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

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

**THE MARCHELLETTAS' MEMORANDUM OF FACTS AND LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE INDICTMENT FOR OUTRAGEOUS GOVERNMENT MISCONDUCT**

Gerard Marchelletta, Sr. and Gerard Marchelletta, Jr. (hereinafter the "Marchellettas"), have moved this court to dismiss the indictment for outrageous government misconduct, and also requested an evidentiary hearing to determine the full scope of the flagrant misconduct, so that a complete and accurate record can be made to support dismissal with prejudice.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**

**Other Authorities**



**Rules**

## INTRODUCTION

The outrageous government misconduct that has infected this case for over twelve years, and continues to infect this case to the present, warrants dismissal of the indictment with prejudice. First, a retrial would violate the Marchellettas' fundamental Fifth Amendment rights, because the prosecution cannot certify that all documents, materials and information required to be disclosed to the defense by Rule 16, *Brady*, *Giglio*, and Jencks have been provided, or even *can* be provided. Second, and equally important, a retrial would constitute an unconscionable miscarriage of justice, and the court should exercise its supervisory power and dismiss this case with prejudice, to deter future illegal conduct, protect the perception and actual integrity of our federal criminal judicial process, and prevent that miscarriage of justice.

The Marchellettas have a fundamental Fifth Amendment right to a Due Process conforming fair trial, and this time-honored, bedrock right would be violated by any retrial. Here, the prosecution is unable to discharge its constitutional and statutory discovery obligations. As evidenced by the U.S. Attorney's recent misrepresentations to this court in the related CBP/ICE FOIA litigation, the prosecutors, law enforcement agencies, and agents continue to lie and deceive to conceal the existence of documents without which the Marchellettas

cannot receive a fair trial, to deceive the court and the defendants regarding the true nature, origin, and course of the criminal investigation, and to protect the lead special agents and prosecutors from further revelations regarding the scope of their unconscionable lies, deceptions, and myriad violations of their oaths and ethical duties.

Furthermore, IRS Special Agent Patricia Bergstrom ("SA Bergstrom") committed perjury during the first trial, obstructed the Marchellettas from obtaining documents they were entitled to during the IRS FOIA litigation, perjured herself in sworn declarations filed in that case, and as newly obtained evidence proves, deceived DOJ Tax Division litigation counsel and IRS Chief Counsel regarding the existence of a crucially important document. SA Bergstrom has had possession, custody, and control over all IRS criminal investigation files in this case since its inception, and the prosecutors must again rely upon her records, as they improvidently did during the first trial, to discharge their Rule 16, *Brady*, *Giglio*, and Jencks discovery obligations.

This they cannot do, given the irreparable taint of SA Bergstrom's perjury, deceptions, and document concealment. We simply cannot know, nor can the prosecutors or this court, what documents did or did not exist, or whether documents have been destroyed, forged, or otherwise secreted. A retrial under

these circumstances would violate the Marchellettas' fundamental right to a Due Process conforming fair trial.

In addition, the U.S. Attorney's office has demonstrated its inability to canvass for and obtain all discovery required to be disclosed to the defense. As will be amplified below, with the exception of FBI 302 reports relating to the Gold Club case and several other categories of outstanding discovery, the prosecution states that discovery is complete. The prosecution's position is simply incorrect, and woefully so. Through multiple FOIA requests to multiple federal agencies, the Marchellettas have received thousands of pages of documents and information relating to undisclosed criminal investigations of the Marchellettas and Circle, including an undisclosed investigation that substantially predated the fictional "happenstance, random, fortuitous" seizure of Circle checks at the Memphis FedEx hub on March 16, 2001.

These investigations were conducted by various federal law enforcement agencies, including the U.S. Department of Labor Office of the Inspector General ("DOL OIG"), the Federal Bureau of Investigation ("FBI"), and the Air Force Office of Special Investigations ("AFOSI"). At least one of these criminal investigations was led by former AUSA Paul Monnin, the lead prosecutor in the first trial. The multiple FOIA requests and disclosure responses, albeit oft times

substantially redacted, revealed substantial information regarding the relationship between unindicted co-conspirator George Gorman, Jerry Marchelletta, Jr., and Circle, and put the lie to the prosecution's discovery and first trial canard regarding some purported "independent alien smuggling investigation." Now, it may be the case that the prosecutors are intentionally withholding mandatory discovery, or that they are simply not competent to discharge their constitutional, statutory, and ethical discovery obligations. Or it could be the case that law enforcement agencies and their discovery canvassing agent conduits are obstructing discovery by concealing documents and information from the prosecutors. Whatever the case, to say that the prosecution's discovery canvas is constitutionally inadequate would be a grotesque understatement.

Moreover, and as against the prosecution's position that discovery is complete (with the exceptions noted above), the prosecutors have failed to disclose any documents or information related to the Southeastern Carpenters Regional Council's ("SCRC's") substantial cooperation and assistance to the prosecution team in this case, including multiple meetings with SCRC representatives and IRS SA Bergstrom and DOL-OIG Special Agent John Jupin, where information relating to the Marchelletta/Circle investigation – undisclosed to the defense to this very day – was exchanged.

Second, and finally, a retrial would constitute an unconscionable miscarriage of justice, and the court should exercise its supervisory power and dismiss this case with prejudice. As was set forth in substantial part in the Marchellettas' Rule 33 motion filed with this court on October 4, 2010, the investigation, indictment and prosecution of this case was plagued by serious investigative misconduct, massive discovery violations, the streaming perjury of SA Sellers and SA Bergstrom, the suborned perjury of several other government witnesses, false statements to the court by the prosecutors, and false and misleading statements by the prosecutors in opening statement and closing argument.

Remarkably, the flagrant misconduct documented in that Rule 33 motion did not capture the totality of egregious conduct and violations of ethics and basic human decency. The defense's investigation since the filing of the Rule 33 has revealed substantial additional misconduct that will be set forth in requisite detail below, while relying upon the Rule 33 motion, memorandum, and exhibits in relevant part. In the end, experience, judicial wisdom, and the pursuit of justice underpin our federal courts' supervisory power. Where, as here, justice has been cavalierly trampled upon by those entrusted with the power, the resources, and the imprimatur of honesty and integrity necessary to secure justice for all, the reasons for our rules are manifestly evident. Dismissing this case with prejudice will

secure the legitimate ends of justice by deterring future illegal conduct and protecting the perception and actual integrity of our federal criminal judicial process.

## ARGUMENT

### I. A RETRIAL WOULD VIOLATE THE MARCHELLETTAS' FUNDAMENTAL FIFTH AND SIXTH AMENDMENT RIGHTS.

A retrial would violate the Marchellettas' fundamental Fifth Amendment rights because the prosecution cannot discharge its discovery obligations under Rule 16, *Brady*, *Giglio*, and Jencks.

#### Legal Standard

Fairness is a founding principle of our criminal justice system. Though always true as a matter of fundamental fairness and law[1], it has been made

[1] The Supreme Court addressed the role discovery plays in this fundamental right to a fair trial as early as 1807 when, in reference to impeachment evidence in the Government's possession, Chief Justice Marshall wrote:

"It is a principle, universally acknowledged, that a party has a right to oppose the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at trial. It is with some surprise an argument was heard from the bar, insinuating that the award of a subpoena on this ground gave the countenance of

abundantly clear over the course of the past five decades that Government disclosure of evidence that may affect the jury's judgment in a defendant's favor is part of the constitutional right to a fair trial provided by the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963) (Elaborating on earlier decisions in which the Government obtained convictions by misleading the jury about the true facts, including by knowingly using perjured testimony or deliberately withholding key information); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); (*United States v. Bagley*, 105 S. Ct. 3375, 3380 (1985) ("When the government does not disclose information in its possession that might reasonably considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict"); *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against

---

the court to suspicions affecting the veracity of a witness who is to appear on the part of the United States … What would be the feelings of the prosecutor if, in this case, the accused should produce a witness completely exculpating himself, and the attorney for the United States should be arrested in his attempt to prove what the same witness had said upon a former occasion, by a declaration from the bench that such an attempt could not be permitted, because it would imply a suspicions in the court that the witness had not spoken the truth? Respecting so unjustifiable an interposition but one opinion would be formed." *United States v. Burr*, 25 F.Cas. 30, 36 (C.C.D. Va. 1807).

misrepresentation…"); *United States v. Jordan*, 316 F.3d 1215, 1261 (11th Cir. 2003).

Where, as here, the evidence is both favorable to a defendant and material, the due process guarantee of a fair trial requires the Government to turn over to the defense that evidence "since, eventually, such evidence may undermine [] the confidence in the outcome in the trial." *Jordan*, 316 F.3d at 1261; *Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment…").

Favorable evidence includes evidence that is, *or that may lead to*, exculpatory evidence, evidence relevant to the credibility of witnesses, and *evidence that suggests lack of thoroughness or good faith of the investigation*. *Giglio*, 405 U.S. at 154-55 ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule") (emphasis added); *Bagley*, 473 U.S. at 676-77 (Court has rejected constitutional difference between impeachment evidence and exculpatory evidence for *Brady* purposes); *Kyles*, 514 U.S. at 444 ("Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for [the witness'] various statements would have raised opportunities to attack not

only the probative value of crucial physical evidence and the circumstances in which it was found, *but the thoroughness and even the good faith of the investigation*, as well.") (emphasis added) (citing for examples *Bowen v. Maynard*, 799 F.2d. 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) ("awarding a new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence 'carried within it the potential … for the … discrediting … of the police methods employed in assembling the case'").

Evidence is material, and thereby requires disclosure in order to assure a fair trial, where there exists a reasonable probability that disclosure of the withheld evidence would have lead to a different result at trial. *Bagley*, 473 U.S. at 676-77; *Jordan*, 316 F.3d at 1952 ("The touchstone of materiality is a reasonable probability of a different result"). A "reasonable probability" of a different result at trial is demonstrated conclusively when the government's suppression of evidence "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 676-77 ("the court must decide whether the prosecution has shown beyond a reasonable doubt that the new evidence, if disclosed and developed by reasonably

competent counsel, would not have affected the outcome of the trial"); *Kyles*, 514 U.S. at 434 (Where "the essence of the State's case" was the testimony of eye witnesses, their statements were material as disclosure of the statements would have reduced or destroyed the value of two of the witnesses, resulting in a weaker case for the prosecution). The standard of materiality is less stringent, however, if the Government knowingly used perjured testimony or failed to correct testimony it learned was false. In that case, the test is whether it is reasonably likely that the falsehood could have affected the jury's verdict. *United States v. Arnold*, 117 F.3d 1308, 1315 (11th Cir. 1997).

When the materiality threshold is met, and the evidence is known or possessed by any Government agent aligned with the prosecution, the prosecution's failure to disclose it to the defendant violates that defendant's due process right to a fair trial irrespective of whether the prosecuting attorneys have knowledge or possession of the information. Instead, in order to assure that a due process conforming fair trial is had, due process requires the disclosure of material information known to other agents of the government, *see Giglio*, 405 U.S. at 154 (citing Restatement (Second) of Agency, and noting that prosecutors speak for the government as a whole), and imports upon prosecutors an affirmative duty to search possible sources of exculpatory information, including a duty to learn of

favorable evidence known to others acting on the prosecution's behalf, including law enforcement agents and persons acting on their behalf, *Kyles*, 514 U.S. at 437, and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government aligned with the prosecution. *See United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("[i]nformation possessed by other branches of the government, including investigating officers, is typically imputed to the prosecutors of the case" for *Brady* purposes); *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) ("[t]his personal responsibility cannot be evaded by claiming lack of control over the files … of other executive branch agencies").

Thus, a defendant's due process right to a fair trial is violated when any Government actor or agent withholds material evidence favorable to the defendant, irrespective of any knowledge on behalf of the prosecuting attorney. *See United States v. Beasley*, 575 F.2d 626, 632 (5th Cir. 1978) ("The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies."); *Ross v. Hopper*, 716 F.2d 1528, 1534 (11th Cir. 1983) ("Any promises offered [by other Government actors], or any information obtained by them in the course of their investigation, must be attributed to the prosecutor for purposes of [*Brady*] violation."); *see Bell v. Haley*, 437 F.Supp.2d 1278, 1307

(M.D. Ala. 2005) ("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.").

Because, by definition, a *Brady* violation results from an evidentiary suppression that undermines confidence in the outcome of the trial, a conviction resulting from a trial in which the Government commits a *Brady* violation is an impermissible violation of due process as a matter of law, of which the minimum remedy is, irrespective of the good faith or bad faith of the prosecution, reversal of any conviction. *Kyles*, 514 U.S. at 436 ("Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict."); *Brady*, 373 U.S. at 87; *Giglio v. United States*, 405 U.S. at 154 ("whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor"); (internal quotations and citations omitted); *see also United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008) ("*Kojayan* and *Blanco* make clear that *Brady* violations are just like other constitutional violations. Although the appropriate remedy will

usually be a new trial, a district court may dismiss the indictment when the prosecution's actions rise, as they did here, to the level of flagrant prosecutorial misconduct.") (internal quotations and citations omitted); *United States v. Lyons*, 352 F.Supp.2d 1231, 1243 (M.D. Fla. 2004) (Court dismissed indictment based on prosecution's *Brady*/*Giglio* violations noting that "[i]f, within a reasonable period after trial the Government had revealed its *Brady* and *Giglio* violations, a new trial order may have been an appropriate remedy. The Government, however, perpetuated an unjust deprivation of Lyons' liberty throughout this case, despite clear constitutional duties … despite actual notice of *Brady* and *Giglio* problems …); *United States v. Dollar*, 25 F.Supp.2d 1320 (N.D. Ala. 1998) (holding that government's failure to comply with the defendants' discovery request for *Brady* materials warranted dismissal of the indictment where the Government continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses after assuring the court it had produced all *Brady* materials).

### A. The Government Cannot Discharge its Discovery Obligations Under Rule 16, *Brady*, *Giglio*, and Jencks, and a Retrial Would Therefore Constitute a Due Process Violation.

The defense began requesting discovery in earnest in August of 2011 by issuing discovery request letters to the prosecution. Between August 18 and

October 6, 2011, the defense issued five discovery requests for essential Rule 16 and *Brady/Giglio* material. These discovery requests focused principally on obtaining the several thousand pages of documents withheld from the Marchellettas in full during the IRS FOIA litigation, obtaining unredacted copies of the documents the IRS had provided but in redacted form, obtaining unredacted copies of documents provided to the Marchellettas during the CBP/ICE FOIA litigation but with substantial redactions, grand jury subpoenas issued by SA Sellers and SA Bergstrom, all memoranda of interview related to any and all federal criminal investigations of the Marchellettas and Circle, all written or recorded statements of any of the three co-defendants within the government's possession, custody, or control, and unredacted versions of SA Bergstrom's SARs and IRS Form 9131. (Exhibits 1-5.)[2] In spite of the fact these requests were very specific, and in some cases included detailed indices of previously withheld or redacted documents, the prosecution's first discovery provision was made on December 12, 2011, almost four months after the defense's first request issued. (Ex. 6.)

Having received only a partial response to only one of the discovery requests after approximately six months had passed, the defense followed up with a letter

[2] All exhibits are filed under the Declaration of Robert G. Bernhoft.

on February 27, 2012, requesting fulfillment of the remainder of discovery request number one, and the status of requests numbered two through four. (Ex. 7.)[3] AUSA Bly responded on March 26, 2012, providing another partial provision of documents responsive to discovery request number one. (Ex. 8.) The defense followed up on March 31, 2012, noting that the recent production did not respond fully to discovery request number one, and again asking for unredacted copies of the twenty Customs reports that had been identified in the CBP/ICE FOIA litigation.[4] (Ex. 9.) The prosecution ultimately produced those documents on April 20, 2012, over eight months after the defense requested them. (Ex. 10.) Then on May 4, 2012, AUSA Bly produced the grand jury subpoenas requested in the defense's discovery request number two. (Ex. 11.)

On May 31, 2012, the defense issued discovery request number six, requesting documents identified by SA Bergstrom in her two sworn declarations filed in support of the IRS's summary judgment motion in the FOIA litigation, public information files relating to several grand juries, and unredacted copies of

[3] Discovery Request number five was mooted by the prosecution's first discovery production of December 12, 2011.

[4] As set forth in the Marchellettas' Rule 33 filings, only five of twenty Customs reports were provided to the defense in discovery prior to the first trial, with a sixth report – the March 21, 2000 debrief of undisclosed confidential informant Shawn McBride – disclosed midway through trial. (Doc. 238, pp. 64-65.) None of the other fourteen reports were ever provided until the Marchellettas filed their FOIA requests with CBP/ICE.

grand jury access lists provided with substantial redactions. (Ex. 12.) Also on May 31, 2012, the defense issued a discovery follow up letter requesting a status on discovery requests numbered three and four (both issued on September 4, 2011), and the defense's multiple previous requests for the Customs' documents AUSA Neeli Ben-David had identified but refused to provide in the CBP/ICE FOIA litigation. (Ex. 13.)

On June 13, 2012, having still not received the additional Customs' documents AUSA Ben-David identified to both this court and counsel in October of 2011, the defense issued a final demand for those documents, advising AUSA Bly that if the documents weren't forthcoming by Friday, June 22, 2012, a motion to compel discovery would be filed. (Ex. 14.) Which brings us to AUSA Bly's startling response letter of June 22, 2012, issued over seven months after the defense's first request. (Ex. 15.)

**1. The prosecution deceived and misled the court and the Marchellettas during the CBP/ICE FOIA litigation, with misrepresentations of material fact upon which the court relied in granting summary judgment to the agency.**

AUSA Bly's letter of June 22, 2012, recants the entire factual scenario regarding the additional Customs' documents AUSA Ben-David begrudgingly identified as existing in the CBP/ICE FOIA litigation. (Case No. 10-cv-03280-

TCB.) The Marchellettas' main argument against the agency's motion for summary judgment was that CBP/ICE had not conducted a reasonably diligent search for responsive records, because by the agency's own admission, it had not queried the two most logical sources of responsive documents: lead Customs SA Sellers and the Customs SAC Atlanta. AUSA Ben-David, representing CBP/ICE, argued aggressively throughout that the agency's query of SAC Memphis and search of the Customs' TECS II database was sufficient, because those queries and searches would yield all responsive documents.

Upon receiving the Marchellettas' opposition to CBP/ICE's motion for summary judgment, AUSA Ben-David filed a reply, wherein she stated:

> After receiving Plaintiffs' Response, Defendants checked with [Customs] SAC Atlanta office to see if it had any additional records responsive to the FOIA request. At that time, they learned that after [Customs] SAC Atlanta completed its collateral investigation for RAC Memphis, it opened its own separate investigation of the Circle Group, under a new case number . . . . Defendants have requested the files regarding the new investigation from archives and, once they receive them, will conduct a review to determine whether there are any additional documents responsive to the FOIA request that should be produced to the plaintiffs.

(Case No. 10-cv-03280-TCB, Doc. 27, p.10, fn.10.)

In response to AUSA Ben-David's filing assertions, the undersigned corresponded with Ben-David to work out a protocol for review and disclosure of these documents in the context of the then-ongoing FOIA litigation. Subsequent to those exchanges, this court allowed Ben-David and the undersigned to set forth our positions on the new documents to the court via e-mail, and ultimately this court granted the Marchellettas the opportunity to file a surreply to address them. In one of those email exchanges, Ben-David told the court:

> [T]he additional documents are in the possession of the National Archives and Records Administration, as [sic] separate entity from the Department of Homeland Security . . . . [and] [a]ccordingly, they should not affect the Court's disposition of the summary judgment motion. The reason I asked the agency to request the additional documents from archives was because of the upcoming criminal trial. I am told that it can take up to 2 months to receive the documents from the National Archives and Records Administration; therefore, the sooner they are requested, the better.

(Ex. 16.)

This entire history and the actual filings and emails were provided to AUSA Bly in the defense's discovery letters dated May 31 and June 13, 2012.

The U.S. Attorney's position in the CBP/ICE FOIA litigation was emphatic: (1) the defendants (CBP/ICE) contacted the SAC Atlanta regarding the existence of responsive documents; (2) SAC Atlanta advised CBP/ICE that after the "collateral" investigation was complete, it opened its own separate investigation of the Circle Group under a new case number; (3) SAC Atlanta advised CBP/ICE

that the documents associated with the new and separate investigation had been sent to archives; and (4) upon AUSA Ben-David's request, and in furtherance of discovery in the criminal case, CBP/ICE requested retrieval of the documents from archives.

Now, over seven months after these affirmative, unequivocal representations to the court and counsel, some made on oath, the prosecution takes the position that *none of this was true*: SAC Atlanta *did not* open up its own, separate investigation under a new case number; and additional documents from this separate investigation *were not* sent to archives, because those documents previously and affirmatively identified *do not exist*. (Ex. 15.) AUSA Bly attributes these false statements to the court and counsel to "misunderstandings" and "awareness" regarding CBP/ICE's "general practices," which apparently, although it's far from clear, were not followed.

To any reasonable mind, the U.S. Attorney's "explanation" is confusing, contradictory, inadequate, and suspicious. One thing we know for certain: SA Sellers' criminal investigation files were in Atlanta in 2007 just prior to the first trial. As former AUSA Monnin then told this court:

> Your Honor, one last thing. On Mr. McBride, I have – we don't have Ms. Sellers' notes of the initial Customs interview. Ms. Sellers was the author of the MOI. We have tendered that over to the defense. So, that is one thing that's missing that I told the Court earlier when Mr. Maloy asked me to

> summarize everything we may have. Ms. Sellers is in D.C. ***Her file is here in Atlanta***.

(Doc. 208, Trial Tr., Vol. IV, p. 122.)

SA Sellers file, then in Atlanta, would have included her time logs, special agent's diary/journal, Rule 6(e) authorizations, Customs' administrative summonses, grand jury subpoenas, work reports, phone log, history of mail and shipping courier "covers," and importantly, her rough notes. *None* of these Customs' criminal investigation documents and things would be posted to the TECS II database, but instead maintained in the lead special agent's files and the SAC's administrative files.

These documents and items were undoubtedly the "additional" documents the SAC Atlanta and AUSA Ben-David identified in the FOIA litigation and advised had been sent to archives, but the prosecution now asserts they do not exist.[5] If in fact it is true that these documents do not exist – particularly SA Sellers' rough notes – then the prosecution cannot discharge its discovery obligations in this case, and any retrial would constitute a Due Process violation.

[5] In spite of the defense's request for special agents' rough notes – rough notes this court ordered to be preserved on April 17, 2007 (Doc. 22) – the prosecution has produced no rough notes to the defense.

**2. The prosecution must rely upon IRS SA Bergstrom's records to discharge its discovery obligations, and given Bergstrom's documented perjury, obstruction, deception, and document concealment, the prosecution cannot certify that it can produce all discovery required by the Constitution and Laws of the United States, rendering any retrial a *per se* Due Process violation.**

Special Agent Bergstrom's conduct in the IRS FOIA litigation is proof positive that she has no compunction about lying, deceiving, and concealing documents. 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 2010, 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. 238-43, p. 10, n.2)[6], 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, (Doc. 238-44, ¶ 25).

[6] References to Doc. 238 followed by a number is to the ECF generated document number for an exhibit filed with the Defendants' Motion for a New Trial.

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. SA Bergstrom's attempts to conceal the existence of her voluminous criminal investigation files – even from her own IRS' colleagues – demonstrate her predisposition to conceal documents she doesn't want anyone to see. And SA Bergstrom's document repository is the prosecution's sole source of discharging its discovery obligations in any retrial relative to the IRS's criminal investigation.

At the conclusion of summary judgment briefing, this court denied summary judgment to the IRS on December 20, 2010, based upon the materially inconsistent stories IRS SA Bergstrom told in her 2007 trial testimony and the two declarations she filed in support of summary judgment. As this court then noted:

> Bergstrom's credibility is a material fact in this case; plaintiffs have presented evidence that she perjured herself; and the IRS has not rebutted Plaintiffs' challenge to her credibility, e.g., presenting other evidence to corroborate her testimony about or adequately explaining how she became involved in the grand jury investigation.

*Id.*, Doc. 40, pp. 23-24.

The court went on to order a four-month discovery track with discovery to commence immediately, but before discovery could commence the IRS moved to

stay the litigation pending resolution of the criminal tax case, and the court granted that request. *Id.*

Fast-forward to 2011, and the defense's discovery requests beginning in August of that year. After four months had passed, AUSA Bly made the first "retrial" discovery production on December 12, 2011. (Ex. 6.) Included in that production were the over 2,600 pages that SA Bergstrom had denominated Grand Jury ("GJ") documents and withheld in full during the FOIA litigation – documents that SA Bergstrom refused to even show DOJ litigation counsel, much less her own IRS Office of Chief Counsel attorneys.[7]

Within this belated production were SA Bergstrom's SAR, Form 9131, and associated exhibits. Among the exhibits was a singularly remarkable document, the ever-elusive U.S. Attorney Request Letter (Ex. 17), the request letter that Bergstrom and DOJ litigation counsel had steadfastly denied existed in Bergstrom's files and records, in the face of the fact the request letter was the required exhibit one to the Form 9131: "Plaintiffs' counsel declares that he received a copy of the August 14, 2002 letter from attorneys at the AUSA [sic]

[7] As the court noted in its order denying summary judgment to the IRS: "Bergstrom testified in her first declaration that she did not provide any of the data protected by Rule 6(e) to Dean and Segal [attorneys at IRS Office of Chief Counsel in Washington, D.C.] because they were not persons designated as eligible to access the grand jury material." (Case No. 1:09-cv-03037-TCB, Doc. 40, p. 20, f.6.)

context [sic] in a non-FOIA context. ***"The Service, however, did not locate a copy of this letter in its records."*** (Case No. 1:09-cv-03037-TCB, Doc. 38, p. 21, fn.7.)

That statement by DOJ litigation counsel, conveyed to her by Bergstrom, was patently false. Bergstrom has a distinct predisposition for concealing documents, and yet her investigative files – particularly the co-called Grand Jury documents where robust exculpatory and impeachment evidence is reposed – were never seen by anyone but her at least through November of 2010. SA Bergstrom has had years to remove, destroy, and manipulate documents, and there's every reason to believe she did, as evidenced by the recently disclosed U.S. Attorney request letter itself from her own IRS' files.

That letter – disclosed by AUSA Bly in his production of December 12, 2011 from Bergstrom's "GJ" IRS files – is dated *July 11*, 2002, whereas the U.S. Attorney Request Letter disclosed by Economic Crimes Chief Randy Chartash in 2009 is dated *August 14*, 2002. (Ex. 18.) So now we have *two* U.S. Attorney Request Letters that purport to be exhibit one to Bergstrom's Form 9131. In addition to the fact the two letters have different dates, there are other disturbing problems with the letters. Aside from the serious implications for Bergstrom's various renditions of the origin and scope of her investigation, the Marchellettas' highly credentialed questioned document/handwriting expert will testify that it is

highly unlikely that the same person signed both letters. (RGB Decl., ¶ 2.) Is the recently released letter from Bergstrom's files a forgery? If it is indeed authentic, why didn't the U.S. Attorney's office produce it in 2009, instead of the August 14, 2002 letter that *was* produced?

In addition to document concealment and manipulation, Special Agent Bergstrom has no compunction against perjury. Again, the best proof comes from the IRS FOIA litigation. For starters, SA Bergstrom set forth there – 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. Bergstrom testified 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. (Doc. 238-43, ¶¶ 2-4.) Bergstrom first asserted 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."[8] *Id.*, ¶ 4.

[8] The "Form 9131", drafted by SA Bergstrom, indicates SA Sellers initiated a grand jury investigation into the Marchellettas in January 2002. The public grand

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. The prosecution failed to disclose Special Agent Bergstrom's written statement, known as a "9131" report, before and during the first trial. That report partially discloses the details of Special Agent Bergstrom's misconduct and unlawful access to grand jury records. Bergstrom completed the "Form 9131" on July 18, 2002 and included an "analysis" of what the grand jury subpoenas issued by SA Sellers revealed. Bergstrom detailed a wide range of grand jury information she received and reviewed.

---

jury file for the relative time period including January 2002, however, shows that no grand jury was empanelled in January 2002. (Doc. 238-73.)

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. 18.) 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. (Doc. 238-3 through 238-5.) Further problematizing Bergstrom's sworn testimony regarding the origin, scope, and course of her investigation in this regard, we now have a *second* U.S. Attorney Request Letter dated July 11, 2002, and expert opinion that the same person did not sign both letters. (RGB Decl., ¶ 2.)

At all events, 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, Trial Transcript, Vol. VI, pp. 956-57.) Apparently upon further reflection, and in diametric opposition to her 2007 trial testimony, SA Bergstrom testified in her first declaration filed in the FOIA case 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. (Doc. 238-43, ¶ 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 was completely false, as evidenced by SA Bergstrom's second declaration. AUSA Griffin's grand jury request and authorization letter of August 14, 2002 also puts the lie to Bergstrom fictions, as does the *second* U.S. Attorney Request Letter recently disclosed by AUSA Bly from Bergstrom's IRS' files . . . take your pick.

SA Bergstrom then 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 IRS FOIA litigation):

(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.

(Doc. 238-72.)

Not even two months after the July 9, 2010 filing of her first declaration, 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 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.[9]

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

[9] 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. (Doc 238-43, ¶¶ 2-4.)

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 9, 2010, 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., ¶ 3.)

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. (Doc. 238-6 and Ex. 18.) In order for SA Bergstrom's first declaration story to be true, this letter must predate January 9, 2002, but it doesn't, and neither does the *second* U.S. Attorney Request Letter that also appears to be a forgery; instead, under either letter, the IRS participation request letter issues some seven or 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.

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*.

All told, SA Bergstrom's manifest perjury, obstruction, deception, and document concealment are already well documented in the IRS FOIA litigation and the Marchellettas' Rule 33 filings, as further amplified herein. The totality of these proofs is more than sufficient to render any effort by the prosecution to

comply with its discovery obligations futile. Are some of Bergstrom's IRS file documents forgeries? Has Bergstrom removed or destroyed documents that exculpate the Marchellettas, provide impeachment information respecting government witnesses, or provide further proof of her rank misconduct? In the end, the prosecution simply cannot vouch that the totality of discovery mandated by the Constitution and Laws of the United States respecting the IRS's investigation files has been, or can be, produced, and any retrial would constitute a Due Process violation.

**3. The prosecution continues to violate its discovery obligations respecting the retrial, with interminable disclosure delays and a continued failure to disclose essential documents and information.**

The U.S. Attorney's office for the Northern District of Georgia is either intentionally withholding discovery or is metaphysically incapable of discharging its discovery obligations. In either event, constitutional due process and basic notions of fairness would be violated by any retrial. In spite of the Marchellettas' very specific discovery requests outstanding for almost twelve months now, the prosecution has failed to even identify Rule 16 and *Brady/Giglio* documents and information arising from several criminal investigations that targeted the Marchellettas and Circle, and that bear directly on this case. These include an FBI Organized Crime Strike Force investigation commenced in early 2003, a U.S.

DOL-OIG criminal investigation that had its roots in a DOL Wage and Hour investigation from as far back as 1999, and an Air Force Office of Special Investigations ("AFOSI") investigation.

The Marchellettas identified these investigations and the high probability of attendant discoverable material by carefully reviewing all trial transcripts and documents obtained through FOIA requests to IRS and CBP/ICE. Having determined the high probability of relevant investigations by various federal agencies other than IRS and CBP/ICE, the Marchellettas issued additional FOIA requests to multiple federal agencies. And lo and behold: thousands of document pages were produced by the FBI, DOL Wage and Hour, DOL-OIG, and AFOSI. Although many of the documents disclosed by the respective agency FOIA offices were heavily redacted, nevertheless, a wealth of exculpatory and impeaching evidence was revealed.

a. *IRS CID Atlanta requested an FBI Organized Crime Strike Force investigation against Jerry Marchelletta, Jr. and Circle in early 2003, and then actively participated in an Organized Crime/La Cosa Nostra investigation into money laundering, mail fraud, and wire fraud, with SA Bergstrom taking lead for IRS.*

The Marchellettas' FOIA request to the FBI revealed that Atlanta IRS CID requested an FBI Organized Crime ("OC") Strike Force investigation of Jerry Marchelletta, Jr. and Circle in March of 2003, less than one month after the

Customs' money laundering investigation was terminated on February 21, 2003. As set forth in the Atlanta Customs' closing report, undisclosed to the defense at the first trial, the two-year Customs' criminal investigation led by SA Sellers found no evidence of money laundering whatsoever, or any other Customs criminal violations for that matter. (Ex. 19.) In spite of the fact SA Bergstrom intimately participated in SA Sellers' criminal investigation and was well aware of the "no criminal violations" finding, with the full support and endorsement of the U.S. Attorney's office for the Northern District of Georgia, she led the charge to ramp up an FBI "*money laundering*/Organized Crime-LCN" investigation weeks after Customs found no evidence of any criminal wrongdoing, much less money laundering. (Ex. 20) (emphasis added). And SA Bergstrom's "OC/LCN" defamatory whispering campaign against the Marchellettas continued.

A total of seven FBI reports ("serials" in FBI parlance), were produced to the Marchellettas by FBI FOIA disclosure. The FBI serials document a very aggressive criminal investigation against Jerry Marchelletta, Jr. and Circle for money laundering and for Organized Crime/*La Cosa Nostra* affiliation and activity, with Atlanta IRS CID requesting and then co-investigating the case, and with Bergstrom taking lead for IRS. Although the serials are heavily redacted, numerous sections obviously refer to IRS SA Bergstrom.

One of the serials reports that: "Atlanta IRS/CID information has revealed that Marchelletta is involved in both wire and mail fraud regarding the business accounts of his Atlanta construction company, Circle Industries, USA." (Ex. 20.) The same report goes on to relate that: "AUSA [redacted] supports the opening of an Atlanta/FBI LCN organized crime investigation on Marchelletta and his construction business." *Id.* The same day as the FBI's OC/LCN investigation commenced, as reflected on the second serial, Atlanta IRS CID and Atlanta FBI requested FBI Philadelphia to identify and investigate "checks that are questionable in nature," and opines that "IRS/CID is assisting the Atlanta Division in an investigation of Circle Industries, USA *and all related bookkeeping*." (Ex. 21) (emphasis added). Serial number five, although heavily redacted, appears to be a 302 report of a witness interview. (Ex. 22.) None of these documents were disclosed to the defense at the first trial, although they clearly constitute *Brady/Giglio* material.

Finally, included in the FBI disclosures was a lengthy FBI 302 interview report of an "Individual, who is in a position to testify"; this 302 interview report was almost completely redacted. (Ex. 23.) This same 302 report was also produced by AUSA Bly in his discovery provision of June 22, 2012, *sans* redactions. (Ex. 24.) In unredacted form, the interview report contains sensational

impeachment material against CPA Stanley Schleger, a principal prosecution intent witness, and the Nastasis, one of whom also testified against the Marchellettas at the first trial. Importantly, SA Bergstom participated in this interview held on January 24, 2006, but this obvious *Brady/Giglio* material was never disclosed to the defense, nor was Bergstrom's MOI of this important interview identified in the IRS FOIA litigation, much less disclosed to the defense at the first trial.[10]

Significantly, AUSA Bly *did not* provide the other six serials, and even in heavily redacted form, these undisclosed serials clearly contain *Brady/Giglio* information. This very recent failure to disclose discoverable information to the Marchellettas certainly flies in the face of the "plenary . . . open file" discovery former AUSA Monnin declared to this court prior to the first trial. (Doc. 37, p. 16.) At all events, either the prosecutors have again intentionally withheld discoverable information, or the FBI discovery canvassing conduit concealed the existence of these documents from the prosecution.

[10] From the facsimile header date of April 10, 2012, it appears this 302 interview report was faxed to the prosecution on April 10, 2012, but not onwardly disclosed to the Marchellettas until two and one-half months later.

*b. In 2003, former AUSA Paul Monnin brought in DOL-OIG Special Agent John Jupin and IRS SA Bergstrom to participate in a criminal investigation of unindicted co-conspirator George Gorman and his company, Eagle Managed Subcontractors, which came to include Jerry Marchelletta, Jr. and Circle as targets, if they were not the true targets all along.*

Unbeknownst to the defense at the first trial, the U.S. Attorney's office had immunized unindicted co-conspirator George Gorman on February 3, 2003, on the same day SA Bergstrom interviewed Gorman about Jerry Marchelletta, Jr. and Circle. Gorman's immunity agreement was never provided to the defense during the first trial. Instead, undersigned counsel spoke with Gorman's attorney, Bruce Morris, and Attorney Morris provided the immunity agreement. (Ex. 25.) According to the documents the Marchellettas received through their FOIA requests to DOL Wage and Hour and DOL-OIG (the criminal enforcement arm of the U.S. Department of Labor):

> On or about July 18, 2003, former AUSA Paul Monnin, Northern District of Georgia requested agents from IRS, DOL-OIG, and DOL-WHD to assist in an ongoing investigation of federal contract fraud at Fort Leonard Wood and FE Warren Air Force Base, Cheyenne, Wyoming by Eagle Managed Subcontractors, a Georgia corporation. Monnin also requested the agents determine the relationship of Managed Subcontractors, International to EMS and [redacted].

(Ex. 26, ¶1.)

George Gorman owned Eagle Managed Subcontractors ("EMS"), and several months after the USAO, ND GA and SA Bergstrom provided full immunity to Gorman, they purported to launch an aggressive, multi-agency investigation against him.[11] The evidence shows, however – even in heavily redacted form – that Jerry Marchelletta, Jr. and Circle were always the true targets of the USAO ND GA and SA Bergstrom, including the salient fact that George Gorman was never indicted, even though the prosecutors identified him in opening statement as a co-conspirator and talked at length in close about Gorman's business relationship with Jerry Marchelletta, Jr. (Doc. 205, Trial Transcript Vol. I, p.16, lines 11-21.)

As examples, on February 23, 2004, DOL-OIG SA Jupin reported that:

> On instant date, SA [redacted], ***IRS-CID identified Jerry Marchelletta, President, The Circle Group***, 2555 Marconi Drive, Suite 100, Alpharetta, Georgia 30005, and telephone (678) 356-1000, as a subject of an organized crime investigation. ***Circle Group information is attached.***

(Ex. 27) (emphases added).

Several months later, on August 9, 2004, SA Jupin reports that he:

> . . . . spoke to SA [redacted] regarding the investigation of EMS ***and Circle Industries***. ASAC Himmel advised that his office [in Fort Lauderdale] ***has opened a probe of Circle Industry, an Atlanta Corporation***, currently doing construction work in various locations, including Florida. SA [redacted]

[11] AUSA Barbara Nelan signed Gorman's immunity agreement, and she is still with the USAO, ND GA.

> sent to Himmel various emails, a summary of the investigation, and the most recent documents ***regarding Circle Industry*** and EMS (attached).

(Ex. 28) (emphases added).

On September 30, 2004, SA Jupin drafts a "Memo to File" that details a meeting between at least six special agents variously from DOL-OIG, the U.S. Postal Inspection Service, ICE, and IRS-CID regarding the on-going work assignments in preparation for a search warrant execution at Gorman's EMS, in furtherance of their multi-agency investigation. (Ex. 29.) As SA Jupin related: "AUSA Monnin wished to determine the name and contact number to see for details about the use of illegal aliens by EMS ***for Circle Industries***." *Id.* (emphases added). Although all of the special agents names are redacted, it is highly likely that the IRS-CID special agent referenced is Bergstrom, as will be further demonstrated below.

Which brings us to the search warrant execution at Gorman's EMS on August 16, 2005. Although the August 2005 raid was purportedly an ICE raid regarding the purported "alien smuggling investigation" independent of any IRS investigation of the Marchellettas or Circle, 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. As related in SA Jupin's closing report dated March 3, 2007:

> On August 16, 2005, agents from the Immigration and Customs Enforcement (ICE), Social Security OIG, Internal Revenue Service-CID, United States Postal Inspection Service (USPIS), United States Secret Service (USSS), Defense Criminal Investigation Service (DCIS), Joint Terrorism Task Force (JTTF), National Insurance Crime Bureau (NICB), United States Department of Labor-Wage and Hour Division, and OLRFI [Office of Labor Racketeering and Fraud Investigations] served a search warrant at the business address of EAGLE MANAGED SUBSCONTRACTORS, aka CONSTRUCTION SERVICES, INC., 3805 Presidential Parkway, Suite 106, Atlanta, Georgia. Over one hundred and nine boxes of records were seized by agents including government contracts, payroll records, I-9 and fraudulent driver licenses, social security cards and green cards. Information obtained at the search site indicates EMS had contracts at 15-20 military installations and numerous government contracts including the recent construction of the FBI's headquarters in Birmingham, Alabama.

(Ex. 26, ¶9.)

Co-defendant Terri Kottwitz could testify that she was at work at EMS the day of the raid, and that SA Bergstrom refused to let her leave EMS's premises. (Doc. 238-78, ¶ 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 attempted to leave with; upon doing so, Bergstrom removed some documents and told Kottwitz she couldn't leave with those, because "***these documents have Circle on them***." *Id*., ¶ 8 (emphases added). 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.

The purported ICE raid was nothing more than an illicit pretext for Bergstrom to obtain Marchelletta and Circle related documents from EMS, believing that EMS had not been forthcoming in response to a grand jury subpoena previously issued to EMS. Of additional and acute concern is the fact that at Bergstrom's request, the prosecution granted 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. 25.)

It also bears noting again that Gorman was never indicted, and continues to operate his various labor subcontracting businesses, including EMS, to this day. Moreover, in response to the undersigned's request for discovery relating to the 109 seized boxes of material and computer hard drive images, former AUSA Anand advised that he didn't know if there was any Marchelletta or Circle discovery in these voluminous materials, because the government had destroyed everything after Gorman showed no interest in having them returned. (Bernhoft Decl., ¶ 4.)

Although heavily redacted, documents produced through FOIA disclosure by DOL-OIG that are dated *after* the August 2005 raid are further illuminating, in that they demonstrate a narrow focus on Marchelletta and Circle:

> On this date, writer met with [redacted], regarding construction projects in the greater Atlanta area. These projects are federally funded and subject to the provisions of the Davis-Bacon Act. ***Writer was particularly interested in Circle Industry projects***.

(Ex. 30.) (emphases added).

Nineteen pages of attachments to this report of interview are then withheld in full.[12]

Then on September 15, 2005, SA Jupin writes:

> See attached write up from [redacted] regarding the CDC Construction and ***Circle Industry***. Previous information has revealed that ***Circle Industry*** is ***the number one client*** for EMS . . . . ***Circle may be the sub-contractor*** for Turner Construction at CDC #21(See attached Turner Construction Company information). ***Circle is currently performing work*** for Turner on another project.

(Ex. DOL, MTF, 09-15-05) (emphases added).

And the Circle/Marchelletta focus continued into 2006, including a review of:

> . . . . the seized hard-drive of Eagle Managed Subcontractors located in

[12] Although the names of the interviewee and other participants are redacted, it is highly likely that SA Bergstrom participated, and that the interviewee is the Special Operations Director for the Southeastern Carpenters Regional Council ("SCRC"), as will be amplified below.

> secure spaces at the IRS-CID Office in Koger Center. The purpose was to obtain any and all information on documents or correspondence about [redacted] and [redacted] association with [redacted] EMS/CSI and ***Circle Industry***.

(Ex. 31) (emphases added).

This report then sets forth a table of documents and descriptions resulting from the seized hard drive review, including "***[b]illing of Circle Industries for work performed for Atlanta Public Schools***." *Id.*

Turning back to SA Jupin's closing report from March of 2007, Jupin made multiple attempts to contact former AUSA Monnin in early 2007: "Writer contacted AUSA Monnin on the following dates with no response: 1/26/07(voice message), 1/30(fax), 2/6/07(email), 2/27/07(voice message)." (Ex. 26.) Jupin then goes on to describe the reasons for closing the investigation:

> This case has been opened since July, 2003. The United States Attorneys Office shows little interest in this investigation over the past six months and a declination has been requested by this office. Based on the above, it is requested that this case be placed in a closed status.

(Ex. 26, ¶¶ 27-28.)

After a four-year, multi-agency, multi-jurisdictional investigation that consumed massive time and resources, the U.S. Attorneys Office in Atlanta declined to even return SA Jupin's phone calls, voice messages, emails, or faxes, and his exasperation and frustration are evident throughout his closing report. (Ex. 26.)

The common thread that insinuates itself through all of these undisclosed investigations and related documents is IRS SA Bergstrom. She takes lead for IRS in the undisclosed FBI OC/LCN money laundering investigation commenced in March of 2003, only several weeks after Customs issues its closing report in late February after concluding that the Marchellettas and Circle had not committed any money laundering offenses, or any other criminal offenses, for that matter.

In turn, the DOL-OIG investigation was orchestrated by the U.S. Attorneys Office and SA Bergstrom to obtain incriminating evidence against the Marchellettas and Circle. Once they'd obtained all they could, they ceased communication with SA Jupin and moved on, without any interest whatsoever in moving forward on the mountain of evidence they had against Gorman and EMS, including evidence of criminal violations of the Internal Revenue Code relating to payroll taxes and employment tax withholding.

As it turns out, according to documents disclosed by DOL Wage and Hour, the origin of the investigation actually began as early as October 1, *1999*, when Jupin commenced his *first* investigation of Gorman and EMS – an investigation that also involved the Marchellettas and Circle and predated the purported "happenstance, random, fortuitous" Customs check seizure by a couple of years.

As SA Jupin related in his November 1, 2001 closing report on that *first* investigation, a DOL supervisor:

> . . . . recommended that W&H ***investigate the companies using the temp employees and that is who litigation should be taken against***. He stated that this firm [Gorman's EMS] could be considered a payroll service even though Eagle hires and fires, and pays the employees.

(Ex. 32) (emphases added).

Significantly, during this *first* DOL investigation commenced in late 1999, Gorman's attorney, Tom DeBerry, provided lengthy interviews with Jupin, the first of which occurred on August 31, 2000, approximately seven months prior to the purported "happenstance, random, fortuitous" Circle check seizure in March of 2001. During this first interview, DeBerry advised Jupin that EMS "operated primarily in the Unites States, ***as well as overseas***." (Ex. 33, FLSA narrative, p. 2.) At Jupin's request, Attorney DeBerry subsequently "provided a list of the General Contractors to whom they [EMS] supply laborers too [sic]." *Id.*, p. 3. Although DOL FOIA disclosure was unable to locate the list DeBerry provided and that was addended to the report, that list would have included Circle as EMS's primary General Contractor. The report goes on to relate that:

> The list Eagle Managed Subcontractors provided on general contractors was small. This list was compared to the general contractors named located on top of the payroll time sheets. ***One of the most common names was The Circle Group.***

*Id.*, p. 5 (emphases added).

Ultimately, DOL Wage and Hour and OIG released hundreds of pages of documents, albeit heavily redacted in many instances. The documents reveal an intense, aggressive investigation against Gorman, EMS, Circle, and Jerry Marchelletta, Jr., including undercover operations, trash runs, mail covers, electronic surveillance, and heavy use of various confidential sources and undercover operatives.[13] Even in heavily redacted form, these documents are littered with specific references to Jerry Marchelletta, Jr., Circle, and actual Circle documents, such as payroll records, invoices, and time sheets.

All of this substantial information would have been exculpatory to the Marchellettas, because at the end of this massive investigation, *no criminal violations were uncovered regarding the Jerry Marchelletta, Jr. or Circle*. In addition, we have no way of knowing how much *Brady/Giglio*, and Jencks material is reposed in these documents because of the heavy redaction of narrative text, and the complete redaction of virtually all names. What *is* clear, is that the prosecution's first trial discovery canard that there was some "independent alien smuggling investigation" independent of the Marchellettas and Circle was

[13] As further discussed below, the defense believes these numerous confidential informants, as well as some of the actual undercover operatives, were supplied by the Southeaster Carpenters Regional Council to the prosecution, to do that which actual government agents could not do, or should not do.

completely false, and most likely intentionally so, given prosecutor Monnin's intimate familiarity with the entire scope of the investigation.

In addition, the already highly dubious prosecution theme that the Circle check seizure in March of 2001 was "happenstance and random" is further and substantially undermined. The government knew that Circle was operating overseas at least as early as August of 2000, and federal law enforcement was keenly interested in Jerry Marchelletta, Jr. at least as early as October of 1999. The prosecution's frequent "if it weren't for the random, fortuitous Circle check seizure, the Marchellettas would have gotten away with bloody tax murder" trial theme is a statement that strongly implies that federal law enforcement had no idea who the Marchellettas or Circle even *were*, but for that purportedly happenstance event. And that is clearly false.

*c. IRS SA Bergstrom and DOL-OIG SA Jupin worked intimately with the Southeastern Carpenters Regional Council ("SCRC") during the investigation of the Marchellettas and Circle, using SCRC undercover operatives, information sharing, "trash runs," and multiple personal meetings with high-ranking union officials to further their criminal investigation.*

The Southeastern Carpenters Regional Council ("SCRC", hereinafter "the Union") inaugurated a campaign of terror against the Marchellettas and Circle, terrorizing the Marchellettas and their children with pickets at their daycare centers

and homes, sending fake Valentine's Day cards with writing disparaging the family name to the Marchellettas' children, mocking Mr. Marchelletta, Sr.'s devout faith by "hand-billing" his neighborhood and neighbors with the now-infamous "Ordained Minister or Saint Marchelletta?" flyer, and otherwise conspiring and colluding to destroy Circle and the Marchellettas.[14] Who could have known that during the Union's reign of terror, the U.S. Attorneys Office and SA Bergstrom had made common cause with the Union to further their criminal investigation of the Marchellettas and Circle.

As early as April 3, 2000, the Union was providing information to SA Jupin regarding EMS in the form of a transcription of an undercover telephone recording made by a Union operative posing as a potential customer. (Ex. 34.) In response to the undercover operative's questioning, the EMS representative states that: "We've got fourteen subcontractors that work for us. We've networked throughout the United States ***and the Bahamas***." *Id.*, p. 4. On April 3, 2000, the Union provided this audio transcription to SA Jupin under official Union

[14] This court took specific note of the "shameful" conduct of the Union towards the Marchellettas at their sentencing on June 20, 2008, and took that into account when determining the appropriate sentence. Although undersigned counsel was in attendance at the sentencing hearing and personally observed intimate and lengthy conversations between then-former AUSA Paul Monnin and Jimmy Gibbs, the Union's Special Operations Director, neither the Marchellettas nor the court could have known the extent of coordination and collusion between the Union, the U.S. Attorneys Office, and SA Bergstrom.

letterhead. *Id.*, p. 1. Approximately one year prior to the Circle check seizure on March 16, 2001, therefore, Jupin was aware of EMS's activities in the Bahamas, and during that same timeframe, had determined that Circle was EMS's primary general contractor.

This information sharing relationship between the Union and the government would only grow stronger and more intimate over the next several years, culminating in numerous personal meetings between IRS SA Bergstrom, DOL SA John Jupin, and various Union Special Operations Directors. One of these Union directors was Steve Shelton, who was deposed on November 5, 2010 in relation to Circle's lawsuit against the Union for conducting illegal secondary boycotts of Circle job sites, the Marchellettas' homes, the homes of general contractors who hired Circle, and the Marchelletta children's day care centers and schools. (*The Circle Group et al. v. Southeastern Carpenters Regional Council*, Case No. 1:09-cv-3039-WSD, N.D. GA.)

Shelton testified that sometime in early 2005, SA Jupin asked him to meet with IRS SA Bergstrom, and Shelton agreed. At the first meeting, Bergstrom told Shelton that "she was investigating Circle Group and wanted to know if I had any information on Circle Group." (Ex. 35) (only the portions of the deposition referring to SA Bergstrom have been attached). Shelton went on to testify that he

personally met with Jupin and Bergstrom on numerous occasions and provided information he had on Circle to Bergstrom. *See id.* Shelton also testified that the Union obtained information through various techniques, including doing "trash runs" on companies they were targeting, where Union operatives would surreptitiously sift through company trash. *See id.*

A witness will also testify that Jimmy Gibbs, the current Director of Special Operations for the Union, spoke to SA Bergstrom by telephone at his union office, so Gibbs has a relationship with Bergstrom as well. (Doc. 238-78, ¶ 9.) Moreover, the audio recording exhibited to the Marachellettas' Rule 33 filing was provided by the Union in discovery in that case, and memorializes Gibbs speaking with a neighbor of Marchelletta, Sr., Sherry Oakes, during a union picket of Mr. Marchelletta's personal residence. (Doc. 238-85) (the media was provided to the court via Fed Ex, but if necessary the defense will re-provision). Gibbs and Oakes discuss how both of them have been working with SA Bergstrom and call Bergstrom by her familiar nickname, "Patti."

We cannot know whether the Marchelletta and Circle related information Bergstrom acquired from the Union was discoverable, because the defense has

never seen that information.[15] We similarly cannot know whether Union operatives surreptitiously recorded any of the three co-defendants in this case and turned those recordings and/or transcriptions over to SA Bergstrom, such that discovery under Rule 16 is mandated. We similarly cannot know whether the Union provided SA Bergstrom with exculpatory or impeachment information that is discoverable. What we *do* know, is that the U.S. Attorneys Office and SA Bergstrom made a deal with the devil to further their criminal investigation of the Marchellettas and Circle, and failed to disclose any of it. Under these unusual circumstances, any retrial would constitute a Due Process violation.

### B. The Prosecutors have Failed to Disclose Substantial *Brady*, *Giglio*, and Jencks information, Mandatory Discovery They've Known About at Least since October 4, 2010.

The Marchellettas filed a Rule 33 motion, memorandum, and exhibits on October 4, 2010. (Doc. 238.) On pages 64 through 77 of the memorandum, the defense categorically set forth the substantial discovery violations that occurred during the first trial. (Doc. 238-1.) Frankly, the extent of these discovery violations is shocking. And at the outset, and to be clear, the prosecution would

[15] Disturbingly, in the Union's discovery provided in the Circle/Union litigation was a picture of one of Jerry Marchelletta, Jr.'s daughters on the balcony of a hotel where he and his family were vacationing in Fort Lauderdale, Florida. The Union claims it does not know where this picture came from, but it is highly likely the picture was taken by a government surveillance team.

have disclosed *none* of this *Brady*, *Giglio*, and Jencks information prior to any retrial, but for the Marchellettas filing numerous FOIA requests, then litigating their right to these materials before this court as to IRS and CBP/ICE at considerable expense. Make no mistake: if the retrial had occurred without the benefit of these massive FOIA disclosures, the prosecution team would have perpetrated the same fraud upon the court and the defendants as they did at the 2007 first trial.

Nevertheless, after receiving thousands of pages of documents through FOIA requests and subsequent litigation, the defense is now in possession of many of these documents. Shockingly, however, of the many witnesses who provided exculpatory information to SA Bergstrom – as detailed in the Rule 33 – not one single MOI was identified in the IRS FOIA litigation or disclosed by the prosecution to this day. These include: (1) Kasandra Logan; (2) Lucille Ronis; (3) Lori Hope; (4) Shanette Bechtold; (5) Anthony Contrino; (6) Sheryl Rea; (7) Merhdad Nankali; and (8) Jeff Cleveland.

Furthermore, based on the defense's continuing investigation after the Rule 33 filing, numerous other Bergstrom MOIs were not provided to the defense during the first trial, and have still not been provided. These include: (1) a second interview of Shawn McBride in early February of 2002; (2) multiple other

interviews of McBride; (3) multiple interviews of CPA Gary Schwartz; and (4) the January 24, 2006 interview of a confidential source who provided sensational impeachment material regarding government witnesses CPA Stanley Schleger and the Nastasis (one of whom testified). Regarding SA Sellers, the prosecution has still not disclosed her ROI for Jeff Cleveland, whom she interviewed on August 21, 2002. Finally, the prosecution has not disclosed *any* rough notes of either SA Sellers or SA Bergstrom, failed to disclose FBI SA Sewell's 302 or rough notes of his March 21, 2000 interview of Shawn McBride, and failed to disclose IRS SA Whitaker's MOI of that same March 21, 2000 interview.

The prosecution team failed to provide substantial amounts of material for the first trial that the Marchellettas would have used to impeach witnesses, put forth exculpatory evidence, and question the good faith and competency of the investigation. These multiple Jencks Act, *Brady*, and *Giglio* violations established a clear pattern and practice of concealing virtually all discovery from the defense that would have assured a constitutionally conforming fair trial. This unseemly pattern and practice continues to this day respecting the retrial, with very substantial mandatory discovery still undisclosed, and substantial discovery that *cannot* be disclosed. Under these circumstances, any retrial would constitute a Due Process violation.

## II. A RE-TRIAL HERE WOULD CONSTITUTE AN UNCONSCIONABLE MISCARRIAGE OF JUSTICE, AND THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER AND DISMISS THIS CASE WITH PREJUDICE TO DETER FUTURE ILLEGAL CONDUCT, PROTECT THE PERCEPTION AND ACTUAL INTEGRITY OF OUR FEDERAL CRIMINAL JUDICIAL PROCESS, AND TO PREVENT THAT MISCARRIAGE OF JUSTICE.

As summarized below, the Marchellettas' Rule 33 filings uncloaked the pervasive government misconduct that infected the investigation and trial of this case – serial misconduct that eviscerated any notion of a Due Process conforming fair trial. As unfortunately might be expected, however – given this case's sordid, surreal, twelve-year history – additional government misconduct has been revealed since the Rule 33 filing in October of 2010, some of which has been set forth at Section I-A, *supra*, with one additional instance of flagrant misconduct that merits particular attention set forth below. In the aggregate, this court's supervisory power is justifiably invoked to dismiss this case with prejudice. By doing so, the ends of justice will be furthered substantially by deterring future illegal conduct, protecting the integrity of our federal criminal judicial process, and preventing a miscarriage of justice.

### Legal Standard

While admittedly a harsh remedy, "[i]t is well established that federal courts have the inherent power to dismiss an indictment if a sufficiently egregious case of

misconduct is shown." *United States v. O'Keefe*, 825 F.2d 314, 318 (11th Cir. 1987); *United States v. Holloway*, 778 F.2d 653, 655 (11th Cir. 1985) ("The law dealing with this particular issue makes it plain that if a sufficiently egregious case of prosecutorial is shown, this Court has the inherent power to direct the indictment to be dismissed."); *see Jordan*, 316 F.3d at 1248-49 ("The dismissal of an indictment on the ground of prosecutorial misconduct is a discretionary call; we therefore review the court's action for abuse of discretion."). A district court may exercise this supervisory power of dismissal to implement a remedy for violations of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and to deter future deliberate governmental improprieties. *See United States v. Hasting*, 461 U.S. 499 (1983); *Elkins v. United States*, 364 U.S. 206, 218 (1960) (in referring to Court's supervisory powers in context of an evidentiary exclusionary rule, noting that "[its purpose is to deter – to compel respect for the constitutional guaranty in the only effective available way – by removing the incentive to disregard it"); *Chapman*, 524 F.3d at 1085.

With an eye on primarily on deterring future Government misconduct, courts have widely recognized the propriety of courts using their supervisory powers to dismiss an indictment where the Government's misconduct arises to flagrancy as

characterized by multiplicity, intent, lack of contrition, or unconscionability. *See e.g.*, *United States v. Lopez-Avila*, 678 F.3d 955, 964 (9th Cir. 2012) (noting that the remedy of dismissal with prejudice is "strong medicine for the entire prosecutorial group", the court remanded "the case to allow the district court to consider dismissal with prejudice of the indictment as an exercise of its supervisory powers and to prevent other misconduct in the future"); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993) (remanding for the district court to determine whether to dismiss the indictment with prejudice as a sanction for the government's behavior, noting that the district court may exercise its supervisory power to make it clear that the misconduct was serious and that steps *must* be taken to avoid a recurrence); *United States v. Hogan*, 712 F.2d 757, 761 (2nd Cir. 1983) (finding that prosecutor's extensive reliance on false testimony, hearsay, and inflammatory rhetoric when before the grand jury, along with other misrepresentations, was flagrant and unconscionable and required dismissal).

In a recent 2011 case, a district court dismissed an indictment with prejudice for flagrant misconduct embracing some, but not all, of the serial misconduct here. *See United States v. Aguilar*, 831 F.Supp.2d 1180 (C.D. Cal. 2011) (using supervisory powers to throw out convictions and dismiss indictment due to the government misconduct of having an FBI agent lying to the grand jury, inserting

material falsehoods into affidavits for search and seizure warrants, recklessly failing to comply with discovery obligations, making misrepresentations to the court, and engaging in questionable behavior during closing argument); *see also United States v. Breslin*, 916 F.Supp. 438, 446 (E.D. Pa. 1996) (dismissing indictment due to prosecutor's actions in front of the grand jury, including introducing of admittedly irrelevant, highly prejudicial testimony, reading transcripts that seriously distorted testimony, and introducing hearsay evidence in a misleading manner); *United States v. Ruehle*, Case No. 8:08-cr-00139-CJC (C.D. Cal.) (Doc. 828, p. 5195) (ordering dismissal in Broadcom back-dating case: "The cumulative effect of [prosecutorial] misconduct [involving the intimidation of witnesses] has distorted the truth-finding process and comprised the integrity of the trial. To submit this case to the jury would make a mockery of Mr. Ruehle's constitutional right to compulsory process and a fair trial."); *United States v. Stevens*, No. 08-231 (D.D.C., April 7, 2009) (setting aside convictions of the late Senator Ted Stevens and ordering criminal contempt investigation on basis of prosecutorial misconduct); *United States v. Stein*, 541 F.3d 130, 136 (2nd Cir. 2008) (affirming dismissal order: "We further hold that the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government

did not cure the violation."); *United States v. Leung*, 351 F.Supp.2d 992, 996 (C.D. Cal. 2005) (ordering dismissal: "The government engaged in willful and deliberate misconduct, depriving defendant of her right of access to a critical witness in her defense."); *Lyons*, 352 F.Supp.2d at 1243 (M.D. Fla. 2004) (ordering dismissal of indictment with prejudice: "myriad [*Brady* and *Giglio*] violations that collectively reveal a prosecution run amuck"); and finally, *United States v. Ramming*, 915 F.Supp. 854, 868 (S.D. Tex 1996) (ordering dismissal: "Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path.").

Dismissal is especially appropriate where, as here, the Government flagrantly fails to meet its constitutional obligations to assure a fair trial, particularly those obligations articulated by *Brady* and its progeny. While the usual remedy for *Brady* violations is a new trial, flagrant *Brady* violations of represent "prosecutorial misconduct in its highest form; conduct in flagrant disregard of the United States Constitution; and conduct which should be deterred by the strongest sanction available." *Chapman*, 524 F.3d at 1085 (affirming a district court's dismissal where the government egregiously failed to meet its constitution obligations under *Brady* and *Giglio* – failing to make an inquiry of discoverable materials concerning key witnesses until after trial began, repeatedly

misrepresenting to the district court that all such documents had been disclosed prior to trial, and failing to turn over more than 650 documents until the day the court declared a mistrial); *Kojayan*, 8 F.3d at 1324 (encouraging district court to exercise its supervisory powers where "evidence of [witness] plea agreement might well have helped convince the jury to reach a not guilty verdict for one or both of the defendants" and prosecutor did "everything he could to keep from learning [witness'] whereabouts and the existence and nature of the cooperation agreement"); *Dollar*, 25 F.Supp.2d at 1332 (Where the Government's practice was to disclose as little as possible and as late as possible in response to the defendant's unrelenting effort to obtain *Brady* materials, "court [was] forced to conclude that the United States [had] defaulted on its fairness obligation … In its determined effort to convict the defendants, the United States [] trampled on their constitutional right to *Brady* materials … disregard[ing] its constitutional and statutory obligations to the defendant and its ethical obligations to the court.").

Similarly, and particularly apt here, because "[m]uch of what the United States Attorney's office does isn't open to public scrutiny or judicial review, where Government misconduct is followed by lack of contrition or lack of awareness, dismissal by the use of the court's supervisory powers is perhaps the only remedy to assure that the circumstances that gave rise to the misconduct won't be repeated

in other cases. *Kojayan*, 8 F.3d at 1318 ("Most disappointing of all, perhaps, is the government's failure to acknowledge that the prosecutor's misconduct was far more than a simple slip of the tongue, more than a temporary misstep … In determining the proper remedy [for prosecutorial misconduct], we must consider the government's willfulness in committing the misconduct and its willingness to own up to it"); *Chapman*, 524 F.3d at 1088 ("The government's tactics on appeal only reinforce our conclusion that it still has failed to grasp the severity of the prosecutorial misconduct involved here, as well as the importance of its constitutionally imposed discovery obligations. Accordingly, although dismissal of the indictment was the most severe sanction available to the district court, it was not an abuse of discretion"); *Lopez-Avila*, 678 F.3d at 964 (finding troubling the government's "continuing failure to acknowledge and take responsibility for" the prosecuting attorney's misrepresentation in front of the court and nothing that "[w]hen a prosecutor steps over the boundaries of proper conduct and into unethical territory, the government has a duty to own up to it and to give assurances that it will not happen again … [a]ccordingly … we remand the case to allow the district court to consider dismissal with prejudice of the indictment … to prevent other misconduct in the future").

**A. Massive Discovery Violations, Streaming Perjury from the Two Lead Special Agents and Other Prosecution Witnesses, False Statements to the Court by the Prosecutors, and False and Misleading Statements During Opening Statement and Closing Argument Rendered the First Trial an Epic Fraud, From Start to Finish.**

As documented in the Marchellettas' Rule 33 Motion, Memorandum, and Exhibits, flagrant government misconduct infected the entire investigation, indictment, and prosecution of the Marchellettas, including:

1. Rampant perjurious trial testimony by Customs SA Kimberly Sellers and IRS SA Patricia Bergstrom;

2. Suborning perjury of several key prosecution witnesses;

3. Threatening, coercing, and intimidating witnesses;

4. Fabricating evidence, including a forged report presented by the prosecution as an official U.S. Customs report;

5. Repeatedly lying to and misleading the jury regarding key elements of the case;

6. Serial violations of Fed. R. Crim. P. 6(e) and 26 U.S.C. § 6103(h);

7. Illicit collusion and conspiracy with private parties, including the Union, in order to obtain documents and information that could not be obtained through legal means;

8. Massive discovery violations, including:

    a. deliberate manipulation of discovery materials to conceal the true origin, nature, and scope of the investigation from the district court, the jury, and the defense;

b. intentional withholding of crucial IRS and Customs memoranda of interview and reports – memoranda and reports that were inconsistent with, if not diametrically opposed to, the prosecution's false trial themes;

c. provisioning of official IRS and Customs memoranda of interview that contained patently false statements by Customs SA Sellers and IRS SA Bergstrom regarding core issues in the case; and

d. multiple other violations of Rule 16, *Brady/Giglio*, and Jencks that substantially prejudiced the defendants in the preparation and presentation of their defense.

Standing alone, based upon the precedents that endorse, support, and affirm dismissing indictments with prejudice and the facts of those cases, the flagrant misconduct that infected the investigation, indictment, and prosecution of the first trial case alone rises to a surreal level above and beyond any of those case's facts. But when combined with the post-trial misconduct and additional misconduct revelations set forth at Section I-A, *supra* – as well as a singularly pernicious additional instance of misconduct set forth immediately below – the predicates for dismissing the indictment with prejudice here far exceed the aggregate of flagrant misconduct that required dismissal in all of the precedents combined.

**B. New Evidence Obtained Since the Rule 33 Filing Shows that SA Bergstrom Obstructed Justice by Threatening a Witness not to Pursue a Lawful Course of Action in Order to Protect Her False Theory of Criminality.**

On October 5, 2005, SA Bergstrom spoke to Gorman's attorney, Bruce Morris, and memorialized that conversation in a Memorandum of Conversation ("MOC"). (Ex. 36.) This MOC was not disclosed to the defense prior to the first trial, nor was it disclosed during the IRS FOIA litigation, but rather when AUSA Bly provisioned the documents identified during that litigation as "GJ" materials in December of 2011. This short but extremely important document merits quotation in full part:

> On the above date and time, Bruce Morris, attorney for George Gorman, telephoned me and advised me that he was speaking on behalf of George Gorman. Mr. Morris made the following statements:
>
> 1. Morris advised me that Gorman had told him that JERRY MARCHELLETTA JR. had never repaid the loan to him by C&G Enterprises Inc.
>
> 2. Morris wanted assurance from me that I would not consider action or inaction by Gorman as an overt act in a conspiracy with MARCHELLETTA.
>
> 3. ***I responded that any demand for a repayment of funds to C&G Enterprises would be considered an overt act, as the theory of investigation was that the funds were not a loan to MARCHELLETTA***.
>
> 4. Morris was going to advise Gorman not to take any action to demand payment of any funds from MARCHELLETTA. I told

Morris I would document our conversation and that I would not consider any inaction by Gorman to be an overt act.

5. Morris advised that he appreciated my documentation of this conversation.

*Id.* (emphases added).

Here, SA Bergstrom inserts herself as a material participant in her own investigation, and protects her false "theory of investigation" by threatening Gorman into not demanding repayment of a loan he made to Jerry Marchelletta, Jr. Gorman, of course, was entitled to pursue repayment of the loan, a clearly lawful course of conduct. According to SA Bergstrom, and shockingly, an overt act of conspiracy includes any act – even a lawful one – that conflicts with her "theory of investigation." Importantly, this $250,000 loan figured large in the prosecution's aggressive opening statement and closing argument.

In former AUSA Anand's opening statement, several references are made to Gorman, whom he identified to the jury as an unindicted a co-conspirator. At one time, Gorman provided labor to Circle, particularly during the Atlantis Hotel and Casino project in Nassau, Bahamas. As AUSA Anand described it, Gorman was an "intermediary, someone who was willing to help" the Marchelletta "funnel $250,000 of Circle's money made in the Bahamas back to the Defendant Marchelletta Junior in the U.S. in a way that wouldn't look like income." (Trial

Transcript Vol. I, p.16.) The loan from Gorman to Marchelletta was an important part of the prosecution's case-in-chief, and based upon an explicit allegation in the superseding indictment:

> On or about April 30, 2004, G.G. (George Gorman) extended until April 11, 2004 the balloon payment due from defendant Marchelletta on his purported $250,000 note to G&C Enterprises (Gorman's company). ***Defendant Marchelletta has never repaid the loan***.

(Doc. 42, ¶ 4-G) (emphases added).

Former AUSA Monnin then hammered the loan issue home to the jury in closing argument as evidence of intent:

> Mr. Marchelletta Junior. First category that we have here is the $250,000 supposed loan that we have. Let me tell you a couple things about that. First, it's a loan between Mr. Marchelletta Junior and George Gorman, his long-time friend, business associate, business partner, a guy who he is routinely going out to clubs with, and a guy who he's routinely conducting business with, and a guy who is as well, associated with the Atlantis project, allowed himself to generate half a million dollars of more of revenues for C&G in 1999 when this transfer was.
>
> ***So, as you evaluate intent*** – and let me tell you, we didn't put Mr. Gorman before you for your consideration, but we did put loan documentation that was signed by Mr. Gorman on behalf of his Chris & George company, C&G Enterprises, that says if this is going to be a bona fide loan, Mr. Marchelletta Junior, if I'm going to give you 250 grand, you have to give me a security interest in this Tullamore lot that we've seen here throughout this litigation. Did that ever happen? Of course not. So, you've got somebody who claims to have a legitimate $250,000 interest, yet never does anything to secure it. Nothing is recorded, no pledge is ever made.

> I could write on here and style this as a loan and have Mr. Anand sign it, and we could call it a loan, and it – we might not have any intention of it being a loan. ***And when you're making your decision as to whether this is a loan or not, you need to look at whether the creditor took it seriously, which he certainly did not.***

(Doc. 213, Trial Transcript Vol. IX, pp. 43-44) (emphases added).

As SA Bergstrom and the prosecutors demonstrated repeatedly throughout the first trial, nothing – including the truth – would stand in the way of obtaining convictions at any and all cost. By threatening Gorman not to pursue a lawful course of conduct – demanding repayment of the loan that he wanted repaid – Bergstrom illicitly protected one of the prosecution's main trial themes, and as to the all-important intent element in a case where truthful intent evidence was non-existent. And again it bears noting that this MOC and its very seriously implications would never have been disclosed by the prosecution but for the Marchellettas' FOIA litigation.

### C. Deterrence of Future Misconduct and the Fact the Marchellettas would be Irreparably Prejudiced by any Retrial Strongly Counsel Dismissing this Indictment with Prejudice.

The systemic misconduct that has marked Government investigations and prosecutions for far too long *requires* courts to exercise their supervisory dismissal powers to protect the public perception of, and the actual existence of, the integrity of the proceedings before it, and to deter not only the government investigators and

prosecutors practicing directly before it, but also the win-at-all costs attitude and abject ambivalence to constitutional rights that has seemingly pervaded Government investigations and prosecutions in districts across the county.[16] (Addendum, filed concurrently with this memorandum.) Besides imposing criminal liability upon investigators and prosecutors, taking away the incentive to engage in misconduct by imposing the most aggressive sanction in cases of flagrant government misconduct – dismissal pursuant to the exercise of supervisory powers – is perhaps the only meaningful and effective way to deter prosecutors who believe that "nobody can touch them. Nobody!" *See generally* PBS Religion & Ethics Newsweekly (Video), *Prosecutorial Misconduct*, available at http://www.pbs.org/wnet/religionandethics/episodes/july-13-2012/prosecutorial-misconduct/11821/ (Former United States Attorney for the District of Columbia Joseph Digenova stating that "I'm a former United States Attorney. I locked up a lot of people. I believe in the Department, I believe in its mission. But the

[16] With its results published in late 2010, an investigation by the USA Today found 201 instances since 1997 of federal courts finding that prosecutors violated laws or ethics rules, resulting in the harassment of innocent citizens and the shortening of sentences for the guilty. USA Today, *Prosecutor Misconduct Lets Convicted Off Easy*, at http://www.usatoday.com/news/washington/judicial/2010-12-28-1Aprosecutorpunish28_CV_N.htm?loc=interstitialskip; A study conducted by the Center for Public Integrity found that prosecutorial misconduct was a factor in dismissed charges, reversed convictions, or reduced sentences in at least 2012 cases since 1970. Center for Public Integrity, *Harmful Error: Investigating America's Local.*

Department is in real trouble. This is serious business. These career prosecutors believe that nobody can touch them. Nobody! That's a very dangerous thing in a free society and the Stevens case proves it in spades.").

Moreover, and just as important as the need for deterrence given the Marchellettas' constitutional right to a Due Process conforming fair trial, the court must consider the prejudice of any retrial to the Marchellettas in the wake of a first trial singularly plagued by flagrant government misconduct. *See United States v. Lopez-Avila*, Case No. 4:10-cr-00035-CKJ-HCE (D.C. Ariz.) (*quoting United States v. Ross*, 372 F.3d 1097, 1081 (9th Cir. 2004)) (finding substantial prejudice to the defendant and dismissing the indictment because "when an initial prosecution ends in mistrial, a subsequent retrial will increase the emotional and financial burden imposed on the defendant, and may give the state an unfair opportunity to tailor its case based on what it learned the first time around.").

## CONCLUSION

It is well past time for the Marchellettas' ordeal to end. The Marchellettas, their families, their beloved Circle company, and justice have suffered enough.

WHEREFORE, the Marchellettas respectfully requests the court dismiss this case with prejudice.

Respectfully submitted on August 6, 2012.

THE BERNHOFT LAW FIRM, S.C.
Attorneys for the Defendant

By: /s/ Robert G. Bernhoft
Robert G. Bernhoft
Wisconsin State Bar No. 1032777

207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
rgbernhoft@bernhoftlaw.com

**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, | ) | Case No. 1:07-CR-107-TCB |
| | ) | |
| Defendants. | ) | |
| | ) | |

This is to certify the above "Motion to Dismiss for Outrageous Government Misconduct" as well as the supporting memorandum has been filed in accordance with the font requirements set forth in Local R. 7.1D, N.D.Ga. Specifically, the brief is prepared using Times New Roman with a 14-point font.

Respectfully submitted on August 6, 2012.

THE BERNHOFT LAW FIRM, S.C.
Attorneys for the Marchellettas

By: /s/ Robert G. Bernhoft
Robert G. Bernhoft
Wisconsin State Bar No. 1032777

1220 Colorado Street, Suite 440
Austin, Texas 78701
(512) 582-2100 telephone
(512) 373-3159 facsimile
rgbernhoft@bernhoftlaw.com