IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GERARD MARCHELLETTA, JR., a/k/a Jerry Marchelletta, Jr., GERARD MARCHELLETTA, SR., a/k/a Jerry Marchelletta, Sr., and THERESA KOTTWITZ, Defendants.	)	Case No. 1:07-CR-107-TCB

DEFENDANTS' JOINT MEMORANDUM IN SUPPORT
OF THEIR JOINT RULE 33 MOTION FOR A NEW TRIAL

Gerard Marchelletta, Jr. and Gerard Marchelletta, Sr. (the "Marchellettas"), by and through their counsel of record, Robert G. Bernhoft, and Theresa L. Kottwitz ("Kottwitz"), by and through her counsel of record, Ward L. Meythaler, (*pro hac vice* application pending), have respectfully and jointly moved for a new trial pursuant to Fed. R. Crim. P. 33. This memorandum of law is filed in support of that motion and pursuant to Local R. 5.1.

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"Oh what a tangled web we weave,
When first we practise to deceive!"

Sir Walter Scott, *Marmion, Canto vi, Stanza 17*.

INTRODUCTION

In the Walter Mitty world of two sister federal special agents, Customs Special Agent Kimberly Sellers and IRS Special Agent Patricia Bergstrom imagined a father-and-son, self-built construction dry wall company – a company employing hundreds of hardworking people both domestically and abroad, opening up opportunities for women and workers of all races, countries and creeds, non-discriminatory and international in scope – was secretly a "Mob" family enterprise with business ties to international terrorist Osama Bin Laden, devising all the great evils of the world. They imagined great evil where none existed, then further imagined themselves the instrumentalities of justice that would expose the tentacular, albeit fictional, *La Cosa Nostra* conspiracy, and in the process, provide much-coveted career advancement to them both. But alas, as the Ancient Wisdom teaches: "Deceit is in the heart of them that imagine evil." *Proverbs*, 12:20 (KJV).

And so that self-serving falsehood turned to self-delusion, then to venality, then to calculated mendacity, for as evidence of the father's and son's complete innocence built, the agents felt compelled to lie, deceive, and even falsify

testimony and evidence in order to justify the extraordinary amount of time and money spent investigating a case which was at most a routine civil tax matter. Customs SA Sellers and IRS SA Patricia Bergstrom lied to their agency bosses, lied to prosecutors, lied to witnesses, lied to grand juries, lied to judges, and lied to the jury in this case to cover up other lies and deceit, but most importantly to conceal the fact their unfortunate targets – the Marchellettas and their company, The Circle Group – were completely innocent of any criminal wrongdoing.

And as with all investigations where outrageous misconduct is the rule, not the exception, the prosecution team committed the necessary and corresponding discovery violations to conceal the misconduct and prevent constitutionally sufficient cross-examination of crucial witnesses. In so doing, the prosecution violated the orders of this court, the statutes of the United States, the Bill of Rights of the United States Constitution, and basic principles of morality and human decency, placing two innocent men and a simple bookkeeper in the dock, now threatened with federal prison after a ten-year tortuous purgatory for crimes they never committed.

The government's unjust persecution of the Marchellettas, Kottwitz, and The Circle Group has done untold damage to the "American-dream" business a father and son founded together many years ago, the fruition of their collective dream to

strike off on their own and build the sort of company that they, their workers, and their community could be proud of – not to mention the personal damage to their reputations in the community, and the economic and psychological harm and torment savagely inflicted upon themselves and their families by rogue federal law enforcement agents and others who colluded with them. At the end of the day, the only evil the special agents conjured was their own.

And now is the time for remedy, and for justice to be done. Justice is not yet dead, the search for truth not yet a faint memory, nor this court's honor stained by the deceit and dishonor of others beyond remedy or repair. Now the Sword of Damocles hangs over *their* collective heads, and over all who conspired and colluded with them in this decade-long, unjust persecution. Rule 33 of the Federal Rules of Criminal Procedure exists to insure the "interest of justice" is paid in full, and paid in full here.

RULE 33 LEGAL STANDARDS

Rule 33 of the Federal Rules of Criminal Procedure vests a district court broad discretion to set aside any verdict where evidence undisclosed at trial recommends a new trial in the interest of justice. The Constitutional rights implicated in any trial include the right to due process of law, the right to confrontation of one's accusers, and the right to present a defense. Rule 33 also

vests broad discretion in the district court to order a new trial whenever evidence undisclosed at trial would so warrant in the interest of justice. The issue for a Rule 33 motion for new trial is "the fairness of the trial" and the "integrity" of the verdict independent of any other matter. *United States v. Williams*, 613 F.2d 573, 575 (5th Cir. 1980).[1]

If an agent of the government permits false or fabricated evidence, or merely withholds statements, evidence, or information compelled disclosed to the defense at or before trial, by law or court order, then a new trial is the appropriate remedy. *See e.g.*, *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Berger v. United States*, 295 U.S. 78, 88 (1935); *Hysler v. Florida*, 315 U.S. 411 (1942); *White v. Ragen*, 324 U.S. 760 (1945); *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1947); *Jencks v. United States*, 353 U.S. 657, 668, n.13 (1957); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959); *Clancy v. United States*, 365 U.S. 312, 316 (1961); *Campbell v. United States*, 373 U.S. 487, 495 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963); *Estes v. Texas*, 381 U.S. 532, 540 (1965); *Goldberg v. United States*, 425 U.S. 94, 96 (1967); *Miller v. Pate*, 286 U.S. 1 (1967); *Alderman v. United States*, 394 U.S. 165, 175 (1969); *Moore v. Illinois*, 408 U.S. 786, 794-95

[1] This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

(1972); *Giglio v. United States*, 405 U.S. 150 (1972); *Davis v. Alaska*, 415 U.S. 308 (1974); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Leon*, 468 U.S. 897, 900-01 (1984); *United States v. Bagley*, 473 U.S. 667, 678-79 (1985); *Rose v. Clark*, 478 U.S. 570, 577-78 (1986); *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995); *Strickler v. Greene*, 527 U.S. 263, 284 (1999); 18 U.S.C. § 3500; Fed. R. Crim. P. 16.

This Circuit follows that tradition. *See e.g., Powell v. Wiman*, 287 F.2d 275, 281 (5th Cir. 1961); *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968); *Smith v. Florida*, 410 F.2d 1349 (5th Cir. 1969); *Luna v. Beto*, 395 F.2d 35, 41 (5th Cir. 1968) (Brown, J., concurring); *Jackson v. Wainwright*, 390 F.2d 288, 299 (5th Cir. 1968); *Davis v. Heyd*, 479 F.2d 446, 453 (5th Cir. 1973); *Dupart v. United States*, 541 F.2d 1148 (5th Cir. 1976); *Calley v. Callaway*, 519 F.2d 184, 224 (5th Cir. 1975); *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977); *Cannon v. Alabama*, 558 F.2d 1211, 1213 (5th Cir. 1977); *Blankenship v. Estelle*, 545 F.2d 510, 514 (5th Cir. 1977); *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977); *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977); *United States v. Herberman*, 583 F.2d 222, 228 (5th Cir. 1978); *United States v. Sink*, 586 F.2d 1041, 1051 (5th Cir. 1978); *Lockett v. Blackburn*, 571 F.2d 309, 313 (5th Cir. 1978); *United States v. Beasley*, 576 F.2d 626, 632 (5th Cir. 1978); *United States*

v. Antone, 603 F.2d 566, 569 (5th Cir. 1979); *Martinez v. Wainwright*, 621 F.2d 184, 186 (5th Cir. 1980); *Ross v. Hopper*, 716 F.2d 1528, 1534 (11th Cir. 1983); *Williams v. Griswald*, 743 F.2d 1533, 1542 (11th Cir. 1984); *United States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *Hays v. Alabama*, 85 F.2d 1492, 1498 (11th Cir. 1996); *United States v. Scheer*, 168 F.3d 445, 452 (11th Cir. 1999); *Carr v. Schofield*, 364 F.3d 1246, 1254 (11th Cir. 2004).

District courts and sister circuits mirror the same. *Nash v. Purdy*, 283 F.Supp. 837, 841 (D.C. Fla. 1968); *United States v. Cleveland*, 477 F.2d 310, 316 (7th Cir. 1973); *Emmett v. Ricketts*, 397 F.Supp. 1025, 1041 (N.D. Ga. 1975); *United States v. Librach*, 520 F.2d 550, 553 (8th Cir. 1975); *Kircheis v. Long*, 425 F.Supp. 505, 510 (D.C. Ala. 1976); *United States v. Turner*, 633 F.2d 219 (6th Cir. 1980); *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983); *United States v. Sorrentino*, 726 F.2d 876 (1st Cir. 1984); *United States v. Welch*, 810 F.2d 485, 490 (5th Cir. 1987); *United States v. Martinez-Mercado,* 888 F.2d 1484 (5th Cir. 1989); *United States v. Sanchez*, 813 F.Supp. 241, 245-46 (S.D.N.Y. 1993); *United States v. Browder*, 1994 WL 665104, *1 (E.D. La. 1994); *Bell v. Haley*, 437 F.Supp.2d 1278, 1307 (M.D. Ala. 2005).

As controlling authority teaches, whenever the Rule 33 concerns governmental misconduct, "the standards applicable . . . are quite different" and impose a lower threshold than typically applied to Rule 33 cases that do not involve withheld evidence. *United States v. Johnson*, 487 F.2d 1318, 1325 n.9 (5th Cir. 1973). The heightened standard applicable to recantation stories or other newly discovered evidence does not apply where the government's case included false testimony, hidden reports, fabricated evidence, or other undisclosed testimony. Hence, in cases of Jencks Act, *Brady*, or *Giglio* violations, or false or fabricated testimony, a defendant need not show he would have been acquitted but for the withheld evidence: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). Moreover, the defense need not demonstrate that the undisclosed information "probably would have resulted in acquittal." *Cannon v. State of Alabama*, 558 F.2d 1211, 1216, n.9 (5th Cir. 1977).

It is axiomatic that newly discovered evidence "need not relate to the issue of guilt or innocence" but instead merely relate to "the existence of a Brady violation" or "another issue of law." *United States v. Beasley*, 582 F.2d 337, 339

(5th Cir. 1978); *United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006). "In this context we cannot merely consider the evidence in the light most favorable to the government but must instead evaluate all the evidence as it would bear on the deliberations of a fact-finder." *Cannon*, 558 F.2d at 1214. "The proper standard . . . must reflect our overriding concern with the justice of the finding of guilt." *Id*. at 1216. In any instance, where the evidence is otherwise weak, a new trial is warranted. *Id*. at 1215.

Furthermore, a hearing is required if the facts alleged by the defense suffice for possible relief. *See United States v. Poe*, 462 F.2d 195, 197 (5th Cir. 1972). In turn, the question is not what the defendant can prove on the face of his motion, but "what the defense might reasonably be able to prove if discovery is conducted." *United States v. Velarde*, 485 F.3d 553, 561 (10th Cir. 2007). The Eleventh Circuit has expressly recognized a right to discovery in the district court in the context of that court's determination of a pending motion for new trial. *See United States v. Espinosa-Hernandez*, 918 F.2d 911, 913 (11th Cir. 1990). Indeed, in the absence of a Rule 33 evidentiary hearing, all the facts alleged "must stand as confessed" and a trial court "abused its discretion" where it failed to conduct "a thorough inquiry." *United States v. Richardson*, 360 F.2d 366, 369 (5th Cir. 1966) (reversing district court for failure to conduct evidentiary hearing on Rule 33

motion). An evidentiary hearing is warranted when the movant is able to make a showing that further investigation under the court's subpoena power very likely would lead to the discovery of such evidence: "When determining whether to conduct discovery, however, the issue cannot be what the defense has already proved, *but what the defense might reasonably be able to prove if discovery is conducted.*" *Velarde*, 485 F.3d at 561 (emphasis added).

A court has the power to do whatever is necessary to ensure a fair and meaningful post-conviction evidentiary hearing, including granting discovery to the petitioner so that the necessary facts for a fair hearing may be obtained. *See Harris v. Nelson*, 394 U.S. 286, 299-300 (1969). Circuits reverse when district courts refuse to grant discovery to defendants seeking discovery in pursuit of a Rule 33 motion. *See Velarde*, 485 F.3d 553. Indeed, an "adversary hearing" is usually necessary "to determine the truth" about the prosecution's or the law enforcement's conduct of the case in a Rule 33 matter concerning undisclosed evidence. *Johnson*, 487 F.2d at 1325.

I. THE ANATOMY OF OUTRAGEOUS GOVERNMENT MISCONDUCT:

AN UNLAWFUL, CORRUPT, AND DECEITFUL INVESTIGATION COMES TO AWFUL FRUITION IN A TRIAL PERNICIOUSLY INFECTED WITH FALSE AND MISLEADING TESTIMONY, FORGED EVIDENCE, AND FALSE ARGUMENT, MAKING A PERVERSE MOCKERY OF BOTH OUR FEDERAL CRIMINAL JUDICIAL PROCESS AND THE MARCHELLETTAS' AND KOTTWITZ'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The story the prosecution told the jury at trial was false in most every material respect, right down to the prosecution's dominant trial theme, hammered home both in opening statement and closing argument, namely, that the Marchellettas and Kottwitz "saw [sic] the sirens in the rearview mirror." (Doc. 205, p. 11.) This prosecution theme was the only significant "intent" evidence in the case, and the two testifying special agents, Customs SA Sellers and IRS SA Bergstrom, provided the entire evidentiary foundation with false and misleading testimony. Even then, however, the evidence was so weak that the jury acquitted three of nine total counts (counts 2, 8, and 9), the prosecution dismissed Count 7 after the close of evidence.

Moreover, the U.S. Court of Appeals for the Eleventh Circuit recently took the extraordinary step of reversing Count 6 for insufficient evidence with instructions to enter a judgment of acquittal, with Judge Birch dissenting to the

extent he would have reversed and acquitted on Count 1, as well, the sole remaining affirmed conviction count, because no rational juror could have determined guilt or innocence on the prosecution's wafer-thin "evidence." The remaining conviction counts were all reversed and remanded for a new trial for failure to instruct the jury on the core theory of defense, reliance on accountant. Here, with only one remaining affirmed conviction count hanging tenuously over Judge Birch's dissent, it simply cannot be persuasively said that the false testimony and discovery violations do not at least warrant discovery, compulsory process, and an evidentiary hearing to determine the truth of all these critical matters.

A. A New Trial Must be Ordered when the Prosecution Knowingly Uses False Testimony and Evidence, as it did Here in the Trial of the Marchellettas and Kottwitz.

Well-settled precedent dictates that the knowing use of false evidence is a denial of due process compelling a new trial as the remedy. *See Mooney v. Holohan*, 294 U.S. 103 (1935); *Miller v. Pate*, 286 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *White v. Ragen*, 324 U.S. 760 (1945); *Pyle v. Kansas*, 317 U.S. 213 (1947); *Hysler v. Florida*, 315 U.S. 411 (1942). This applies even when only a law enforcement agent rather than the prosecutor knew of the false evidence. *See Smith v. Florida*, 410 F.2d 1349 (5th Cir. 1969); *see also Luna v. Beto*, 395 F.2d 35, 41 (5th Cir.

1968) (Brown, J., concurring). Moreover, the rule obtains even greater force when the fabricated evidence comes from the prosecution itself, in the form of false testimony or evidence from law enforcement agents. *See Smith v. Florida*, 410 F.2d 1349.

Where the state knowingly uses false testimony to obtain a conviction, such a conviction violates the due process rights of the accused and cannot be permitted to stand. A deliberate deception on the part of the prosecution by the presentation of known false evidence is not compatible with the "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Antone*, 603 F.2d 566, 568 (5th Cir. 1979); *Carr v. Schofield*, 364 F.3d 1246, 1254 (11th Cir. 2004).

In criminal cases where a conviction rests on "perjured testimony" or a defendant is "deprived by the State of impeachment evidence," prosecutors "have long been on notice that such a conviction violates due process requirements." *Blankenship v. Estelle*, 545 F.2d 510, 514 (5th Cir. 1977). "It is clear that if the government knowingly used perjured testimony to convict the petitioner, even as to matters only affecting the credibility of a witness, then the petitioner would be

entitled to relief." *Dupart v. United States*, 541 F.2d 1148 (5th Cir. 1976). Any testimony "even though technically not perjurious" requires a new trial whenever it was merely "highly misleading to the jury, a body generally untrained in such artful distinctions." *Id*. Importantly, this Circuit has reiterated it will not tolerate prosecutorial participation in "technically correct, yet seriously misleading, testimony which serves to conceal." *Blankenship*, 545 F.2d at 513.

In any proceeding predicated upon falsified testimony or fabricated evidence known to a government agent as such, then "the judicial proceeding" which obtained the conviction of a defendant "is used merely as a legal subterfuge for wrongfully depriving a defendant of his liberty." *Kircheis v. Long*, 425 F.Supp. 505, 509 (D.C. Ala. 1976). Furthermore, "the prosecutor, though not necessarily soliciting false testimony, is under an obligation to correct the testimony when it appears that the failure to remedy the untruth would prejudice the defendant." *Id*. Consequently, this too would be a "constitutional due process violation." *Id*.

A prosecutor's lack of knowledge the evidence was false is no bar to establishing a due process violation when the law enforcement officials knew. *See Smith v. Florida*, 410 F.2d at 1349. Any case where a government agent is the source of the false evidence requires a new trial. *See Espinosa-Hernandez*, 918 F.2d at 914. That the false testimony goes only to the credibility of the witness

does not weaken this rule. *See United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977). As controlling Fifth Circuit authority elaborates:

> The principle that a State may not knowingly use false evidence, including false testimony, implicit in any tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Powell v. Wiman, 287 F.2d 275, 282 (5th Cir. 1961) (internal citations and quotations omitted.)

"Where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony," the testimony is considered material "if there is any reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (internal citations and quotations omitted); *see also Carr v. Schofield*, 364 F.3d 1246, 1255 (11th Cir. 2004). False testimony is presumed material unless "failure to disclose it would be harmless beyond a reasonable doubt." *United States v. Bagley*, 473 U.S. 667, 678-79 (1985). A new trial must be granted whenever a state law enforcement officer lied on the stand. *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977); *see also Smith v. Florida*, 410 F.2d at 1349. Reversal is "virtually automatic" wherever a government agent

knowingly permitted the introduction of untrue testimony. *United States v. Sanchez*, 813 F.Supp. 241, 245-46 (S.D.N.Y. 1993); *see also United States v. Turner*, 633 F.2d 219 (6th Cir. 1980) (affirming district court's new trial order).

Here, both SA Sellers and SA Bergstrom deceived the jury at trial with false and misleading testimony that provided the entire illicit foundation for the prosecution's dominant trial theme – the Marchellettas and Kottwitz "saw [sic] the sirens in the rear view mirror" – a falsehood inextricably woven throughout the entire trial. (Doc. 205, p. 11.) And as with all cases where investigative misconduct is the unseemly rule, rather than the rare exception, both agents concealed voluminous Jencks Act, *Brady*, and *Giglio* discovery from the defense, going so far as to pass off a composite forgery as an official Customs report, to hide and bolster their lies to the court and the jury.

B. The Government Presented Substantial Falsified Testimony at Trial, Most Disturbingly from the Two Lead Special Agents Themselves.

Special Agents Sellers' and Bergstrom's trial testimony focused on the origin, scope, significant events, and general chronology of their investigation of the Marchellettas and their company, The Circle Group. And with very few exceptions, they lied about everything. Customs SA Sellers falsely told the jury that her investigation was "just like a routine administrative case," (Doc. 210, p.

928), "it was routine. Routine administrative," *id*., p. 930, a mere "collateral request" to confirm that Circle in Atlanta and its Bahamian counterparts were bona fide companies with legitimate sources of income, *id*., p. 928. But the truth was very different. In fact, SA Sellers initiated an aggressive criminal investigation from the outset, and only several months after the March 2001 check seizure at the Memphis Fedex hub that purportedly began the criminal investigation, had initiated a formal grand jury investigation and subpoenaed voluminous bank records in aid of her criminal money laundering investigation.

IRS SA Bergstrom picked up the perjurious trial torch from SA Sellers and falsely told the jury that she became involved in the case based on SA Sellers calling her and asking whether she'd like to take a look at a case she was working. *Id*. p. 956. In fact, SA Bergstrom had been conspiring with SA Sellers for some time to develop a pretext to expand Sellers' Customs grand jury criminal investigation to include Bergstrom's investigation of possible criminal tax violations. This was going to be the career-making case for the sister federal special agents. Indeed, as early as January 9, 2002, SA Bergstrom set about the task of collecting evidence to draft the IRS Form 9131 special agent's report required by DOJ Tax Division and IRS rules before any IRS special agent can access and utilize the power of a grand jury – power denied to IRS special agents

except under special circumstances, and for good reason, as this case amply demonstrates.

These trial testimony deceptions and falsehoods formed the foundation for the prosecution's dominant, albeit false, trial theme: the Marchellettas and Kottwitz "saw [sic] the sirens in the rearview mirror." (Doc. 205, p. 11.) The setup was simple. SA Sellers wasn't even conducting a criminal investigation, but rather a "routine administrative matter", something akin to a fact-check based upon a routine "collateral request" from the Memphis Customs office. (Doc. 210, pp. 928, 930.) Nothing could be more "routine," she told the jury. But according to SA Sellers trial testimony, something strange happened, something very unusual and out of the ordinary: Circle's two attorneys, Marianne Boston and Richard Abbey, repeatedly badgered her with demands to know whether the IRS would be notified. She testified the lawyers repeatedly asked whether she was going to notify the IRS. (Doc. 210, p. 931, 935-37.) "Will the IRS be notified?" they incessantly queried. And it was only because of these very strange demands to know if IRS would be notified that SA Sellers felt it was incumbent upon her to bring the case to IRS's attention, because this was obvious evidence of guilty knowledge. If the Marchellettas and the Circle Group hadn't committed tax

crimes, after all, why were their attorneys constantly badgering her about IRS notification?

As it turns out, SA Sellers entire testimony in this important regard was completely false. Neither Attorney Marianne Boston nor Attorney Richard Abbey ever asked SA Sellers or anyone else at Customs whether the IRS would be notified. Attorney Boston will testify, and her contemporaneous emails will corroborate, that she never once asked SA Sellers whether she was going to notify IRS. In fact, when interviewed about the alleged "will IRS be notified?" inquiries, she exclaimed: "That's a blatant lie!" (Pearson Decl., ¶ 5; Ex. 4.)[2] Similarly, Attorney Abbey will testify, and his contemporaneous emails will corroborate, that he never asked SA Sellers, or anyone else at Customs, whether IRS would be notified. In fact, as Attorney Abbey will testify and his contemporaneous emails will corroborate, it was U.S. Customs Attorney Richard Resin that informed Abbey *that SA Sellers herself told Resin she suspected criminal tax violations and wanted IRS involved in the investigation*, and well after SA Sellers falsely attributed these "IRS notification" inquiries to Attorneys Boston and Abbey. Moreover, it was Customs Attorney Resin who relayed to Abbey that upon SA Sellers conveying her suspicions to him of IRS criminal tax violations, Customs Attorney Resin advised

[2] All documents in this paper have been authenticated by Robert G. Bernhoft in his declaration. There are 71 exhibits authenticated from ¶¶ 10-69 of Bernhoft's declaration.

her that if that's what she thought, she should close down her Customs' criminal investigation and refer the matter to IRS. But SA Sellers *did not* close down her criminal investigation, because she and IRS SA Bergstrom had big plans for the Marchellettas and The Circle Group.

So the prosecution proceeded to put their false story to the jury: if the Marchellettas hadn't committed tax crimes, why were their attorneys badgering poor Customs SA Sellers about whether she was going to notify IRS? After all, SA Sellers testimony misled the jury into thinking she was some sort of mere administrative bureaucrat charged with confirming the "routine administrative matter" that the Circle companies were real and had legitimate sources of income. Poor SA Sellers was confused and consternated over these incessant demands to know whether she'd notified IRS of her investigation. One would have thought, as the jury must have, that she wasn't even a criminal investigator with a gold shield and a Glock, *exclusively charged with investigating criminal violations of laws within Customs' jurisdiction*. And that was the whole point: to deceive and mislead the jury into thinking that but for the Marchellettas' attorneys incessantly querying SA Sellers about IRS notification, the IRS would have never even *begun* a criminal investigation of the Marchellettas.

But the true story doesn't end there, for Special Agents Sellers and Bergstrom had several other powerful reasons to conceal the true origin, nature, scope, events, and chronology of their investigation of the Marchellettas. First, SA Bergstrom had committed multiple criminal contempts of Fed. R. Crim. P. 6(e), the grand jury secrecy rule, by accepting and reviewing hundreds of pages of bank record information from SA Sellers that Sellers had subpoenaed through her undisclosed Customs' grand jury investigation starting in January of 2002. According to Bergstrom's 9131 special agent's report drafted on July 18, 2002 – undisclosed to the trial defense in clear violation of the Jencks Act, as more fully amplified *infra* at § II – "SA Sellers initiated a grand jury investigation in January of 2002 and began issuing grand jury subpoenas." (Ex. 1, p. 6.)

SA Bergstrom goes on to set forth what the IRS refers to as a "bank deposit reconciliation" in her 9131 special agent's report, summarizing all deposits into three of Circle's principal bank accounts relating to the Atlantis Hotel & Casino construction project in Nassau, Bahamas. In her report, SA Bergstrom falsely tells her IRS superiors and DOJ Tax Division policymakers that the Marchellettas and Circle are involved in a billion dollar-plus money laundering and tax evasion scheme, have possible ties to organized crime, and have ties to the Bin Laden Construction Company in the wake of the 9/11 tragedy. John Grisham couldn't

have written a more exciting fiction, and that's exactly what SA Bergstrom's 9131 was: a complete fiction.

Only problem was, as SA Bergstrom either knew at that time or discovered later, she had no Rule 6(e) authority whatsoever to review U.S. Customs Service subpoenaed bank records. SA Bergstrom's unauthorized access to, and review of, grand jury secret documents constituted criminal contempt and abuse of the grand jury and grand jury process, something her trial perjury concealed, and not coincidentally. Second, it was extremely important to both special agents that they conceal the true origin, scope, events, and chronology of the investigation, because the proverbial thousand-pound gorilla was lurking behind the scenes in the creepy personage of undisclosed confidential informant Shawn McBride, the inveterate liar, batterer, burglar, thief, and all-around ne'er-do-well the prosecution knew him to be, but did not disclose to the defense.

As SA Bergstrom set forth in her 9131 report, undisclosed to the defense, as a result of the Circle check seizure by U.S. Customs on March 16, 2001, "SA Sellers located and interviewed a former employee of Circle through her contacts with an Atlanta FBI agent (The individual was also being used as an informant in the ongoing Gold Club investigation)." (Ex. 1, p. 5.) A telephonic interview was held with CI McBride on "March 21, 2000." (Ex. 5.) The CI was "controlled by

Special Agent Mark Sewell, FBI, Atlanta, Georgia." *Id*. The meeting was conducted at the Organized Crime Drug Enforcement Task Force (OCDETF) Office, Atlanta, Georgia and present were FBI SA Mark Sewell, IRS-CID SA Lynn Whittaker and U.S. Customs SA Kimberly Sellers. *Id*.

Shawn McBride, undisclosed to the trial defense team in the infamous Gold Club case, was a confidential government informant controlled by FBI SA Mark Sewell throughout the investigation of the Gold Club and its owner, Steve Kaplan. Once McBride's services were no longer needed in that investigation and prosecution, he was "re-purposed" to the government's investigation of Jerry Marchelletta, Jr., who was determined to be an organized crime mobster, or in FBI parlance, "OC", for organized crime. This conclusion was apparently based upon SA Sewell's videotaping Jerry Marchelletta entering and leaving the Gold Club during Sewell's surveillance of same during that investigation, and the fact that Jerry Marchelletta, Jr. is Italian.[3]

At all events, the defense proffers, and discovery, compulsory process, and an evidentiary hearing would show, that the prosecution misled the defense, the

[3] So much for the notion that America has moved forward from the rank, unseemly stereotypes of yesteryear, such as Irish-Americans are drunks who like to fight a lot, Polish-Americans are lazy people with poor hygiene, or that Italian-Americans are probably in the Mafia. As a matter of fact, according to FBI statistics, only .0034% of Italian-Americans are associated with organized crime. *See* http://italic.org/imageb1.htm (last accessed on October 4, 2010). In fact, it's much more likely that a white male Italian-American is a Neo-Nazi White Supremacist than a mobster.

jury, and the court into believing that a completely fortuitous, "happenstance" seizure of an undeclared negotiable instrument at the Fedex Memphis hub started this entire sordid affair, without which "happenstance" seizure the Marchellettas and Circle would have gotten away with bloody tax murder. Poppycock. The checks were purportedly seized randomly by a National Guardsman performing package inspection at the Fedex Memphis hub on Friday, March 16, 2001. (Ex. 25.) The very next Monday, March 19, 2001, Memphis Customs' SA Spinella faxed SA Sellers copies of the seized checks and other documents, and the very next day, on Tuesday, March 20th, SA Sellers opens a criminal investigation, undisclosed during her trial testimony. Then, a mere three business days after the check seizure, a major meeting is convened at the Atlanta FBI's Organized Crime Strike Force Headquarters, with FBI SA Sewell, Customs SA Sellers, and IRS SA Lynn Whitaker in attendance, the purpose of which was to "debrief" confidential informant Shawn McBride about the check seizure. This Customs ROI was one of only six Customs Reports provided to the defense, but this particular report was not provided until September 10, 2007, only one week prior to trial.

According to SA Bergstrom's IRS Form 9131 special agent's report, undisclosed to the defense in clear violation of the Jencks Act, SA Sellers located CI McBride "through her contacts with an Atlanta FBI Agent." (Ex. 1, p. 5.) But

how could SA Sellers have known in three business days that some confidential informant controlled by an FBI special agent assigned to the purportedly completely unrelated Gold Club case might have some information regarding a Circle Group check signed by Jerry Marchelletta? SA Sellers had just received facsimiles of the seized checks, and two days later there's a debrief of a Gold Club confidential informant at the Atlanta FBI Organized Crime Strike Force Headquarters? And where does IRS Special Agent Lynn Whitaker come from? What does an IRS special agent have to do with a seized check being investigated by Customs, particularly when the prosecution insisted at trial, through SA Bergstrom's testimony, that there was no IRS investigation of the Marchellettas or Circle before she opened her investigation on January 9, 2002? (Doc. 210, pp. 957-58.)

Moreover, Federal Express has no record of ever receiving the seized package from Circle for shipment, nor that it ever even arrived in Memphis, and the Fedex waybills provided the defense in discovery are not the same as waybills disclosed to the Marchellettas in the related FOIA litigation. How could a package be randomly seized at the Fedex Memphis hub that was never in Fedex's shipping stream? The defense proffers that discovery, compulsory process where necessary, and an evidentiary hearing will show that the entire "happenstance" check seizure

was a ruse, a pretext, an illicit devise dreamed up by FBI SA Sewell, IRS SA Whitaker, Customs SA Sellers, and others, to justify initiating a grand jury to investigate the Marchellettas and Circle Group, based upon their paranoid delusions that the Marchellettas were dangerous mobsters who had to be taken down.

So how did Sellers and Bergstrom expect to get away with their trial perjury regarding the origin, events, and chronology of their investigation? How could they make up these false stories and not expect to be caught? After all, the Marchellettas and Kottwitz had hired notable criminal defense attorneys, and surely they'd be able to expose the lies and uncover the truth at trial. As fully detailed *supra* at § II, the defense attorneys didn't have a chance, because the prosecution team committed massive Jencks, *Brady*, *Giglio*, and other discovery violations that prevented the defense from exposing the fraud upon the court perpetrated by Sellers and Bergstrom, and others to be identified through compulsory process and an evidentiary hearing.

The Marchellettas engaged appellate counsel after the trial concluded, who upon reviewing the trial transcripts, in retrospect, thought some of the trial testimony was downright implausible, particularly Sellers' and Bergstrom's testimony. And there were other emblems of a "dirty" trial, as well. The trial

transcripts for several prosecution witnesses who testified negatively against the Marchellettas, including Sellers, Bergstrom, McBride, and Jeff Johnson, carried the hallmark indicia of illicit coaching, if not subornation of perjury.

Former AUSA Paul Monnin's trial colloquy with the court and defense counsel over Shawn McBride's "status" vis-à-vis the government was, and is, particularly disturbing. As Mr. Monnin related to the court:

> Well, Your Honor, Mr. McBride was used as a -- I don't believe that he was a cooperating source within FBI parlance. That requires a contract with the witness, certain agreements and exchange of funds typically as well. My understanding, I wasn't an AUSA back in 1999 when that investigation began. ***My investigation from Special Agent Mark Sewell, who was the case agent in Gold Club, and that comes from Special Agent Bergstrom, is that he was not a cooperating source***.

(Doc. 208, pp. 749-50) (emphases added).

The question the defense put was simple: was Shawn McBride a confidential informant during the Marchelletta investigation or wasn't he? Initially, Mr. Monnin says he just doesn't quite know, that he doesn't believe so, but that he'll have to check with McBride, his witness. Upon further dialogue with the court and defense counsel, AUSA Justin Anand promised to make the appropriate inquiries over lunch and report back post. Upon reconvening after lunch, Mr. Anand advised the court and defense counsel that he queried McBride regarding McBride's status. McBride relayed to Anand that he "never had an

agreement with the government, never received anything of value, compensation, or otherwise." (Doc. 208, p. 759.)

As it turned, SA Bergstrom certainly knew of McBride's status as a confidential informant, because she interviewed Shawn McBride with Customs SA Sellers as early as February 6, 2002, at Hartsfield International Airport at the Customs Resident-Agent-in-Charge's Office, and the ROI and MOI were never disclosed to the defense prior to trial. The defendants only know of this crucial second interview of McBride because ICE disclosed SA Sellers' ROI of the interview in response to the Marchellettas' FOIA requests, albeit heavily redacted, but the IRS has neither disclosed nor even identified SA Bergstrom's MOI of this second McBride interview in the on-going FOIA litigation. Moreover, SA Bergstrom herself continuously identified McBride as her confidential informant throughout her investigation, including after she assumed grand jury authority on September 12, 2002. (Exs. 26-30.)

How could it be that the lead prosecutor and lead special agent in a federal tax and conspiracy prosecution did not know whether their principal "intent" witness was a confidential informant during the Gold Club and Marchelletta investigations? Fact is, they did.

At all events, based on misconduct indicia in the trial record, defense counsel undertook a two-year investigation into the prosecution's investigation, indictment, and trial of the Marchellettas and Kottwitz. During the course of that lengthy investigation, multiple Freedom of Information Act requests were made to IRS, Customs and Border Patrol ("CBP"), and Customs and Immigration Enforcement ("ICE"). The administrative FOIA process ground slowly on all fronts, and significant delays in processing were experienced at all levels. Regarding CBP and ICE, after lengthy administrative engagement with the respective "front-line" FOIA analysts, and then formal appeals to the respective appeals offices lasting many months, both CBP and ICE finally released documents to the Marchellettas and Circle Group, and those documents were indeed shocking.

The thirteen undisclosed Customs Reports released, along with other investigative documents including SA Sellers' own emails, told a completely different story than the false and misleading story the prosecution told the trial jury. As amplified further *infra* at § II, the prosecution provided only six of these eighteen total official Customs Reports to the defense in discovery – a hand-selected group designed to conceal the actual investigation facts from the defense, and provide the illicit predicate for the "sirens in the rearview mirror" evidence-of-

guilty-knowledge falsehood repeatedly told to the jury. SA Sellers testified that as of October 2001, the Marchellettas' attorneys had no reason whatsoever to contact her, because after she sent her request for collateral information up to Memphis Customs, she was through with her investigation. (Doc. 210, p. 935.) SA Sellers also testified that she didn't know when Customs Fines, Penalties, and Forfeitures ("FPF") gave the 1.5 million in checks back to Circle, less a $50,000 administrative penalty. *Id*., p. 950.

Both of those material statements were false. As is customary throughout law federal law enforcement, when civil matters arise concurrent with a criminal investigation, the agency's "civil side" gives way to the dictates of the criminal investigation special agent, in this case SA Sellers. According to ROIs and emails released through FOIA – none of which were disclosed to the defense – SA Sellers actually told FPF at one point *not* to release the checks to Circle, because she didn't want them to know about the criminal investigation:

> Thank you for your help in this matter. As I mentioned, I do not want CIRCLE or their counsel to know of any of the details of the investigation, especially IRS involvement. It is an open investigation and I feel that disclosure of any such details could jeapordize [sic] the investigation.

(Ex. 31, p. 9; *see also id*., pp. 9-11 (further discussion of the seized funds).) SA Sellers was calling the shots all along, directly contrary to her sworn trial

testimony. And significantly, SA Sellers didn't even close her criminal investigation until February 21, 2003, over fifteen months after she told the jury she was basically done, in support of the "sirens in the rearview mirror" falsehood.

The lengthy and difficult history of the IRS FOIA requests, on the other hand, is detailed in the related FOIA litigation case presently before this court, most particularly in the Marchellettas' opposition to the IRS's motion for summary judgment. (*Marchelletta, et al. v. Internal Revenue Service*, Case No. 1:09-cv-3037-TCB (N.D. Ga.).) In relevant summary here, incorporating by reference the relevant argument and sworn declaration filings in that case, SA Bergstrom deceived her own IRS FOIA colleagues about the existence of responsive documents, variously misrepresented the nature of those documents to the FOIA analysts and disclosure manager, and then, when all else had apparently failed in terms of obstructing the Marchellettas' access to her criminal investigation file documents, dropped the nuclear bomb of all FOIA exemptions: SA Bergstrom told her disclosure colleagues that the Marchellettas were dangerous mobsters who would hurt or kill people if any documents were released to them. (Exs. 32-35.)

Thus, almost a full decade after she began her unjust persecution of the Marchellettas and The Circle Group, SA Bergstrom continues to propagate the pernicious and defamatory lie that the Marchellettas are secretly really big-time

mobsters, actual members of *La Cosa Nostra*, (Ex. 36, p. 5), dangerous people who need to be taken down. Bergstrom's motive for her FOIA deceptions and obstruction? Simple. If the Marchellettas received through FOIA her own SAR, her own 9131 special agent's report, the thirteen undisclosed Customs Reports, numerous of her own undisclosed MOIs providing exculpatory and/or impeachment material, and other reports and information, all of her misconduct and concomitant cover-up lies would be exposed. And they were.

After receiving unprecedented full denials from IRS Disclosure, the Marchellettas filed suit in this court in January of 2010 to compel the IRS to disgorge responsive documents to them. Over the course of the next six months, DOJ counsel appeared to represent IRS in the suit, and things changed. Once independent DOJ counsel from Washington, D.C. became involved, the outrageous (b)(7)(f) "people are going to get hurt or whacked" FOIA exemption was completely dropped; DOJ counsel would not defend the exemption, because there was no basis in fact for SA Bergstrom's scandalous assertion. The "OC" whispering campaign had served SA Bergstrom well for almost a decade, but it was time to pay the piper.

As the IRS's summary judgment filing date of July 9, 2010 approached, DOJ counsel began to voluntarily release documents, first only several, then a

hundred or so, and finally, in late June of this year, DOJ counsel released approximately 90,000 pages of responsive documents from SA Bergstrom's investigative files. This, a far cry from Bergstrom's initial misrepresentation to her own IRS FOIA colleagues that she had "no documents responsive" to the FOIA requests, (Doc. 37, p. 10, n.2), then upon being jawboned by IRS FOIA Analyst Valdine Young, that perhaps she had "several boxes of responsive documents," *id*., ¶ 10, then after Analyst Young actually went to Bergstrom's office to confront her, that perhaps "approximately 20 boxes of responsive documents" exist, (Ex. 38, ¶ 25). Once the Marchellettas filed suit, however, the story changed again, and now there were "45-plus boxes of responsive documents." (*Marchelletta, et al. v. Internal Revenue Service*, Case No. 1:09-cv-3037-TCB (N.D. Ga.), Doc. 6, ¶ 53.) From zero to 90,000 pages in about eleven months, and the decade-long cover-up conspiracy had been partially broken.

And as expected, the 90,000 pages of document released by DOJ counsel, along with the hundreds of pages released through FOIA by CBP and ICE, provided overwhelming evidence of outrageous government misconduct: (1) SA Bergstrom violated Rule 6(e) by reviewing Customs grand jury documents without any 6(e) permission or authority; (2) Sellers' and Bergstrom's "sirens in the rearview mirror" trial testimony was completely false and misleading; (3)

prosecution "intent" and intimidation witness Shawn McBride was a confidential informant during both the Gold Club and Marchelletta/Circle investigations, and both Sellers and Bergstrom knew it; (4) SA Bergstrom and other special agents conducted interviews of witnesses, undisclosed to the defense, that gutted the prosecution's "no clients at the Gold Club" canard; (5) both Sellers and Bergstrom knew that the Marchellettas were *not* dangerous mobsters; (6) SA Bergstrom had deliberately concealed the most damaging documents from both her IRS Disclosure colleagues and the IRS's own DOJ counsel, approximately 2,600 pages of documents still in dispute in the FOIA litigation, documents only SA Bergstrom has apparently seen; and (7) prosecution witness and CPA Gary Schwartz committed perjury at trial, and SA Bergstrom knew it, when Schwartz declared he'd never heard the words Crabapple or Newport Bay until he testified at trial. (Doc. 209, p. 63-64) (testimony of Schwartz on September 21, 2007).

As set forth in detail in the section immediately below, all of the numerous Jencks, *Brady*, and *Giglio* violations directly correspond to bolstering the prosecution's false and misleading case-in-chief, concealing previous misconduct, or preventing constitutionally sufficient cross-examination of hostile witnesses who were carefully and extensively coached by the prosecution. All of this warrants discovery, compulsory process, and an evidentiary hearing to develop a

complete record upon which the court can consider the available remedies. But before turning to the multitude of specific discovery violations below, the defense will also proffer that discovery, compulsory process, and an evidentiary hearing will show further misconduct on the part of SA Bergstrom and other government persons.

First, when SA Bergstrom's investigation started to lose steam in late 2003 through early 2005, she resolved to take one last illicit shot at co-defendant Kottwitz. SA Bergstrom approached ICE SA Sir Streeter about conducting a raid on Eagle Managed Subcontractors ("Eagle"), where Kottwitz worked after being discharged by Circle in 2003. Eagle was owned by George Gorman, whom the prosecution identified in opening statement as "an unindicted co-conspirator." (Doc. 205, p. 17.) Although the August 2005 raid was purportedly an ICE raid regarding some alien smuggling investigation independent of any IRS investigation of the Marchellettas or Kottwitz, IRS SA Bergstrom actually drafted the probable cause affidavit and led the raid team, a very unusual, if not unprecedented, occurrence. Neither the search warrant nor Bergstrom's probable cause affidavit were ever provided to the defense in discovery.

Terri Kottwitz will testify that she was at work the day of the raid, and that SA Bergstrom refused to let her leave Eagle's premises. (Pearson Decl., ¶ 6.) Ms.

Kottwitz telephoned her attorney, who in turn finally convinced SA Bergstrom that she had to allow Kottwitz to leave if she wanted to. *Id*., ¶ 7. Before doing so, however, Bergstrom insisted on searching the contents of a folder Kottwitz's attempted to leave with; upon doing so, she removed some documents and told Kottwitz she couldn't leave with those, because "these documents have Circle on them." *Id*., ¶ 8. Another witness will also testify that at one point during the execution of the purported ICE search warrant, SA Bergstrom took ICE SA Streeter into a side office and was heard to "woodshed" SA Streeter about not being aggressive enough during the raid.

An evidentiary will show that the purported ICE raid was nothing more than an illicit pretext for Bergstrom to take one last shot at intimidating Ms. Kottwitz into testifying for the prosecution against the Marchellettas, in spite of the fact that Ms. Kottwitz had steadfastly maintained her, and the Marchellettas', innocence throughout the investigation, including during an interview with SA Bergstrom while Ms. Kottwitz was performing handwriting exemplars pursuant to a grand jury subpoena. Of additional and acute concern is the fact that at Bergstrom's request, the prosecution granted George Gorman full immunity in February of 2003, more than two years prior to the pre-textual "ICE" raid, an immunity

agreement never provided to the defense, although the prosecution identified Gorman as an unindicted co-conspirator in opening statement. (Ex. 39.)

Second, CPA Gary Schwartz was secretly cooperating with SA Bergstrom early on in the investigation, but this informing and cooperation was never disclosed to the defense. CPA Schwartz created the controversial "draft" returns that were admitted into evidence at the prosecution's behest at trial, draft returns Circle never asked nor authorized him to create, but which he created at Bergstrom's suggestion to fabricate "intent" evidence. Furthermore, CPA Schwartz was intimately aware of the Crabapple and Newport Bay house construction projects, as early as August of 2002, and he actually provided the detailed job costing ledgers for both to SA Bergstrom in May of 2003. (Exs. 40-41.) The Crabapple and Newport home construction job costing ledgers were provided to the Marchellettas in the IRS FOIA litigation by DOJ counsel, from Bergstrom's investigation files, in a separate folder specially marked "Gary Schwartz CPA."[4] (Bernhoft Decl., ¶ 3.) This FOIA disclosure totaled 1694 pages, and the document range is denominated by Bates stamp numbers FOIA-05-00375 through FOIA-06-01121. *Id*., ¶ 4. In contrast, the "Gary Schwartz CPA" file

[4] Counsel for the IRS in the FOIA litigation before this court, (Case No. 1:09-cv-03037-TCB), DOJ Trial attorney Carmen Banerjee, has represented that the 45 boxes of material came from SA Bergstrom's files. (RGB Decl., ¶ 3.)

provided the defense in Rule 16 was 1343 pages, 351 pages less than disclosed in the FOIA litigation, and denominated by Bates stamps 000223 through 001565.[5] *Id*., ¶ 5.

Included in the FOIA production of the "Gary Schwartz CPA" file is the Crabapple job ledger from FOIA-06-01026 through FOIA-06-01075. (Ex. 40.) Also included in the FOIA production of the "Gary Schwartz CPA" file from IRS Disclosure is the Newport Bay job ledger from FOIA-06-00986 through FOIA-06-01011. (Ex. 41.) Both ledgers were produced by Schwartz on May 19, 2003 at 9:04 a.m., and placed by SA Bergstrom in her investigative files.

Nevertheless, CPA Schwartz denied having any knowledge of Crabapple or Newport at trial in the following direct examination colloquy:

Q: Mr. Schwartz, do you know anything about Newport Bay as a job?

A: No.

Q: Do you know anything about Crabapple as a job?

A: No.

[5] Neither the "Gary Schwartz CPA" file provided in Rule 16 discovery nor the "Gary Schwartz CPA" file disclosed in the IRS FOIA litigation have been exhibited to this motion and memo because of their sheer volume, but are available upon request.

Q: Does the code 00998 for Newport Bay, does that mean anything to you?

A: No.

Q: And how about 00999 for Crabapple; does that mean anything to you?

A: No.

(Doc. 209, p. 63-64) (testimony of Schwartz on September 21, 2007).

Finally, and again in late 2004, when SA Bergstrom's investigation continued to lose steam, Bergstrom began working with the local Southeastern Carpenters Union, but particularly with two union thugs named Chris Freitag and Jimmy Gibbs, in an attempt to destroy The Circle Group's business and undermine the Marchellettas' ability to mount an effective trial defense once the indictment issued. Union documents already in the defense's possession show that the union was providing information to the U.S. Attorney's Office, N.D. GA, and IRS SA Bergstrom, and the defense proffers that SA Bergstrom and/or others provided documents and information to the union. (Exs. 42-43.) A witness will also testify that Jimmy Gibbs spoke to SA Bergstrom by telephone at his union office, and Gibbs has already admitted in a recent civil deposition that he knows SA Bergstrom and spoke to her on many occasions. (Pearson Decl., ¶ 9.) Moreover,

the audio recording exhibited to this memorandum was provided by the union in discovery in the on-going Section 303 illegal secondary boycott litigation, (*The Circle Group et al. v. Southeastern Carpenters Regional Council*, Case No. 1:09-cv-3039, N.D. Ga.), and memorializes Gibbs speaking with a neighbor of Marchelletta, Sr., Sherry Oakes, during a union picket of his personal residence. (Ex. A.)[6] Gibbs and Oakes discuss how both of them have been working with SA Bergstrom and call Bergstrom by her familiar nickname, "Patti."

II. MASSIVE JENCKS AND BRADY/GIGLIO DISCOVERY VIOLATIONS DEMAND A NEW TRIAL ON THE SOLE REMAINING CONVICTION COUNT.

At the Marchellettas' and Kottwitz's trial, the government withheld evidence that contradicted several of the prosecution themes. This including evidence of an extensive Customs criminal investigation which negated the so-called "they have no reason to be calling us" and "sirens in the rearview mirror" themes. The government also withheld evidence impeaching the testimony of both special agents Bergstrom and Sellers, CPA Schwartz, and their undisclosed confidential informant Shawn McBride.

[6] This Exhibit is an audio copy of the telephone conversation in .wav format to be sent to the Court under separate cover. *See* Notice of Filing of Electronic Media filed concurrently with this Memorandum.

In addition to testifying witness for whom no MOIs were provided, the Defendants' investigation uncovered another category of witnesses: those that did not testify, but did provide exculpatory and/or impeachment information to the interviewing agent(s). All of these violations could individually require a new trial. Collectively, they demand one.

A. This Court Previously Ordered Disclosure of Rule 16, *Brady*, *Giglio*, and Jencks Act Information, but the Government Provided Very Little of the Mandated Discovery, Thereby Ambushing the Defense at Trial.

On April 17, 2007 the court issued its standard, pretrial scheduling order. (Doc. 22). In that order, the court scheduled a pretrial conference for April 26, 2007 but prior to the scheduling conference, the government was ordered to "permit the defendant to inspect and copy discoverable matter, including, but not limited to, all Rule 16 materials . . ." *Id*. at p. 2. Additionally, "If the government has discoverable materials not immediately available locally, it shall advise the defendant of the existence and nature of items." *Id*. Reiterating the government's Rule 16 obligations at Section IV (Standard Rulings) of the pretrial scheduling order the court reminded the prosecution of its "continuing duty to disclose any evidence that is subject to discovery or inspection." *Id*. at pp. 5-6 (citing *United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir. 2003) and Fed. R. Crim. P. 16(c)).

Under the "Standard Rulings" section, the government was also directed to "provide all materials and information that are arguably favorable to the defendant in compliance with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny." (Doc. 22, p. 6.) With respect to exculpatory material as defined in *Brady* and *Kyles*, 514 U.S. at 434, it "must be provided sufficiently in advance of trial to allow a defendant to use it effectively." (Doc. 22, p. 6.) "Impeachment material must be provided no later than production of the Jencks Act statements." *Id*.

Prior to the rescheduled pretrial conference of June 4, 2007, on May 11, 2007 counsel for Marchelletta, Sr., requested *Brady* material from the government, specifically, the IRS audit report of Nastasi & Associates for the years 1998-2001, (Doc. 32, Ex. A), as well as a bill of particulars, (Doc. 31, Ex. A). Additionally, under separate cover dated May 10, 2007, Marchelletta Jr. requested the disclosure of SA Bergstrom's Special Agent's Report (SAR). Citing to the prosecution's obligations under *Brady* and pursuant to the court's standing order of April 17, 2007 counsel for Marchelletta, Jr. had "reason to believe that Special Agent, Ms. Bergstrom's, Report contains: (1) exculpatory information that will aid Mr. Marchelletta's defense; and (2) information that could be used to impeach the government's witness in this case." (Doc. 33, Ex. B.)

Unwilling or unable to provide the requested materials through informal process, counsel for both Marchellettas filed independent requests for *Brady* material on May 30, 2007. (Docs. 30-33.) Marchelletta Sr.'s requests were titled, "Motion for a Bill of Particulars" and "Request for Disclosure of Exculpatory and Impeachment Information," while Marchelletta, Jr. titled his request "Motion to Require Government Response" in reference to the informal request of May 10, 2007. (Docs. 31-33.) At the June 4, 2007 pretrial conference, Magistrate Judge Baverman ordered government responses by June 18, 2007 and defendant replies by June 29, 2007. (Docs. 34-36).

On June 19, 2007 the prosecution filed its joint response to both Marchellettas' motions for discovery and argued: "The government's compliance with its Rule 16 obligations strongly militates against granting a bill of particulars motion, particularly where, as here, the defendants are well counseled, well-financed, and hence well-able to mount a vigorous defense." (Doc. 37 at p.13.) Additionally, the prosecution stated in the concluding paragraph: "the Defendant's have received (and will continue to receive) ***plenary discovery***, and they are well-equipped, both due to the level of the fact pleading in the indictment as well as the degree to which the government has provided essentially ***open-file discovery***, to defend themselves against the charges in issue without further explication of the

government's theory of prosecution or the evidence it will adduce to establish each Defendant's guilt." (Doc. 37, pp.16-17) (emphases added). On June 29, 2007 counsel for both Marchellettas filed timely replies in support of their discovery motions. (Docs. 39, 40.)

After issuing a Superceding Indictment on July 2, 2007, (Doc. 42), yet another pretrial status conference was held on August 1, 2007 before Magistrate Judge Baverman. The first issue addressed was the production of the Nastasi audit file requested by Marchelletta, Sr. on May 11, 2007. AUSA Monnin represented to the court the file would be forthcoming sometime in mid-August and indeed, it was provided on August 20, 2007. (Doc. 141, Tr. of Hearing dated August 1, 2007, pp. 4-5.) Second, the parties discussed the timing of Jencks Act production. After stating he would not "dump a bunch of stuff on them" (referring to the defense) the Friday before trial and in an attempt to not "have issues come up during the case where there are claims of surprise," AUSA Monnin represented to the court that Jencks Act material would be provided to the defense on September 10, 2007, seven days before trial. *Id*., p. 5.

On August 23, 2007 Magistrate Judge Baverman issued his order and final report and recommendation with respect to Docs. 30-33, outlined above. (Doc. 63.) The court denied all three defendant's motions for a bill of particulars.

Additionally, the court denied as moot Marchelletta, Sr.'s motion for disclosure of the Nastasi audit file in lieu of the prosecution's representation at the August 1, 2007 status conference but did grant Marchelletta, Sr.'s motion for disclosure of *Brady* material. (Doc. 32.) However, because Marchelletta, Jr.'s request for the SAR was construed as a motion for a bill or particulars alone, the SAR production issue was not addressed.[7] On September 10, 2007 the Defendants verbally waived objection to Magistrate Judge Baverman's final Report and Recommendations and on September 11, 2007 this court adopted the Report and Recommendation. (Doc. 73.)

Discussions with the Marchellettas' trial counsel have revealed the only documents produced pursuant to *Brady*/*Giglio* were the Nastasi audit file produced on August 20, 2007, and the criminal histories of the government's potential witnesses at trial, including the incomplete criminal history of informant Shawn McBride.[8] There were no other documents designated as *Brady*/*Giglio* material and produced by the prosecution.

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[7] It is not clear from the record why the court chose to "treat" Marchelletta, Jr.s' request, (Doc. 33), as a motion for a bill of particulars alone. (*See* Doc. 34.) The government did not address the production of the SAR in its joint response. (Doc. 37.)

[8] Subsequent investigation has uncovered the prosecution failed to provide CI McBride's complete criminal history. The prosecution failed to provide information on CI McBride's arrest for theft by taking on October 21, 2000 in Roswell, Georgia where CI McBride was at his employers house to change locks and wound up stealing the home owners (his employer's) watches, the arrest warrant issued for non-payment of child support in Lexington, Kentucky on

B. In Addition to this Court's Discovery Orders, the Prosecution Has Independent Discovery Production Mandates Pursuant to *Brady*, *Giglio*, and the Jencks Act.

From the earliest strictures against governmental lies in court proceedings, which seriously undermines the defendant's right to a fair trial, the Supreme Court created and expanded a host of affirmative duties and obligations upon the government, some further codified as statutory obligations and enforced through orders of the court. Fed. R. Crim. P. 33 helps remedy governmental violations of these court orders and government-bound obligations, insure integrity in the judicial processes, truth in the trial process, and justice be done. *See e.g., Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Berger v. United States*, 295 U.S. 78, 88 (1935); *Pyle v. Kansas*, 317 U.S. 213, 215-216 (1942); *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *Jencks v. United States*, 353 U.S. 657, 668, n. 13 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959); *Clancy v. United States*, 365 U.S. 312, 216 (1961); *Campbell v. United States*, 373 U.S. 487, 495 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963); *Estes v. Texas*, 381 U.S. 532, 540 (1965); *Goldberg v. United States*, 425 U.S. 94, 96 (1967); *Alderman v. United States*, 394 U.S. 165, 175 (1969); *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *Giglio v.*

November 9, 2003 and his arrest for assault in the 4th degree in Lexington, Kentucky on or around late 2004 or early 2005. (Pearson Decl., ¶ 10.) It bears noting that information in the Roswell, Georgia theft by taking incident report indicates CI McBride had been removed from NCIC. *Id.*, ¶ 11.

United States, 405 U.S. 150 (1972); *Davis v. Alaska*, 415 U.S. 308 (1974); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Leon*, 468 U.S. 897, 900-01 (1984); *United States v. Bagley*, 473 U.S. 667, 678-79 (1985); *Rose v. Clark*, 478 U.S. 570, 577-78 (1986); *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995); *Strickler v. Greene*, 527 U.S. 263, 284 (1999); 18 U.S.C. § 3500; Fed. R. Crim. P. 16.

The obligations include: the duty to turn over any prior statement of any witness if in any way related to the subject matter of their testimony; the duty to turn over any information that could be used by the defense in investigating the case, presenting favorable testimony, or mitigation of harm; and the duty to turn over any information that could be used by the defense to impeach any witness in the proceeding. Loosely by label, these three duties constitute the prosecution's Jencks Act, *Brady*, and *Giglio* discovery obligations. At all instances, the government's ethical duty and the court's supervisory obligation requires justice be done and truth be affirmed. One stands out above all: there shall be no deceit upon the courts of this country.

This assures the trial as the chosen forum for ascertaining the truth about criminal accusations. *See Rose v. Clark*, 478 U.S. 570, 577-78 (1986); *Estes v. Texas*, 381 U.S. 532, 540 (1965); *United States v. Leon*, 468 U.S. 897, 900-901 (1984) (recognizing general goal of establishing "procedures under which criminal

defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth' ") (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969). Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years. *See, e.g.*, *Rush v. Cavanaugh*, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

Comment 1 to Model Rule 3.8 states that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the

conviction of innocent persons." *See, e.g.*, *Jencks v. United States*, 353 U.S. 657, 668, n. 13 (1957), *citing* Canon 5 of the American Bar Association Canons of Professional Ethics (1947) for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done"; 11 ABA Canons of Professional Ethics, Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.").

"Brady requires the prosecution to turn over to the defense any exculpatory evidence in its possession or control." *United States v. Jordan*, 316 F.3d 1215, 1226 n.15 (11th Cir. 2003). "The Government must disclose evidence that could, in the eyes of a neutral and objective observer, alter the outcome of the proceeding." *Id*. at 1252. There is no limitation on this requirement to the prosecution lawyers; rather, possession of the information by government investigative agents suffices. *See Smith v. Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969); *see also* Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 124-25 (1972). "Even when evidence known to police is never turned over to the prosecutors, knowledge of the evidence is

imputed to the prosecutors for *Brady* purposes." *Bell v. Haley*, 437 F.Supp.2d 1278, 1307 (M.D. Ala. 2005).

This is common throughout the Circuit. *See Ross v. Hopper*, 716 F.2d 1528, 1534 (11th Cir. 1983) (any information obtained by law enforcement officers in court of investigation must be attributed to prosecutor for purposes of *Brady* violation); *see also United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979) (imputing knowledge of state investigators to federal prosecutors for determining whether there was Brady violation.) "The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies." *United States v. Beasley*, 576 F.2d 626, 632 (5th Cir. 1978).

1. *Jencks Act Violations Are Particularly Egregious Because it is Impossible to Speculate How Prior Statements Will Be Used at Trial*.

Any Jencks Act violation by any prosecutor or any investigator or any agency compels reversal as a critical prophylactic rule to enforce fundamental fairness and integrity in our courts and ensure fair trials. If the Jencks Act compelled the disclosure of a statement, then the withholding of such a statement compels a new trial unaffected thereby. Justice Douglas of the United States Supreme Court explicated the reason for the prophylactic rule: "Since the production of at least some of the statements withheld was a right of the defense, it

is not for us to speculate whether they could have been utilized effectively." *Clancy v. United States*, 365 U.S. 312, 216 (1961).

Critically, since courts cannot "speculate" whether Jencks material "could have been utilized effectively" at trial, then the "harmless error doctrine must be strictly applied" against the government in all such cases. *Goldberg v. United States*, 425 U.S. 94, 96 (1967). Unless the court's "conviction" of mind is so "sure that the error" of non-disclosure "did not influence the jury or had but very slight effect," then the verdict must be set aside. *Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946) (quoted in *Goldberg v. United States*, 425 U.S. 92, 96 (1967)). This is because the Jencks Act is "designed to further the fair and just administration of criminal justice." *Campbell v. United States*, 373 U.S. 487, 495 (1963) (internal citations and quotations omitted). Hence, "undisclosed and unproduced documents then in the hands of the police" regardless of prosecutor knowledge "passes beyond the line of tolerable imperfection and falls into the field of fundamental unfairness." *Smith v. Florida*, 410 F.2d at 1351 (internal citations omitted).

In particular, the Jencks Act compels the disclosure of any prior statement of a witness concerning the subject matter of their testimony. *See* 18 U.S.C. § 3500. A special agent's report is "clearly a statement" of any testifying law enforcement

agent who drafted or verified the report. *United States v. Sink*, 586 F.2d 1041, 1051 (5th Cir. 1978). As this Circuit's precedent declares, a special agent's report memorandum "was clearly a statement" of the witness compelled by *Jencks*. *Id*. at 1051. This has "commonly been so held" across the Circuits for decades. *United States v. Cleveland*, 477 F.2d 310, 316 (7th Cir. 1973).

It has been axiomatic law in this Circuit and the sister Fifth Circuit since the inception of *Jencks* "that an agent's investigation report, which the agent prepared from his notes and recollections from witness interviews, was clearly a statement as to the agent." *United States v. Welch*, 810 F.2d 485, 490 (5th Cir. 1987) (quoting and citing *Sink*, 586 F.2d at 1051). Even an undercover agent's investigative reports must be disclosed to the court and then disclosed to the defense if any of the statements merely relate to the subject matter of the case. *See Welch*, 810 F.2d at 490.

Nor is this law unique to this Circuit. A special agent's report "is clearly a statement" under Jencks, must be disclosed to the district court, and then any portions of the report related in any manner to the subject matter of the witness' testimony, disclosed to the defense. *United States v. Sorrentino*, 726 F.2d 876 (1st Cir. 1984) (outlining proper protocol to be utilized). Coequally and concomitantly, any memorandum of interview of another witness by a special agent is a Jencks

statement as to the special agent, regardless of whether it may also be a Jencks statement of the interviewed witness. *See United States v. Martinez-Mercado,* 888 F.2d 1484 (5th Cir. 1989); *see also United States v. Browder*, 1994 WL 665104, *1 (E.D. La. 1994). Thus, district courts across the country routinely compel the disclosure of any "surveillance or monitoring report" or any other report of the special agent whenever the special agent will testify in the case pursuant to Jencks. *United States v. Floyd*, 1988 WL 79610, *1 (N.D. Ill. 1988). A special agent's report "clearly falls within the scope of the Jencks Act." *United States v. Jaskiewicz*, 272 F.Supp. 214, 217 (D.C. Pa. 1967) (citing *United States v. O'Connor*, 273 F.2d 358 (2nd Cir. 1959)).

The mere failure to produce the special agent's report compels a new trial. After a district court failed to understand the critical importance of a special agent's reports to any defense in a tax trial, a federal appeals court twice reversed and remanded for a new trial due to the failure to disclose the special agent's report. *See United States v. Cleveland*, 507 F.2d 731, 743 (7th Cir. 1974). This duty is on the entire government prosecution team, including the investigators, not just the individual prosecutors. "The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies." *United States v. Beasley*, 576 F.2d 626, 632 (5th Cir. 1978) (internal citations and

quotations omitted). Investigators and their agencies cannot hide behind the prosecutor for failure to fulfill their obligations.

Keeping prosecutors in the dark is no tenable excuse. As this Circuit reiterates again and again, "it is made clear that it makes no difference if the withholding is by the prosecutor or by officials other than the prosecutor." *Smith v. Florida*, 410 F.2d at 1351. "The fact that any evidence allegedly suppressed from the defense was also withheld from the prosecuting attorneys has no bearing on this issue. It is clear that non-disclosure is not neutralized when the deception is practiced on the prosecuting attorney as well as the defendant." *Nash v. Purdy*, 283 F.Supp. 837, 841 (D.C. Fla. 1968).

18 U.S.C. § 3500(b) required the prosecution to turn over any statement of a witness upon conclusion of direct examination. Indeed, this court ordered all such materials disclosed to the defense. (Doc. 22.) The Government never obeyed that order. As will be outlined in the detailed discussion of the government witnesses, the law enforcement agents responsible for the investigation and prosecution of this case withheld their own statements, including a 9131 report, a special agent's report ("SAR"), multiple memorandum of reports, customs' agents' reports including a final report, and a host of other statements clearly defined as such by Eleventh Circuit and federal case-law. This alone requires a new trial.

Equally, prior statements of "non-government agent" witnesses ("lay witness") would be Jencks Act documents this court ordered disclosed as to those lay witnesses. As the High Court has already noted, a district court is "entitled to infer" that a 15-year law enforcement agent "would record with sufficient accuracy" the interview of a witness with sufficient accuracy to make it useful for impeachment possibilities. *Campbell v. United States*, 373 U.S. 487, 495 (1963) (the Jencks Act rule compels disclosure of special agent's interview reports). This is because the Jencks Act is "designed to further the fair and just administration of criminal justice." *Id.* (internal citations and quotations omitted). Therefore, because the lay witness' statement is deemed by the *Campbell* inference to be an accurate rendition of that witness' statement, the interview notes must be disclosed as Jencks. *See id.* (the Jencks Act compels disclosure of special agent's interview reports). "It is obvious that a Jencks act violation occurred" when the government failed "to disclose Special Agent's Harker's complete report concerning [another witness] oral statement." *United States v. Richards*, 241 F.3d 335, 342 (3rd Cir. 2001).

2. *The Prosecution Team's Failure to Disclose Brady Material Going to the Heart of the Prosecution's Case, Including MOIs of Witnesses who Specifically Rebutted the Prosecution's "No-Client's-at-the-Gold Club" Canard, Related Exculpatory Videotape, and Other Exculpatory Material Demands a New Trial*.

Anytime a defendant fails to receive "a trial resulting in a verdict worthy of confidence" because the prosecution failed to disclose evidence, constitutional error exists. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Defense counsel is entitled "to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination." *Strickler v. Greene*, 527 U.S. 263, 284 (1999).

The point of the *Brady* inquiry is to require the disclosure of exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (11th Cir. 1985) (recognizing the Supreme Court's rejection of a distinction between impeachment evidence and exculpatory evidence in *Giglio v. United States*, 405 U.S. 150 (1972)). *Brady* requires a new trial if the missing evidence "'in any reasonable likelihood have affected the judgment of the jury.'" *Giglio*, 405 U.S. at 154 (quoting *Napue v. People of State of Illinois*, 360 U.S. 264, 271 (1959)). In order to prove materiality under the *Brady* standard a defendant does not need to show

"by a preponderance of the evidence that disclosure would have resulted ultimately in the defendant's acquittal." *Hays*, 85 F.2d 1492, 1498 (11th Cir. 1996); *see also United States v. Scheer*, 168 F.3d 445, 452 (11th Cir. 1999).

Even when evidence known to police is never turned over to the prosecutors, knowledge of the evidence is imputed to the prosecutors for *Brady* purposes. *See Williams v. Griswald*, 743 F.2d 1533, 1542 (11th Cir. 1984). To adopt any other rule would "substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Kyles*, 514 U.S. at 438.

Of course, prosecutors cannot choose to withhold potentially exculpatory information simply because they personally do not believe the evidence to be true. "It [is] for the jury, not the prosecutor, to decide whether the contents of an official police record [are] credible." *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985). Otherwise, "prosecutors might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense, thus setting *Brady* at nought." *Id.* The right of the accused to have evidence material to his defense cannot depend upon the benevolence of the prosecutor. *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968). This applies wherever the information may be located, "'even if such information is contained in statements, reports, memoranda

or other 'work product' materials." *United States v. Eley*, 335 F.Supp. 353, 357 (D.C. Ga. 1972).

Indeed, "the rule of Brady would be thwarted if a prosecutor were free to ignore specific requests for material information obtainable by the prosecutor from a related government entity, though unobtainable by the defense." *Martinez v. Wainwright*, 621 F.2d 184, 187 (5th Cir. 1980). This is axiomatic law in this circuit. *See United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977). "The fact that any evidence allegedly suppressed from the defense was also withheld from the prosecuting attorneys has no bearing on this issue. It is clear that non-disclosure is not neutralized when the deception is practiced on the prosecuting attorney as well as the defendant." *Nash v. Purdy*, 283 F.Supp. 837, 841 (D.C. Fla. 1968).

When the government withholds exculpatory evidence from the defense, a petitioner need not show "by a preponderance of the evidence that disclosure would have resulted ultimately in the defendant's acquittal." *Hays*, 85 F.2d at 1498. Indeed, "undisclosed evidence can require a new trial even if it is more likely than not that a jury seeing the new evidence would still convict." *Id*. The petitioner must simply show that "the Government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

Equally, a defendant "need not show there was insufficient evidence to convict in view of the suppressed evidence." *Hays*, 85 F.2d at 1498. Put simply, there is no "harmless error" analysis of *Brady* errors. *Id*. Similarly, the materiality of alleged *Brady* information is not to be judged on an item-by-item basis, but "in terms of the cumulative effect of suppression." *Id*.

The suppression of evidence justifies a new trial irrespective of the good faith or bad faith of the government agents involved. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Giglio v. United States*, 405 U.S. 150 (1972) (nondisclosure of material evidence requires reversal regardless of whether nondisclosure resulted from design or mere negligence). Mere failure to disclose a prior statement required a new trial. *See Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977).

It is well-established that the "familiar rule that government suppression of favorable evidence material to the defense justifies a new trial irrespective of the good or bad faith of the prosecution." *United States v. Librach*, 520 F.2d 550, 553 (8th Cir. 1975). The "need for reversal" is evident whenever suppressed evidence "might reasonably have affected the jury's judgment on some material point." *Id*. at 554 (internal citations and quotations omitted). "Deliberate hiding of favorable

evidence" also requires relief and remedy from the federal courts. *Lockett v. Blackburn*, 571 F.2d 309, 313 (5th Cir. 1978).

Even where the prosecutor's actions can be characterized as only negligent "(t)he deception which results from negligent nondisclosure is no less damaging than that deception which is a product of guile, and such negligent nondisclosure entitles a defendant to relief." *Martinez v. Wainright*, 621 F.2d 184, 188 (5th Cir. 1980). If, after examination of the demanded evidence, the court determines that favorable evidence has been suppressed, then the defendant "must be granted a new trial." *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968). Withholding evidence "casts the prosecution in the role of an architect of a proceeding that does not comport with standards of justice." *United States v. Herberman*, 583 F.2d 222, 228 (5th Cir. 1978). Such errors require a new trial. *See Davis v. Heyd*, 479 F.2d 446, 453 (5th Cir. 1973).

3. *The Failure to Disclose Hundreds of Pages of Giglio Impeachment Material, Including Thirteen Custom's Reports, SA Bergstrom's Own Special Agent's and 9131 Reports, the Extensive Criminal History of Undisclosed Confidential Informant Shawn McBride, and CPA Gary Schwartz's Cooperation with Special Agent Bergstrom, Which the Defense Could Have Used to Impeach Critical Evidence at Trial, Requires a New Trial*.

The point of *Giglio* is "to ensure that the jury knows the facts that might motivate a witness in giving testimony." *Brown v. Wainwright*, 785 F.2d 1457,

1465 (11th Cir. 1986) (quoting *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir. 1983)). The State's duty to disclose evidence of deals or understandings with witnesses does not extend to only formal, enforceable grants of immunity. *Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985); *see also Williams v. Brown*, 609 F.2d 216, 221 (5th Cir. 1980). Wherever the impeachment could have "introduced a new source of potential bias," then its withholding is material error. *Brown v. Wainwright*, 785 F.2d 1457, 1466 (11th Cir. 1986). Any "failure by police to produce other critical evidence raises questions a jury is entitled to know to the help them determine" the factual issues in the case. *Kircheis v. Long*, 425 F.Supp. 505, 510 (D.C. Ala. 1976). Whenever evidence was withheld that "would clearly reflect" upon the credibility of a witness, then "the plaintiff's due process rights have been violated" and a new trial necessary to preserve the integrity of the judiciary. *Id.* at 511.

In regard to impeachment evidence, a constitutional error may be shown from the Government's failure to assist the defense by disclosing information that might have been helpful in conducting cross-examination. *See United States v. Bagley*, 473 U.S. 667, 678 (1985). This applies to any information merely "available to the prosecution." *Calley v. Callaway*, 519 F.2d 184, 224 (5th Cir. 1975). Notably, any information in the possession or custody of federal agency

must be "imputed to the prosecution." *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979). As this Circuit's precedents reiterate, "this Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel." *Id*. at 569.

Society wins when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. *Nash v. Purdy*, 283 F.Supp. 837, 841 (D.C. Fla. 1968). The right to confrontation of witnesses equally compels this standard. Failure to disclose impeachment evidence is "even more egregious" than failure to disclose exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses." *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983).

Nondisclosure of evidence affecting credibility requires retrial if there is merely "any reasonably likelihood" that such evidence might "have affected the judgment of the jury." *Giglio*, 405 U.S. at 154. Indisputably, "the nondisclosure of the evidence favorable to the defense, even when there was no showing of the prosecution's bad faith, offends the fundamental conceptions of a fair trial essential to due process." *Jackson v. Wainwright*, 390 F.2d 288, 299 (5th Cir. 1968). In turn, any "failure to produce the personnel file of a key witness" even when that

file was in the possession of another government agency, "constituted error" and compelled reversal if merely material to the case. *Martinez v. Wainwright*, 621 F.2d 184, 186 (5th Cir. 1980); *see also Lockett v. Blackburn*, 571 F.2d 309, 313 (5th Cir. 1978).

Where the government "failed to disclose or suppressed evidence" concerning the credibility of a witness, due process compelled a new trial. *Powell v. Wiman*, 287 F.2d 275, 281 (5th Cir. 1961). Any withheld evidence "essential to a fair appraisal of the credibility" of a witness compels reversal. *Emmett v. Ricketts*, 397 F.Supp. 1025, 1041 (N.D. Ga. 1975). Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. It makes no difference if the withholding is by officials other than the prosecutor. *See id*. The State may not defend its wrongful suppression of vital information on the grounds that defense counsel could by luck or intuition have hit upon the existence of the suppressed materials. *Id.* at 1043. Defense attorneys were not required to request the production of specific documents and materials, particularly those of which they had no knowledge; the requests to produce filed in these cases served to avail the petitioners of the principles proclaimed in Brady. *See id*. at 1045.

C. As to Every Critical Witness Testifying in the Government's Case, the Prosecution Team Withheld Prior Statements, Exculpatory Information, and/or Impeaching Material Within the Government's Possession.

The Prosecution Team failed to provide substantial amounts of material that the Marchellettas and Kottwitz could have used to impeach witnesses, put forth exculpatory evidence, or catch several witnesses changing stories through their prior statements. The extent of these discovery violations is shocking. As to most of the witnesses, the information and evidence withheld from the defense as to that witness touched on all of Jencks, *Brady*, and *Giglio*, but the violations are organized below based upon the dominant violation.

1. *Jencks Act Violations*.

As to these witnesses, the Government withheld critical prior statements from the defense.

a. Special Agent Bergstrom.

Special Agent Bergstrom testified, but numerous statements of hers went undisclosed. They include, but are likely not limited to:

(1) The 9131 Report. (Ex. 1.)

(2) The SAR. (Ex. 44.)

(3) The 4930 reports. There are multiple 4930 reports and we know of ones issued on the following dates: January 9, 2002; July 1, 2002; September 23,

2002; December 18, 2002; April 29, 2003; June 2, 2004; September 27, 2004; December 21, 2004; and November 14, 2005. (Exs. 26-29 and 45-49.)

(4) Summary Reports & Progress Reports. These include, but are likely not limited to an IRS Quick Investigation Summary Report and an SSA Progress Report. (Exs. 30 and 36.)

(5) The Hidden Memorandum of Interview Reports ("MOIs"). There are multiple undisclosed MOIs that the Marchellettas and Kottwitz know about. These include, but are likely not limited to interviews of the following persons on the following dates: Tom Bostick on January 19, 2006; Marvin Young on March 17, 2006; Susan McCoy on February 6, 2006; an unknown person on December 3, 2003;[9] a known "closing attorney" on November 1, 2005; Brooks Thomas on August 1, 2002; CPA Gary Schwartz on July 3, 2003; David Whitcomb on January 31, 2006; and David McDonough on August 9, 2006. (Exs. 51-59.)

b. Special Agent Sellers.

The same applies equally to withheld and hidden reports and prior statements by Special Agent Sellers.

(1) Special Agent Reports. There are several Special Agent Reports that were undisclosed. The Marchellettas and Kottwitz received six customs reports

[9] It is highly likely that this person is CPA Gary Schwartz since Schwartz had a grand jury subpoena returnable the same day. (Ex. 50.)

from several different cities (one of which was a composite of two reports). They were numbered 1 through 6. The exhibits labeled 6, 11, 12, 13, 14, 24 were received by the defense prior to trial.

There were actually 18 customs reports from three different cities, many of which were drafted by Sellers (and undisclosed). The exhibits labeled 6 through 9 were from Memphis, the exhibits labeled 10 through 16 were from Atlanta, and the exhibits labeled 17 through 23 were from Miami. A comparison of Exhibit 24 (the composite) with Exhibits 15, 16, 22, and 23 shows that the first two pages of Exhibit 24 (the composite) match the first two pages of Exhibit 22 (Atlanta report 6). The third page of Exhibit 24 is the last page of Exhibit 23 (Atlanta report 7). Again Atlanta reports 6 and 7 were not provided to the defense, likely because Atlanta report 6 details the bank documents provided through the Customs grand jury subpoenas and Atlanta report 7 is an undisclosed interview with Shawn McBride. (Ex. 15 and 16.)

c. Kasandra Logan.

Ms. Logan testified on September 19, 2007 as a government witness. She was an accounting manager at the Marchellettas' company, The Circle Group, for seven years (1994-2000) and worked directly with co-defendant Theresa Kottwitz as Ms. Kottwitz ran a similar accounting program for Nastasi (the parent company

of Circle) in New York. Additionally, Ms. Logan testified regarding her familiarity with the accounting system used at Circle to track current jobs, the drafting of job management reports, and how she would process invoices as they arrived at Circle's offices. In particular, she was asked about her familiarity with Circle's job at the Atlantis Resort and Casino in Nassau, Bahamas and Marchelletta, Jr.'s relationship with George Gorman, a labor subcontractor. Finally, Ms. Logan denied having any knowledge concerning the building of the Marchelletta homes or how these homes were booked in Circle ledgers. Ms. Logan was not asked any questions on direct with respect to classifying expenditures as entertainment expenses. (Doc. 207, pp. 369-435.)

As a result of this investigation, Ms. Logan was identified, located, and interviewed by defense investigator Maurice "Buddy" Pearson on June 11, 2009. (Pearson Decl., ¶ 12.) Ms. Logan declared that she interviewed twice with SA Bergstrom, once at her home in Marietta, Georgia and another at the Federal building in downtown Atlanta. (Logan Decl.) Ms. Logan recalled that in response to one of SA Bergstrom's questions: "I told SA Bergstrom I cashed several $500 checks for Mr. Marchelletta, Jr., that he used to take clients out at restaurants and other entertainment spots." *Id*. She continued, "I expensed the funds to entertainment because Mr. Marchelletta, Jr. was entertaining." *Id*. Again, this

exculpatory information was not provided to the defense as no MOI of Ms. Logan was provided.

d. Lucille Ronis.

Ms. Ronis testified as a government witness on September 18, 2007. She was a long-time friend of the Marchellettas and moved to Atlanta to start a better life for her family after her husband obtained employment with The Circle Group. After moving to Atlanta, Ms. Ronis testified she began working as a bookkeeper for George Gorman in 1998, on a part time basis. Specifically, Mr. Gorman had Ms. Ronis work on a labor-subcontracting project he had been working on at the Atlantis Hotel and Casino in Nassau, Bahamas with The Circle Group. She testified that her primary responsibility was performing payroll for the Atlantis construction job. She also performed bank account reconciliations and dealt with invoicing for the Atlantis job. Ms. Ronis identified several checks from C&G Enterprises, a company set-up by Mr. Gorman so that he would be able to comply with Bahamian labor laws, to/from The Circle Group. (Doc. 206, pp. 253-267.)

As a result of this investigation, Maurice "Buddy" Pearson identified, located, and interviewed Ms. Ronis on May 11, 2009, with respect to her employment with George Gorman and her interaction with investigators from IRS-CI, including SA Bergstrom. (Pearson Decl., ¶ 13.) Her first encounter with the

IRS occurred at her workplace one month before the trial of the Marchellettas. (Ronis Decl.) Initially, two agents arrived at her home, one unidentified female agent and SA Harry Chavis. *Id*. Both SAs displayed their credentials to her husband, Stuart Ronis, as Ms. Ronis was not home at the time. *Id*. The agents left a "Notice to Call an IRS Agent" and indicated the purpose of their visit was the case *United States v. Marchelletta*, *et al*. *Id*. When Ms. Ronis arrived home that evening she called Marchelletta, Sr. and asked what she should do. *Id*. He referred her to Mr. Ted Robertson, a retired IRS-CI Special Agent that was assisting as an investigator for the defense team. *Id*. Mr. Robertson told Ms. Ronis it was up to her if she chose to speak with the IRS, and she chose not to. *Id*.

Two days later, two male IRS SAs arrived at her then place of employment, Konica-Minolta in Duluth, Georgia. *Id*. She was not in the office at the time, but Ms. Ronis began to receive telephone calls from several colleagues informing her that two men with guns were at the business looking for her. *Id*. When she did arrive at work, Ms. Ronis walked into the office to find out what had happened. *Id*. Apprised of the situation, she returned to her vehicle in the parking lot. *Id*. Immediately, two men, who later identified themselves as IRS-CI SAs, sped up behind her vehicle and blocked her into her parking spot on an angle. *Id*. Ms. Ronis conveyed her displeasure with the SAs as "ridiculous," "Starsky and Hutch"

antics. One of the SAs asked Ms. Ronis why she did not respond to the "Notice to Call an IRS Agent." *Id*. She responded, that she did not have to call if she chose not to. *Id*. Subsequently, the SAs provided her with a "Request for Information" to come and talk with the IRS, and the SAs had her sign that document. *Id*.

Prior to her interview, Ms. Ronis telephoned SA Bergstrom to determine if she had to talk to the IRS. *Id*. SA Bergstrom replied that "if I didn't come down and talk to the IRS, she would have me in court everyday during the trial just sitting there, waiting to be called as a witness." *Id*. Ms. Ronis explained to Mr. Pearson that if this would have happened her employer would not have paid her, therefore, "I had no other choice then to speak with SA Bergstrom. I needed the income." *Id*.

Ultimately, a few days after her phone call with SA Bergstrom, Ms. Ronis did attend a meeting with her and another IRS agent. *Id*. Ms. Ronis voiced her displeasure with the incident at her place of employment but SA Bergstrom stated this was now "water under the bridge." *Id*. The interview focused on Ms. Ronis' knowledge of the Atlantis Hotel and Casino job in the Bahamas and a $250,000 check. *Id*. During the interview, Ms. Ronis stated, she felt as if SA Bergstrom was attempting to get her to admit to having knowledge of the circumstances surrounding the $250,000 check, but Ms. Ronis told her she could not remember

the details. *Id*. As with other crucial interviews, the MOI of Ms. Ronis was never provided to the defense.

e. Lori Hope and Shanette Bechtold.

The government also provided no MOIs regarding former Circle employees and prosecution witnesses Lori Hope and Shanette Bechtold. In fact, Ms. Kottwitz's trial attorney brought this issue to the court's attention after the testimony of Ms. Hope and Ms. Bechtold:

> **Mr. Froelich**: Your Honor, I just didn't want to leave something on the record that --Mr. Monnin said, well, you see the loyalty that these people have. What I wanted to point out was, one, we never interviewed any of these people. We've never had contact with these people.
>
> Second of all, they're asking about things – Lori Hope was there (at Circle) from 1997 and 2001, and Ms. Bechtold from April 1998 to -- to 1999. And they're asking people to recall things. We don't have any Jencks. The first time they're talking to these people is in the last week or so. And there's nothing recorded, nothing.
>
> And, so, I just don't think it's fair to attack these people when you're asking whether it was 75 or 90, you're asking someone --
>
> **The Court**: Well, he's attacking them because they testified different -- or they made different statements previously. That's the basis for impeachment.
>
> **Mr. Froelich**: The problem is, your Honor, that there's nothing -- there's never ever been -- they're interviewing people later, and there's nothing that's recorded --written, recorded or anything else in Jencks from us. And so --

> **The Court**: They don't have -- they can't give you what they don't have.
>
> **Mr. Froelich**: Well, your Honor, with all due respect, I was a federal prosecutor. If you have got an agent sitting there and they said they had an agent, she's taking notes, and that's Jencks.
>
> **The Court**: Mr. Monnin, I'm just going to assume very blithely and blindly that the Government's going to comply with its Jencks obligations.
>
> **Mr. Monnin**: Your Honor, I believe we have. We've produced the memoranda of interview that we have, which is a very liberal interpretation of Jencks.

(Doc. 205, pp. 129-30.)

f. Anthony Contrino.

Anthony Contrino testified as a government witness on September 18, 2007. Mr. Contrino worked at the Circle Group from 1998 until December 2000 as a project manager. His testimony on direct examination centered around his time as the project manager for the Atlantis Hotel and Casino job in Nassau, Bahamas. Particularly, Mr. Contrino verified Mr. Gorman's and Marchelletta, Jr.'s signatures on a loan agreement between Gorman's company C&G Enterprises and Marchelletta, Jr.'s company, Circle. (Doc. 206, pp. 223-48.)

In the course of the Defendants' investigation, Attorney Marianne Boston's Circle file was requested for review. (Bernhoft Decl., ¶ 6.) Ms. Boston represented the Marchellettas during the Customs investigation. *Id*. The

production included Ms. Boston's internal email correspondence with Mr. Abbey as they worked together to find a resolution to the Customs seizure of $1.5 million from The Circle Group. *Id*. In an email dated July 2, 2002, Ms. Boston communicated to Mr. Abbey that "the project manager (from the Atlantis job) was contacted, but we don't want to mention that because Kim Sellers threatened him with federal prosecution if he told anyone he talked to her." (Ex. 60.) The project manager referenced was Mr. Contrino.

The Defense has attempted to contact Mr. Contrino to verify the legitimacy of this claim, but has been unable to speak with him.

g. Shawn McBride.

Shawn McBride is discussed elsewhere in this brief. Nevertheless, AUSA Justin Anand disclosed to Attorney Robert Bernhoft that Special Agent Bergstrom met with McBride dozens of times before the trial, but the Marchellettas and Kottwitz only received two MOIs. (Bernhoft Decl., ¶ 7.)

2. Brady *Violations*.

As to these witnesses, the prosecution withheld critical exculpatory information from the defense that was within the government's possession.

a. Sheryl Rea.

At trial, the prosecution called IRS Revenue Agent Jack Lesso as its expert witness. The following exchange took place during his cross-examination by defense counsel:

Q: Mr. Lesso, you've testified -- you got into this investigation pretty earlier; isn't that right?

A: Yes.

Q: And you gave some directions, obviously, on what documents you needed and who to be interviewed; isn't that correct?

A: Yes.

Q: And you've sat through the trial?

A: Yes.

Q: Now, there were other employees -- other than the ones that testified, there were other employee of Circle interviewed; isn't that correct?

A: There were other employees of Circle?

Q: Yes.

A: Yes.

Q: All right. And, for example, Sheryl Rhea, the payable's clerk, was interviewed; isn't that correct?

A: I was not a part of those interviews.

Q: But do you know that occurred?

A: Do I --

Q: You know that occurred?

A: I wasn't part of it. I'm assuming it had, but I was not a party to the interview.

Q: Okay. But there were -- were you -- you would have direct or would you -- you would have wanted the clerks to be interviewed; isn't that correct?

A: I believe some of them have been interviewed.

Q: Thanks. That's all I have.

(Doc. 211, pp. 341-42.)

As a result of the defendants' investigation, Maurice "Buddy" Pearson identified, located, and interviewed Ms. Sheryl Rea. On August 4, 2009 Ms. Rea provided a declaration, sworn under penalty of perjury, concerning her interaction with SA Bergstrom. (Pearson Decl., ¶ 14.) First, Ms. Rea informed Mr. Pearson she has a degree in Criminology from the University of South Florida ("USF"). (Rea Decl.) Upon graduation from USF, Ms. Rea was a detention deputy for the Pinellas County, Florida, Sheriff's Office for 10 years prior to relocating to the Atlanta area. *Id*. Upon relocation, Ms. Rea worked as an assistant to co-defendant Ms. Kottwitz in the accounting department for Circle. *Id*. She was in charge of accounts payable from September 2000 until July of 2004 at which time Mr.

Marchelletta, Jr. laid her off. *Id*. She further stated she first met SA Bergstrom in 2001 but did not actually speak to her until August of 2007. *Id*.

In August of 2007, SA Bergstrom called Ms. Rea to speak with her about the investigation of the Marchellettas and Kottwitz. *Id*. Ms. Rea told SA Bergstrom she did not want to meet at Rea's office, so SA Bergstrom agreed to meet her in the parking lot of the Dawsonville Outlet Mall. *Id*. SA Bergstrom served Ms. Rea with a subpoena at the meeting. *Id*. SA Bergstrom further communicated that she didn't have to meet Ms. Rea away from her place of employment and further informed her she should not speak with Ms. Kottwitz at any time. *Id*. Additionally, SA Bergstrom told Ms. Rea that if she did not cooperate, she would have her sit in the courtroom every day until Ms. Rea was called to testify as a witness. *Id*. Ms. Rea told Mr. Pearson she felt threatened by SA Bergstrom's remark because if she had to miss work, she would not get paid. *Id*. She further stated that missing work during the day would have led to working extra hours late at night, because she was responsible for medical billings. *Id*.

Ultimately, in response to the "threat," Ms. Rea chose to travel to the Federal building in downtown Atlanta and was interviewed by SA Bergstrom and AUSA Paul Monnin. *Id*. SA Bergstrom asked Ms. Rea questions about who signed several checks from Circle. *Id*. She asked Ms. Rea to identify Ms.

Kottwitz's signature. *Id*. Ms. Rea was able to do so but did not answer many other questions because she simply did not know the answers. *Id*. SA Bergstrom told Ms. Rea that the meeting wasn't a game, to which Ms. Rea replied she knew this was a criminal investigation and did not appreciate SA Bergstrom's comment. *Id*.

Finally, Ms. Rea told SA Bergstrom she never saw anything criminal while performing her accounting duties at Circle. *Id*. Ms. Rea went on to explain to Mr. Pearson that because of the "disgusting" way SA Bergstom had treated Ms. Kottwitz during the course of the investigation, "she was a disgrace to the profession and the badge." *Id*. Ms. Rea further commented she did not understand why all of this happened to Ms. Kottwitz as she had always tried to do the "right thing." *Id*. At the end of the interview with Mr. Pearson, and drawing on her experience as a former detention deputy and experience in law enforcement, Ms. Rea commented that she would categorize SA Bergstom as a "rogue agent." *Id*.

b. Merhdad Nankali.

At the time of his interview with Mr. Pearson, on May 14, 2009, Mr. Nankali had known Mr. Marchelletta, Jr. for approximately 15 years. (Pearson Decl., ¶ 15.) Mr. Nankali was employed by Bovis Land Lease, an international construction company located in Atlanta, Georgia. (Nankali Declaration.) Mr.

Marchelletta Jr.'s business, Circle Industries, was a subcontractor for Bovis Land Lease. (Nankali Decl.)

During the IRS investigation of the Marchellettas and Circle, two Treasury Department Agents, one female and one male, arrived at Mr. Nankali's home and began to interview him. *Id*. Mr. Nankali did not remember the names of the two agents because they did not provide business cards. *Id*. The agents wanted to know if Mr. Nankali had ever been to the Gold Club with Marchelletta, Jr. Mr. Nankali told the agents that he had. *Id*. Additionally, he told the agents there were other guests with Marchelletta, Jr. at the same time he was with him at the Gold Club. *Id*. Again, no MOI detailing this exculpatory and impeachment information was ever provided to the defense.

c. Richard Orleski, Sr.

On December 13, 2005, IRS SA Lauren Jones interviewed Mr. Orleski at his place of business, All About Vacuums located in Decatur, Georgia. (Ex. 61.) Mr. Orleski installed a Central Vacuum system at Machelletta, Jr.'s residence located in Alpharetta, Georgia. *Id*. Mr. Orleski was asked by SA Jones to identify invoices related to the installation and additionally commented "he did not find it unusual that the payment came from a business account for work done at a

residence." *Id*. This, of course, is exculpatory information and again, the MOI was not provided to the defense.

d. James Greene.

IRS SA Harry Chavis interviewed Mr. Greene at his residence on April 17, 2003. (Ex. 62.) As a landscape architect, Mr. Greene owns Outdoor Design Group. *Id*. The construction supervisor at Marchelletta, Jr.'s residence, Larry Henderson, requested that Mr. Greene provide a consult concerning a problem that had arisen with the building of a swimming pool. *Id*. Greene arrived at the Marchelletta, Jr. residence and met with Mr. Henderson. *Id*. Mr. Henderson, according to SA Chavis' MOI, told Mr. Greene that he would pay him for his hours of consultation, but that he needed help with reworking the pool plans to accommodate the owners. *Id*. Mr. Henderson advised Mr. Greene that Circle was the general contractor for the house. *Id*. This information is exculpatory and/or impeachment information and the MOI was not provided to the defense.

3. Giglio *Violations*.

As to these witnesses, the Government withheld critical impeachment information from the defense that was within the Government's possession.

a. Jeff Cleveland.

On September 26, 2007, SA Bergstrom testified for the second time. (Doc. 210, pp. 955-1006.) Her direct examination focused on how she came to be involved in the investigation of the Marchellettas and The Circle Group. Upon cross-examination, Attorney Bruce Malloy, inquired:

Q: Without – I'm not asking you for the substance or the identity of the person that you spoke to, but when did you conduct your first interview in regard to the criminal investigation of Circle in this case?

A: I can't remember

Q: Would it have been August 2002 or prior to that?

A: You're going to have to be more specific. I have no recollection of what you're speaking to.

Q: Well, at some point during the course of your investigation, you would go out and identify yourself as an agent of the Criminal Investigation Division of the Internal Revenue Service and interview individuals, as I said, making your identity clear. And my question is: When's the first one of those interviews that you did, if you recall?

A: I can't remember.

Q: Okay. And do you recall who the first individual was?

A: No. It's been several years.

Q: Was Jeff Cleveland one of the first individuals you interviewed?

A: Kim Sellers interviewed him. I was with her.

Q: All right. And would you have identified yourself?

A: Probably, yes.

Q: I mean, that's your policy, isn't it?

A: Yes.

(Doc. 210, pp. 988-89) (emphasis added).

No MOI has been provided with respect to SA Sellers' and SA Bergstrom's interview with Mr. Cleveland. It is likely that Mr. Cleveland provided impeachment information to Sellers and Bergstrom.

b. Brooks Thomas.

Through various Freedom of Information Act ("FOIA") requests, counsel for Marchelletta, Jr. requested and received over 90,000 pages of material related to the Marchelletta and Circle investigation.[10] Included in the documents released through FOIA were dozens of MOIs of non-testifying witnesses previously undisclosed to the defense. Although these individuals did not testify, several provided exculpatory and/or impeachment information. Brooks Thomas was one of these individuals. (Ex. 63.) At the time of his interview on August 1, 2002, Mr. Thomas was Assistant Chief Counsel for U.S. Customs assigned to the Atlanta

[10] The prosecution provided approximately 25,000 pages of material in its Rule 16 production.

Field Office. *Id*. Although by her own admission SA Bergstrom did not have grand jury authority until mid-September 2002, she conducted the interview with Mr. Thomas alone. *Id*.

As a result of the Defendants' post-trial investigation, Maurice "Buddy" Pearson identified, located, and interviewed Attorney Abbey at the law firm of Miller, Chevalier & Chartered in Washington, D.C. on October 29, 2009. Mr. Pearson asked Attorney Abbey questions respecting a U.S. Customs memorandum of conversation ("MOC") drafted by SA Sellers on July 3, 2002. (Pearson Decl., ¶ 16; Ex. 64.) Attorney Abbey advised unequivocally that he never asked SA Sellers about any IRS' investigation, and that the MOC was untrue in that respect. (Pearson Decl., ¶ 17.) Subsequent to that interview, and as a result of the FOIA release of SA Bergstrom's previously undisclosed MOI of Customs Attorney Brooks Thomas, Attorney Bernhoft emailed Mr. Abbey and asked him to comment on this newly released MOI. (Bernhoft Decl., ¶ 8.) Attorney Abbey responded via email: "(SA) Bergstrom's memo is inaccurate with respect to my statement to Brooks Thomas that if the IRS Criminal Investigation were involved then the delay would be justified. I never made such a statement." (Ex. 65.) As with multiple other discoverable MOIs, SA Bergstrom's Thomas' MOI was never provided to the defense.

These multiple Jencks Act, *Brady*, and *Giglio* violations establish a clear pattern and practice of concealing virtually all discovery form the defense that would have assured a constitutionally conforming fair trial. The multiple violations are serial, not isolated, and demand a reversal of the sole remaining affirmed conviction count and a new trial.

III. SA BERGSTROM ABUSED THE GRAND JURY AND GRAND JURY PROCESS BY ILLICITLY ACCESSING AND REVIEWING RULE 6(e) GRAND JURY MATERIAL, AND MOST RECENTLY, COMMITTED PERJURY IN THE RELATED FOIA LITIGATION TO FURTHER CONCEAL HER SERIOUS MISCONDUCT.

A. SA Bergstrom Unlawfully Accessed and Reviewed Grand Jury Materials Protected by Rule 6(e).

1. *The Lawful Conduct Story*.

Special Agent Bergstrom sets forth – in painstaking detail and with copious citations to controlling authority – the mandatory and logical series of procedures required for a special agent of the Internal Revenue Service to lawfully access records obtained in a grand jury investigation to conform to both Constitutional standards, grand jury secrecy, and the court's supervisory obligations toward protecting that grand jury secrecy. In the FOIA litigation currently pending before the court, Special Agent Bergstrom testifies that she, the IRS SAC, and the U.S. Attorney's office followed and complied with each and every one of them to the letter. (Ex. 37, ¶¶ 2-4.) SA Bergstrom first asserts the criminal investigation

against the Marchellettas began with a U.S. Customs Service March 2001 check seizure that Customs "pursued through a federal grand jury."[11] *Id*., ¶ 4.

Although not clear from the IRS's FOIA litigation summary judgment filings, but impliedly necessary to SA Bergstrom's first declaration story, SA Sellers, as the non-tax Customs grand jury special agent, allegedly developed sufficient evidence during her 2001 grand jury criminal investigation of not only probable criminal violations of laws within Customs' criminal enforcement jurisdiction, but probable violations of the Internal Revenue Code penal sections enforced by IRS, as well. (If SA Sellers hadn't, after all, there would have been no legitimate foundation to request expansion of the non-tax Customs grand jury to include IRS' grand jury investigation of criminal tax violations).

This story is a law-conforming story: SA Bergstrom had the U.S. Attorney's request and 6(e) authorization to access grand jury records as of January 9, 2002. The problem is it wasn't true.

2. *The Truth*.

The prosecution failed to disclose Special Agent Bergstrom's written statement, known as a "9131" report, before and during trial. That report discloses

[11] The "Form 9131", drafted by SA Bergstrom, indicates SA Sellers initiated a grand jury investigation into the Marchellettas in January 2002. However, recent disclosure of the public grand jury file for the relative time period including January 2002 by the U.S. Attorney's Office N.D. Ga. shows that no grand jury was empanelled in January 2002. (Ex. 67.)

the details of Special Agent Bergstrom's misconduct and unlawful access to grand jury records. SA Bergstom completed the "Form 9131" on July 18, 2002 and included an "analysis" of what the grand jury subpoenas, purportedly issued by SA Sellers, revealed. Bergstrom detailed a wide range of grand jury information she received and reviewed.

An assistant U.S. Attorney, Daniel Griffin, overseeing the Customs grand jury investigation into the Marchellettas, wrote a letter to Special Agent in Charge C. Andre Martin requesting IRS participation in SA Sellers Customs grand jury investigation, but that grand jury material review authority and request letter was not dated until August 14, 2002. (Ex. 2, p. 3.) Bergstrom's grand jury material review and the 9131 report were filled out and finalized on July 18, 2002, almost a month before any United States attorney provided the necessary grand jury authorization and access permission. (Ex. 1.) Finally, and of note, only the United States Attorney can approve grand jury access to the Internal Revenue Service or any special agent, and there is no proof any such approval was ever given for the grand jury records received and reviewed by SA Bergstrom.

SA Bergstrom records in the "Form 9131" that SA Sellers initiated a grand jury investigation into the Marchellettas in January 2002.[12] (Ex. 1, p. 6.) "Her (SA Sellers) initial actions included the issuance of grand jury subpoenas to First Union Bank, ScotiaBank and Bank of America." *Id.* The "Form 9131" goes on to describe what each bank provided pursuant to subpoena from the Customs grand jury, and these are the 6(e)-protected bank records SA Bergstrom received from SA Sellers and reviewed to perform the bank deposit reconciliation set forth in her 9131 report:

First Union

First Union is the bank account from which the seized checks were written on. The "Form 9131" states the subpoena asked for bank statements for particular time periods. "The First Union Hebrides at Atlantis" documents were produced in Rule 16 discovery and have a Bates stamp control number range of 016904 through 017029.[13] Within the range of documents are two stamps indicating the documents were received, in response to a subpoena from SA Sellers, in March of 2002. These stamps are found at pages 01700 and 017029 of the document range.

[12] SA Bergstrom records in various official IRS documents that she opened up a primary investigation ("PI") on January 9, 2002, the same time that SA Sellers opens her grand jury investigation. (Ex. 26.)

[13] Due to the size of the First Union document range they were not attached as an exhibit to this memorandum but are available upon request of the court.

ScotiaBank

The "Form 9131" states: "A grand jury subpoena was issued to ScotiaBank as a correspondent bank to obtain any U.S. Dollar wire transfers through New York to or from known bank accounts at ScotiaBank in the Bahamas." (Ex. 1, p. 7.) Purportedly, two wire transfers were provided in response to the subpoena.

ScotiaBank documents provided through Rule 16 have a Bates stamp control range of 017030 through 017035. (Ex. 68.) The first page of the range, 017030, clearly states "ScotiaBank Circle Group" while the second page of the Bates range indicates it is page 3 of 7 of a facsimile transmission dated March 5, 2002; pages 1 and 2 were not provided to the defense. *Id*. Additionally, the fax header at 017032 indicates the documents were sent from "BNS (Bank of Nova Scotia) General Counsel" at 416-866-7767 to 8-404-581-6159, again, on March 5, 2002. *Id*. The fax number the documents were sent to belongs to the Law Enforcement Coordinating Committee ("LECC") at the United States Attorney's Office Northern District of Georgia. (Ex. 69.)

NationsBank/Bank of America

The "Form 9131" indicates: "A grand jury subpoena was issued to Bank of America to obtain all known bank account of the Circle entities. (Ex. 1, p. 7.) In a "response" to the grand jury, four bank accounts of Circle Industries USA were

identified; three were operating accounts and one a payroll account. The 1999 statements are denominated Bates stamp control range 006950 through 006983. The fax header at 006983 (signature card for the account signed by Marchelletta, Jr. and Sr.) indicates the statements were sent from Bank of America on April 24, 2002. (Ex. 70.)

SA Sellers subpoenaed these bank records in aid of her Customs grand jury investigation from March through April of 2002, and SA Bergstrom reviewed and incorporated them into her 9131 report completed on July 18, 2002. (Ex. 1.) The prosecution disclosed these bank records to the defense in Rule 16 discovery, but oddly, the IRS has neither disclosed nor even identified the First Union and ScotiaBank records in the on-going FOIA litigation, and disclosed only the cover page, (Ex. 71), of the Nations Bank/Bank of America records, but not the bank records themselves. At all events, SA Bergstrom reviewed these grand jury documents without the requisite 6(e) authorization and access approval, and the entire investigation was irreparably tainted from this early point forward.

B. SA Bergstrom Committed Perjury in the Related FOIA Litigation Regarding Her Unauthorized Grand Jury Material Access and Investigation.

SA Bergstrom testified at trial that she became involved in the non-tax Customs grand jury investigation of the Marchellettas when Customs SA Sellers

gave her a call sometime in January of 2002 and advised she had a case she'd like SA Bergstrom to look at. (Doc. 210, pp. 956-57.) Apparently upon further reflection, and in diametric opposition to her 2007 trial testimony, SA Bergstrom has now testified in her first declaration filed in the FOIA case pending before this court, (Ex. 37), that her involvement had nothing whatever to do with any telephone call from SA Sellers; in fact, Customs SA Sellers isn't even mentioned in her first FOIA declaration.

According to SA Bergstrom's second story (her first declaration filed in the FOIA litigation before this court), sometime after the March 2001 check seizure and SA Sellers' subsequent initiation of a grand jury investigation against the Marchellettas, SA Bergstrom's IRS office received a request from the U.S. Attorney to become involved in a non-tax grand jury investigation. *Id*., at ¶ 4, lines 12-14. SA Bergstrom avers that this U.S. Attorney request letter conveyed grand jury information developed by the non-tax Customs grand jury investigation (as it must), and that upon receiving this request letter and grand jury information: "The SAC, André Martin, reviewed and analyzed financial and other relevant information provided with the [U.S. Attorney's] request and determined that CI's participation was warranted based on the potential for criminal prosecution for crimes falling within CI's jurisdictional authority." *Id*., at ¶ 4, lines 14-19. Based

upon the IRS SAC's review and determination, SA Bergstrom further avers, the SAC assigned her to review the Customs grand jury material and draft an IRS Form 9131 "Request for Grand Jury", and that pursuant to that assignment, she opened a primary investigation on January 9, 2002. On that date, Bergstrom also "began to review the [grand jury] information provided with the [U.S. Attorney's] request." *Id*., ¶ 4, lines 20-24.

SA Bergstrom's declaration makes clear that all of these necessary events subsequent to the check seizure – Customs SA Sellers initiating a grand jury investigation and developing probable criminal tax violations in addition to Customs law violations through grand jury subpoenas, the U.S. Attorney issuing a letter to the IRS SAC requesting IRS involvement and conveying grand jury material and 6(e) review authority, the SAC reviewing that material and determining probable criminal tax violations, and her assignment and opening a primary investigation to draft the 9131 – happened between March 2001 and January 9, 2002. The only problem is, that story is completely false, as evidenced by SA Bergstrom's second declaration and AUSA Griffin's grand jury request and authorization letter of August 14, 2002. (Exs. 2, 66.)

Apparently upon further reflection during the time since her July 9, 2010 declaration filing, SA Bergstrom filed a second sworn declaration in the FOIA

litigation and in direct contravention of her two previous stories, avers that none of that really happened after all. If we are to believe SA Bergstrom's third sworn story (in her second declaration filed in the FOIA litigation before this court):

(1) the U.S. Attorney *did not* send a request letter to the IRS SAC and *did not* convey financial and other grand jury information with any request letter;

(2) the IRS SAC, André Martin, *did not* review or analyze any grand jury materials;

(3) SAC Martin *did not* determine that IRS Criminal Investigation's ("CI's") participation was warranted based upon any finding of probable criminal tax violations within CI's jurisdiction;

(4) SAC Martin *did not* assign SA Bergstrom to any criminal tax investigation based upon any U.S. Attorney grand jury expansion request; and

(5) SA Bergstrom *did not* open a primary investigation on January 9, 2002 based upon any such SAC assignment, because SAC Martin made no such assignment pursuant to receiving any such U.S. Attorney request and authority conveyance letter.

(Ex. 66.)

Not even two months after the July 9th filing of her first declaration, SA Bergstrom apparently had an entirely different recollection of these crucial events

and circumstances, as set forth under penalty of perjury in her second declaration filed on September 2, 2010. Under this *third* sworn story, all of the mandatory procedures, authority and information conveyances, and associated writings were either affirmatively violated or otherwise simply not undertaken or complied with. Directly contrary to the four-page sworn recitation in SA Bergstrom's first declaration, the entire process now consisted of a "verbal" conversation or two between herself and an AUSA, where the AUSA: (1) made a "verbal" request to Bergstrom to see if she "would be interested" in participating in the Marchelletta non-tax grand jury investigation; (2) "verbally recited" all of the evidence and information procured to that date by the non-tax Customs grand jury that he believed "showed the potential for criminal" tax violations; and (3) "verbally" advised SA Bergstrom that he had placed her on some unspecified Rule 6(e) "list" on some unspecified date. *Id*.

There is a reason that SA Bergstrom impliedly disavowed substantial portions of her first declaration filed on July 9, 2010, with her second declaration filed on September 2, 2010. After the IRS filed its summary judgment papers on July 9, 2010, and with SA Bergstrom's first declaration specifically in mind, plaintiffs' counsel offered to simplify the litigation dramatically – perhaps even to the extent of a stipulated dismissal – if the IRS would produce the U.S. Attorney's

request letter that conveyed the financial documents and other information the Customs grand jury had developed to that date indicating probable criminal tax violations in addition to Customs criminal offenses, along with the all-important 6(e) authority to review those grand jury materials.[14]

By producing the U.S. Attorney request letter, the IRS would establish that SA Bergstrom had Customs grand jury material review authority upon the IRS SAC reviewing the request letter and the grand jury documents and information provided therewith, and determining probable violations of federal criminal tax law, then assigning SA Bergstrom on or shortly before January 9, 2002 to review the grand jury information and draft a 9131 report either recommending or not recommending that IRS participate in the Customs grand jury investigation of the Marchellettas. According to SA Bergstrom's first declaration, the U.S. Attorney request letter and conveyance, IRS SAC Martin's review, and her assignment by SAC Martin to prepare the 9131 all preceded her opening of a primary investigation on January 9, 2002, after which she begin reviewing the Customs

[14] As scrupulously detailed in SA Bergstrom's first declaration, this U.S. Attorney request letter is mandated by "Tax Division Directive No. 86-59 – Delegation of Authority to Approve Grand Jury Expansion Requests to Include Federal Criminal Tax Violations" and various sections of the Internal Revenue Manual dictating procedures upon receiving such a request from the U.S. Attorney. (Ex. 37, ¶¶ 2-4.)

grand jury information previously provided with the U.S. Attorney's request to SAC Martin.

The only problem, apparently, was none of that was true, as SA Bergstrom well knew. This problem came to a head when plaintiffs' counsel reviewed SA Bergstrom's first declaration filing of July 9th, and offered to substantially narrow the litigation dispute if the IRS would provide the U.S. Attorney request letter. Plaintiffs' counsel advised DOJ counsel that such a request letter is always Exhibit 1 to a 9131 government attorney-initiated request to expand a non-tax grand jury to include IRS' investigation of potential tax crimes, provided a specimen 9131 for counsel's confirmation, and insisted that the request letter had to be in the "9131 Binder" identified by SA Bergstrom, as "Exhibit 1" to the actual Form 9131 in that "binder." (Bernhoft Decl., ¶ 9.)

Having received no conclusive response one way or the other from DOJ counsel, the answer was apparently made with SA Bergstrom's second declaration filing of September 2, 2010, which, as set forth above, materially contradicts in significant part her first declaration. The most significant disavowals, not coincidentally, directly relate to SA Bergstrom's extensive first declaration rendition of SAC Martin's receiving the U.S. Attorney's request letter and

conveyance of Customs grand jury information sometime in late 2001, and subsequent actions taken by him and SA Bergstrom pursuant thereto.

Enter the U.S. Attorney's request letter dated August 14, 2002, the Exhibit 1 to the 9131 disclosed to the plaintiffs by the U.S. Attorney's office after meeting regarding misconduct allegations. (Ex. 2.) In order for SA Bergstrom's first declaration story to be true, this letter must predate January 9, 2002, but it doesn't: it issues some eight months later, well after SA Bergstrom reviewed voluminous Customs grand jury materials that SA Sellers obtained by grand jury subpoena between January and May of 2002. This the crucial U.S. Attorney request letter that the IRS has refused to disclose to the plaintiffs in the FOIA litigation, much less even identify as being part of SA Bergstrom's so-called "9131 Binder", and the letter that puts the lie to substantial portions of SA Bergstrom's first declaration. SA Bergstrom's inability to produce the U.S. Attorney request letter pre-dating January 9, 2002 apparently precipitated the filing of her second declaration.

What *is* clear, even in light of Bergstrom's multiple and conflicting stories, is that she had no grand jury 6(e) authorization to review the bank records Customs SA Sellers subpoenaed from March through April of 2002. And it's beyond cavil that she did indeed review and use them in her investigation, as evidenced by her

own 9131 report, undisclosed to the defendants before or during the 2007 trial, in violation of the Jencks Act, *Brady*, and *Giglio*.

CONCLUSION

As popularized in texts like John Grisham's true story, *The Innocent Man*, and scholastically surveyed in law reviews and respected commentary, the fundamental role of federal courts remains to ensure trials with integrity and fairness, so that the true ends of justice are served. Justice delayed is still better than justice denied.

Two special agents lied to this court and lied to the jury empanelled by this court. They flagrantly flouted and violated this court's specific and direct orders to produce witness statements, exculpatory information, and impeachment information, but contumaciously, they never did. Instead, special agents Sellers and Bergstrom fabricated evidence through a cut-and-paste set of incomplete Customs reports, coached and suborned perjury from a critical CPA witness, then committed further misconduct at trial with their own false and misleading testimony. And a decade after the investigation commenced, and almost three years after the 2007 trial, SA Bergstrom committed perjury in the on-going FOIA litigation to conceal additional evidence of her serial misconduct.

The Marchellettas and Kottwitz have unfairly borne the full burden of these special agents' sins. Let it be no more. Remedy is due, and the law gives this court the power and responsibility to set things right.

WHEREFORE, for all the foregoing reasons, the Marchellettas and Kottwitz respectfully pray for an order granting them a new trial, but first an order granting discovery, compulsory process, and an evidentiary hearing, after which they will renew their prayer for an order granting their Rule 33 motion for a new trial on the sole remaining affirmed conviction count.

Respectfully submitted on October 4, 2010.

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