material by the government. 2006 U.S. Dist. LEXIS 74036, at *22. The court further held that defense counsel should not be put in the position of hoping to "stumble across" which files would be used by the government at trial, and that "basic fairness, an opportunity for adequate preparation for trial, avoidance of surprise or unfair advantage, as well as the elimination of possible mid-trial recesses" required pretrial identification of trial exhibits by the government. 2006 U.S. Dist. LEXIS 74036, at *22-23. See also In re Adelphia Communications Corp., 338 B.R. 546, 551 (S.D.N.Y. 2005) (court notes that it "does not endorse a method of document production that merely gives the requesting party access to a 'document dump,' . . .with an instruction to the party to 'go fish'")(citing Hagemeyer North America v. Gateway Data Sciences Corp., 222 F.R.D. 594, 598 (E.D.

Wis.2004); Doe v. Nat'l Hemophilia Foundation, 194 F.R.D. 516, 518 (D. Md. 2000)).[6]

Finally, the government should be required to disclose all Brady, Bagley, and Giglio material regardless of whether it exists in written form. See, e.g., United States v. Rodriguez, No. 05-3069-cr, 2007 U.S. App. LEXIS 17508 (2d Cir. July 27, 2007).

POINT V

THE GOVERNMENT SHOULD BE REQUIRED TO PROVIDE A COPY OF THE TAPE RECORDING OF MR. MICHAEL'S GRAND-JURY TESTIMONY

Rule 16(a)(1)(B)(iii) of the Federal Rules of Criminal Procedure requires that the government produce "the defendant's recorded testimony before a grand jury relating to the charged offense." Mr. Michael submits that the rule requires production of the recorded testimony itself. See FED. R. CRIM. P. 16(a)(3). Particularly where criminal charges hinge on precisely what was said to the grand jury, fundamental fairness requires that a defendant should be entitled to verify the accuracy of the grand-jury transcript for himself or herself. In addition, since subtleties of intonation and emphasis on the part of both the

[6] As noted above, the government produced in discovery an FBI 302 documenting an extensive debriefing of Cunningham that does not mention Mr. Michael. The document was located in approximately the middle of a box containing about 3,000 documents.

witness and the examining attorney could prove informative and relevant to a jury, Mr. Michael also should have the opportunity to listen to his testimony in order to determine whether to move the tape itself into evidence.

Accordingly, the Court should direct that the government provide Mr. Michael a copy of the recording of his testimony and to make the original available for inspection if needed.

POINT VI

THE GOVERNMENT SHOULD DISCLOSE SPECIFIC EVIDENCE IT INTENDS TO INTRODUCE UNDER FEDERAL RULE OF EVIDENCE 404(b)

The government should be required to give notice under Federal Rule of Evidence 404(b), with reasonable specificity, of any evidence it intends to introduce under that section. Such disclosure should be made immediately in order to permit the defense to make any appropriate motions under Federal Rule of Evidence 104 or otherwise, and to permit adequate investigation of the evidence that otherwise may require so-called "minitrials" if the conduct is disputed.

Rule 404(b) contemplates disclosure of other-crimes evidence prior to trial:

> upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good

> cause shown, of the general nature of any such evidence it intends to introduce at trial.

The applicable committee notes provide that the 1991 Amendment authorizing disclosure, "is intended to reduce surprise and promote early resolution on the issue of admissibility" (emphasis added).

The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See e.g., Rule 412 (written notice of intent to offer evidence under rule); Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5)(notice of intent to use residual hearsay exceptions).

Especially given the complexity and breadth of the government's case, immediate disclosure of other crimes evidence should be required in order to facilitate an orderly trial of this case. Such disclosures should be made regardless of whether the government ultimately considers such evidence to be admissible under Rule 404(b) or as conspiratorial conduct. Absent proper cause to avoid immediate disclosure, the government's only motive for delay would be to engage in trial by ambush.

POINT VII

THE COURT SHOULD ORDER IMMEDIATE EXPERT-WITNESS DISCLOSURE

With trial rapidly approaching, the Court should direct the government to provide immediate expert disclosure under Federal Rule of Criminal Procedure 16(a)(1)(G), along with copies of transcripts of the anticipated witness's previous testimony. Immediate production should be required in order to permit the defense not only to prepare adequately for this testimony, but also to move to exclude such testimony if appropriate, either because it is not admissible expert testimony under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), or because it is based on testimonial hearsay that would violate the defendants' confrontation rights as explicated in Crawford v. Washington, 541 U.S. 36 (2004).

POINT VIII

THE COURT SHOULD HOLD A HEARING REGARDING GRAND-JURY LEAKS

At the status conference held on July 23, 2007, the Court indicated that, in light of the failure of the Department of Justice to undertake a credible investigation into the blatant violations of Rule 6(e) of the Federal Rules of Criminal Procedure that occurred in the course of the government investigation that preceded the indictment of Mr. Michael and Mr.

Wilkes, the Court was reconsidering its decision not to hold a hearing. See Transcript at 29. Mr. Michael hereby joins Mr. Wilkes's motion to dismiss on the grounds of outrageous government conduct and violations of Rule 6(e), and respectfully requests that the Court conduct such a hearing and allow him to present evidence in support of dismissal or any other relief the court may deem appropriate.

CONCLUSION

For the reasons set forth above, Mr. Michael respectfully requests that the Court grant the relief sought herein.

Dated: New York, New York
August 16, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Raymond R. Granger, certify that: I am a citizen of the United States; I am at least eighteen years of age; my business address is 757 Third Avenue, 7th Floor, New York, New York 10017; and I am not a party to the above-captioned action.

I further certify that I served John Michael's Motions to Dismiss or, in the Alternative, to Disqualify, and for Other Relief, dated August 16, 2007, on the following parties by electronically filing that document with the Clerk of the District Court using the District Court's ECF System, which electronically notifies them of the filing and provides access to a copy of the document:

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August 16, 2007

_____
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