IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 13-2447

UNITED STATES OF AMERICA,
Appellee

v.

JAMES BULGER
Appellant

ON APPEAL FROM THE JUDGMENT AND COMMITMENT ORDER AFTER CONVICTION BY JURY BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
99-10371-DJC

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Mr. Bulger was convicted of thirty-one counts of the indictment on August 12, 2013. (D. 1304). The Court issued Mr. Bulger's Judgment and Commitment Order on November 19, 2013 (D. 1388), and he filed a timely appeal on November 20, 2013. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review District Court decisions pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did The Trial Court Violate Mr. Bulger's Fifth And Sixth Amendment Rights When It Ruled That He Could Not Testify At Trial That He Had Been Granted Immunity From Prosecution Requiring Automatic Reversal?

2. Were The Cumulative Effect of The Government's Brady Violations So Prejudicial To Mr. Bulger That A New Trial Was Warranted On The Grounds That He Was Denied His Fifth And Sixth Amendment Right To A Fair Trial, Due Process and Right To Confront Witnesses?

3. Did The Trial Court Commit Reversible Error When It Ruled That The Defense Could Not Call The State Trooper Who Alleged That Martorano Was Engaged In Ongoing Criminal Conduct And A Prosecution Team Member Had Obstructed His Investigation?

4. Was The Prosecutor's Repeated Disparagement Of Counsel And Opinions On Evidence In Front Of The Jury So Prejudicial That Reversal Is Required?

5. Did The Cumulative Effect of All The Errors and Prosecutorial Misconduct Violate Mr. Bulger's Fifth Amendment Right To A Fair Trial?

STATEMENT OF THE CASE

This case arises out of Mr. Bulger's 1995 indictment and 2013 conviction before a jury for multiple federal crimes including 18 U.S.C. § 1962 (RICO), 18 U.S.C. § 1956 (money laundering), and 18 U.S.C. § 924(c) (firearms violation). (Third Superseding Indictment, D. 215). The Honorable Richard Stearns originally presided over the case, but was recused after this Court granted the defense motion to that effect. *In re Bulger*, 710 F.3d 42 (1st Cir. 2013). The Honorable Denise Casper presided over his trial and sentenced Mr. Bulger to life imprisonment followed by a consecutive minimum mandatory term of five years and a consecutive minimum mandatory term of life on November 19, 2013. (D. 1388). Trial lasted thirty-five days and over a thousand exhibits were admitted. Mr. Bulger filed his timely appeal on November 20, 2013. (D. 1389).

STANDARD OF REVIEW

Objected to errors of fact are reviewed pursuant to the clear error standard. *United States v. Bryant*, 571 F.3d 147, 153 (1st Cir. 2009). Unobjected to errors are reviewed under the plain error standard. *United States v. Hansen*, 434 F.3d 92, 98 (1st Cir. 2006). This Court reviews the district court's legal conclusions regarding constitutional claims novo. *United States v. Earle*, 488 F.3d 537, 542 (1st Cir. 2007). This Court has held, "[i]f a constitutional error has occurred, we must order a new trial unless the government has shown that any error was 'harmless' beyond a reasonable doubt." *Id*.

There is a serious question about whether the harmless error standard applies when the appellant's right to testify is deprived by the court. *Compare Bucuvalas v. United States*, 98 F.3d 652 (1st Cir. 1996), with *Lema v. United States*, 987 F.2d 48 fn 4 (1st Cir. 1993). *Compare also Chapman v. California*, 386 U.S. 18 (1967), with *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). As deprivation of the right to testify constitutes a structural error, appellant moves this Court to apply the automatic reversal standard in this case. *United States v. Gonzalez-Lopez, supra*.

STATEMENT OF THE FACTS

The United States Attorney's Office indicted James Bulger in 1995 for various federal offenses including RICO and alleged that he had led an organized crime syndicate in Boston from the early 1970s into the 1990s. (This indictment was the first docket entry in 95-mj-00001-LPC-3.) Despite James Bulger's notorious reputation in Boston for over twenty years, he was never charged with a crime. (*E.g.*, D. 750:9).[1] The federal government did not arrest Mr. Bulger until 2011. (Tr. 30:60, 69).[2]

A. History of Corruption

Before Mr. Bulger's arrest, many significant events transpired, including the 2002 Congressional hearings in which Jeremiah Sullivan was called to testify about his decision to forgo indictments against Mr. Bulger in a race-fixing case.[3] O'Sullivan was the head of the Strike Force and later the United States Attorney for the District of Massachusetts. The Committee determined that O'Sullivan's testimony was "false." (D. 848).[4] The history of corrupt practices in federal law

[1] Pleadings and court orders are cited as D. (ECF Docket Number):(page number).
[2] Trial transcripts are hereinafter referred to as Tr. (Day):(page number).
[3] D. 848, citing Investigation of Allegations of Law Enforcement Misconduct in New England: Hearing Before the H. Comm. on Gov. Reform, 107th Cong. 300-02 (2002), "Everything Secret Degenerates."
[4] The Committee found ". . .O'Sullivan testified that before the Committee that another reason that he did not indict Flemmi was because Flemmi's role in the race-fixing scheme was limited to the receipt of proceeds from the illegal scheme. This testimony was false. When confronted with his own memorandum that Stephen Flemmi and James Bulger participated in a meeting to

enforcement in this district are well-documented, and the government's modus operandi was presented to the trial court. (D. 848). *See Limone v. United States*, 815 F. Supp. 2d 393, 409 (D. Mass. 2011) ("[T]here is no doubt that there was bad faith in connection with the government's conduct during discovery…"); *Ferrara v. United States*, 384 F. Supp. 2d 384 (D. Mass. 2005)("The sad fact is that the government promised the petitioner that it would carry out fully its obligation to produce exculpatory evidence but instead manipulated a key witness, deliberately chose not to reveal to the petitioner the stunning evidence concerning Jordan's recantation, yet represented falsely to the petitioner that it had kept its promise.") Exposure of the government's practices resulted in nineteen civil trials brought by victims and their family members against the Department of Justice alleging corruption and/or liability for crimes against them. (D. 729:1, n.1).

B. The Case Against Mr. Bulger

The government's case against Mr. Bulger was built primarily using testimony from cooperating witnesses who, in exchange for their testimony, were rewarded with vast sums of money, the return of forfeitable property obtained with illegal proceeds, dramatically reduced sentences, and in some cases, relief from the

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discuss the race-fixing scheme, that Bulger and Flemmi 'would help find outside bookmakers to accept the bets of the group' that they were financiers of the conspiracy and that Flemmi appeared to be a part of the core working group of the conspiracy, O'Sullivan replied, 'You've got me.'" Everything Secret Degenerates at 315-16.

death penalty. The government also unconvincingly presented witnesses and documents in an effort to support its theory that Mr. Bulger was an informant during the 1980s and 1990s. This informant claim was central to the government's argument that John Connolly was a rogue agent who masterminded Mr. Bulger's success, rather than acknowledging the liability and complicity of the DOJ.[5]

Former FBI agent John Morris was given complete immunity in exchange for his testimony. (Tr. 12:179-80). He admitted to committing numerous crimes including providing information to Mr. Bulger from a Title III (Tr. 13:78; Tr. 14:92-98), information about Brian Halloran's cooperation with the FBI which the prosecution asserted led to Halloran and Michael Donahue's deaths (Tr. 13:31,34), accepting bribes (*e.g.*, Tr. 13:31) and knowingly filing false reports authored by John Connolly. (Tr. 13:67). Despite his crimes, Morris was allowed to keep his pension. (Tr. 14:157).

John Martorano admitted to killing twenty people. Two of these murders involved the death penalty. (Tr. 2:74; Ex. 1157; Ex. 1158; Ex. 1159). His plea agreement called for a sentencing range of twelve-and-a-half to fifteen years and

[5] Trooper Thomas Foley testified: "Q. So when you said in the book that the federal government stymied your group's investigations, they got you investigated on bogus claims, tried to push you off the case of pursuing Winter Hill and Mr. Bulger, got you banished to a distant barracks, phonied up charges against other members of the State Police, lied to reporters, misled Congress, drew on the President of the United States to save themselves, and nearly got you and your investigators killed, that was the truth wasn't it? A. Yes, it was." (Tr. 2:125-36).

not being subject to the death penalty in two capital cases in exchange for his cooperation and future testimony. (Tr. 4:69). The Honorable Mark Wolf sentenced him to fourteen years in prison.[6] (Tr. 4:69). Martorano also received financial payments, including $6,000 for his jail canteen and $20,000 for his "transition" into civilian life upon release, (Tr. 4:82-84) and $200,000 from illegal proceeds resulting from the sale of a home. (Tr. 6:87-88) He was also permitted to keep $70,000 in royalties from a book deal and $250,000 from movie rights about his criminal activities, with the prospect of an additional $250,000 if his movie is produced (Tr. 6:91-92, 95).

Kevin Weeks was charged with racketeering and faced thirty years to life before he quickly agreed to cooperate. (Tr. 17:129; Tr. 16:55; Ex. 1166). He also entered coordinated agreements with state authorities, which provided him immunity for his state crimes. (Ex. 1164, 1165, 1167; Tr. 16:64). He pled guilty to the charges, which included five predicate murders and received a six-year sentence. (Tr. 16:56, 66). Weeks was returned some of the proceeds from a lottery

[6] In D. 768 at n.10, the defense reproduced Judge Wolf's statement at John Martorano's sentencing hearing: "He [Martorano] did say he didn't want to testify against certain people, Pat Nee and Howie Winter, and I continue to have concerns that in cultivating this relationship, all of the relevant questions with regard to those individuals were not pursued, Mr. Nee being the last person, according to the evidence presented to me in 1998, to have been with John McIntryre before he disappeared, and we now know he died." Martorano Sentencing Hr'g. 109:12-19 (June 24, 2004).

ticket the government previously sought to forfeit. (Tr. 17:146-47). He was only called as a trial witness in criminal cases against John Connolly and James Bulger.

Stephen Flemmi was spared the death penalty in two states (Tr. 24:99), and was placed in Witness Security with vastly improved conditions as part of his deal. (Tr. 25:10; Ex. 1172A-D, 1171). Flemmi's relations were allowed to stay in residences he bought with criminal proceeds and the government forewent forfeiture proceedings on other properties. (Tr. 25:20-21). He was never prosecuted with the Poulos murder in Nevada despite his confession (Tr. 27:152), and his plea bargain in Florida allowed for a future Rule 35 motion. (Tr. 29:26-32).

Anthony Attardo was provided complete immunity (Ex. 1150) after committing perjury in the grand jury for which he was never charged. (Tr. 20:80-93). He was allowed to keep his bar, which was purchased with illegal proceeds. (Tr. 20:103). Similarly, Richard Buccheri, who committed perjury before a federal grand jury after being granted immunity, was never charged. (Tr. 29:134, 146, 148-49). He was a close friend of both James and John Martorano. (Tr. 29:137-38).

Frank Capizzi, Ralph DeMasi, and Joseph Tower were all granted complete immunity by courts. (Tr. 8:116-17; Tr. 7:54-55; Tr. 14:160). William Shea received immunity before testifying in 1997. (Ex. 1173; Tr. 15:112).

Paul Moore's sentence was reduced in half after he agreed to cooperate. (Tr. 20:20). Kevin O'Neil pled guilty to federal charges and received a year sentence in

exchange for his cooperation. (Tr. 29:61-63). William Haufler was a criminal associate of Kevin Weeks. After Weeks became a cooperating witness, law enforcement, gave him a note from Weeks--the contents of which have never been disclosed to the defense--and retrieved numerous firearms from Haufler's basement. While Haufler was not given formal immunity, he testified law enforcement provided him an informal promise characterized as "a wink and a nod" and he was never charged with any crime. (Tr. 16:50). Haufler was given immunity on the day of his testimony. (Tr. 16:12; Ex. 1329).

James Katz, who had been convicted of money laundering and given a long federal prison term, had his sentence reduced; an order forfeiting over one million dollars in property was vacated after he agreed to cooperate. (Tr. 3:10, 61; Ex. 1155). He also received over $85,000 from the government. (Tr. 3:117).

David Lindholm who had previously received the benefit of a Rule 35 motion, had his sentence reduced in exchange for his cooperation and received immunity for his 1995 grand jury testimony. (Tr. 23:139, 140). He was also provided a home and rental car, and received about $85,000 from the FBI and DEA. (Tr. 23:140-41). Richard O'Brien pled guilty to perjury and obstruction of justice and entered an agreement that also protected his daughter, both receiving probation in exchange for his cooperation. (Tr. 3:130; Ex. 1170; Tr. 3:133-34; Tr. 4:51, 55-56, 58). Charles Raso aided John Martorano as a fugitive by collecting his

illegal gambling proceeds and sending money to him in Florida. (Tr. 7:105-06, 118-19). He also purchased a house under his name for Martorano, and paid the taxes and other fees from cash given to him by Martorano. (Tr. 7:118-19). Despite his crimes, he was never charged.

Michael Solimondo, who was friends with James Martorano, committed perjury in front of a Florida grand jury investigating Callahan's death. (Tr. 22:145). When recalled, he lied again, purportedly at James Martorano's instruction to blame Bucky Barrett. (Tr. 22:146-47). He was provided a compulsion order promising whatever he had done would be excused. (Tr. 22:114).

C. Tacit Promises and Ongoing Protection

The full scope of John Martorano's cooperation agreement is still unknown despite extensive efforts to obtain evidence of tacit promises made by the government. (D. 768; D. 848; D. 856; D. 979; D. 987; D. 994). The government opposed numerous discovery requests including those related to tacit promises (D. 785; D. 854; D. 859; D. 860; D. 881; D. 900) and denied that they had promised Martorano that he would not have to testify against his brother, James Martorano, Pat Nee,[7] Howard Winter,[8] and others. (Tr. 2:207-09; Tr. 6:103). These representations were shown to be untrue at trial. (Tr. 2:170-73; Tr. 6:35; 133-134)

[7] John Martorano told Trooper Foley that Pat Nee was involved in murders with him. (Tr. 2:165-66).

The question of tacit promises to Martorano also arose one month before trial when the government provided investigative reports, mostly conducted by members of the prosecution team, to the defense. The reports memorialized interviews of John Martorano and some of his associates, where everyone interviewed denied any wrongdoing by Martorano. (PT 6/7/13:21). The defense independently learned that an active twenty-year veteran of the Massachusetts State Police had made a complaint alleging that John Martorano was involved in ongoing crime and that his handler, and key member of the prosecution team, Trooper Stephen Johnson, was obstructing investigation into the Martoranos criminal activity. (D. 979). The prosecution refused to provide these materials to the defense and the court denied the defense discovery requests without an evidentiary hearing. (D. 988; PT 6/11/13 (pm):4). The court also precluded the defense from calling the Trooper who made the complaint and Martorano's associates listed in the reports as witnesses at trial. (Tr. 29:160-61).

D. Trial Defenses

Mr. Bulger intended to show that he had been granted immunity through witnesses and his own testimony. (Tr. 35:72). The government sought to prevent

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[8] Martorano testified about Howie Winter's direct involvement in nine murders: (1) Milano (Tr. 4:121); (2) Plummer: (Tr. 4:128); (3) O'Brien (Tr. 4:129; Tr. 5:175); (4) Joseph Notarangeli (Tr. 4:133); (5) Al Notarangeli (Tr. 4. 138:15); (6) O'Toole (Tr. 4:144); (7) Sousa (Tr. 4:148-49); (8) King (Tr. 5:27); (9) Castucci (Tr. 5:42).

Mr. Bulger from testifying at trial about immunity and his relationship with Jeremiah O'Sullivan by requesting the court decide the issue pre-trial rather than allowing the jury to assess the evidence. (D. 855; PT 4/26/13). The court precluded the defendant from raising his immunity arrangements at trial in any form, including but not limited to, cross-examining adverse witnesses, presenting any evidence through his own witnesses, and most importantly, testifying to the agreement himself. (D. 835).[9]

Despite the grave restrictions on the defense, the prosecution was allowed to discuss the relationship between Mr. Bulger and Jeremiah O'Sullivan to support their hypothesis that Mr. Bulger's criminal success was based on his role as an FBI informant. (Tr. 12:84-87). The defense was precluded from demonstrating that the informant characterization was a fabrication devised to insulate the Department of Justice, Jeremiah O'Sullivan, and his superiors from liability. (D. 835; Tr. 2:38-39; Tr. 17:101-04; Tr. 27:4-10). Instead, the court limited the defense to addressing the government's rogue agent theory without reference to the role of the DOJ. (Tr. 33:107-12; Tr. 34:48-51).

Contrary to the prosecutors' rogue agent theory, that "[t]here's two corrupt agents here,"[10] there was a vast amount of evidence supporting the conclusion that

[9] During the government's first witness, the court iterated its preclusion of immunity and related matters. (Tr. 2:36-39).

[10] Tr. 28:77 offered by virtue of prosecution speaking objection.

the corruption in Bulger's case was institutional and not limited to two agents. The defense was precluded from effectively countering the government's theory of limited government liability, (Tr. 28:77), even though Trooper Foley admitted that many times the Department of Justice itself was undermining his investigations (Tr. 2:127), offering, the "mobsters, and the FBI, and the United States Attorney's Office didn't traffic in the truth, it wasn't their language, they said everything but, it was all lies and half-truths and deceptions." (Tr. 2:127-28). The government was allowed to routinely promote its rogue agent theory but the defense was precluded from rebutting and developing contradictory evidence in response given the court's preclusion of Mr. Bulger's immunity defense.[11]

Trooper Foley conceded that his opinion that Mr. Bulger was an informant was partially based on two unreliable and corrupt sources. The first source consisted of what he was told by the FBI, the same FBI that lied to him and undermined his investigations. (Tr. 2:218). The second source for his opinion that Bulger was an informant came from Connolly's file which, again, was written by

[11] The government questioned Stephen Flemmi extensively to try to demonstrate that he did not have immunity. The defense sought to use the door the government opened to introduce evidence to rebut the proposition, and to question Mr. Bulger similarly. (Tr. 27:4-11). The defense made clear they were limiting their approach based on the court's ruling and that Mr. Bulger intended to testify about his immunity agreement if allowed. (*Id*.). Counsel simply wanted to ask Mr. Bulger the same questions the prosecutor was allowed to ask Flemmi. (*Id*.). The court reviewed Flemmi's testimony and precluded the defendant from rebutting the government's contentions. (Tr. 27:195-97).

the same group of people who had lied and undermined his investigations. (Tr. 2:219). Foley admitted that had never witnessed or heard Mr. Bulger provide information about anybody to law enforcement. *Id.*

Former FBI agent and informant coordinator Frank Davis Jr. testified "it was continually a source of aggravation to the agents assigned to my squad that [Connolly] would just walk into the squad area and access the rotor."[12] (Tr. 33:105). After reviewing the Connolly's file in his role as an informant coordinator, Mr. Davis had concerns about the validity of Bulger's informant status, recommended the file be closed, (Tr. 33:127) and concluded that the information in the file was "worthless." (Tr. 33:128). Former FBI Assistant Special Agent in Charge Fitzpatrick interviewed Mr. Bulger to see if he would be a suitable informant, and Mr. Bulger told him, "I'm not an informant." (Tr. 31:46). Fitzpatrick decided to close his file, and submitted a report to Special Agent in Charge Sarhatt trying to close Mr. Bulger's file as a result. (Tr. 31:47-48).

On cross-examination, John Morris testified that every meeting that he had with Mr. Bulger was purely social and he believed that nothing substantive was discussed. (Tr. 13:59-60). He knew that Connolly was putting exaggerated and fabricated reports in the file. (Tr. 13:66-67). When Flemmi was under investigation and closed as an informant, Morris assumed Connolly was putting information

[12] A rotor is a filing system where informant files and classified information was kept.

from Flemmi's file into a file marked for Bulger. (Tr. 13:56). The prosecutor presented Mr. Morris with approximately five entries he authored from Connolly's file which containing generalized information, claiming that this information could have come from a phone call with Bulger. (Tr. 13:61). There was nothing in the documents to indicate the information was given during a phone call and Morris had no specific memory of the substance of the telephone calls or specific information in the reports. (Tr. 13:61, 63). There was no reason to believe that these five entries were not fabricated or based upon hearsay.

Part of the prosecution team, Assistant Inspector General Marra, spent hours reading documents to the jury from Connolly's file in a manner that suggested that he could confirm that Mr. Bulger gave the information to Connolly. He admitted on cross-examination that nearly all of the reports were prepared by Connolly and that he never even spoke to Connolly. (Tr. 11:23). Marra admitted that Connolly fabricated reports. (Tr. 11:22). Marra could not cite one investigation based on information contained in the file that led to any criminal charges. (Tr. 11:37). Marra knew that Connolly had a number of active informants in the late '70s and '80s and some lived in the South Boston area in the 1980s. (Tr. 11:43). Marra had no first-hand knowledge about the information contained in Connolly's file, therefore, the information could have been drawn from those other informants and placed in Mr. Bulger's file by Connolly.

The only witness called at Mr. Bulger's trial that supposedly had first-hand knowledge to support the government's supposition was Stephen Flemmi. Prior to Flemmi reaching an arrangement with the prosecution, he was an adverse witness. As an adversary, the prosecution opined "Flemmi's inability to testify consistently from one day to the next and sometimes from one moment to the next about simple facts is a classic indicator of perjury." (D. 943:5) (quoting the Government's Post-Hearing Brief in United States v. Salemme, filed January 29, 1999 at 5-6). The prosecutors saw fit to entitle one section of their argument about Flemmi as "Lies, lies and more lies." *Id.* (quoting the Government's Post-Hearing Brief in United States v. Salemme, filed January 29, 1999 at 30).

E. Immunity

The appellant sought to present supporting evidence, witnesses, and Mr. Bulger's testimony that he received immunity from prosecution for various crimes and that the FBI and the Strike Force were so corrupt during this time period, that it was a realistic possibility that Mr. Bulger was provided immunity for some of his conduct. (D. 768; D. 811; D. 848). The trial court issued an order that the defense could not even raise the subject at trial even through Mr. Bulger's own testimony. (D. 895). This deprived Mr. Bulger of a critical defense. The prejudice to the appellant was made clear by Mr. Bulger when he informed the court his decision not to testify was involuntary because of its ruling (Tr. 35:72).

While Mr. Bulger was convicted on 31 of 32 indictments, the jury found him not guilty on one indictment and also found the prosecution had not proven nine of the predicates, including eight murders, and a no finding as to another predicate to Count 2, the Racketeering indictment. (D. 1304).

SUMMARY OF THE ARGUMENT

> It is axiomatic that the government must turn square corners when it undertakes a criminal prosecution. This axiom applies regardless of whether the target of the prosecution is alleged to have engaged in the daintiest of white-collar crimes or the most heinous of underworld activities. It follows that courts must be scrupulous in holding the government to this high standard as to sympathetic and unsympathetic defendants alike.

Ferrara v. United States, 456 F.3d 278, 280 (1st Cir. 2006).

In Mr. Bulger's case, the prosecution ignored the clear warnings of *Ferrara* when it ". . . far from squaring the corners, lopped them off at their edges." *United States v. Scott*, __F. Supp. 2d __(D. Mass. April 14, 2014), 2014 WL1410261 at 3. The prosecution's tactics, *Brady* violations, and undisclosed inducements failed to meet these ideals that every defendant, even James Bulger, was entitled to.

The accused's theory of defense was twofold. First, the defendant intended to show the systemic corruption that existed in the federal government during the 1970s through 1990s and the political and institutional motivations that led Jeremiah O'Sullivan and the Strike Force to provide immunity to James Bulger. The promise not to prosecute by Jeremiah O'Sullivan was one part of Mr. Bulger's

defense. Second, when the DOJ's methods of prosecution and its systemic corruption began to be exposed at Judge Wolf's "Salemme Hearings," the DOJ made unprecedented deals with organized crime figures and murderers in an attempt to insulate themselves from civil liability and cover up their practices. *United States v. Salemme*, 91 F. Supp. 2d 141, 315 (D. Mass. 1999). The defense intended to demonstrate how deeply inspired the government's rewarded witnesses were to blame Mr. Bulger for any and all crimes in compliance with the government's theory, regardless of the truth.

Both theories of defense were compromised and infected by errors of constitutional import and conduct that violated the right to a fair trial. As to the first theory of defense, the prosecution sought to preclude Mr. Bulger from testifying to a jury about the protections afforded him by the DOJ and mentioning its tortured history. The court ruled that the defense could not raise the immunity defense at trial in any form, including the defendant's own testimony at trial. (D 895). This was constitutional error and denied the defendant his right to (a) effectively present a defense; (b) testify on his own behalf; and (c) a fair trial in violation of Mr. Bulger's Fifth and Sixth Amendment rights. (See Brief at Section IA) See *Rock v. Arkansas*, 483 U.S. 44, 49-52 (1987). This error effected the fundamental fairness of Mr. Bulger's trial and his convictions should be

automatically reversed as a result. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). Compare *Bucuvalas v. United States*, 98 F.3d 652 (1st Cir. 1996).

As to the second theory of defense, the defense requested a complete inventory of the rewards, promises, and inducements granted two critical witnesses such as John Martorano, and the prosecution had maintained that they had done so. (*E.g.*, D. 768; D. 878; D. 979). On the eve of trial, the defense independently learned about what can only be described as exculpatory evidence or *Brady*/*Giglio* materials, (D. 979; PT 6/7/13; PT 6/10/13) (Brief at IIB), complaints of ongoing criminal conduct by John and James Martorano and protection from prosecution by a key member of the prosecution team. All efforts to obtain this information were denied by the prosecution and the court. *Ibid*. This compounded the ongoing concerns of transparency and fairness in this case, and also denied Mr. Bulger the ability to review and investigate this evidence in violation of his Fifth and Sixth Amendment rights. (Brief at IIB). The court compounded this deprivation by denying the defendant's request for the Trooper to testify in violation of the accused's Fifth and Sixth Amendment rights. (Brief at IV). See *Brady v. Maryland*, 373 U.S. 83 (1963).

At trial, the government witnesses admitted that Martorano was afforded undisclosed promises allowing him to protect his family and friends from prosecution. (Brief at IIA). This was inconsistent with the prosecution's

representations. The prosecution then sought to dilute the impact of this exculpatory evidence through well-crafted yet improper parsing of the agreement's terms. *Ibid*. These *Brady* violations, whether taken severally or jointly, were not harmless and prejudiced Mr. Bulger's Fifth and Sixth Amendment rights.

The government engaged in a persistent campaign during trial, through the use of speaking objections, of infecting the jury with improper commentary and opinions by vouching for witnesses, disparaging defense counsel and attempting to promote its theory of prosecution. (Brief at V). The defense motion for a mistrial and constant cautions by the trial judge did nothing to dissuade the prosecution from these prejudicial tactics. *Ibid*. The court did not sanction the prosecution or provide curative instructions to the jury. *Ibid*. The collective impact of these improper comments was so pervasive and their content so prejudicial that they likely influenced the verdict in the defendant's case. *United States v. Cormier*, 468 F.3d 63, 73 (1st Cir. 2006). As a consequence, Mr. Bulger's Fifth Amendment right to a fair trial was violated and reversal is warranted.

The trial court's erroneous rulings on discovery, denial of access to *Brady* materials withheld by the prosecution, preclusion of Brady witnesses from testifying, prohibition of Mr. Bulger's testimony about immunity and related matters as part of his defense and to rebut prosecution theories proposed at trial, and the prosecution's obfuscating the nature of its arrangements with critical

witnesses severely undermined the appellant's Fifth Amendment right to a fair trial. (Brief at I-V). These acts of "lopping off the square edges" was not harmless error, as the government's evidence was primarily based upon unreliable hearsay and cooperating witnesses who were profoundly rewarded for their testimony and insulated by the prosecution's tactics. Mr. Bulger's convictions should be reversed.

ARGUMENT

I. The Trial Court Deprived Mr. Bulger of His Right to Testify at Trial and Present a Defense in Violation of His Fifth and Sixth Amendment Rights

At the end of the defendant's case, Mr. Bulger stated that he was denied his right to present a defense because the court had barred him from testifying about the agreement he had with Department of Justice ("DOJ") official Jeremiah O'Sullivan and the intricacies of that relationship as it related to his immunity agreement. (Tr. 35:71-73). He stated that the trial was a sham and that he would have testified at trial but for the court's ruling:

> THE COURT: Okay, Mr. Bulger, I just want to address you directly. You understand that this is the juncture of the case at which I ask for a decision about whether or not you're going to testify. Mr. Carney has just represented on your behalf that you're choosing not to testify....
>
> THE COURT: And are you making this choice voluntarily and freely?
>
> THE DEFENDANT: I'm making the choice involuntarily because I don't feel -- I feel that I've been choked off from having an opportunity to give an adequate defense and explain about my conversation and agreement with Jeremiah O'Sullivan. For my protection of his life, in return, he promised to give me immunity.
>
> THE COURT: I understand your position, sir, and certainly you're aware that I have considered that legal argument and made a ruling.
>
> THE DEFENDANT: I understand.
>
> THE COURT: I understand, sir, if you disagree with it, okay?

> THE DEFENDANT: I do disagree, and that's the way it is. And my thing is, as far as I'm concerned, I didn't get a fair trial, and this is a sham, and do what yous want with me. That's it. That's my final word.
>
> (Tr. 35:71-73).

Mr. Bulger's decision not to testify was not voluntary, rather, the result of the court's erroneous order that he could not raise the immunity defense or refer to his relationships with Department of Justice officials including Jeremiah O'Sullivan in any form or fashion including his own testimony. (D. 895). As discussed below, that ruling constitutionally deprived Mr. Bulger of his right to present an effective defense to the government's indictments, respond to the issues raised in its case in chief and stripped him of his right to testify about how he was able to avoid prosecution for almost twenty-five years. This constitutional error effected the fundamental fairness of his trial and must result in automatic reversal. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).[13]

[13] There is a serious doubt that the harmless error standard applies when the appellant's right to testify is deprived by the court as in this case. *Compare Bucuvalas v. United States*, 98 F.3d 652 (1st Cir. 1996) with *Lema v. United States*, 987 F.2d 48 fn 4 (1st Cir. 1993) *Compare also Chapman v. California*, 386 U.S. 18 (1967) with *United States v. Gonzalez-Lopez*, *supra*. As deprivation of the right to testify, similar to the denial of one's right to choose counsel, constitutes a structural error, appellant moves this Court to apply the automatic reversal standard here. *United States v. Gonzalez-Lopez*, *supra*.

A. Ordering Mr. Bulger to Prove the Existence of Immunity Pre-trial Before He Could Testify about Related Matters in His Own Defense Exceeded the Court's Authority and Usurped the Jury's Role as the Final Arbiter of Facts, in Violation of Appellant's Fifth Amendment Right Not to Incriminate Himself and His Sixth Amendment Right to a Jury Trial

Mr. Bulger was entitled to testify before a jury, at his trial, about relevant and material evidence in his own defense. Fifth and Sixth Amendments to the United States Constitution; *see also Rock v. Arkansas*, 483 U.S. 44, 49-52 (1987). The lower court's ruling that Mr. Bulger could not testify about his immunity agreement unless he first provided a detailed preview of his testimony was coercive and violated these rights and his Fifth Amendment right not to incriminate himself unless and until he chose to do so. (D. 895).

The court erroneously precluded Mr. Bulger from raising his immunity defense at trial in his own words. Even if, *arguendo*, Mr. Bulger was required to prove pretrial that he had a grant of immunity before presenting third party witnesses and other independent evidence, the court should not have prohibited the accused from testifying at trial about his relationship with key members of the DOJ and the protections they afforded him. This testimony was fundamental to disputing many of the indictments against him and critical to responding to the government's theory of prosecution that Mr. Bulger had corrupted just two members of the FBI to avoid prosecution. Mr. Bulger had a Fifth and Sixth Amendment right to testify that the government's witnesses were lying about his

alleged role as an informant and rebut by explaining his immunity agreement with the DOJ.

There can be no dispute that Mr. Bulger had the right to both devise his own defense and testify on his own behalf. *Rock v. Arkansas*, 483 U.S. at 49-52. This right has its origins in both the Sixth and Fifth Amendment to the United States Constitution. *Id*. at 50. "There is no justification today for a rule that denies an accused the opportunity to offer his own testimony." *Id*. at 52. "Even more fundamental to a personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure of the Amendment,' . . . is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness." *Id*.

The lower court's opinion that its ruling did not bar "Bulger from choosing to take the stand in his own defense" (D. 895:24) ignores the deleterious limitations the court imposed upon his testimony. Even if the court chose not to instruct on an "immunity" defense the court had no authority to preclude his testimony about immunity-related matters without first allowing the defendant to testify and assess his testimony as it was presented. A court must justify whether the interests served by the exclusion of testimony outweigh the defendant's

constitutional right to present evidence in his own defense. *Rock v. Arkansas*, 483 U.S. at 56. No such assessment was made by the court.

Further, "[t]his Court considers a defendant's right to testify in a criminal proceeding against him so basic to a fair trial that its infraction can never be treated as harmless error. . . " *United States v. Butts*, 630 F. Supp. 1145, 1148 (D. Me. 1986). The court's reliance on *United States v. Reeder*, 170 F.3d 93, 108 (1st Cir. 1999) and *United States v. Roszkowski*, 700 F.3d 50, 54-55 (1st Cir. 2012) to preclude the defendant's testimony is misplaced. Both cases involved limitations to a defendant's right to introduce evidence through third parties as opposed to the defendant's own testimony.

"[While] [t]he judge's traditional role in a jury trial is thus limited to arbiter of the law and manager of the trial process, *Quercia v. United States*, 289 U.S. 466, 469. . . (1933); the jury remains the primary finder of fact and essential check on arbitrary government. . ." *United States v. Evanston*, 651 F.3d 1080, 1084 (9th Cir. 2011). *See* Sixth Amendment. The trial court must be careful not to overstep its inherent functions and usurp the fact-finding role of the jury. *See also United States v. Sabetta*, 373 F.3d 75, 80 (1st Cir. 2004). "[u]ndeniably inherent in the constitutional guarantee of trial by jury is the principle that a court may not step in and direct a finding of contested fact in favor of the prosecution 'regardless of how overwhelmingly the evidence may point in that direction.'" See *United States v.*

Rivera-Santiago, 107 F.3d 960, 965 (1st Cir. 1997)(district court committed reversible error in invading province of jury).

Also, in attempting to relieve the Fifth Amendment deprivation that would have resulted from compelling his testimony in a mandatory pre-trial hearing, the trial Court offered *Simmons* protections to Mr. Bulger. (D. 895). *See Simmons v. United States*, 390 U.S. 377, 390 (1968). The court's offer could not accommodate concerns about the derivative use of Mr. Bulger's testimony from being used in other jurisdictions including states where the death penalty was sought. *See Kastigar v. United States*, 406 U.S. 441, 453, 459 (1972).

Compelling his testimony pretrial or be subjected to preclusion of his trial testimony (D. 895) was a Hobson's choice that is particularly alarming when premised upon the trial court's less compelling interest in managing its trial. (D 895). There can be no question that Mr. Bulger's Fifth Amendment right to testify in his own words at trial trumped any ministerial duty of the trial court and, therefore, the court's order was constitutionally infirm.

B. The Trial Court's Ruling that Immunity Was a Legal Issue That Must Be Decided by the Court Pretrial Violated Mr. Bulger's Right to Present His Defense in His Own Words to a Jury of His Peers as Guaranteed by the Sixth Amendment

Contrary to the court's ruling (D. 895:1), Mr. Bulger's immunity defense was not a legal issue that fell exclusively within the domain of the court's

functions. (D. 895:15). Nor was there any basis for its conclusion that "the issue of immunity is one that the Court 'can determine without a trial of the general issue.'" (D.895:15) (quoting Fed. R. Crim. P. 12(b)(2) . The court did not know the scope of the defendant's testimony, his strategy and the impact upon the indictments against him. This ruling usurped the jury's role as the fact finder in our trial system and violated appellant's right to be judged by a jury of his peers and to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. at 52. The court's ruling denied Mr. Bulger a fair trial.

1. Rule 12 Expressly Entitled Mr. Bulger to Raise Immunity as his Defense at Trial

Federal Rule of Criminal Procedure 12(b)(2) states that "a party may raise by pretrial motion any defense, objection or request that the court can determine without a trial of the general issue." (emphasis added). In addition, Rule 12(b)(3) provides a specific category of "motions that must be made before trial." (emphasis added). The appellant did not request a hearing or file a motion to resolve these issues pretrial and the plain language of Rule 12(b)(2) and the corresponding Advisory Note are clear that the defendant can raise the immunity defense at trial without first seeking pretrial dismissal or resolution of the issue.

There is no precedent, legal authority, or procedural rule that required Mr. Bulger to disclose the particulars of his immunity defense in advance of trial. (D.

895). This burden of production would have only been triggered if Mr. Bulger had initiated and affirmatively sought to dismiss the indictments pretrial or otherwise limit the government's evidence at trial pursuant to Rule 12(b)(2). *See United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000) (defendant has burden to demonstrate existence of immunity agreement at motion to dismiss); *United States v. Salemme*, 91 F. Supp. 2d 141, 315 (D. Mass. 1999); *United States v. McLaughlin*, 957 F.2d 12, 16 (1st Cir. 1992) (pretrial motion to suppress denied); *United States v. Black*, 776 F.2d 1321 (6th Cir. 1985) (motion to dismiss denied); *United States v. Crooker*, 688 F.3d 1 (1st Cir. 2012) (Courts routinely make findings of fact on Rule 12 motions filed by the defense as suppression, not immunity claims, must be raised pretrial pursuant to subsection (b)(3)).[14]

Mr. Bulger opposed the government's motion to seek pretrial resolution at every stage (D. 855; PT 4/26/13). In mandating a pre-trial hearing, the trial court paradoxically recognized that an immunity defense could not be waived or forfeited if not raised pretrial, and then proceeded to in fact waive and forfeit his defense for non-compliance with the court's order to raise it pre-trial. (D. 831; D. 856; D. 895:15). The trial court's ruling was constitutional error and not harmless.

[14] Unlike Rule 12(b)(2), Rules 12.1 through 12.3 require the defense to provide the government with pretrial notice of an alibi, insanity and public authority defense. There is a strong presumption that the drafters of Rule 12(b)(2) intentionally decided not to mandate pretrial notice of intent to assert immunity. United States v. Hernandez-Ferrer, 599 F.3d 63, 67-68 (1st Cir. 2010) (applying venerable canon of expressio unius est exclusio alterius to exclude tolling of supervised release term where Congress explicitly allowed for it in other circumstances).

2. The Court's Ruling that the Immunity Defense Was Severable Because "Immunity Is One that the Court 'Can Determine without a Trial of the General Issue'" Violated Mr. Bulger's Fifth and Sixth Amendment Rights to Testify on His Own Behalf

The trial court ruled that appellant's immunity defense was a contract issue that was severable from the question of guilt or innocence and, therefore, resolvable pretrial. (D. 895:16). Since precedents cited by the court involve motions filed by a defendant seeking pretrial resolution, not the government, they were inapplicable to Mr. Bulger's case. The trial court simply misconstrued its judicial role and usurped the jury's function in the adversarial process when it decided that the court, not the jury, should resolve factual disputes relating to appellant's immunity defense.

The facts at issue include but were not limited to whether: (a) Mr. Bulger had immunity, (b) a high-level Department of Justice prosecutor (Jeremiah O'Sullivan) had the authority to grant him immunity, and (c) an immunity grant could extend (i.e., the scope of the grant) to all or just some of the charged crimes. (D. 895). The trial court's decision that these issues fell within the exclusive domain of the judge violated Mr. Bulger's fundamental constitutional right to a trial by jury. *See* discussion below. *See also Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (the "right to a trial by jury in serious criminal cases [is] 'fundamental to the American scheme of justice'"); *United States v. Evanston*, 651 F.3d at 1084

("The judge's traditional role in a jury trial is thus limited to arbiter of the law and manager of the trial process. . .").

The court mistakenly assumed that Mr. Bulger intended to assert an immunity defense for all crimes including prospective crimes of murder. (D895:15). Mr. Bulger never made such a claim. Mr. Bulger should have been allowed to testify about his immunity agreement and then, subject to objections, the court could make admissibility rulings consistent with every other witness that testified. Despite the trial court's rigid view of immunity as a defense, Mr. Bulger's immunity defense was not limited to an all or nothing approach at trial, as he was charged with thirty-three counts including a RICO charge that alleged various predicates including homicides. The court prevented Mr. Bulger from presenting an immunity defense for some crimes and relying upon the government's burden of proof beyond a reasonable doubt for others. The court's decision that Mr. Bulger was required to provide a pretrial proffer even about his own testimony was constitutional error and must result in the reversal of all his convictions.

3. High Ranking DOJ Official Jeremiah O'Sullivan Had Authority to Grant Immunity

The court ruled that Mr. Bulger failed to establish that either his "promise of immunity was made by a person with actual authority to make it or that Bulger

detrimentally relied on that promise as required under *Flemmi*." (D. 895:22). *See United States v. Flemmi, supra*. The court's ruling was primarily based upon an untested affidavit of a DOJ employee ("Margolis affidavit") which asserted that Jeremiah O'Sullivan did not have authority under the internal DOJ manual to grant immunity. (Margolis Affidavit, D. 855:11). The DOJ guidelines that Margolis' opinion relied upon were simply internal guidelines that did not have the force of law and were not binding upon DOJ officials at the time at issue in this case. (D. 848).

Title 28 U.S.C. § 547, provides in pertinent part that ". . . each United States attorney, within his district, shall . . . prosecute for all offenses against the United States." As this court observed in *Flemmi*, ". . . the power to prosecute plainly includes the power not to prosecute . . ." 225 F.3d at 87. Other circuits have similarly recognized the authority of U.S. Attorneys and Assistant U.S. Attorneys to enter immunity agreements with defendants or cooperators. See *United States v. Fitch*, 964 F.2d 571, 573 (6th Cir. 1992) ("The AUSA entered into an informal immunity agreement signed by [defendant] and the Assistant U.S. Attorney . . .").

The court's ruling that Mr. O'Sullivan did not have actual authority to grant immunity was also factually erroneous. The Margolis affidavit is contradicted by both the law and the past practice of O'Sullivan's where he exercised such power in a similar case, that was upheld by this very Court. *United States v. Winter*, 663

F.2d 1120, 1132-33 (1st Cir. 1981), abrogated on other grounds by *Salinas v. United States*, 522 U.S. 52, 61-62 (1997) (informal grant of immunity was upheld by this court). The Margolis affidavit was simply irreconcilable with the findings by this Court in the *Winter* case.

This ruling was erroneous and denied Mr. Bulger his Fifth and Sixth Amendment rights to confront witnesses, have the jury decide his guilt or innocence, and a fair trial.

4. Mr. Bulger Proffered a Good Faith Basis to Testify that He had Immunity for Some Crimes

Even if, *arguendo*, Mr. Bulger was required to present some factual basis for his defense of immunity, he satisfied that threshold obligation. The court's conclusion that he failed to do so ignores the facts of the case and Mr. Bulger's own statement during his colloquy as to why he chose not to testify. (Tr. 35:71-73). The defense also informed the court that Mr. Bulger had not been prosecuted for his crimes because a high-level DOJ prosecutor, Jeremiah O'Sullivan, had granted him immunity, (D. 768:5-10; D. 848:3) not because he was a confidential informant, but in exchange for other consideration. (D. 848:3:10-12). The defense

informed this Court during the recusal process of Judge Stearns[15] that the agreement was entered into before 1984. (D. 832:13). If the trial court had authority to require Mr. Bulger to provide a basis for the existence of an immunity agreement before he was entitled to present evidence at trial in his own words, the defense burden was slight. *United States v. Thompson*, 25 F.3d 1558, 1565 (11th Cir. 1994) ("[I]f there was any basis to support the theory that [the defendant had 'immunity'], the jury should have been permitted to hear the testimony and weigh the evidence itself.").

The trial court's failure to find that Mr. Bulger satisfied that slight burden was constitutional error. Mr. Bulger's convictions should be automatically reversed as the court's deprivation of his Fifth Amendment right to testify was structural error as it effected the basic fundamental fairness of his trial. See *Rock v. Arkansas*, *supra*, and *Gonzalez-Lopez*, *supra*.

5. Mr. Bulger Was Prejudiced by the Loss of His Immunity Defense

If this Court were to find, *arguendo*, that the court's deprivation of his right to testify was not structural but was guided by the harmless error standard, then the government cannot show that this error was harmless beyond a reasonable doubt.

[15] Counsel's statement to the Appellate Court during oral argument relative to motion to recuse Judge Stearns was adopted by Judge Stearns in D. 832:13 and relied upon by the trial court in its assessment.

"[T]he exclusion of evidence cannot violate the Sixth Amendment unless that evidence would be relevant and material, as well as favorable to the defense." *United States v. Davis*, 772 F.2d 1339, 1348 (7th Cir. 1985). Mr. Bulger was unable to respond to the government's indictments and present his understanding of the immunity agreement in his own words. The lower court's ruling prejudiced Mr. Bulger and violated his Fifth and Sixth Amendment rights to testify on his own behalf and present an effective defense to a jury of his peers.

A primary theme throughout the government's case in chief was that a couple of rogue and corrupt FBI agents used Mr. Bulger's alleged informant status as a means to obstruct his prosecution for over two decades. Mr. Bulger should have been permitted to rebut these assertions and testify that these allegations were untrue by explaining the scope and basis of his immunity agreement with Mr. O'Sullivan and the DOJ.

The government's argument that the omission of an immunity agreement from Mr. Bulger's alleged informant file meant one could not have existed is belied by the evidence. First, the FBI and the DOJ have a history of manipulating DOJ files and fabricating evidence to promote particular causes and wrongful prosecutions during this period of time. (See Tr. 13:66-67)(Morris testified that Connolly was putting exaggerated and fabricated reports in Mr. Bulger's purported file). See also *Limone v. United States*, 497 F. Supp. 2d 143 (D. Mass. 2007);

Ferrara v. United States, 384 F. Supp. 2d 384 (D. Mass. 2005). This conclusion was also supported by O'Sullivan stated under oath in a 2004 deposition, "[W]hen you dealt with the FBI, you never saw - if they wanted to create a memorandum, you never saw the memorandum that they created in the file and sent to Washington. So you had to be on your guard at all times because whatever they wrote, you never saw and somebody in Washington saw it." Q: "And you presumed, I take it, that they would write what was necessary to support their position?" . . . A: "Yes." (D. 848: 26). In this context, the lack of a document in this alleged informant file has little relevant weight on this issue.

The trial court had many other reasonable options available to it that were far less restrictive than disproportionate and wholesale denial of Mr. Bulger's right to testify about his immunity arrangement. The court could have allowed Mr. Bulger to testify about the immunity arrangement at trial and then assessed whether he could call witnesses to corroborate his testimony and to impeach the government's theory that such an oral promise was simply implausible.

The court, instead, required too much of Mr. Bulger in advance of trial and denied him his right to present an effective defense at his jury trial in violation of the Fifth and Sixth Amendments to the United States Constitution. The trial court usurped the jury's role in this matter as the defense presented a sufficient proffer to warrant presentation of the immunity defense to the jury through Mr. Bulger

himself at the very least. Mr. Bulger's convictions should be reversed and his case remanded for a new trial.

II The Government's *Brady* Violations Denied Mr. Bulger's Fifth and Sixth Amendment Rights, Due Process, Right to Confront Witnesses and Right and a Right To A Fair Trial

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the suppression of "evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Similarly, the prosecution is required to turn over impeachment evidence to the defense that relates to a witness's credibility. *United States v. Friedman*, 658 F.3d 342, 358 (3d Cir. 2011) (citing *United States v. Giglio*, 405 U.S. 150, 154 (1972)). For purposes of *Brady* and *Giglio*, evidence is only material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

There are two categories of *Brady* violations, each with its own standard for determining whether the undisclosed evidence is material and merits a new trial. *United States v. Agurs*, 427 U.S. 97, 103-07 (1976). The first category of violations, often called *Giglio* claims, occurs where the undisclosed evidence reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false. *Agurs*, 427

U.S. at 103-04; *Giglio v. United States*, 405 U.S. at 153. "The other category of *Brady* violations occurs when the government suppresses evidence that is favorable to the defense, although the evidence does not involve false testimony or false statements by the prosecution." *Smith v. Secretary, Dep't of Corrections*, 572 F.3d 1327, 1334 (11th Cir. 2009). A "reasonable probability" of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

A. The Prosecution's Failure to Disclose Promises, Rewards and Inducements Provided to John Martorano Constitutes a *Brady* Violation

The government made representations that Martorano would be compelled to testify against Winter, Nee and his brother if requested. (*E.g.*, Tr. 4:72). This was not true. Reluctant to disclose the details of Martorano's deal, Foley was confronted with his prior sworn testimony about whether Martorano was given such a promise:

> Q: . . . "Did you believe that to be somewhat of a priority, for the Massachusetts State Police to prosecute murders that occurred within the State of Massachusetts?" Your answer, sir?
>
> A: "At the time we were working on the case, realistically, John Martorano was not going to testify against those individuals."
>
> Q: "Okay. Well was he given a pass on that?"

A: "I suppose it was part of the agreement that his attorney made with the United States Attorney's Office."

Q: "And this was something that you folks agreed to?" And could you read your answer, please?

A: "Unfortunately, we were put into a situation where we had to agree to that. If John Connolly and the FBI had done their job, we-"

(Tr. 2:169, citing pg.00266115 of prior testimony in *Florida v. Connolly*)

Despite Foley's prior sworn testimony, the prosecution continued to obfuscate the promise it made to Martorano. For example, on redirect examination of Foley, the prosecution emphasized that Martorano provided information about his associates' involvement in murder (Tr. 2:207) without fairly informing the jury that despite whatever 'evidence' he provided in a proffer or grand jury, there was no likelihood his friends and brother would ever be charged with murders or other crimes. Again, Foley needed to be impeached with prior testimony to shed light on the prosecution team's intimations: "Q: Did you make any efforts to take the information Mr. Martorano gave you to try to develop a case against Mr. Winter and Mr. Nee?" . . . A. "No, sir, I didn't." (Tr. 2:173). [16]

[16] "[W]e expect the evidence to show that one of the benefits to John Martorano was the decision not to prosecute Pat Nee. So that brings Pat Nee directly into this case, because the degree of exposure that Pat Nee had will increase the benefit that John Martorano received by not having his friend prosecuted." (PT 6/11/13 (pm):11-12) . The government responded, "Pat Nee is not a witness in this case. He has nothing to do with this case. He may have been investigated time and time again by the State Police on cases that are unrelated to this one, but, you know,

Faced with the obvious fact that the prosecution was intimately aware of the misdeeds of Martorano's associates, and did nothing about them, the prosecution attempted to insulate its office and the DOJ by redirecting blame upon other agencies[17] rather than acknowledge their promise to Martorano.

> Q. So is it fair to say they could not be prosecuted federally?
>
> A. Yes.
>
> Q. Now, you did bring the information to the attention of state authorities, you told us?
>
> A. Yes.
>
> Q. And who were those authorities?
>
> A. There was Suffolk County District Attorney's Office, Middlesex County District Attorney's Office, and as part of that we also spoke with the Boston Police Department.

Tr. 2:209. This line of inquiry by the prosecution was, again, intentionally misleading to the jury and done in bad faith, as Suffolk County had signed onto this agreement. (Tr. 4:67).

Contrary to the prosecution's implication that the state district attorneys were to blame for failing to prosecute, Foley, a state law enforcement agent, met

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again, it's a *non sequitur*." (PT 6/11/13 (am):12). This position was contradicted by Flemmi, when he testified that Nee admitted he was involved in the Halloran and Donahue murders. (Tr. 29:36-40).

[17]This attempt at plausible deniability ignores the United States Attorney's Office's ability to assist and actively pursue prosecutions in state court if it meets their agenda. Tr. 2:207.

with the district attorney's offices when assembling the deal. "[W]e were bringing the people that had jurisdiction into the discussion as to whether we were going to go into an agreement with Mr. Martorano or not; and therefore, they had to know what we were talking about, what the information was, and for them to evaluate what they had." (Tr. 2:214-15).

This 'lopping' off corners at their edges continued in the prosecution's presentation of Martorano to the jury. Similar to its tactic with Foley, the prosecution continued to obfuscate the promise it made to Martorano by emphasizing that Martorano "provided information" about his associates' involvement in murder and other crimes (Tr. 6:104-05), without disclosing that Martorano knew he would never be called to testify against them in a prosecution.[18] During cross-examination, Martorano admitted that he would not have signed an agreement to cooperate with the government if the terms required him to participate in the prosecution of his friends and family. (Tr. 6:35-36).

After the prosecution again tried to imply that Martorano was obligated to testify against his friends and family in any prosecution by virtue of his previous federal grand jury testimony (Tr. 6:104-05), the defense had to resort to Martorano's previous sworn testimony to attempt to correct the prosecutor's misimpressions to the jury:

[18] "Q. And in fact, sir, you were never called by another court, were you? A. No." (Tr. 6:56).

Q: "How many murderers did you tell the government that your brother, James Martorano, did?"

A. He was with me one time, it says. . . .

Q: "And part of the plea agreement was that couldn't be used against you?" Your answer: "Positively."

Q: "So that's something else you got from the government?"

A: "Positively."

Q: "But you got protection from not only yourself, but from – but your brother, James Martorano?" Your answer: "Like I said, I had good lawyers."

A. Yes. . . .

Q: "So part of the deal included protection for your brother, James Martorano, right?" And your answer, sir?

A. It says, "Sure."

(Tr. 6:133-34).

In reality, Martorano was only required to testify against ten people selected by the government and characterized as a "target list." (*E.g.*, Tr. 6:37). The target list omitted Nee, Winter, and James Martorano despite the fact that he had direct information about their involvement in serious crimes including homicides. The target list consisted of John Connolly, James Bulger, Stephen Flemmi, and seven people who Martorano barely knew.[19] Martorano knew that John Connolly was the

[19] *See* Tr. 6:37-42 generally. "Q. When you were previously asked, 'Why did you agree to testify against somebody you didn't know? Didn't you say, Well, that's the

target of the government. (Tr. 6:28).[20] He also knew that if he didn't cooperate with other prosecutions, there would be no effect on his deal with the United States Attorney's Office. (Tr. 6:55-56).

The prosecution's conduct falls into the first category of *Brady* violations, often called *Giglio* claims, since they either failed to disclose the actual promises, rewards and inducements to the defense pretrial or actively and intentionally distorted those terms though their examination of witnesses. *Agurs*, 427 U.S. at 104; *Giglio*, 405 U.S. at 153 (noting previous Supreme Court precedent that the same rule applies "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.") (internal quotation marks omitted); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995). Under this category of Brady violations, the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103-04. The "could have" standard requires a new trial unless the prosecution persuades the court that the false testimony was "harmless beyond a reasonable doubt." *Ford v. Hall*, 546 F.3d 1326, 1332 (11th Cir. 2008)

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best way to agree, I didn't write the list? A. I could have. Q. Do you forget? A. No, I don't forget, I probably did say that." (Tr. 6:42).

[20] AIG Marra testimony provides insight. "Q. Out of all the agents that were under scrutiny, wasn't Mr. Connolly the most outspoken one? A. He was the most vocal. Q. Well, he was complaining that the Department of Justice was involved, wasn't he? A. Yes, I think he's made those complaints. Q. And Mr. Morris didn't say the Department of Justice was involved, did he? A. I don't recall him saying that. Q. And Mr. Morris did not get prosecuted, did he? A. No. . ." (Tr. 11:92-93).

(quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). This standard favors relief as the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio*, 405 U.S. at 153.

The prosecution will not be able to demonstrate that the distortions of the rewards and incentives Martorano received to testify against Bulger were harmless beyond a reasonable doubt. *See Chapman v. California*, *supra*. Martorano was a critical witness for the prosecution who tied Mr. Bulger to many of the predicate crimes including many murders and insisted that he was the head of a RICO organization called "Winter Hill." The undisclosed promise was purposely distorted in front of the jury, and was critical to the jury's assessment of Mr. Martorano's credibility.

Consequently, Mr. Bulger's convictions should be reversed based upon these Brady violations and the attempts at trial to obfuscate the truth behind the rewards, promises and inducements granted Martorano in exchange for his testimony, in violation of appellant's Fifth Amendment right to a fair trial and due process and his Sixth Amendment right to effectively confront the witnesses against him.

B. The Failure of the Prosecution to Provide Evidence of Martorano's Ongoing Criminal Conduct and Allegations of Protection of John Martorano by a Member of the Prosecution Team was a *Brady* Violation

On May 14, 2013, about one month prior to trial, the government provided investigative reports to the defense memorializing interviews of John Martorano and some of his associates.[21] The interviews were innocuous as they basically contained denials by Martorano and his associates about involvement in ongoing criminal activity together. (PT 6/7/13:21). Just days before empanelment, the defense learned that veteran Massachusetts State Police Trooper, Nunzio Orlando, had made a complaint to Assistant United States Attorney Jamie Herbert alleging that John Martorano was involved in ongoing crime and that a key member of the prosecution team, Trooper Stephen Johnson, was obstructing investigations into Martorano's criminal activity. The defense filed a motion for Brady discovery on June 6, 2013. (D. 979).

The next day, on June 7th, the court conducted a hearing on the defense motion. (D. 979). At the hearing, the defense and the trial judge learned for the first time that the prosecution had possessed these allegations, including participation by James Martorano, for nearly six months. (PT 6/7/13:24). During this time, the trial judge had ruled on both immunity related motions and numerous discovery

[21] See PT 6/7/13:21. Some of the reports dated back to January 29, 2013 and December 8, 2012. See *also* D. 987:4-5.

motions without the benefit of the materials. The prosecution revealed that it had previously filed related documents ex parte with the prior judge, Honorable Richard Stearns. (PT 6/7/13:27).[22] The prosecution refused to provide this information to the defense claiming that its investigation determined the claims to be "unsubstantiated." (PT 6/7/13:26; 6/10/13:9).

On June 10, 2013, the defense filed a motion requesting a stay of the trial and production of the materials (D. 987; D. 994). The court reviewed the materials in camera, held two hearings, and observed "having looked at the reports that were produced to me in camera, were found to be, and I'm quoting now, 'false and not factual.'" (PT 6/11/13:13). The court denied defense requests for a hearing to allow evaluation of the Trooper (PT 6/7/13:29-30), also denied the defense discovery requests and motion to stay. (D. 979, D. 987, and D. 994) (PT 6/11/13 (pm)). The court reasoned that the requested materials were not *Brady* or *Giglio* because the allegations were unsubstantiated (*Id*. at 4-5) and, alternatively, there was no evidence that any of these promises were communicated to Martorano. *Id*. at 7, yet, the court recognized that the May 14, 2013 materials "are fairly characterized as *Giglio* materials or potentially *Giglio* materials in regards to Mr. Martorano." (PT 6/10/13 (pm):6). The court's differing interpretation of the May 14, 2013 disclosures and the withheld information is irreconcilable.

[22] This Court ordered the recusal of Judge Stearns on March 14, 2013.

The central questions before this court are (a) whether the complaint by the Trooper, amongst other undisclosed materials were relevant to Martorano's credibility or the defense's theory of the case and (b) whether the prosecution's failure to provide these materials to the defense and/or failing to alert the new judge to their existence constitutes a *Brady* violation. *See* *Brady*, 373 U.S. 83 (1963) and its progeny.

Based upon the hearings conducted below, the ex parte materials at issue fall into the second category of *Brady* violations. The appellant is entitled to a new trial if he can establish that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict. *Kyles*, 514 U.S. at 434.

The prosecution's suggestion that its investigation of the allegations was independent is simply outrageous on its face. With the exception of one interview, all the reports that were turned over to the defense on May 14, 2013 indicate that the trial prosecutors and/or law enforcements agents that were part of the prosecution team either conducted or were present during every interview except for one. Moreover, Martorano's handler, the person directly accused of inappropriately protecting Martorano, was actively involved in investigating the

same cover-up he was alleged to have been involved in. (D.987 n.3).[23] When an investigation is conducted by the same people who have an incentive to protect the witnesses, and themselves, an appearance of bias and cover-up naturally arises from that scenario. See (PT June 10, 2013:3-14).[24] Despite the prosecution's protestation during the pretrial hearings that they were the arbiters of the truth (PT 6/7/13; PT 6/10/13), the government's history in such prosecutions belies that self-assessment. *See Limone v. United States*, 497 F. Supp. 2d 143 (D. Mass. 2007), *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006).

On their face, these suppressed documents were necessarily material to (a) the credibility of Martorano; (b) the existence of a reward or promise that permitted him to continue his criminal endeavors; and (c) the defense theory that the government was so corrupt that it would stop at nothing to forge witness testimony through perverse plea agreements, tacit rewards to witnesses and the destruction of those who oppose their theory of prosecution. (PT 6/11/13).

Consequently, the appellant moves this court to review these materials in the context described above, and to find that the failure to provide these materials to the defense was a *Brady* violation. The case should be reversed and remanded to

[23] Ironically, this scenario invites the same type of criticism fairly posited by the prosecution when reflecting upon the Boston FBI assigning John Connolly to investigate the murder of John Callahan. (Tr. 36:76-78).

[24] Attendees at the interviews included, at different times, the case agent, James Marra; Martorano's handler, Trooper Stephen Johnson; and both of Bulger's trial prosecutors.

the lower court with instructions to provide the defense with the opportunity to review the sealed materials and investigate the underlying allegations. Alternatively, the case should be remanded with instructions to give the defense access to these materials so that they can demonstrate the prejudice suffered to the appellant.

C. The Cumulative Effect of These Material Brady Violations Must Result in Reversal

The appellant moves this court to reverse and order a new trial as the cumulative effect of *Brady* violations were not harmless error but violated his right to a fair trial and his ability to mount an effective defense as guaranteed by the Fifth and Sixth Amendments. But for these *Brady* violations, the jury would have reasonably likely returned a different verdict, as the evidence was mostly based upon cooperating witnesses and unreliable hearsay. Alternatively, the appellant moves this court to remand to the district court to determine whether the cumulative impact of these material *Brady* violations should result in a new trial. See *Kyles v. Whitley*, *supra*.

III The Trial Court's Decision to Bar Defense Access to the *Brady* Materials and Not Grant a Stay in the Trial Was an Abuse of Discretion

The court should have given the defense access to the documents *in camera* and allowed the defense to supplement the information with their own

investigatory materials and explain to the court the relevance and materiality of the evidence. (D. 994; PT 6/7/13; PT June 10, 2013). The court's ruling was an abuse of discretion and violated Mr. Bulger's Fifth Amendment right to a fair trial and due process and his Sixth Amendment right to present witnesses in his own defense. *See Rock v. Arkansas*, *supra*.

For all the reasons stated herein and in Section II(2) above, appellant moves this court to remand with instructions for the trial court to grant the defense access to the sealed materials and then hold an independent evidentiary hearing where the defense is allowed to call the State Trooper and other witnesses. This independent hearing will (a) give the appellant and the public confidence that the adversarial process is functioning properly and (b) assist the court and parties in determining what weight to give particular evidence and what credibility can be assessed particular witnesses in the final determination of whether the suppressed information prejudiced the appellant sufficiently to warrant a new trial.

IV Denial of Right to Call the State Trooper Who Alleged the Martorano Cover-up as a Witness Violated Compulsory Process, Appellant's Right To Confront Witnesses and Due Process Violated Appellant's Fifth and Sixth Amendment Rights

Based upon the record before the this Court, the lower court should have permitted the defense to call Trooper Nunzio Orlando and the Martorano associates

identified in the May 14, 2013, discovery disclosures, Neil Cherkas and Dominic Masella, as witnesses at trial. A State Police witness claims that Martorano was still engaged in criminal conduct and that Martorano's handler was protecting him from prosecution went to the heart of the defense and directly related to the prosecution's ongoing effort of concealing inducements to their witnesses. This evidence was also relevant and probative of the accused's defense that the federal government was willing to use any means to achieve its goal of a successful prosecution including undermining the career of a veteran State Trooper so that his investigation of their star witness could be portrayed as having been "debunked."[25]

The court ruled that the testimony of Mr. Orlando, Mr. Cherkas and Mr. Masella was not admissible pursuant to Federal Rule of Evidence 608(b) and *United States v. Beauchamp*, 986 F.2d 1 (1st Cir. 1993) (misconduct to show veracity). (Tr. 29, 161). The court erroneously rejected the defense position that Trooper Orlando's testimony should be admitted as *Giglio* evidence as it constituted governmental "forbearance of investigation." *Id.* These rulings were in error and deprived the defendant his right to compulsory process, his right confront witnesses and due process in violation of the Fifth and Sixth Amendments.

[25] The federal government's tactic of attempting to ruin the reputation of anyone critical of its methods is not a unique concept. *See generally* Tr. 31:118-34 (testimony of former ASAC Robert Fitzpatrick).

Orlando's expected testimony about his complaint and the retaliation he suffered by attempting to expose the protection given to Martorano is compelling exculpatory evidence. The court usurped the jury's role by deciding that the Trooper was not credible and could not be called as a defense witness because the government's "independent" investigation "debunked" his allegations. It was the jury's role to decide issues of credibility and the court violated Mr. Bulger's Fifth and Sixth Amendment right to mount a defense to his indictments.

This court should remand to the district court and order that court to conduct a voir dire of the Trooper with full participation by counsel and the appellant.

V The Prosecution's Repeated Offerings of Prejudicial and Inadmissible Opinions to the Jury through Improper Speaking Objections Must Result in a New Trial

The prosecution's persistent speaking objections saturated the jury with improper and inadmissible opinions and evidence. The prosecution's effort to unfairly influence the jury was not harmless. This court has fashioned a three-prong test to determine if a prosecutor's statements have so poisoned the well that a new trial is required. *United States v. Joyner*, 191 F.3d 47, 54 (1st Cir. 1999). Specifically, the Court considers: "(1) whether the prosecutor's conduct was isolated and/or deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; and (3) whether it is likely that any prejudice surviving the

judge's instruction could have affected the outcome of the case." *Id*. *See also United States v. Cormier*, 468 F.3d 63, 73 (1st Cir. 2006).

First, the prosecutor's statements were not isolated. There were dozens of improper speaking objections interposed by the prosecution throughout trial. The timing, content, and purpose of the speaking objections made clear that the effort was deliberate and tactical. The objections included:

Commentary accusing the defense of acting in bad faith:[26]

- "There is no good-faith basis for that question, and Mr. Brennan knows that." (Tr. 13:117);
- "Objection, your Honor. This is beyond the pale." (Tr. 6:13);
- "Objection to the form of the question, 'involved with.' I think that's not made in good faith." (Tr. 27, 155).

That the defense was misleading[27]:

- ". . . I think he is painting a picture that's not accurate." (Tr. 2:130);
- "Objection. That's not a fair characterization." (Tr. 6:46);
- "Mr. Carney is misstating the law regarding Rule 35." (Tr. 3:76);

Efforts to protect its witnesses[28]:

[26] ". . . [N]ot made in good faith" (Tr. 27:155); "Your Honor, I object to this constant impugning of the prosecution. It's totally unprofessional." (Tr. 36:163).
[27] "I object to that, that's an incorrect statement of the law, your Honor." (Tr. 36:141).

- "Objection. I think Mr. Marra has testified extensively he didn't know about any kind of special file room." (Tr. 11:15);[29]

- "I object to that, 'provide something.' The agreement calls for him to tell the truth, you Honor." (Tr. 14:156);

- "Objection. Again, there's no criminal liability. He doesn't need immunity." (Tr. 27:159);

Providing inadmissible personal opinions to the jury:

- "[H]e's trying to goad the witness and any response he should expect." (Tr. 27:52).

- "Totally inappropriate to insert--" (Tr. 11:19);

- "I object to that, that's an incorrect statement of the law, your Honor." Court: "Overruled." Defense closing argument (Tr. 36, 141:9-11).

Second, the court did not provide any cautionary instruction to the jury. It is incumbent upon the court to ensure that Federal Rule of Evidence 103(d) is followed. *See* Fed. R. Evid. 103(d) "Preventing the Jury from Hearing Inadmissible Evidence." ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."). The court was unable to prevent the prosecution's repeated violations of this rule

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[28] "We're impeaching – I don't know what we're doing here, quite frankly." (Tr. 2:188). *See also* Tr. 17:163 ("No, I'm not. I'm saying it's an inaccurate summation of his plea agreement.");

[29] During redirect of James Marra, the prosecutor stated: "For all you know, Mr. Brennan is making that up, right?" (Tr. 11:127).

during trial, rather, its cautions were simply ignored by the prosecution.[30] Defense counsel's motion for a mistrial was summarily denied and did nothing to impede the prosecution's commitment to improper speaking objections in front of the jury.[31]

Third, the prejudice was real and the failure of the court to provide any instructions to the jury gave the prosecutor's improper statements their full force. The weight of a prosecutor's statements on a jury has been clearly and intelligently remarked on by the United States Supreme Court and later quoted by the Tenth Circuit Court of Appeals as follows:

> The United States Attorney is the representative not only of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,. . . is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. . . . It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should carry none.

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[30] The court's caution and directions were ignored. Tr. 2:166; Tr. 2:188-89; Tr. 3:72; Tr. 3:95; Tr. 3:103-04; Tr. 6:93; Tr. 11:20; Tr. 11:63; Tr. 13:84; Tr. 13:117; Tr. 22:57; Tr. 22:103; Tr. 24:78; Tr. 28:77-78.

[31] Tr. 23:40; Tr. 27:155; Tr. 27:159; Tr. 28:77; Tr. 28:134; Tr. 28:139; Tr. 29:28; Tr. 36:141; Tr. 36:163.

United States v. Gabaldon, 91 F.3d 91, 94-95 (10th Cir. 1996) (quoting *Berger v. United States*, 295 U.S. 78, 89 (1935)).

These improper remarks were so pervasive and deliberately prejudicial that without any cautionary or curative instruction by the court, the comments likely impacted and influenced the jury's verdict in this case. Consequently, the appellant's convictions should be reversed as his Fifth Amendment right to a fair trial was violated. *See United States v. Pena*, 930 F.2d 1486, 1491 (10th Cir. 1991) (analyzing whether prosecutor's improper comments required a new trial; no reversal necessary where comment was "singular and isolated" and ample other evidence existed to convict the defendant).

VI The Cumulative Effect of All the Errors, Brady Violations and Misconduct During Trial Violated the Defendant's Right to a Fair Trial

The trial court's errors, when combined with the government's *Brady* violations and misconduct during trial, as described in this brief, violated Mr. Bulger's right to a fair and impartial jury trial as guaranteed by the Fifth Amendment. These errors and misconduct were not harmless error beyond a reasonable doubt as the government's evidence was primarily based upon unreliable hearsay and cooperating witnesses who were paid for their testimony with money, reduced sentences, protection of their criminal cohorts and, ultimately, immunity from prosecution for serious felonies including capital

murder. But for these errors, it is not clear beyond a reasonable doubt that a jury would have convicted Mr. Bulger. They acquitted him on some conduct and found him not responsible for some RICO predicates. (D. 1304).

If Mr. Bulger had been permitted to testify about his immunity defense in his own words, then the jury would have the opportunity to weigh his credibility with that of the government's witnesses. The court's denial of his right to raise this defense deprived Mr. Bulger of this fundamental right. *Rock v. Arkansas*, *supra*. His testimony alone could have made a difference in the verdict.

The prosecution's open disparagement of the defense team impacted their effectiveness in front of the jury. The government is viewed as the arbiter of truth by the jury and their comments carry significant weight. Their personal attacks on the defense prejudiced Mr. Bulger and lessened the credibility of counsel in the eyes of the jury. The court's failure to cure these errors only served to increase the credibility of the prosecution and diminish that for the defense. This diminishment for the defense in respect mattered when it came to examination of witnesses such as Martorano, Weeks and Flemmi. The government's personal attacks allowed the jury to brush aside any impeachment as merely a defense ploy and convict on matters that were based merely on cooperating witnesses or hearsay. *See United States v. Cormier*, *supra*.

If the government had disclosed the *Brady* materials and not distorted the true rewards behind Martorano's plea agreement, this could have made a difference in eyes of the jury. This examination was not only a battle between counsel to find the truth but Martorano was a key connection to most of the predicate acts for the RICO charge. If the defense had more ammunition, a jury may have rejected all his testimony along with the other witnesses. *See* Argument in Section II and III above.

The court's failure to give the defense the opportunity to review the *Brady* materials held *in camera* further prejudiced the defense as it denied them the opportunity to present contemporaneous testimony about how the government was willing to use the full power of its machinery to crush those who did not conform to their views or theory of the case. This error, together with all the others herein, deprived Mr. Bulger of a fair trial and was not harmless error. *See Neder v. United* States, 527 U.S. 1 (1999).

CONCLUSION

Appellant, James Bulger, moves this Court to reverse his convictions and remand this case to the lower court for a new trial based for the reasons stated above and with instructions that (1) the government be ordered to produce all *Brady* and *Giglio* materials consistent with this opinion and (2) appellant be

permitted to (a) testify at trial about his immunity arrangement subject to the rules of evidence, and (b) review and investigate the materials filed under seal regarding the Trooper's allegations of misconduct and ongoing crimes.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Defendant's Motion through the appellate court's ECF system which was sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on this 14th day of August, 2014. Those nonregistered participants are: none.

/s/ James Budreau

CERTIFICATE OF COMPLIANCE

I, James Budreau, certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 13,966 words.

/s/ James Budreau
JAMES H. BUDREAU

ADDENDUM

Orders & Docket Entries

Constitutional Provisions

Statutes

Rules

11/16/2012	781	Transcript of Status Conference as to James J. Bulger held on April 18, 2012, before Magistrate Judge Marianne B. Bowler. Court Reporter Name and Contact Information: No Reporter Used. Digital Recording transcribed by Karen Aveyard. The Transcript may be purchased through Karen Aveyard at 978−466−9383, viewed at the public terminal, or viewed through PACER after it is released. Redaction Request due 12/7/2012. Redacted Transcript Deadline set for 12/17/2012. Release of Transcript Restriction set for 2/14/2013. (Scalfani, Deborah) (Entered: 11/16/2012)
11/16/2012	782	Transcript of Status Conference as to James J. Bulger held on May 29, 2012, before Magistrate Judge Marianne B. Bowler. Court Reporter Name and Contact Information: No Reporter Used. Digital Recording transcribed by Karen Aveyard. The Transcript may be purchased through Karen Aveyard at 978−466−9383, viewed at the public terminal, or viewed through PACER after it is released. Redaction Request due 12/7/2012. Redacted Transcript Deadline set for 12/17/2012. Release of Transcript Restriction set for 2/14/2013. (Scalfani, Deborah) (Entered: 11/16/2012)
11/16/2012	783	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above−captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general−info.htm (Scalfani, Deborah) (Entered: 11/16/2012)
11/16/2012	785	RESPONSE to Motion by USA as to James J. Bulger re 768 MOTION for Discovery *Under Rule 16(a)(1)(E)* (Wyshak, Fred) (Entered: 11/16/2012)
11/16/2012	786	Sealed Document: Exhibits A, B, and C, in support of 785 Government's Response to Defendant's Motion for Rule 16(a)(1)(E) Discovery. (Seelye, Terri) (Entered: 11/16/2012)
11/20/2012	787	Judge Richard G. Stearns: ORDER entered granting in part and denying in part 760 Motion for Order as to James J. Bulger (3) (Zierk, Marsha) (Entered: 11/20/2012)
11/28/2012	788	Transcript of Arraignment as to James J. Bulger held on July 6, 2011, before Magistrate Judge Marianne B. Bowler. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Redaction Request due 12/19/2012. Redacted Transcript Deadline set for 12/31/2012. Release of Transcript Restriction set for 2/26/2013. (Scalfani, Deborah) (Entered: 11/28/2012)
11/28/2012	789	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above−captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general−info.htm (Scalfani, Deborah) (Entered: 11/28/2012)
11/30/2012	790	Judge Richard G. Stearns: AMENDED PRETRIAL ORDER as to James J. Bulger. Final Pretrial Conference set for 6/5/2013 at 3:00 PM in Courtroom 21 before Judge Richard G. Stearns. Jury Selection set for 6/6/2013 at 10:00 AM (Courtroom to be determined); Jury Trial set for 6/10/2013 at 9:00 AM (Courtroom to be determined) before Judge Richard G. Stearns. (TRIAL SCHEDULE: 9:00 A.M. TO 4:00 P.M. ON MONDAY JUNE 10, 2013 AND 9:00 A.M. TO 1:00 P.M. DAILY THEREAFTER)(Seelye, Terri) (Entered: 11/30/2012)
12/06/2012		Judge Richard G. Stearns: ELECTRONIC ORDER entered granting in part and denying in part 768 Motion for Discovery as to James J. Bulger (3). Requests 1−3 (correspondence between the U.S. Attorney's Office and the New England Organized Crime Strike Force (NEOCSF), the DOJ, and the FBI "relative to" defendant and members of the "Winter Hill Gang") are DENIED except as to any correspondence reflecting the existence of any agreement, formal or informal, acknowledging or memorializing the conferral of immunity on defendant by the U.S. Government or its authorized agents for any past or prospective crimes for which defendant was responsible (or an affirmance that no such correspondence exists). Request 4 (correspondence between (now FBI Director) Robert Mueller and any other member of the DOJ "relative to" defendant, Stephen Flemmi, John

		Martorano, and Kevin Weeks) is DENIED except as to any correspondence reflecting the existence of any agreement, formal or informal, acknowledging or memorializing the conferral of immunity on defendant by the U.S. Government or its authorized agents for any past or prospective crimes for which defendant was responsible (or an affirmance that no such correspondence exists). Request 5 has been withdrawn by defendant. Request 6 (all prosecution memoranda of the U.S. Attorney's Office and the NEOCSF related to all investigations of the "Winter Hill Gang" from 1967 to the present) is DENIED. Any such memoranda fall within the attorney−work product privilege and the deliberative process privilege, and to the extent they may contain potentially exculpatory evidence, the court notes the government's representation that they have been produced. Request 7 (production of the "McGuire Memorandum" of January 29, 1979, or a statement of the privilege asserted) is MOOT. The government states that President George W. Bush has asserted executive privilege over the production of the Memorandum. Requests 8−9 are not addressed in defendant's motion. Request 10 (all DEA recordings taken from defendant's automobile during "Operation Beans") is MOOT. The government represents that all such tape recordings have been produced. Request 11 (all memoranda, etc., from officials of the DOJ addressed to (then U.S. Attorney) William Weld or Robert Mueller regarding the compromise of "Operation Beans") is MOOT. The government represents that to the extent any such material might tend to be exculpatory or suggest the existence of an immunity agreement, it has been produced. Request 12 has been withdrawn by defendants. Request 13 (all prison records and evidence of preferential treatment of John Martorano) is ALLOWED in part and DENIED in part. The government represents that it will provide a list of any government payments (state or federal) made to John Martorano's prison commissary account. The court agrees that defendant has not made the showing necessary to order production of the Martorano pre−sentence report (PSR) prepared by the Probation Department. The government represents that it has produced all requested records regarding Carolyn Wood; that Carolyn Wood, Patricia Lytle, or Jeffrey Jenkins were never targeted for prosecution; and that former Attorney General Janet Reno had no involvement in any aspect of Martorano's plea agreement. Request 14 (prison records and prior proceeding transcripts of Stephen Flemmi) is ALLOWED in part and DENIED in part. The court agrees that defendant has not made the showing necessary to order production of Flemmi's prison records or the PSR. The government agrees to produce the requested plea hearing and sentencing transcripts, and to expedite the production of tape recordings made of Flemmi during his incarceration at the Plymouth House of Correction. Request 15 (prison records and evidence of cooperation of Patrick Nee) is DENIED. The government represents that Nee is not and will not be a witness in this case and that it has produced or will produce any potentially exculpatory evidence in its possession provided by Nee. Request 16 (prison records and evidence of cooperation of Kevin Weeks) is ALLOWED in part and DENIED in part. The court agrees that defendant has not made the showing necessary to order production of Weeks's prison records or the PSR. The government represents that it has produced or will produce all other requested material that is potentially exculpatory or impeaching. Request 17 (prison records and evidence of cooperation of James Martorano) is DENIED. The government represents that James Martorano is not and will not be a witness in this case and that it has produced or will produce any potentially exculpatory evidence in its possession provided by James Martorano. Request 18 has been withdrawn by defendant. Requests 19−23 (appointment books, logs, and other materials related to Jeremiah O'Sullivan) are MOOT. The government represents that all such relevant and unprivileged information in its possession has been produced. Defendant has indicated that request 24 has been fulfilled. Request 25 (information regarding an alleged improper relationship between former FBI agent Thomas Daly and an informant) is DENIED. Defendant has shown no conceivable relationship between such information, if it exists, and this case. Request 26 (results of a polygraph administered to Stephen Flemmi) is DENIED. Polygraph results are inadmissible in a federal criminal trial for any purpose. It is further ordered that defendant respond, by January 4, 2013, to the government's assertion that defendant's claim of immunity is a matter of law to be decided by the court. The government will have until January 23, 2013, to submit a further reply on this issue. (RGS, law1) (Entered: 12/06/2012)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 99-10371-RGS

UNITED STATES OF AMERICA

v.

JAMES J. BULGER

MEMORANDUM AND ORDER ON GOVERNMENT'S MOTION PURSUANT TO FED. R. CRIM. P. 12(b)(2) AND 12(d) TO RESOLVE DEFENDANT'S IMMUNITY CLAIM PRIOR TO TRIAL

March 4, 2013

STEARNS, D.J.

On December 6, 2012, the court ordered defendant James Bulger to respond to the government's contention, set out initially in its November 16, 2012 response to defendant's November 2, 2012 motion for discovery, that his claim of immunity from prosecution is a matter of law to be decided by the court. On January 14, 2013, defendant submitted his response, in which he insists that it is his right to try the issue of immunity to a jury. On February 6, 2013, the government filed a formal motion pursuant to Fed. R. Crim. P. 12(b)(2) and 12(d), asking the court to resolve the issue prior to trial. A hearing on the motion was held on February 13, 2013. For the reasons set out below, the government's motion will be granted. Further, defendant's

claim of prospective immunity will be denied, while additional briefing on the issue of historical immunity will be ordered.

DISCUSSION

Rule 12 of the Federal Rules of Criminal Procedure, which governs pretrial motions, establishes in subdivision (b) two classes of such motions: those that "may" be made before trial, and those that "must" be made. *See* Fed. R. Crim. P. 12(b)(2)-(3).[1] Because immunity falls within the class of objections and defenses "which the defendant at his option may raise by motion before trial," Notes of Advisory Committee to the 1944 Adoption (Advisory Notes), defendant asserts that the Rule "empowers the defense, and not the government or the court, with the choice of pursuing the issue of immunity as a defense at trial." Def.'s Mem. at 2. Defendant

[1] Rule 12(b) provides, in pertinent part:

> (2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.
> (3) Motions That Must Be Made Before Trial. The following must be raised before trial:
>
> (A) a motion alleging a defect in instituting the prosecution;
> (B) a motion alleging a defect in the indictment or information-but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;
> (C) a motion to suppress evidence;
> (D) a Rule 14 motion to sever charges or defendants; and
> (E) a Rule 16 motion for discovery.

maintains that when he makes that choice, the court's function is limited to simply determining whether the evidence presented at trial plausibly supports a theory of immunity, and, if it does, to instructing the jury as to the law it must apply in making its findings of fact.[2]

Defendant's argument is premised on a faulty reading of Rule 12. As the Advisory Committee comment from which defendant selectively quotes makes plain, Rule 12 creates a dichotomy between objections and defenses that must, on pain of forfeiture, be raised prior to trial, and those that may, but need not necessarily, be raised. *See* 1944 Advisory Notes ("These two paragraphs classify into two groups all objections and defenses to be interposed by [pretrial] motion . . . . In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver."). Viewed in this context, the permissive language of Rule 12(b)(2) does no more than provide that certain objections and defenses are not forfeited if they are not raised in a pretrial motion. *See United States v. Jarvis*, 7 F.3d 404, 414 (4th Cir.

[2] Defendant also argues that "[a]ny further involvement [by the court] would violate the doctrine of separation of powers." Def.'s Mem. at 5. The court interprets this argument as a challenge to the authority of the court to review the legality of a grant of immunity extended by the Executive Branch, even one of the scope alleged here. This argument will be addressed.

1993) ("Failure to raise a contemporaneous objection of immunity *before* trial does not constitute a forfeiture of the objection . . . ."). What the Rule does not confer is a right to a jury determination where one does not otherwise exist.

Properly viewed, Rule 12 is intended to encourage the resolution of disputes of law prior to trial. *See generally* 1974 and 1975 Advisory Notes. To this end, the rule permits the filing of pretrial motions relative to "any defense, objection, or request that the court can determine without a trial of the general issue," Fed. R. Crim. P. 12(b), and requires the court to decide any such motion if deferring a ruling on a motion would "adversely affect a party's right to appeal," or where no good cause for deferral exists. Fed. R. Crim. P. 12(d). A claim of immunity is not the "general issue" to which the Rule refers. "The general issue in a criminal trial is, of course, whether the defendant is guilty of the offense charged." *United States v. Doe*, 63 F.3d 121, 125 (2d Cir. 1995), citing *United States v. Yater*, 756 F.2d 1058, 1062 (5th Cir. 1985); *accord United States v. Barletta*, 644 F.2d 50, 58 (1st Cir. 1981).

Rule 12 "clearly envision[s] that a district court may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motion so long as the court's findings on the motion do not invade the province of the ultimate finder of fact." *United States v. Jones*, 542 F.2d 661, 664-665 (6th Cir. 1976), citing 8 James Wm. Moore, Moore's Federal Practice § 12.04 at 12-24, 25 (2d ed. 1976); *see*

also Fed. R. Crim. P. 12(d) (which expressly contemplates judicial fact finding in deciding pretrial motions). Indeed, the Rule in its original incarnation defined issues susceptible to pretrial determination as those in which a jury trial was not required "under the Constitution or an Act of Congress." Fed. R. Crim. P. 12(4) (1944), reprinted in 1A Charles Alan Wright et al., Federal Practice & Procedure § 190, at n.2 (4th ed. 2011). Although the reference to issues that must be tried by the jury was deleted as surplusage, the deletion was not intended to effect any change in existing law or practice. *See* Wright et al. § 190, n.21. Rather, the Rule embodies the longstanding presumption in favor of pretrial resolution of matters to which no jury right attaches.

That no jury right attaches to defendant's claim of immunity is firmly established by binding precedent. The First Circuit has expressly held that a defendant's rights under an alleged immunity agreement "are determined by the terms and conditions of the bargain *as found by the court*." *United States v. McLaughlin*, 957 F.2d 12, 16 (1st Cir. 1992) (emphasis added); *see also United States v. Flemmi*, 225 F.3d 78, 82-91 (1st Cir. 2000) (assuming no procedural error in district court's pretrial evaluation of an alleged oral immunity agreement); *cf. United States v. Rodman*, 519 F.2d 1058, 1059-1060 (1st Cir. 1975) (affirming the pretrial dismissal

of an indictment based on a breach of a promise to recommend no prosecution).[3] Other Courts of Appeals are in accord that a claim of immunity is to be decided by the judge, and not a jury. *See, e.g.*, *United States v. Plummer*, 941 F.2d 799, 802-803 (9th Cir. 1991) ("The district court's interpretation of the agreement between [defendant] and the government, and whether that agreement was violated, determined whether the motion to dismiss the indictment would be granted or denied."); *United States v. Butler*, 297 F.3d 505, 512-513 (6th Cir. 2002) (same); *United States v. Cahill*, 920 F.2d 421, 424-426 (7th Cir. 1990) (same).

Defendant has not (and cannot) point to any federal decision holding otherwise.[4] Instead, he argues that the defendants in the above-cited cases

[3] These federal court rulings render inapposite defendant's reliance on the Massachusetts rule that the "'existence of a contract ordinarily is a question of fact, for the jury.'" Def.'s Mem. at 4-5, quoting *American Private Line Servs. v. E. Microwave, Inc.*, 980 F.2d 33, 35 (1st Cir. 1992) (construing Massachusetts law). While in some state civil law contexts the jury makes the determination of whether a contract exists, *McLaughlin* and the related cases make clear that the existence, scope, and validity of an alleged agreement of immunity from federal prosecution do not depend on state law.

[4] Contrary to defendant's characterization, *United States v. Thompson*, 25 F.3d 1558 (11th Cir. 1994), does not recognize a right to "bring an immunity defense at trial." Def.'s Mem. at 3. In *Thompson*, the Eleventh Circuit found that the district court had erred in precluding the defendant from presenting at trial a defense of entrapment by estoppel. *See id.* at 1564-1565. Entrapment by estoppel, unlike a claim of immunity, is an affirmative defense that by custom and practice is tried to the jury. *See, e.g.*, *id.; Doe*, 63 F.3d at 125. While the Court of Appeals in *Thompson* faulted the district court for precluding jury consideration of defendant's entrapment defense, it specifically upheld the lower court's pretrial denial of a motion to dismiss based on a claim of immunity. *See Thompson*, 25 F.3d at 1562-1563.

"specifically sought the court's evaluation of the 'terms and conditions' of their immunity claims by opting under Rule 12(b)(2) to present these issues in the context of a motion to dismiss or suppress before trial." Def.'s Mem. at 2-3. Here, Bulger trumpets the fact that he has chosen not to do so, heralding that "the presentation of evidence concerning immunity will be initially presented by defendant in his testimony at trial." *In re Bulger*, No. 12-2488: Hearing before the First Circuit Court of Appeals (Jan. 8, 2013).

Although often colloquially referred to as a "defense," a claim of immunity is not an affirmative defense negating criminal intent, but instead a defense of avoidance that seeks to bar a prosecution *en toto*. The Ninth Circuit Court of Appeals explains the distinction nicely in discussing the analogous claim of outrageous government conduct. *See United States v. Sotelo-Murillo*, 887 F.2d 176, 182 (9th Cir. 1989) ("Although outrageous government conduct is sometimes referred to as a 'defense,' it is not an affirmative defense such as entrapment. This 'defense' is really an argument that the government's conduct was so outrageous that due process principles bar the government from using the courts to obtain a conviction." (internal citations omitted)).[5] Avoidance defenses are ordinarily – and voluntarily – raised

[5] As the government accurately notes,

> [T]he "objections and defenses" referred to in [Rule] 12(b)(2) are all legal bars to prosecution: (1) former jeopardy, *see, e.g.*, *Witte v. United*

during pretrial proceedings to escape the burdens and risks of trial. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (noting in the context of § 1983 qualified immunity that "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial"). This court has been unable to identify a single instance in which any other defendant has sought to "reserve" the details of a ripe immunity claim until trial.

That something has not been done before is, of course, not conclusive of the issue of whether it can be done at all. Here, however, defendant's distinction is one without a difference. That a claim of immunity may be raised at trial does not mean that deferring the decision to do so operates to convert the claim from one of law into a matter of jury-decisional fact. *See United States v. Dudden*, 65 F.3d 1461, 1469 (9th Cir. 1995) (concluding that the district court did not err in refusing to submit a determination of the terms of an immunity agreement and the existence of a

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> *States*, 515 U.S. 389, 396 (1995); former conviction and former acquittal, *see, e.g.*, *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); and statute of limitations, *see, e.g.*, *Stogner v. California*, 539 U.S. 607, 616 (2003) . . . . "Lack of jurisdiction" and "failure of indictment or information to state an offense" similarly preclude prosecution entirely when raised by substantiated motion. Immunity is no different. It is a legal bar to prosecution, not a defense at trial.

Gov't's Mot. at 14 n.8.

government breach to the jury because the issue was one of law); *United States v. Gerant*, 995 F.2d 505, 509-510 (4th Cir. 1993) (same, defendant's breach of an immunity agreement); *cf. United States v. Gonzalez-Sanchez*, 825 F.2d 575, 578 (1st Cir. 1987) (same, claim of breach of a plea agreement); *United States v. Luisi*, 482 F.3d 43, 58 (1st Cir. 2007) (same, claim of outrageous government misconduct). In other words, a defendant's tactical choices do not dictate what constitutes a matter of law for the court to decide.

This conclusion may fatally undermine defendant's presumed intent in delaying until trial the raising of his claim of immunity. Nonetheless, whether the government's motion is one which the court must rule on pretrial is a separate issue. The government argues that the ability to precipitate a pretrial ruling pursuant to Rule 12(b)(2) does not reside uniquely with a criminal defendant. Under the circumstances of this case, the court agrees.

The court's decision on this issue is informed by the longstanding federal judicial treatment of motions in limine. The federal courts have long sanctioned – indeed encouraged – the government and criminal defendants to seek pretrial rulings on the admissibility of evidence in the interests of an orderly presentation of evidence at a trial, even though no provision of the federal criminal rules expressly authorizes

the practice.[6] *See, e.g.*, *United States v. Valencia*, 826 F.2d 169, 171-172 (2d Cir. 1987); *United States v. Layton*, 720 F.2d 548, 553 (9th Cir. 1983), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008). "[T]he practice of allowing such motions has developed over time 'pursuant to the district court's inherent authority to manage the course of trials.'" *Graves v. Dist. of Columbia*, 850 F. Supp. 2d 6, 10 (D.D.C. 2011), quoting *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). "Consistent with the historical origins of the practice, motions in limine are 'designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions.'" *Id.*, quoting *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1070 (3d Cir. 1990).

The function of the government's motion here is fairly analogized to a motion in limine, and it seeks to accomplish similar ends. Pretrial denial of defendant's

[6] The government argues that the reference in Rule 12 to a "party" to a criminal proceeding, entitles it to seek relief under the Rule. Gov't's Mot. at 10, citing Fed. R. Crim. P. 12(b)(2) ("*A party* may raise by pretrial motion any defense, objection, *or request* that the court can determine without a trial of the general issue." (emphasis added)). This argument takes the government only so far, as courts have differed in their views of what under the Rule qualifies as a "defense, objection, or request." The Second Circuit, for example, has observed with regard to a government motion for a pretrial ruling in favor of the admissibility of evidence that such a motion "is not a 'defense' or an 'objection,' and, though it is generically a 'request' for a ruling, that term, as used in Rule 12 when applied to the [g]overnment, would seem to mean requests for reciprocal discovery under Rule 16(b)." *United States v. Valencia*, 826 F.2d 169, 171 (2d Cir. 1987). *But see United States v. Cobb*, 588 F.2d 607, 610 n.2 (8th Cir. 1978) (finding defendant's pretrial motion to exclude evidence authorized by Rule 12(b)).

immunity claim would narrow the focus of the inquiry at trial, thereby limiting the scope of evidence to be presented and the potential for jury confusion and distraction.[7] Conversely, a finding that defendant's prosecution is barred by a valid grant of immunity would prevent an unnecessary trial and the expenditure of considerable public resources. Under these circumstances, it would present a disservice to judicial economy and the orderly administration of justice to sit idly by awaiting the raising of an objection that is now ripe and which defendant has unequivocally indicated his intent to invoke. *See United States v. Brimberry*, 744 F.2d 586-587 (7th Cir. 1984) ("[T]he trial judge should be alerted to the possible superfluity of the impending trial so that if the claim proves to have merit the time and effort of a trial might be saved." (internal alterations and citation omitted)); *United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976) (cautioning that "the very limited resources of our judicial system require that [known] challenges be made at the earliest moment in order to avoid needless waste").

This is particularly true in light of the court's further conclusion that defendant's objection to prosecution is "entirely segregable from the evidence to be presented at trial." *Barletta*, 644 F.2d at 58. As previously noted, Rule 12 provides

[7] Bulger, of course, has the right to testify at trial on his own behalf, regardless of the court's ruling on his immunity claim. The right to testify in one's own defense is a fundamental guarantee of the Sixth Amendment limited only by the rules relating to materiality and perjury. *See generally Harris v. New York*, 401 U.S. 222, 225 (1971).

in part that "[t]he court must decide every pretrial motion before trial unless it finds good cause to defer a ruling." Fed. R. Crim. P. 12(d).[8] While a motion requiring the presentation of a nontrivial quantity of evidence relevant to the question of guilt or innocence constitutes good cause to defer a ruling, the objection raised here is neither "substantially founded upon [nor] intertwined with evidence concerning the alleged offense[s]." *United States v. Wilson*, 26 F.3d 142, 159 (D.C. Cir. 1994) (internal quotation marks and citation omitted); *accord Barletta*, 644 F.2d at 58. Resolution of defendant's immunity claim requires an inquiry only into the existence, scope, and validity of the alleged agreement he made with New England Organized Crime Strike Force Chief Jeremiah O'Sullivan. It does not require the presentation of evidence regarding the commission of any of the nineteen murders or other crimes with which defendant is charged. The government's motion is thus not only appropriately raised, but calls for pretrial resolution.[9]

[8] The court disagrees with the government's assertion that a pretrial ruling is also required by Rule 12(d)'s mandate that "[t]he court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal." Gov't's Mot. at 12. Were the defendant to succeed in obtaining the termination of the proceedings against him on the basis of immunity, the result would not implicate factual guilt or innocence, and thus a government appeal would not offend double jeopardy principles. *See United States v. Scott*, 437 U.S. 82, 98-99 (1978).

[9] Defendant's argument that compelling the pretrial resolution of his immunity claim would somehow run afoul of his Fifth Amendment privilege against self-incrimination is without merit. The testimony of a defendant in a pretrial evidentiary hearing may not be used against him for any substantive purpose at trial. *Cf. Simmons v. United States*, 390 U.S. 377, 394 (1968). *See also United States v.*

In undertaking this task, the court begins by noting the paucity of information provided by defendant regarding his purported claim of immunity. In his written and oral representations to this court and the Court of Appeals, defendant's counsel has alleged only that O'Sullivan orally promised Bulger immunity from prosecution at some time prior to December of 1984, and that the grant of immunity included protection from prosecution for any and all crimes, past and future, up to and including murder. Ordinarily, the details of that claim and their veracity would be ferreted out in the course of an evidentiary hearing convened for that purpose. *See generally United States v. Salemme*, 1997 WL 810057, at *2 (D. Mass. Dec. 29, 1997). Here, however, an evidentiary hearing is premature in its scope because the agreement, even if made, is at least partially, if not entirely, unenforceable as a matter of law.

Informal promises of immunity made incident to cooperation agreements are governed by traditional principles of contract law. *See, e.g.*, *United States v. McHan*, 101 F.3d 1027, 1034 (4th Cir. 1996); *McLaughlin*, 957 F.2d at 16; *United States v. Carrillo*, 709 F.2d 35, 36 (9th Cir. 1983). Pursuant to these principles, "a defendant who seeks specifically to enforce a promise . . . contained in . . . a freestanding cooperation agreement[] must show both that the promisor had actual authority to

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Salvucci, 448 U.S. 83, 93-94 (1980).

make the particular promise and that he (the defendant) detrimentally relied on it." *Flemmi*, 225 F.3d at 84, citing *San Pedro v. United States*, 79 F.3d 1065, 1068 (11th Cir. 1996); *Thomas v. I.N.S.*, 35 F.3d 1332, 1337 (9th Cir. 1994); *United States v. Streebing*, 987 F.2d 368, 372 (6th Cir. 1993).[10] "If either part of this showing fails, the promise is unenforceable." *Id.* Insofar as defendant avers he was granted prospective immunity to commit murder, his claim fails on the first ground.

It is well settled that a United States Attorney has the authority to promise immunity in exchange for cooperation. *See Flemmi*, 225 F.3d at 86 (reasoning that implicit in the United States Attorney's authority to prosecute and to extend formal use immunity is the authority to offer assurances of immunity); *id.* at 87 ("[T]he power to prosecute plainly includes the power not to prosecute (and, thus, the power to grant use immunity) . . . ."). Equally true is the proposition that "a United States Attorney's decision to prosecute (or, conversely, to forbear) is largely unreviewable by the courts." *Flemmi*, 225 F.3d at 86; *see also Wayte v. United States*, 470 U.S. 598, 607 (1985) ("Such factors as the strength of the case, the prosecution's general

[10] The First Circuit has recognized a "narrow exception" to this rule where failure to enforce an unauthorized promise would render a prosecution "fundamentally unfair." *Flemmi*, 225 F.3d at 88 n.4; *accord Johnson v. Lumpkin*, 769 F.2d 630, 634 n.8 (9th Cir. 1985) ("[W]here constitutional or statutory safeguards are surrendered in exchange for an unauthorized promise of immunity, the promise – however unauthorized – may still provide a defense to prosecution."). "This case," like Flemmi's, "lies well outside the compass of that seldom-seen exception." *Flemmi*, 225 F.3d at 88 n.4.

deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."). But while defendant would have the court begin and end its analysis with this truism, the government argues, correctly, that the authority to grant immunity from prosecution – and therefore the court's deference to the decision to issue such grants[11] – does not extend to crimes committed *in futuro*.

While the issue has never been presented as starkly as it is in this case, various courts have intimated as much.[12] In *United States v. Black*, 776 F.2d 1321 (6th Cir. 1985), the Sixth Circuit construed an ambiguously drafted immunity agreement to exclude protection for future crimes, reasoning that "[i]t is too firmly established that grants of immunity do not license future criminal conduct to permit any other construction of the language in the agreement." *Id.* at 1328. Citing *Black*, the Fifth

[11] Defendant protests that "the court has no role in determining if this grant of immunity was appropriate or not, as this would be judicial encroachment on the power of the executive branch." Def.'s Mem. at 7. However, judicial deference to prosecutorial prerogative presupposes the existence of proper authority to issue the grant of immunity. As many of the very cases on which Bulger relies make clear, courts can and do routinely inquire into the scope of the promising agent's authority.

[12] As the Seventh Circuit Court of Appeals observed in facing a similar paucity of controlling precedent: "There has never been a case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune . . . because no previous case had found liability." *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

Circuit in *United States v. Ramos*, 537 F.3d 439 (5th Cir. 2008), similarly rejected a proposed construction of a written immunity agreement that would immunize testimony relating to crimes that did not exist when the agreement was made. *Id.* at 452. And in *United States v. Irwin*, 612 F.2d 1182 (9th Cir. 1980), the Ninth Circuit held that "substantial compliance" with a plea bargain is not "a defense for committing additional criminal acts subsequent to the agreement." *Id.* at 1192. While these cases did not entail precisely the question presented here, their import is clear: an immunity agreement cannot as a matter of public policy license future criminal conduct.

Defendant makes much of the fact that the *Irwin* and *Black* decisions did not suggest "that a person would be guilty of an offense where he participates in criminal activity solely to protect or continue to maintain his undercover status." *Irwin*, 612 F.2d at 1192 n.22; *accord Black*, 776 F.2d at 1328 ("This is not to say that immunity could not be granted a cooperating individual for future acts that in other circumstances might be criminal." (citing *Irwin*, 612 F.2d at 1192 n.22)). But defendant has not (yet) made such a claim (which would in any event amount to a defense of public authority requiring the giving of advance notice to the government). *See Doe*, 63 F.3d at 125; *People v. C.S.A.*, 104 Cal, Rptr. 3d 832, 838 (Cal. Ct. App. 2010).

More to the point, it has been observed in the context of the public authority defense that "[t]he proposition that a defendant may commit a criminal act without prior notice to any Government official on the basis of a supposed *carte blanche* authorization or a license to do everything but kill is without precedent and stretches any concept of good faith reliance beyond recognition." *United States v. Berg*, 643 F. Supp. 1472, 1480 (E.D.N.Y. 1986). A license to kill is even further beyond the pale and one unknown even in the earliest formulations of the common law.[13]

Based on the foregoing, the court concludes that any grant of prospective immunity to commit murder was without authorization and is hence unenforceable under any circumstance. Without knowledge of the date of the alleged agreement, however, the court is unable to say whether this determination nullifies defendant's claim of immunity in its entirety (again, assuming proof of its existence). The government argues that any grant of immunity for murders preceding the alleged

[13] One need only recall the current public debate over the legality of targeted overseas killings of persons deemed to have ties with terrorism, some of whom may be American citizens. Given that even the authority of the President and Commander and Chief of the Armed Forces to authorize such killings has been called into question by legislators and respected legal commentators, it strains credulity to suggest that an Assistant United States Attorney would have had the authority decades ago to authorize the murder of American citizens, on American soil, for reasons wholly unrelated to national security concerns. The roots of the dispute are ancient: "To bereave a man of life . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom." 1 William Blackstone, Commentaries on the Law of England 131-132.

agreement was similarly void – not because a grant of retrospective immunity is per se unauthorized, but because any such grant in this case would have been made contrary to the Department of Justice (DOJ) policies and procedures that were in place at any conceivable time when the alleged promise to Bulger could have been made.[14] In support of this argument, the government submits the affidavit of Associate Deputy Attorney General David Margolis, who served in the Organized Crime and Racketeering Section (OCRS) of the DOJ from 1969 to 1990, describing the policies and procedures of the DOJ regarding cooperating individuals. The Margolis Affidavit states that if O'Sullivan did in fact grant defendant historical immunity for murder, he did so without obtaining proper approval and in contravention of OCRS practices regarding immunity from prosecution for serious crimes of violence.

Raised as it was for the first time in the government's supplemental briefing, this argument is one to which defendant has yet to have the opportunity to respond.

[14] While an agreement not to prosecute for past crimes of murder might seem counterintuitive, it is not without precedent. One particularly well known case is that of Sammy "the Bull" Gravano, who received immunity for nineteen murders to which he confessed in exchange for his testimony against members of the Gambino crime syndicate. *See generally United States v. Avellino*, 136 F.3d 249 (2d Cir. 1998). "Since the primary function of a Federal prosecutor is to enforce the criminal law," however, current guidelines caution that non-prosecution agreements should not be "routinely or indiscriminately" entered and require prosecutors to conduct careful balancing of competing considerations. Department of Justice, 9 Principles of Federal Prosecution § 27.620.

In the court's view, the interests of justice require that the opportunity be afforded, including possibly the opportunity to test Margolis's testimony under cross-examination. The court therefore defers any ruling as a matter of law on the historical element of defendant's immunity claim. The court will grant the parties an additional briefing period and the opportunity to request an evidentiary hearing on Margolis's statements regarding DOJ policies. That briefing should address (or expand upon) the argument that any grant of historical immunity in this case exceeded O'Sullivan's scope of authority, as well as the question of whether a presumed grant of prospective immunity vitiates the whole of the agreement pursuant to *Kiely v. Raytheon Co.*, 105 F.3d 734 (1st Cir. 1997), and similar cases. *See id.* at 736 n.2, citing Restatement (Second) of Contracts § 184 ("If an agreement contains an illegal provision that is not central to the agreement and the illegal provision does not involve serious moral turpitude, the illegal portion of the agreement is discarded, and the balance of the agreement is enforceable.").[15]

[15] *See also* Williston, Law of Contracts, § 1761 (Rev. ed. 1938) ("[I]f the performance actually rendered by the plaintiff is something in itself forbidden by law, the fact that the bargain was in such general terms as to cover either the illegal performance or a lawful performance, and that both parties originally had no intention to have the performance unlawful, will surely not justify recovery on the bargain if the illegality is serious or more than an incidental part of the performance.").

ORDER

For the reasons stated above, the government's motion to resolve defendant's immunity claim prior to trial is GRANTED. Defendant's claim of prospective immunity is DENIED.[16] The parties are ordered to submit any supplemental briefing on the issue of historical immunity within fourteen (14) days of the date of this Order. The court will accept replies not exceeding ten (10) pages within seven (7) days thereafter before scheduling any further hearing.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

[16] At the February 13, 2013 hearing, defendant's counsel at times implied that defendant's claim is actually one of entrapment by estoppel (or public authority). The defense of entrapment by estoppel requires inquiry into "whether [defendant] was advised by a government official that the act was legal, whether [defendant] relied on that advice, whether that reliance was reasonable, and whether, given that reliance, prosecution of the defendant would be unfair." *United States v. Smith*, 940 F.2d 710, 715 (1st Cir. 1991). Relatedly, a public authority defense requires that "the conduct of the defendant was undertaken at the behest of a government official with the power to authorize the action . . . and the defendant reasonably relied on the authorization." *United States v. Cao*, 471 F.3d 1, 4 (1st Cir. 2006), citing *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994). Both entrapment by estoppel and public authority are affirmative defenses to be tried to a jury. The court's ruling is without prejudice to defendant's ability to advance either defense, subject to appropriate notice of the defense to the government, Fed. R. Crim. P. 12.3, and a determination that defendant has a cognizable and colorable basis for asserting it, *see Smith*, 940 F.2d at 713; *Cao*, 471 F.3d at 4-5.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES	)	
v.	)	**Civil Action No. 99-10371-DJC**
JAMES J. BULGER	)	

MEMORANDUM AND ORDER

CASPER, J. **May 1, 2013**

I. Introduction

Defendant James J. Bulger ("Defendant" or "Bulger") now moves to vacate the Memorandum and Order issued by the Court (Stearns, J.) on March 4, 2013 ("March 4th Memo & Order"), D. 856, regarding the government's motion to resolve Bulger's proffered claim of immunity prior to trial. Bulger has also asked this Court to vacate the Order issued by the Court (Stearns, J.) on December 6, 2012 ("Docket entry, 12/6/2012") which denied in part Bulger's November 2, 2012 motion seeking discovery, some of which he argued was material to the issue of immunity. D. 768; D. 856. Bulger has also renewed many of his requests from the November 2, 2012 motion that sought discovery relating to immunity. D. 848 at 5-6. He now also seeks discovery of the names and dates of service of certain officials of the Department of Justice ("DOJ"). Id. After having held a hearing on these motions on April 26, 2013 and for the reasons stated below in this Memorandum and Order, the Court DENIES Bulger's motion to vacate and the related discovery motion and ALLOWS the government's motion to preclude Bulger from raising the alleged claim of immunity to the jury at his upcoming trial.

II. Factual Background

In a 111-page, 48-count indictment, the government has charged Bulger with participation in a racketeering conspiracy involving, among other crimes, murder, extortion and money laundering (Count 1) and separate charges of racketeering, money laundering, extortion, and a range of firearms crimes (Counts 2-27, 39-40, 42, 45 and 48). Bulger has alleged that the government has granted him immunity from prosecution for all of these charged crimes. The parties have filed extensive briefing addressing whether there has been a sufficient proffer that any such immunity agreement between Bulger and an authorized agent of the government existed; whether any such agreement would be enforceable as a matter of law; and whether the government's Fed. R. Crim. P. 12(b)(2) motion to resolve this matter before trial denies Bulger his Sixth Amendment right to put on a defense where he intends to present the matter to the jury at trial.

III. Procedural History

A. Bulger Proffers That He Will Defend at Trial by Claiming Immunity from Prosecution

At least as early as the August 6, 2012 status conference, counsel for Bulger has expressed an intention to present the issue of immunity at trial before the jury. D. 713 at 41. At the November 1, 2012 hearing on Bulger's motion to continue the trial date, counsel for Bulger noted that he did not intend to file any dispositive motion relating to Bulger's claim of immunity. D. 798 at 6. In response to Bulger's motion for discovery relating to this issue, the government denied the existence of any such immunity agreement, but also argued that even if such an agreement existed, it could not encompass crimes committed after the alleged agreement's execution. D. 785 at 3-9, 18-19. In this opposition, the government also took the position that

whether any such agreement existed was an issue for resolution by the Court prior to trial. Id. at 2.

In response, Bulger submitted a memorandum regarding the immunity issue arguing that: (1) Bulger could present his claim of immunity as a defense at trial; (2) the issue of immunity should be decided by the jury; and (3) the alleged immunity agreement between the government and Bulger could, as a matter of law, encompass crimes committed after the agreement's execution. D. 811. On February 6, 2013, the government moved to resolve Bulger's immunity claim prior to trial pursuant to Fed. R. Crim. P. 12(b)(2). D. 819.

The Court (Stearns, J.) held a hearing on the government's motion on February 13, 2013. D. 827. During the hearing, the Court raised four issues with counsel, namely: (1) whether Fed. R. Crim. P. 12(b)(2) requires Bulger to raise a claim of immunity before trial; (2) if Rule 12(b)(2) did not do so, whether the government may compel the Court to rule on a potential immunity claim prior to trial; (3) if the government may not, whether the Court may nonetheless decide the immunity issue prior to trial; and (4) if the Court may decide the issue prior to trial, whether the Court is limited strictly to decisions of law implicated by the claim. D. 827 at 3-5. At the hearing, Bulger continued to assert that the issue of immunity was a matter that he could elect to present to a jury and that Rule 12(b)(2) did not permit the government to bring a Rule 12 motion to preclude an immunity defense at trial. D. 827 at 16-20. When the Court asked about the elements of Bulger's purported defense, defense counsel acknowledged that the first element was whether the government agent who granted such immunity was authorized to do so. D. 827 at 21. Counsel agreed with the Court that this element was an issue of law. Id. The government argued that this same issue was a matter for the Court that it could properly consider pre-trial, since any fact-finding would not invade the province of the jury. D. 827 at 9-10. The

government also argued that the issue of immunity (for the Court) was distinct from the defenses (for the jury's consideration) of public authority and entrapment by estoppel that Bulger could assert, provided Bulger established the proper foundation and gave appropriate notice under Fed. R. Crim. P. 12.3. D. 827 at 13-14. At the end of the hearing, the Court solicited additional briefing from the parties on the specific issues that the Court had raised during the hearing. D. 827 at 37.

After the hearing, both parties filed additional briefing. D. 830; D. 831. The government attached an affidavit from Associate Deputy Attorney General David Margolis ("Margolis Aff.") to its supplemental filing. D. 830-1. The government argued that the Margolis Aff. demonstrated that New England Organized Crime Strike Force Chief Jeremiah O'Sullivan ("O'Sullivan"), the person whom Bulger alleged granted him immunity, would have had no authority to grant Bulger the immunity he now claims.

B. Bulger Moves for Discovery Relating to Immunity

On November 2, 2012, Bulger moved for discovery under Fed R. Crim. P. 16(a)(1)(E). D. 768. He now also moves to vacate the Court's ruling on that motion. D. 856 at 1. In the discovery motion, Bulger sought, inter alia, DOJ internal correspondence, by and between the U.S. Attorney's Office and the New England Organized Crime Strike Force, the DOJ and the Federal Bureau of Investigation ("FBI") relating to Bulger and certain alleged associates referred to as the "Winter Hill Gang" (Requests 1-3), D. 768 at 5; all correspondence from Robert Mueller, now head of the FBI, and any other members of the DOJ relative to Bulger, Stephen Flemmi, John Martorano and Kevin Weeks (Request 4), D. 768 at 13; prosecution memoranda relating to investigations regarding Bulger and his associates from 1967 to the present (Request

6), D. 768 at 14;[1] a 1979 memorandum addressed to Gerard McGuire from DOJ attorneys O'Sullivan and McDowell (the so-called "race fix memorandum") (Request 7),[2] D. 768 at 16; DEA tape recordings of Bulger's automobile in 1985, memoranda during the course of the "Operation Beans" investigation and reports regarding the compromise of this investigation by any DOJ member directed to Mueller or former U.S. Attorney William Weld (Requests 10-11), D. 768 at 16-17; logs of O'Sullivan's daily appointments, phone calls and related notes (Request 19), D. 768 at 30-31; notes and 302 reports pertaining to interviews, depositions and testimony of O'Sullivan (Requests 20; 22-23), D. 768 at 31-32; depositions of O'Sullivan other than those conducted in the Limone and Rakes civil actions which the defense has already received (Request 21), D. 768 at 31; and documents pertaining to allegations of misconduct by former FBI agent Thomas Daly (Request 25), D. 768 at 32-33.[3] As to these categories of documents, Bulger argued that they were material to his alleged defense of immunity and, therefore, discoverable under Fed. R. Crim. P. 16(a)(1)(E). D. 768 at 3, 5-10, 13-14, 16-17, 29-34.

In addition, Bulger sought certain discovery in the November 2nd motion that he alleges concerns not his purported defense of immunity, but bears upon the credibility of three anticipated, key government witnesses at trial. Bulger therefore contends that he is entitled to this discovery as Giglio information. See Giglio v. United States, 405 U.S. 150 (1972). These requests included the prison records of John Martorano including all records reflecting money that law enforcement placed or directed to his commissary or any "financial considerations"

[1] The Court notes that Bulger withdrew Request 5. D. 768 at 14.

[2] The Court also notes that Bulger's motion made no reference to Requests 8 and 9. See Docket entry, 12/6/2012.

[3] In his motion, Bulger referred to this request as Request 24, but the Court believes that it is misnumbered, particularly since Bulger also acknowledges that Request 24 has been fulfilled. Accordingly, the Court will refer to it here as Request 25 as the Court did in its December 6, 2012 Order. Docket entry, 12/6/2012.

given to him including upon his release from prison, his pre-sentence report ("PSR"), concessions regarding the forfeiture of certain property to satisfy his obligations to his ex-wife, whether certain persons associated with John Martorano were targets of any criminal investigation, any agreement about the limitation of his testimony, documents "authored, signed or approved" by former Attorney General Janet Reno relative to Martorano and his plea agreement and any and all promises, rewards or inducements provided to him by DOJ (Request 13). D. 768 at 18-21.[4] Bulger also asked for all prison records of Stephen Flemmi, his PSR, plea and sentencing transcript, any and all promises, rewards or inducements provided by any member of the DOJ not previously produced and all documents relating to a polygraph test administered to Flemmi (Requests 14 and 26). D. 768 at 21-23, 34. Bulger further requested records regarding Patrick Nee as it bears upon the "amount of favor" the government extended to John Martorano and Kevin Weeks by not prosecuting Nee (Request 15). D. 768 at 23-25. He also asked for records pertaining to James Martorano (Request 17).[5] D. 768 at 28-29.[6] Finally, Bulger asked for records concerning Weeks, including his PSR and any and all other promises, rewards and inducements from DOJ to Weeks (Request 16), D. 768 at 27.

In a December 6, 2012 Order, Judge Stearns ruled on the motion, granting it in part and denying it in part, and noting that certain of the requests had become moot. Docket entry, 12/6/2012. In regard to Bulger's request for internal DOJ correspondence relating to Bulger and his associates (Requests 1-4), Judge Stearns denied these requests except as to:

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[4] The Court notes that Bulger withdrew Request 12. D. 768 at 18.

[5] The Court notes that Bulger withdrew Request 18. D. 768 at 29.

[6] Although Bulger contends that the discovery sought about Nee primarily bore upon the credibility of John Martorano and Weeks, he also argued that such discovery would also be "corroborative support of [his claim of] immunity" and incorporated the same basis for the request as to James Martorano. D. 768 at 26, 29.

> any correspondence reflecting the existence of any agreement, formal or informal, acknowledging or memorializing the conferral of immunity on defendant by the U.S. Government or its authorized agents for any past or prospective crimes for which defendant was responsible (or an affirmance that no such correspondence exists).

Id. As to the other requests that Bulger argued were material to the issue of immunity, the Court denied the request for prosecution memoranda (Request 6) on the grounds that the work product doctrine and the deliberative process privilege protect these documents from disclosure, but noted that to the extent such memoranda contained any potentially exculpatory evidence, the government represented that such material had been produced. Id. As to the race fix memorandum sought in Request 7, the Court declared this request moot as former President George W. Bush had asserted executive privilege over it. Id. The Court declared Requests 10 and 11 moot since the government had already produced the recordings sought from "Operation Beans" and to the extent that Bulger sought other documents regarding this investigation, the government represented that it had produced such documents where any such documents might tend to be exculpatory or suggest the existence of an immunity agreement. Id. As to the requests for the logs, notes, reports or depositions not previously produced regarding O'Sullivan, the Court declared this request moot in light of the government's representation that all such relevant and unprivileged information in its possession as to these categories had been produced. Id. As to the request regarding an alleged improper relationship between former FBI agent Daly and an informant (Request 25), the Court denied the request because Bulger had shown "no conceivable relationship" between the information sought and this case. Id.

As to the Giglio discovery sought regarding John Martorano, Stephen Flemmi and Kevin Weeks, the Court allowed these requests in part. Specifically, the Court allowed the request for prison records and evidence of preferential treatment of John Martorano in that the government represented that it would provide a list of any government payments, state or federal, to his

prison commissary account; had already produced all requested records regarding his ex-wife; and that former Attorney General Janet Reno had no involvement with his plea agreement (Request 13). Id. As to all of Bulger's requests for the PSRs of Martorano, Flemmi and Weeks, the Court denied these requests on the grounds that the defendant had made an insufficient showing to warrant production (Requests 13, 14, 16). The Court allowed the motion as to Flemmi in part as well and noted that the government agreed to produce the plea and sentencing hearing transcripts and to expedite the production of the recordings of Flemmi during his incarceration in Plymouth (Request 14). Id. As to Request 26, the request for documents relating to the polygraph of Stephen Flemmi, the Court denied this request since polygraph results are inadmissible in a federal criminal trial for any purpose. Id.

C. The Court Rules on the Government's Rule 12(b)(2) Motion Regarding Immunity

In the March 4th Memo & Order, as discussed more thoroughly below, the Court ruled that the issue of immunity was a question that the Court both could and should decide before trial. D. 832 at 3. Second, the Court observed that prior to March 4, 2013, counsel for Bulger had alleged only that O'Sullivan had orally promised Bulger immunity prior to December 1984 and that the immunity extended to "prosecution for any and all crimes, past and future, up to and including murder." Id. at 13. Third, the Court concluded that if O'Sullivan had granted Bulger immunity, the immunity agreement could not have, as a matter of law, extended to crimes committed in futuro. Id. at 15. Such an agreement, the Court found, could not have been in the scope of O'Sullivan's authority as an agent of the DOJ. Id. at 17. The Court deferred any ruling with respect to Bulger's allegations that O'Sullivan had immunized Bulger for crimes committed prior to the alleged grant of immunity because "[w]ithout knowledge of the date of the alleged agreement, . . . the court is unable to say whether this determination [that a grant of prospective

immunity was unenforceable] nullifies defendant's claim of immunity in its entirety (again, assuming proof of its existence)," D. 832 at 17 and because the government proffered the Margolis Aff. after the hearing and the Court wanted to give the defense an opportunity to respond. D. 832 at 18. To that end, the Court granted the parties additional time to file supplemental briefing and, if warranted, request an evidentiary hearing regarding whether any grant of historical immunity exceeded O'Sullivan's scope of authority and whether a presumed grant of prospective immunity vitiated the whole of any agreement. Id. at 19 (citing Kiely v. Raytheon, 105 F.3d 734 (1st Cir. 1997)).

D. The First Circuit Issues Its Decision on Recusal Pursuant to 28 U.S.C. § 455(a)

While the parties argued the immunity issue, they also were litigating Bulger's mandamus petition to the First Circuit regarding whether Judge Stearns should have recused himself where, as Bulger alleged, the judge's impartiality could reasonably be questioned under 28 U.S.C. § 455(a). At oral argument before the First Circuit on January 8, 2013, counsel for Bulger proffered that O'Sullivan had granted Bulger immunity sometime prior to December 1984 (the date that Judge Stearns became Chief of the Criminal Division within the U.S. Attorney's Office). Oral Argument at 4:01, In re Bulger, 12-2488 (1st Cir. Jan. 8, 2013).

The First Circuit ultimately granted the petition, having determined that Judge Stearns's impartiality could reasonably be questioned under 28 U.S.C. § 455(a) where "a reasonable person might question the judge's ability to preserve impartiality through the course of this prosecution and the likely rulings made necessary by the immunity claim." In re Bulger, 710 F.3d 42, 49 (1st Cir. 2013). At several junctures in its decision, the First Circuit took care to note that its ruling was based only upon a concern about the appearance of bias and that no actual bias on Judge Stearns's part was alleged or found. Id. at 46, 49 n.3. Given that the First Circuit's

decision issued shortly after the Court had issued the March 4th Memo & Order, the appellate court noted in explicit terms that its ruling did not "require that Judge Stearns's March 4 order (or any other, save the one under review) be vacated. The defendant is free to respond to that order as he sees fit, but nothing we decide here necessarily requires reploughing the ground, given the absence of any allegation that Judge Stearns is actually biased." Id. at 49 n.3. Shortly after the First Circuit's ruling, this case was redrawn to this session. D. 839.

E. Bulger Now Moves to Vacate the March 4th Memo & Order

Bulger has filed additional briefing, as solicited by the Court in the March 4th Memo & Order, and has now moved to vacate that decision. D. 855; D. 856. The government has opposed the motion and renewed its request that the Court preclude Bulger from raising immunity at trial. D. 862. Bulger seeks to vacate on the grounds that to the extent that the prior presiding judge's impartiality to hear this case could be reasonably questioned, "[t]he resolution of this question [of immunity] must be free from doubts about the judge's neutrality" and "[o]nly a full reconsideration of the immunity issue by a judge of unquestioned neutrality can purge the trial of any appearance of partiality," D. 856 at 2-3; the distinction between prospective and historical immunity is a false dichotomy injected into the Court's analysis by the government where Bulger posits that his immunity was "ongoing," D. 856 at 5; the Court's denial of discovery to Bulger regarding the immunity issue was inconsistent with its acceptance of the Margolis Aff. proffered by the government, D. 856 at 7; and that the March 4th Memo & Order and related discovery rulings amount to a denial of Bulger's constitutional rights, namely his right to put on a defense. D. 856 at 7; D. 855 at 10.

F. Bulger Also Moves to Vacate the December 6, 2012 Electronic Order Relating to Discovery and Has Filed a Separate Motion Seeking the Same Discovery

Bulger also seeks to vacate Judge Stearns's December 6, 2012 ruling, which denied in part certain of Bulger's requests for discovery. D. 856. The motion seeks to vacate the December 6, 2012 Order in toto and Bulger's discovery motion renews many of his initial discovery requests as related to his alleged immunity defense. D. 848 at 5-6. In addition, Bulger now also seeks discovery of the names and dates of service for: (1) Department of Justice attorneys assigned to the Strike Force from 1972 to 1994; (2) Chiefs of the Criminal Division from 1972 to 1994; (3) Chiefs of the General Crimes Section from 1972 to 1994; and (4) the Special Agents in Charge of the Drug Enforcement Administration from 1972 to 1994. Id. at 6. The government also opposes this motion. D. 859.

The Court scheduled a hearing on both motions, D. 848 and D. 856, for April 19, 2013, but that hearing had to be rescheduled in light of the Courtwide closure that day. D. 868, 880. The hearing was held on April 26, 2013 at which time the Court also heard counsel on the other discovery motions pending at the time, D. 846, 847, 878 and 883. The Court took all matters under advisement.

IV. Discussion

A. Defendant's Motion to Vacate the March 4, 2013 Memorandum and Order

1. Nothing in the First Circuit Decision on Recusal Mandates Reversal of the March 4th Memo & Order

The First Circuit's opinion made abundantly clear that it found no actual bias on Judge Stearns's part and that Bulger alleged no such actual bias. In re Bulger, 710 F.3d at 46 (noting that "defendant has made no claim that Judge Stearns has in fact demonstrated any bias in his handling of the case"). Vacatur of prior decisions, on this ground, is not required. Accordingly, "[i]t does not follow . . . that this litigation must return to square one" or even where it stood

when Bulger first made his request for recusal. In re Sch. Asbestos Litig., 977 F.2d 764, 785 (3d Cir. 1992).

Where, as here, "no actual bias is at issue, where the question is solely one of appearances, judicial actions already taken are not necessarily rendered invalid because of a circumstance that violates § 455(a)." In re Allied Signal Inc., 891 F.2d 974, 975 (1st Cir. 1989). If any action shall be taken as to past rulings after such a finding, it should be only "to fashion retrospective relief with an eye toward a just result." Id. at 976 (citing Liljeberg v. Health Srvcs. Acq. Corp., 486 U.S. 847, 862 (1988)) (declining to declare mistrial on mandamus petition where it would be unfair to interrupt the present trial, given the time and expense expended by the parties and where declining to do so would not create a "serious crisis of confidence in the impartiality of the judiciary"); see In re Cargill, 66 F.3d 1256, 1269 (1st Cir. 1995) (Campbell, J., dissenting) (noting that if the majority had granted the petition for a writ of mandamus under § 455(a) "requiring [appointment of] a new judge . . . it would have been open to this court to let stand the former judge's ruling on [the party's] dismissal motion"). In considering whether to allow prior orders stand after a finding of "a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public confidence in the judicial process." Liljeberg, 486 U.S. at 864.

Here, the First Circuit was aware of the March 4th Memo & Order at the time that it issued its decision on March 14, 2013 and noted that nothing in its ruling necessarily requires "reploughing the ground" covered by Judge Stearns. In re Bulger, 710 F.3d at 49 n.3.

Bulger, however, urges this Court to replough the ground because "[o]nly a full reconsideration of the immunity issue by a judge of unquestioned neutrality can purge the trial of

any appearance of [prior] partiality." D. 856 at 2-3. Such consideration is unnecessary. The issue of immunity addressed in the March 4th Memo and Order and the related discovery motion were extensively briefed. The Court heard oral argument on the former issue and both matters were resolved by the Court in well-founded and well-reasoned orders. Docket entry, 12/6/2012; D. 832. Although Bulger contends that "Judge Stearns's rulings on these issues were almost entirely adverse to the defendant," D. 856 at 2, (a characterization that the Court rejects, particularly in regard to Judge Stearns's discovery rulings), an adverse ruling does not mean that the rulings were wrongly decided or were "tinged with bias" as Bulger contends. D. 856 at 3.

2. The Court Declines to Apply the "Law of the Case" Doctrine

Since vacatur is not required in the absence of actual bias, In re Allied Signal, Inc., 891 F.2d at 975; see also In re Bulger, 710 F.3d at 49 n.3, the government urges that the Court should decline to vacate the March 4th Memo & Order since it is "law of the case" and should continue to govern the same issues in the subsequent stages in the same litigation. D. 862 at 5. The law of the case doctrine contemplates that a legal decision made at one point during a legal proceeding should "remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court." United States v. Moran, 393 F.3d 1, 7 (1st Cir. 2004) (citing Christianson v. Colt Indus. Oper'g Corp., 486 U.S. 800, 816-17 (1988)).

Under this doctrine, reconsideration of a prior legal decision is, in general, only appropriate under certain circumstances. Ellis v. United States, 313 F.3d 636, 647-48 (1st Cir. 2002). Specifically, reconsideration is proper if (1) the court's initial ruling was made on an insufficient record or was preliminary or tentative; (2) there has been a material change in the controlling law; (3) the parties have presented newly discovered evidence that bears on the question; or (4) necessary to avoid manifest injustice. Id. (internal citations omitted). Under

these circumstances, a showing of manifest injustice "requires, at a bare minimum, 'a definite and firm conviction that a prior ruling is unreasonable or obviously wrong' and resulted in prejudice." Moran, 393 F.3d at 8 (quoting Ellis, 313 F.3d at 648)). The first three exceptions are clearly inapposite. Specifically with regard to the first, the Court notes that the March 4th Memo & Order considered only those issues ripe for consideration and, in fact, gave counsel leave to file additional briefing and request a hearing regarding the issue of historical immunity. Nor have the parties brought to the Court's attention any change in controlling law or newly discovered evidence. The Court recognizes that Bulger's motion for vacatur could also be construed to argue that it would be manifest injustice for the March 4th Memo & Order (and related discovery order) to stand in light of the ruling about the appearance of impropriety. The Court disagrees, as discussed above, that there is any evidence of partiality in any of the prior rulings of the Court and the First Circuit's decision does not suggest otherwise. The Court need not revisit the March 4th Memo & Order for this reason.

However, "[i]n this circuit the 'law of the case' doctrine has not been construed as an inflexible straightjacket that invariably requires rigid compliance with the terms of the mandate." Ne. Util. Serv. Co. v. FERC, 55 F.3d 686, 688 (1st Cir. 1995) (citing Messenger v. Anderson, 225 U.S. 436, 444 (1912) (Holmes, J.) (noting that "the phrase[] 'law of the case,' . . . merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power")). Although not compelled to do so in light of the First Circuit's ruling on recusal or because of any risk of manifest injustice arising from adhering to the March 4th Memo & Order and December 6, 2012 Order regarding discovery as law of the case, the Court, in its discretion, addresses this issue anew.

3. After Independent Consideration, the Court Concludes That the Issue of Immunity Is for the Court, Not the Jury to Decide

a) Immunity is an Issue for the Court's Consideration

Bulger has argued that he is entitled to a jury finding on the issue of immunity. He contends that Fed. R. Crim. P. 12(b)(2) empowers him, and not the government or even the Court, to decide the timing of raising the issue of immunity. Bugler asserts that he may raise immunity as a defense at trial. It, however, remains the case that any alleged immunity agreement, if any such agreement existed, is a bar to prosecution to be determined by the Court and not a defense to the crimes charged to be presented to the jury.

As an initial matter, this Court agrees that Bulger's argument is "premised on a faulty reading of Rule 12." D. 832 at 3. Rule 12(b)(2) provides that "[a] party may raise by pre-trial motion any defense, objection, or request that the court can determine without a trial of the general issue." The categories of matters that are covered by Rule 12(b)(2) are defenses, objections and requests that, if not made pre-trial, are not waived. Id. at 3 (citing United States v. Jarvis, 7 F.3d 404, 414 (4th Cir. 1993) (noting that "[f]ailure to raise a contemporaneous objection of immunity before trial does not constitute a forfeiture of the objection . . .") (emphasis in original)). That is, the consequence of not raising such matters pre-trial is not that the issues convert to a jury matter at trial, but that the issue is not otherwise forfeited. See United States v. Meacham, 626 F.2d 503, 509 (5th Cir. 1980); United States v. Issacs, 493 F.2d 1124, 1140 (7th Cir. 1974).

Moreover, the issue of immunity is one that the Court "can determine without a trial of the general issue." Fed. R. Crim. P. 12(b)(2). The general issue for trial is the guilt or innocence of the defendant. See United States v. Barletta, 644 F.2d 50, 58 (1st Cir. 1981). Whether the government (specifically, O'Sullivan) had the authority to enter into such an agreement, whether

such an immunity agreement existed and whether the charges in this case fall within the alleged agreement amount to issues severable from that of the general issue of guilt or innocence. See D. 832 at 4; United States v. Thompson, 25 F.3d 1558, 1562-63 (11th Cir. 1994) (denying pre-trial motion to dismiss indictment based on defendant's allegations that immunity barred his prosecution, and noting that to dismiss the indictment on these grounds, "the court would have to find that an agreement existed, that [the defendant] had substantially performed his part of the bargain, and that the government had breached the clear terms of the agreement"). Even if the Court has to make preliminary findings of fact to do so, "a defendant's rights [under an immunity agreement] are determined by the terms and conditions of the bargain as found by the court." United States v. McLaughlin, 957 F.2d 12, 16 (1st Cir. 1992). Immunity agreements, like plea agreements, are contractual in nature; courts therefore interpret such agreements according to principles of contract law. See McLaughlin, 957 F.2d at 16; United States v. Black, 776 F.2d 1321, 1326 (6th Cir. 1985). In doing so, courts must determine the terms and scope of such agreements. See McLaughlin, 957 F.2d at 16. Courts routinely make such findings of fact in ruling on Rule 12 motions. See, e.g., United States v. Crooker, 688 F.3d 1, 8 (1st Cir. 2011); United States v. Aleman, 286 F.3d 86, 92 (2d Cir. 2002). Accordingly, any fact-finding necessitated by determining whether any such immunity barred prosecution of Bulger for the crimes charged here would not invade the province of the jury in making the ultimate determination of guilt or innocence.

Bulger points to the posture of the pending Rule 12(b)(2) motion as having been brought by the government and not by the defendant as further proof that this issue should not be resolved pre-trial and that he should not be required to make a further proffer about his alleged immunity. In his papers and again at the April 26th hearing, Bulger points to the fact that the

although the rule itself makes such pre-trial motions permissive by "[a] party," the advisory committee notes to the Rule refer to "the defendant [who] at his option may raise by motion before trial . . . all defenses and objections which are capable of determination without a trial of the general issue." Fed. R. Crim. P. 12 advisory committee's note. Nevertheless, "the Advisory Committee Note is not the law; the rule is. Accordingly if the Advisory Committee Note can be read in two ways, we must read it, if we consult it at all, in a manner that makes it consistent with the language of the rule itself, and if the rule and the note conflict, the rule must govern." United States v. Carey, 120 F.3d 509, 512 (4th Cir. 1997).

But even so, the Court's consideration of the government's motion is consistent with the Court's inherent authority to consider motions in limine and appropriately narrow the focus of the presentation of evidence at trial. Determination of this issue pre-trial is also proper in that it promotes the efficient use of the Court's resources. In both civil and criminal matters, courts routinely avail themselves of procedural devices to narrow the issues for trial. Such a pre-trial determination cuts both ways. As the March 4th Memo & Order noted, "[p]retrial denial of defendant's immunity claim would narrow the focus of inquiry of trial," but "[c]onversely, a finding that defendant's prosecution is barred by a valid grant of immunity would prevent an unnecessary trial and the expenditure of considerable public resources." D. 832 at 10-11.

Finally, that Bulger did not elect to raise the issue of immunity under Rule 12(b)(2) does not turn the issue into one that must be decided by the jury at trial. "That a claim of immunity may be raised at trial does not mean that deferring the decision to do so operates to convert the claim from one of law into a matter of jury-decisional fact." D. 832 at 8 and cases cited.[7]

[7] At the April 26th hearing, counsel for Bulger suggested that a footnote in an earlier decision, D. 771 at 12 n.13, contradicts the Court's later ruling on this point in the March 4th Memo & Order. This Court does not agree. First, that footnote predated the government's Rule

Declining to raise the issue now does not turn the issue into a jury question and, therefore, Bulger's argument that deciding this issue pre-trial on the government's motion denies him his Sixth Amendment right to put on a defense at trial rings hollow.

b) The Alleged False Distinction between Prospective and Historical Immunity Was Not Improper or Inconsistent with Bulger's Limited Proffer and the Court Will Not Vacate the Prior Ruling Regarding The Former

From the Court's review of the various filings regarding Bulger's alleged immunity, the proffer of the parameters of that immunity has evolved over time. See, e.g., D. 768 at 6 n.2; D. 811 at 10-12; D. 827 at 37; D. 855 at 9-10. Based on defense counsel's representations to this Court and to the First Circuit, the most that can be said now is that Bulger contends that O'Sullivan gave him immunity from prosecution of crimes in this district and that this agreement was entered into sometime before December 1984 and ended in 1989. D. 832 at 13; see also Oral Argument at 4:01, In re Bulger, 12-2488 (1st Cir. Jan. 8, 2013); D. 855 at 9-10 (noting that Bulger "kept his promise to the Dept. of Justice until O'Sullivan left the U.S. Attorney's Office in 1989"). Bulger contests the distinction between prospective immunity for committing crimes after the agreement's execution and historical immunity for crimes committed in the past that the Court employed in its March 4th Memo & Order. But the defendant's proffer of his alleged immunity was still evolving at the time of the February 13, 2013 hearing on this matter and even

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12(b)(2) motion and the full argument and briefings by both parties on this matter. Second, the cases cited in that footnote, at most, support the Court's ruling that immunity is an issue for the Court to determine and, at a minimum, do not contradict it. See United States v. Doe, 63 F.3d 121, 125 (2d Cir. 1995) (affirming denial of defendant's Rule 12 motion to dismiss where his claim was in essence that, as a confidential informant, he had been authorized to engage in criminal transactions and a "claim of public authority is an affirmative defense that is tried to the jury" since it "provides a defense to liability for the crimes charged in the indictment"); St. Hilaire v. City of Laconia, 71 F.3d 20, 24 & n. 1 (1st Cir. 1995) (ruling that the "ultimate question of qualified immunity should ordinarily be decided by the court" in the context of a § 1983 claim even while noting that whether the factfinder as to disputes of material fact was for the judge or jury was still not well settled).

now Bulger characterizes his immunity agreement, while in effect, as "ongoing." D. 855 at 8. Given the paucity of the proffer about the terms, timing or scope of this alleged agreement, particularly against the backdrop of the charges in this case that span a period from 1972 to 2000, it certainly was reasonable for the Court to frame the analysis in terms of historical and prospective immunity and, notwithstanding Bulger's suggestion otherwise, see D. 856 at 3, the Court's use of this terminology does not suggest a biased wholesale adoption of the government's position. However the Court previously framed the issue, the ruling in the March 4th Memo & Order that any alleged agreement of prospective immunity was unenforceable as a matter of law is well-founded and the Court declines to vacate it. D. 832 at 17.

Certainly, the Court understands the point that defense counsel made at the April 26th hearing that to rule in Bulger's favor on this motion would not amount to blessing an alleged "license to kill," but would mean only that Bulger could contend that an authorized government agent granted him immunity from prosecution in this district for the charges alleged in this case, namely, a wide ranging racketeering conspiracy, and separate counts of racketeering, extortion, money laundering and firearms offenses. However, this point does not change the Court's independent conclusion that Bulger's claimed immunity is not a defense to the charged crimes to be presented to the jury at trial.

After independent review, this Court agrees "[t]hat no jury right attaches to defendant's claim of immunity is firmly established by binding precedent." D. 832 at 5. This Court has been unable to find, and counsel have not identified any cases, save Bulger's citation to Thompson, to suggest otherwise. Thompson does not aid Bulger's argument. In Thompson, although there was a pre-trial denial of a motion to dismiss based upon a claim of immunity, the defense that the Eleventh Circuit concluded the district court should have allowed the defendant present at trial

was not an immunity defense, but a defense of entrapment by estoppel, id. at 1565, a defense, that as discussed below, this ruling does not preclude the defendant from raising at trial.

c) There Has Been an Insufficient Proffer of the Claimed Immunity Agreement, Regardless of Whether Such Immunity is Characterized as Prospective, Historical or Ongoing

Ultimately, the defendant bears the burden of demonstrating that an agreement existed, that the promisor had actual authority to enter into the agreement and that the defendant detrimentally relied on the promise not to prosecute. United States v. Flemmi, 225 F.3d 78, 84 (1st Cir. 2000) (defendant seeking to enforce promise has burden to demonstrate promisor's authority to make promise and defendant's detrimental reliance on promise); see also United States v. Jimenez, 256 F.3d 330, 347 (5th Cir. 2001) (defendant bore burden of proving that immunity agreement existed); Thompson, 25 F.3d at 1563 (affirming district court's ruling that there was not sufficient evidence to find the existence of an immunity agreement, where "the only evidence in support of a grant of immunity was [the defendant]'s conclusory statements that such an agreement existed"); United States v. Salemme, Nos. 94–10287–MLW, 97-10009-MLW, 1997 WL 810057, at *4 (D. Mass. Dec. 29, 2007) (defendant has burden to demonstrate existence of immunity agreement at motion to dismiss). No showing has been made here and Bulger has declined to make a further proffer to support his contention. In the March 4th Memo & Order, the Court offered Bulger an opportunity for additional briefing and an evidentiary hearing to test the government's assertion that even if O'Sullivan had granted Bulger immunity, O'Sullivan had no authority do so. D. 832 at 18-19. Although Bulger submitted further briefing regarding this issue, D. 855, he declined any pre-trial hearing regarding his claim of immunity on the grounds that "[t]he defendant will not request an evidentiary hearing that the court is not

authorized to conduct." D. 855 at 10.[8] Moreover, counsel for Bulger indicated at the April 26th hearing that he would not participate in any pre-trial evidentiary hearing determinative of the immunity issue regardless of how the Court rules on the pending motion.

The Court disagrees with Bulger that forcing him to make a further proffer or offer evidence regarding the alleged immunity agreement in pre-trial proceedings violates his Fifth Amendment right against self incrimination. It may be too much to say that Simmons v. United States, 390 U.S. 377, 390 (1968), bars the use of any testimony of a defendant from a pre-trial evidentiary hearing against the defendant at trial, D. 832 at 12 n.9, but it would do so here. Simmons was concerned with the "undeniable tension" that exists when a defendant is "obliged either to give up what he believed, with the advice of counsel, to be a valid Fourth Amendment claim, or in legal effect, to waive his Fifth Amendment privilege against self-incrimination." Simmons, 390 U.S. at 394. The Supreme Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another" and held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." Id. The First Circuit has not applied the Simmons bar where a defendant did not have to surrender a constitutional right to assert another by testifying at a pre-trial conference, but has applied the Simmons bar where contemplated pre-trial testimony created this

[8] In the March 4th Memo & Order, the Court also solicited supplemental filings as to whether the prospective aspect of the alleged grant of immunity was severable from the entirety of the alleged agreement, or if the entirety of such agreement would be void as a matter of public policy. D. 832 at 19 (citing Kiely, 105 F.3d at 734). In response, Bulger maintained his position that the Court had no authority to review a prosecutor's decision not to prosecute Bulger. D. 855 at 7-8. But the law in this Circuit is that "an agreement to achieve mutual benefit from the parties' cooperative violation of the law…even if explicitly agreed to by both parties, is void and unenforceable as against public policy." Kiely, 105 F.3d at 736. This principle remains implicated by the agreement alleged here, particularly where the Court has already ruled that such agreement, at least as to prospective immunity, is unenforceable as a matter of law.

intolerable choice. Compare United States v. Catano, 65 F.3d 219, 224 (1st Cir. 1995) (concluding that Simmons would not bar use of a defendant's pre-trial testimony limited by the Court to his understanding of a plea/cooperation agreement at trial), with United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991) (ruling that if the defendant had testified at a pre-trial evidentiary hearing about a meeting with an agent giving rise to his contention that the government had authorized his possession of firearms, such testimony would not waive his Fifth Amendment right under Simmons). Bulger should not and would not be forced to incriminate himself in a pre-trial hearing to assert his Sixth Amendment right to raise immunity as a bar to this prosecution, or as he contends, put on a defense. This is the untenable situation that Simmons bars for a defendant and it would, in this Court's view, serve to bar the use of any of his statements at trial on the issue of guilt.[9]

That this matter is before the Court on the government's motion, and not the defendant's motion, does not appear to be a material distinction that Simmons and its progeny in this Circuit has recognized and the defendant has not identified any case suggesting otherwise. Since Simmons was concerned with the defendant's "Hobson's choice" of having to waive one right to assert another, Simmons, 390 U.S. at 391, it is this essential issue that remains here.

Bulger's proffer suffers not only from a lack of sufficient detail, but there has been no showing that the alleged promise of immunity was made by a person with actual authority to make it or that Bulger detrimentally relied on that promise as required under Flemmi. Although Bulger attacks the integrity of the affiant in the Margolis Aff., D. 855 at 11, he has now

[9] Indeed, on the eve of Stephen Flemmi's trial earlier in this case, the government took the same position in a motion in limine in regard to Flemmi's pre-trial testimony regarding an alleged grant of immunity. D. 528 at 7 n.4; see also United States v. Salemme, 91 F. Supp. 2d 141, 175 (D. Mass. 1999) (reflecting Flemmi's testimony regarding at alleged grant of immunity at pre-trial evidentiary hearings).

repeatedly declined an evidentiary hearing regarding the issue of O'Sullivan's actual authority to make the promise that Bulger alleges and, accordingly, the Margolis Aff. remains unrefuted here. The Court recognizes that as prosecutors are empowered to pursue prosecution, they are also empowered to forbear prosecutions. Flemmi, 225 F.3d at 86. Whether a government official had the authority to bind the United States to an informal promise of immunity is a fact-based inquiry, requiring the defendant to demonstrate that the promisor acted with the authority of the federal government. Even if, as Bulger contends, the DOJ guidelines proffered by the government in support of its argument that O'Sullivan had no authority to grant any such agreement do not have the force of law, D. 855 at 3-6, the relationship between the United States and its agents are not entirely governed by statutes and regulations that have the force of law. See Flemmi, 225 F.3d at 85 (noting that "[a]ctual authority [to bind the government] may be conferred either expressly or by necessary implication"). Thus, whether or not the DOJ guidelines have the force of law, they, at a minimum, bear upon the principal-agent relationship between the government and DOJ attorneys during the relevant period and suggest a basis for questioning O'Sullivan's actual authority to grant Bulger the scope of immunity he claims here.

However, even putting aside the issue of actual authority, there is no evidence in the record, and Bulger has not proffered any, that he detrimentally relied upon any such promise, even if it was made. There is no suggestion that Bulger took any action to his disadvantage in reliance upon this promise. He did not, for example, waive any constitutional right, incriminate himself or offer to plead guilty in reliance on same. See, e.g., United States v. Carter, 454 F.2d 426, 427 (4th Cir. 1972). To the contrary, as alleged by the government, D. 611 at 2, Bulger fled upon word of the charges to come in this matter and remained at large until his arrest in June 2011. Id.

For all these reasons, to the extent that the March 4th Memo & Order left open the entirety of Bulger's claimed immunity, reserving on the issue of historical immunity upon further submission of the parties, the Court concludes, on the present record, that there has been an insufficient proffer that any such promise of immunity was made by a person with actual authority to make it or that Bulger detrimentally relied upon such promise, or that any such agreement was enforceable as a matter of law. Moreover, such alleged agreement, if characterized as prospective, historical or ongoing, is not a defense to be presented at trial to the jury.

d) Preventing Bulger from Arguing the Immunity Issue at Trial Does Not Violate His Rights Under the Sixth Amendment

As referenced above, Bulger argues that if the Court does not permit him to raise the immunity issue at trial, such preclusion would deprive him of his Sixth Amendment right to present a defense. First, there is nothing about this ruling or the March 4th Memo & Order that bars Bulger from choosing to take the stand in his own defense. D. 832 at 11 n.7. Second, the constitutional guarantee that Bulger invokes is not boundless. See United States v. Reeder, 170 F.3d 93, 108 (1st Cir. 1999) (noting that the Sixth Amendment does not grant defendant "unfettered" right to offer inadmissible evidence) (quoting Montana v. Egelhoff, 518 U.S. 37, 42 (1996)). In addition, where a defendant has failed to make a sufficient evidentiary proffer to support a defense, the Court may prevent the defendant from presenting that defense without violating the defendant's constitutional rights. See United States v. Roszkowski, 700 F.3d 50, 54-55 (1st Cir. 2012) (affirming trial court's refusal to compel testimony in support of entrapment defense, where defense was otherwise "tenuous" in light of a "speculative proffer"). As discussed above, the Court has determined that the issue of immunity is not an issue for the jury; evidence of immunity would therefore not be relevant at trial. See Fed. R. Evid. 401, 402.

For all the reasons stated here and previously in the March 4th Memo & Order, D. 832, the Court DENIES Bulger's motion to vacate and ALLOWS the government's motion to preclude Bulger from presenting his alleged claim of immunity to the jury as a defense.

e) Bulger May Still Assert Defenses of Entrapment by Estoppel and Public Authority

Even though the Court has concluded that the existence and enforceability of immunity agreements are to be found by the Court, there are related defenses which Bulger could present to the jury. Even as defense counsel has recognized, the defenses of public authority[10] and entrapment by estoppel[11] are "branch[es] of the immunity tree." D. 827 at 18. At the April 26th hearing, defense counsel did not, when asked, assert any factual or legal impediments to raising these defenses, but noted that the facts drive the defendant's defense and that he was consequently pressing his immunity defense.

Although Bulger has indicated, as recently as the April 26th hearing, that he does not intend to raise either defense, the Court notes that no deadline for notice of a public authority

[10] To prevail on the defense of public authority, the defendant must demonstrate that: (1) the defendant engaged in the alleged criminal conduct at the behest of a government official; (2) the government official had the power to authorize the action; and (3) the defendant reasonably relied on the government official's authorization. See United States v. Cao, 471 F.3d 1, 4 (1st Cir. 2006); see also United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994). The Court notes that to prevail on a public authority defense requires a showing that the authorizing government official had actual authority to sanction illegal conduct. See United States v. Holmquist, 36 F.3d 154, 161 n.6 (1st Cir. 1994) (rejecting defense of "apparent public authority" and finding that only those with "actual public authority" could lawfully sanction illegal conduct); see also Baptista-Rodriguez, 17 F.3d at 1368 n.18 (observing that "the validity of this defense depends on whether the government agent in fact had the authority to empower the defendant to perform the acts in question").

[11] To prevail on the defense of entrapment by estoppel, the defendant must demonstrate that: (1) a government official informed the defendant that certain conduct was legal; (2) the defendant engaged in what otherwise would be criminal conduct; (3) the defendant's engagement in that conduct was in reasonable reliance of the official's representation; and (4) prosecution for the alleged conduct would be unfair. United States v. Smith, 940 F.2d 710, 715 (1st Cir. 1991); see also United States v. Lemieux, 550 F. Supp. 2d 127, 133 (D. Me. 2008).

defense under Fed. R. Crim. P. 12.3 has been set in this case. Accordingly, the Court sets May 6, 2013 as the deadline for the defendant to serve and file notice of same in accordance with Rule 12.3.

B. Motion to Vacate Discovery Order

1. The Applicable Legal Standard for Discovery in Criminal Cases

Bulger's right to discovery from the government originates from specific sources: his constitutional right to exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972); Fed. R. Crim. P 16; and the Jencks Act, codified at 18 U.S.C. § 3500. United States v. Griebel, 312 Fed. Appx. 93, 96 (10th Cir. 2008) (observing that "discovery obligations . . . are defined by Rule 16, Brady, Giglio, and the Jencks Act"); see also United States v. Presser, 844 F.2d 1275, 1285 n.12 (6th Cir. 1988) (noting that "in most criminal prosecutions, the Brady rule, Rule 16 and the Jencks Act exhaust the universe of discovery to which the defendant is entitled").

Brady and Giglio entitle criminal defendants to exculpatory evidence that is material to guilt. Giglio, 405 U.S. at 154; Brady, 373 U.S. at 87. Materiality for purposes of Brady is "traditionally assessed from the vantage point of appellate review." United States v. Pesaturo, 519 F. Supp. 2d 177, 189 (D. Mass. 2007). Courts consider evidence material if its disclosure has a "reasonable probability" of affecting the outcome at trial. United States v. Avilés-Colón, 536 F.3d 1, 20 (1st Cir. 2008).

Rule 16(a)(1)(e) states in relevant part that: "[u]pon a defendant's request, the government must permit the defendant to inspect and to copy . . . documents . . . if the item is within the government's possession, custody, or control and the item is material to preparing the defense." The materiality standard for Rule 16 "essentially tracks the Brady materiality rule,"

United States v. LaRouche Campaign, 695 F. Supp. 1290, 1306 (D. Mass. 1988), though some courts have found that materiality under Rule 16 is broader than under Brady. Pesaturo, 519 F. Supp. 2d at 189; see also United States v. Poulin, 592 F. Supp. 2d 137, 143 (D. Me. 2008) (noting that "unlike the Government's Brady obligation to disclose exculpatory evidence that is material either to guilt or to punishment, Rule 16 requires the disclosure of inculpatory and exculpatory evidence alike") (internal citation and quotation marks omitted) (citing United States v. Marshall, 132 F.3d 63, 68 (D.C. Cir. 1998)). In addition, other courts have focused on the usefulness of the evidence to defending the case including the potential for "uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." Pesaturo, 519 F. Supp. 2d at 190-91 (quoting United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotation marks omitted)); see also United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993) (observing that "evidence that the government does not intend to use in its case in chief is material if it could be used to counter the government's case or to bolster a defense"). However, "the requested information must have more than an abstract relationship to the issue presented; there must be some indication that the requested discovery will have a significant effect on the defense." United States v. Chimera, 201 F.R.D. 72, 76 (W.D.N.Y. 2001) (citations omitted). Defendants bear the burden to make a "prima facie showing of materiality." United States v. Carrasquillo-Plaza, 873 F.2d 10, 12 (1st Cir. 1989).

Many of Bulger's complaints about the alleged failure of production by the government are that the defense and the Court have been forced to rely on the government's representations about its fulfillment of its discovery obligations. D. 848 at 39-42, 45. However, much of this reliance is inherent in these obligations falling on the government, Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987); Ferrera v. United States, 456 F.3d 278, 293 (1st Cir. 2006); United States v.

Brooks, 966 F.2d 1500, 1505 (D.C. Cir. 1992), and the penalties, if noncompliance with these obligations is found, also fall on the government. See Ferrera, 456 F.3d at 293; United States v. Jones, 620 F. Supp. 2d 163, 178 (D. Mass. 2009).

2. The Court Will Not Vacate the December 6, 2012 Order Regarding Bulger's Discovery Requests and Denies the Renewal of Certain of those Requests

The Court denies Bulger's motion to vacate the December 6, 2012 Order, which granted in part and denied in part his discovery requests for a number of reasons. First, Bulger overstates the scope of the Court's denial of his requests concerning the issue of the immunity. At the time of Bulger's original discovery motion and the Court's order regarding same, the government had not yet filed its Rule 12(b)(2) motion in which it contended, among other things that Bulger's claimed immunity was not a defense for trial, D. 819, although the Court was aware of Bulger's expressed intention to press same as a defense at trial. D. 768. Nonetheless, the Court did not reject all of Bulger's requests in respect to this matter, but instead limited the broadly framed discovery requests in Requests 1-4 regarding certain correspondence about Bulger and associates, including members of the so-called Winter Hill Gang to "correspondence reflecting the existence of any agreement, formal or informal, acknowledging or memorializing the conferral of immunity on defendant by the U.S. Government or its authorized agents for any pas or prospective crimes for which defendant was responsible (or an affirmance that no such correspondence exists)." Docket entry, 12/6/2012. Since this ruling, the government has represented that no such documents exist to support Bulger's claim of immunity. D. 859 at 1; D. 785 at 8-9.

To exceed what the Court previously allowed as to this category of discovery requests would be to go beyond what the parameters of what Giglio, Brady, the Jencks Act and Rule

16(a)(1)(E) require. For the same reason, the Court does not see fit to vacate the other rulings concerning evidence alleged to be related to the immunity issue where the Court determined that such other requests were moot where production had already been made (Request 10) or production as to potentially exculpatory evidence or evidence suggesting the existence of an immunity agreement had been produced (Request 11) or disclosure of such relevant and unprivileged information had been produced (Request 19 to 23). The Court did deny the request regarding an allegedly improper relationship between former FBI Special Agent Daly, an agent that Bulger alleges was the case agent on the race fix case, D. 848 at 19, and an informant on the grounds that the "[d]efendant has shown no conceivable relationship between such information, if it exists, and this case" (Request 25). Docket entry, 12/6/2012. However, nothing in the renewed motion for discovery provides a further basis to link such an alleged relationship to this case or to suggest that the requested information would be discoverable under Fed. R. Crim. P. 16(a)(1)(E) or as exculpatory evidence. Finally, to the extent to which Bulger still complains about the failure of the government to produce the race fix memorandum in this case, counsel's representations at the hearing reflect that the defense team now has a copy of the memorandum and the necessity for an ordering compelling same is now moot.

The same is true with Bulger's new request for the names and service dates of certain DOJ officials. Bulger does not explain how such information constitutes exculpatory evidence or bears upon the credibility of any likely government witnesses or how it is otherwise discoverable save for the contention that it is material to his alleged defense of immunity. D. 848 at 6. However, even as Bulger contends that such a broad request bears upon his alleged immunity, the Court concludes that the previous line drawn by this Court in the December 6, 2012 Order regarding the production of correspondence reflecting, acknowledging or

memorializing any informal or formal agreement is the right line given the defendant's allegations and the parameters of the government's discovery obligations and, accordingly the Court denies this further request.

Although the renewed motion for discovery, D. 848, focuses on discovery material to the alleged defense of immunity, since Bulger seeks to vacate the December 6, 2012 Order regarding his November 2, 2012 motion in toto, the Court now briefly addresses the portions of that order that concerned Giglio information regarding John Martorano, Stephen Flemmi and Kevin Weeks. As an initial matter, the Court allowed much of the requests for impeachment information as to these key government witnesses expected to testify at trial and/or the government indicated that it had produced or was going to produce same. To the extent that the Court denied such requests, it was largely in regard to the production of such information in a certain form (i.e., PSRs) and not a denial that the government would have to produce the substance of any Brady or Giglio information contained therein. This Court sees no reason to revisit this issue.

For all these reasons and in the absence of a showing that the government has failed to produce the requisite discovery as obligated or previously ordered, the Court declines to vacate the Court's December 6, 2012 Order or allow the renewed motion for discovery.

V. Conclusion

For the above reasons, Bulger's motion for discovery, D. 848, and his motion to vacate, D. 856, are DENIED. The government's motion to preclude Bulger from arguing his claim of immunity to the jury as a defense at trial, D. 819, is ALLOWED. The Court sets May 6, 2013 as the deadline for the Defendant to serve and file notice under Fed. R. Crim. P. 12.3.

So Ordered.

/s/ Denise J. Casper
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES	)	
v.	)	**Civil Action No. 99-10371-DJC**
JAMES J. BULGER	)	

MEMORANDUM & ORDER

CASPER, J. **May 14, 2013**

I. Introduction

Defendant James J. Bulger ("Bulger") has filed a series of motions seeking certain discovery from the government. The Court addresses the remaining three of these motions, D. 847, 878 and 883, in this Memorandum and Order.

II. Relevant Factual Background and Procedural History

Bulger has been charged in a 111-page, 48-count indictment charging him with participation in a racketeering conspiracy involving, among other things, murder, extortion and money laundering and separate charges of racketeering, money laundering, extortion and a range of firearms crimes. Trial in this matter is scheduled to begin on June 10, 2013. The government's 21-day disclosures pursuant to Local Rule 116.2(b)(2) are due on or before May 20, 2013. The government, however, at the April 26, 2013 hearing ("April 26th hearing") indicated that it had produced all Brady exculpatory evidence, 90% of Giglio information about its anticipated trial witnesses and 90% of the statements of these witnesses under the Jencks Act, 18 U.S.C. § 3500, and confirmed its intent to produce the balance of same to counsel for Bulger

before the 21-day deadline. D. 901 at 68. Bulger has filed a series of discovery motions. The first, D. 847, and the last, D. 883, seek unredacted versions of documents that the government has previously produced. The other motion, D. 878, seeks a Court order that the Department of Justice ("DOJ"), as opposed to the United States Attorney's Office ("USAO"), produce and certify discovery in this matter. This motion also seeks several categories of documents. At the April 26th hearing, the Court gave the parties the opportunity to be heard on these pending motions, D. 901 at 59-78, and the government has now filed its opposition to each. D. 860, 881, 900. Now that all of these motions are ripe for consideration, the Court addresses them here.

III. Discussion

Bulger's right to discovery from the government originates from specific sources: his constitutional right to exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972), Fed. R. Crim. P. 16 and the Jencks Act, 18 U.S.C. § 3500. United States v. Griebel, 312 Fed. Appx. 93, 96 (10th Cir. 2008); see United States v. Presser, 844 F.2d 1275, 1285 n.12 (6th Cir. 1988). Brady and Giglio entitle criminal defendants to exculpatory evidence that is material to guilt or innocence. Giglio, 405 U.S. at 154; Brady, 373 U.S. at 87. Fed. R. Crim. P. 16(a)(1)(E)(i) states that "[u]pon a defendant's request, the government must permit the defendant to inspect and to copy . . . documents . . . if the item is within the government's possession, custody, or control and the item is material to preparing the defense." The Jencks Act requires the government to produce prior statements of government witnesses where such statements relate to the subject matter to which the witness has testified on direct examination. 18 U.S.C. § 3500(b).

The discovery that Bulger now seeks falls into several different categories which the Court now addresses in turn.

A. Discovery Seeking Disclosure of Confidential Informants

As in D. 846 (previously decided by this Court, D. 888), some of Bulger's requests seek the disclosure of the identities of confidential informants ("CIs"). Although the Court understands Bulger's contention that he was not a CI for the Federal Bureau of Investigation ("F.B.I.") as the government contends, the Court does not agree that the disclosure of CIs who may have provided information as the basis for a Title III wiretap application regarding Vanessa's Restaurant not charged in this case, Exh. A, D. 849; D. 847 at 3-4, 6-7, 9, makes that contention more or less probable or is otherwise discoverable. Although the government notes that both Bulger and Stephen Flemmi were sources of information for this wiretap application, the disclosure of any other CI who may have provided information to establish probable cause in that investigation does not make the fact of Bulger's status more or less true or likely. Accordingly, Bulger has failed to meet the high burden under Roviaro v. United States, 353 U.S. 53 (1957), particularly where the fruits of this wiretap are not charged in this case, there is no suggestion that the undisclosed CI is the only one able to amplify or contradict the testimony of a government witness or no equally compelling reason exists, United States v. Mills, 710 F.3d 5, 14 (1st Cir. 2013), that outweighs the public interest underlying the CI privilege.[1]

Bulger also seeks the disclosure of a CI who provided information about former Organized Crime Strike Force Attorney David Twomey and Frank Lepere (identified by Bulger as a bookmaker and by the government as a drug trafficker). D. 847 at 4, Exhs. C, D, D. 849; D. 860 at 5. The government has responded that the two documents upon which Bulger relies for this request are unrelated, the latter was produced in completely unredacted form and the former had redactions to protect the identity of a CI who provided information leading to Lepere's arrest

[1] The same is true for the 1986 orders, affidavits and applications for electronic surveillance in this Title III investigation, Exh. I, D. 849, D. 847 at 6-7, where such investigation is not being offered at this trial and did not result in any interceptions of the defendant.

by the Drug Enforcement Administration ("DEA"). D. 860 at 5-6. In the absence of a showing of a compelling reason to disclose the identity of this CI, the Court denies this request.

Bulger also seeks the identity of a CI who provided information about former F.B.I. Special Agent John Connolly's corruption, a fact that Bulger contends is "highly relevant to the defense." D. 849, Exhs. E, F; D. 847 at 5. Although the government does not dispute the characterization of Connolly, who now stands convicted of federal RICO and obstruction of justice charges and second degree murder charges in Florida, as corrupt, it disputes that Bulger has made a sufficient showing under Roviaro for the disclosure of this CI's identity. The Court agrees as to the disclosure of this CI's identity. However, to the extent that Bulger seeks information supporting his contention that he was not an informant for the F.B.I., the Court queried counsel at the April 26th hearing about how information about such a claim would be material to any defense for the purposes of discovery under Fed. R. Crim. P. 16(a)(1)(E). D. 901 at 72. The government noted that part of its case-in-chief would be the nature of the relationship between Bulger and Connolly, one that the government contends was one of informant-to-F.B.I.-handler. Id. In this context, it appears that information that bears upon or supports Bulger's contention would be discoverable under Rule 16(a)(1)(E). The government has denied Bulger's contention about his non-informant status (even going as far to say that it "does not have an obligation to find evidence of something that does not exist," D. 881 at 1) and has stated that "[t]here is no discovery that shows [Bulger] is not an informant." D. 901 at 73. However, given Bulger's motion to this Court regarding this matter, to the extent any such documents exist, the government shall produce any documents that support or reflect Bulger's contention that he was not an informant for the F.B.I.[2]

[2] If any annual informant reports regarding Bulger, Request 5, D. 878 at 20, or the full version of an informant report regarding Bulger and Flemmi, Exh. R, D. 847 at 10, would fall

Although the Court agrees that Bulger is entitled to Giglio information about anticipated government witnesses at trial, in regard to the request for disclosure of the identities of CIs bearing upon information about John Connolly, Stephen Flemmi, Kevin Weeks and Steven Davis, the Court notes that the information itself has been revealed, Exhs. G, J, K, L, D. 849; D. 847 at 5-6, 7-8, and Bulger has not shown how the disclosure of these CIs' identities is warranted under Roviaro or its progeny. The same is true as to the disclosure Bulger seeks of the identity of a CI with knowledge of the actions of John Riblet Hunter in connection with the murder of Roger Wheeler in Tulsa, Oklahoma, which is charged in connection with Count I, the racketeering conspiracy, D. 215 at 26, in this case. Exh. H, D. 849, D. 847 at 6. One of the government's anticipated trial witnesses, John Martorano, has confessed that he shot and killed Wheeler and has pled guilty to this crime. D. 847 at 6; D. 860 at 7-8. In this circumstance where Martorano's confession is (presumably) part of the government's case-in-chief and the CI's information about Hunter has already been disclosed, the necessity of disclosing the CI's identity under Roviaro is unclear and, accordingly, the Court denies this request for further disclosure.

B. Bulger Seeks Additional Unredacted Documents

Bulger seeks a fully unredacted version of a document which discusses the extortion of Michael Solimando. Exh. M, D. 849; D. 847 at 9. However, Bulger concedes that a fully unredacted version of this report, in teletype format, has been produced by the government, Exh. N, D. 849, and the Court does not perceive a need for further unredacting of Exh. M, D. 849,

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into this category, the government shall produce them. Otherwise, the Court denies these requests. Bulger also seeks documents authored by F.B.I. Assistant Special Agent in Charge Robert Fitzpatrick requesting the closure of Bulger as an informant. Request No. 33, D. 878 at 28. To the extent that any such reports would fall within this category, such documents shall be produced if they remain in the government's possession, custody and control and have not yet been produced.

where the fully unredacted version has been produced and any differences between the two reports do not appear to be material. As to the request for further unredacting of a document that makes reference to the "elimination of La Cosa Nostra," Exh. O, D. 849; D. 847 at 9, it is unclear how the portions of information redacted from this page constitutes Brady or Giglio information or are otherwise discoverable, even as Bulger contends that the elimination of La Cosa Nostra was an objective that the government contends he played a role in achieving. The same goes for the last page of a report from James Ring pertaining to the "Jungle Mist" investigation. Exh. Q, D. 849; D. 847 at 9-10.

In a subsequent motion, D. 883, Bulger seeks the unredacted versions of additional documents that the government has produced. Specifically, he seeks an unredacted version of a redacted 1999 F.B.I. 302 report that concerns Kevin Weeks moving weapons and a sighting of Bulger while he was a fugitive which, Bulger contends, bears upon impeachment of Weeks at trial and provides "insight" into the F.B.I.'s investigation and pursuit of him following his 1995 indictment. D. 883 at 2-3; Exh. A, D. 884. Similarly, Bulger seeks the unredacted form of various documents that Bulger contends contain additional impeachment material as to Weeks and Stephen Flemmi. D. 883 at 4; Exhs. C-D, D. 884. Given that the substance of this information has been disclosed to Bulger's counsel and given the representation by the government that the redacted portions are either irrelevant as to these anticipated witnesses at trial or that further disclosure would reveal the identity of a CI, the Court denies these requests where there has been an insufficient showing under Roviaro or the discovery standards, including Rule 16(a)(1)(E), that further unredacting is warranted. Nothing about this decision or anything else in this Memorandum and Order, however, reduces the government's ongoing

obligation to produce exculpatory evidence under Brady or Giglio as constitutionally required and within the time frame provided by the Local Rules.

In D. 883, Bulger also seeks the personnel reports, completely redacted, regarding F.B.I. ASAC Robert Fitzpatrick, who was a supervisor during the investigation of Bulger in the 1980s and, at one point, recommended that the F.B.I. close Bulger's informant file. D. 883 at 3-4; Exh. B, D. 884. The government identifies Fitzpatrick as "a nongovernment witness," which the Court understands to mean a person whom the government does not intend to call at trial (as opposed to a witness whom the government does intend to call at trial, but who is no longer employed by the government).[3] As such, the personnel records sought would not constitute possible Giglio information and the Court does not see another basis, on this record, for determining that such records are discoverable.

Bulger also seeks various statements made by certain CIs pertaining to him, D. 883 at 4-6; Exhs. E-G, D. 884, but notes that the "defense is interested in the contents of the communication rather than the identity of the[se] informants." D. 883 at 4. As to Exh. F, the government responds that the redacted portion of this document is irrelevant to this case or that its disclosure could reveal the identity of a CI. D. 900 at 1-2. Since, however, the defense does not seek disclosure of the CI, the government shall confirm that contents of the redactions here are not otherwise discoverable, or shall produce same, by May 20, 2013. As to Exh. E, a Joseph C. Saccardo to Martin Foley memorandum, which is heavily redacted, and Exh G, an investigative document detailing information from a CI to Special Agent John Gamel, which is less heavily redacted, the government has agreed to review these documents again and, "[i]f anything discoverable is located, the government will produce it in accord with its obligations."

[3]If the Court's understanding is incorrect, the government shall file a clarification of its position regarding this witness on or before May 20, 2013 so that the Court can revisit this issue.

D. 900 at 3. The Court orders the government to do so by May 20, 2013. Similarly, as the government has agreed to locate and produce a more legible copy of certain informant files, D. 883 at 6; Exh. H, D. 884; D. 900 at 3, the government shall also do so by May 20, 2013.

In reference to certain Giglio and Jencks information regarding Kevin Weeks, Bulger cites the government's agreement to produce Jencks statements and Giglio information early. D. 883 at 6-7; Exhs. I-K, D. 884. As to Exh. J, the government has agreed to review this exhibit again and, if anything discoverable is located, produce it in accordance with its obligations, D. 900 at 3, and is now ordered to do so by May 20, 2013. As to the requests for unredacted versions of Exhibits I and K, which appear to be part of the government's Giglio production for Kevin Weeks, the government has reaffirmed its duty to produce all Giglio information for Kevin Weeks including, but not limited to, any grand jury transcripts of his testimony (and which the Court otherwise orders the government to complete by May 20, 2013).

C. Request for Discovery from the Department of Justice as Opposed to Discovery from the U.S. Attorney's Office

In a separate filing, D. 878, Bulger demands that "this Court order the Department of Justice to provide him relevant and material evidence in this case" given his contention that "the United States Attorney's Office cannot certify whether relevant evidence exists and it does not have access to Department of Justice records to the extent necessary to comport with due process." D. 878 at 1. Although Bulger makes reference to his purported defense of immunity in this filing, it is clear that this motion concerns evidence material to his defense generally and not only material to this issue. See D. 878 at 2 (discussing entitlement to Department of Justice documents "that are exculpatory or otherwise material to his defense"); D. 878 at 13 (evidence also "relevant to every protected or immunized witness the government calls at trial and to attack their credibility and motives for shaping testimony to meet the Department of Justice's

objectives"). Although Bulger claims that the U.S. Attorney's Office has taken the position of "absolute separation between their office and the DOJ," D. 878 at 4, the prosecutor's office has denied that there was any distinction between its office and the DOJ for the purposes of required disclosures, noting that any suggestion of such separation "had no relation to any request for discovery." D. 901 at 61-62. As such, no order is necessary where courts treat multiple sections of the Department of Justice as one entity for purposes of discovery. See United States v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995) (finding that the United States Attorney's Office was required to produce discoverable documents in possession of the Department of Justice's Bureau of Prisons); see also United States v. Salyer, 271 F.R.D. 148, 156 (E.D. Cal. 2010) (adopting the parties' position in a criminal antitrust prosecution that "documents within the possession of the United States Attorney's Office, the Anti–Trust Division of the Department of Justice, the FBI, IRS–CI (criminal), the USDA and FDA" are within the possession, custody and control of the "government" for purposes of discovery).

D. Giglio Information and Jencks Statements Sought

In his motion, D. 878, Bulger also makes various requests for discovery that the Court now groups together in general categories and addresses in turn.[4]

First, Bulger seeks Jencks and Giglio material for all witnesses that the government intends to call at trial. (Request 1, D. 878 at 15-16). As referenced above, at the April 26th hearing, the government represented that it had already produced the bulk of Giglio information and Jencks statements for its anticipated trial witnesses. Moreover, the production of the former is not due until 21 days before trial (here, May 20, 2013); the latter need not be produced until

[4] Although the government filed an opposition to this motion, indicating its disagreement with Bulger's continuing contention that the DOJ provided him immunity and that he was not an informant, that response did not address each of the specific requests that Bulger included in the motion. D. 881.

the completion of the direct examination of the specific witness at trial, 18 U.S.C. § 3500(a), but the government has also stated its intention, on the record, to produce the remainder of Jencks statements in the period applicable to the production of Giglio material (i.e., also on or before May 20, 2013). D. 901 at 70. Accordingly, to the extent that Bulger seeks an order compelling such production of these documents within a different time frame, the Court denies this request.

To the extent that Bulger seeks documents relating to the issue of immunity—i.e., documents that Bulger contends will evidence the DOJ's protection of him despite knowledge of his criminal conduct (Requests 2-4, D. 878 at 16-19); the "chron file" and all records and files of Jeremiah O'Sullivan pertaining to Bulger (Request No. 14, D. 878 at 20);[5] documents regarding David Margolis (Requests No. 19-20, 22, D. 878 at 22-23, 25); documents reflecting instances in which the DOJ approved extraordinary criminal activities involving a significant risk of violence (Request No. 21, D. 878 at 24); and complete, unredacted copies of the Manual of Investigative Operations and Guidelines and the Manual of Administrative Operations and Procedures (Requests 25 and 26, D. 878 at 26)—the Court will draw the same line as the Court did in its 12/6/12 Order and which it reaffirmed in its most recent Memorandum and Order—documents "reflecting the existence of any agreement, formal or informal, acknowledging or memorializing the conferral of immunity on defendant by the U.S. Government or its authorized agents for any past or prospective crimes for which defendant was responsible (or an affirmance that no such correspondence exists)," Docket entry, 12/6/2012; D. 895 at 28-29 (noting that "[t]o exceed [the parameters of the 12/6/12 order] would be to go beyond what the parameters of what Giglio, Brady, the Jencks Act and Rule 16(a)(1)(E) require"), shall be produced.[6]

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[5] The motion makes no reference to Requests 6 through 13.

[6] Bulger also requests all DOJ documents directing various DOJ officials to object to or contest parole hearings of defendants falsely convicted of the murder of Edward Deegan. Request No.

The Court has previously denied an earlier iteration of Bulger's request for the names of the Deputy Chiefs assigned to supervise the Organized Crime Strike Force during O'Sullivan's tenure and all employees in reporting order that held positions between Deputy Chiefs and O'Sullivan during his tenure, Requests No. 23 & 24, D. 878 at 25, although the Court did not do so before Bulger had filed the instant motion. See D. 895 at 29 (denying Bulger's request for the names and service dates of certain DOJ officials and stating reasons for same). The Court denies this request for the reasons previously articulated in its earlier Memorandum and Order. Id.

As discussed above, the government has or is producing Giglio information regarding its anticipated trial witnesses. Such production shall include Kevin Weeks's grand jury testimony, Request No. 17, D. 878 at 22, other previous statements by Weeks, request No. 16, D. 878 at 21; Request No. 18, D. 878 at 22,[7] and documents bearing upon the credibility of John Martorano. Request No. 29, D. 878 at 27; Requests No. 30 and 31, D. 878 at 27. The government is also obligated to produce information about promises, rewards and inducements given by the government to a witness, Local Rule 116.2(b)(1)(C), and the Court agrees with Bulger's counsel that forbearance from pursuing forfeitable property as to Weeks and Stephen Flemmi could be reasonably characterized as same. Requests 27 and 28, D. 878 at 26-27. The Court understands the government's response to similar requests, D. 900 at 2, to be an acknowledgment of its

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32, D. 878 at 28. Although such documents, if they exist, would conceivably be relevant to other cases, it is unclear how they would be relevant here. Bulger provides no explanation for this request, D. 878 at 28, but to the extent that he seeks such documents as bearing on his argument about immunity, the Court denies same for the reasons articulated above.

[7] If there are missing pages from this report or from the trial testimony of Weeks at Connolly's trial in Florida, Request No. 34, D. 878 at 28, the government shall endeavor to locate and produce them by May 20, 2013. Bulger also seeks missing pages from two reports from Special Attorney Wendy Collins to Judge Arthur Garrity concerning a wiretap at 98 Prince Street in Boston, noting that these two reports are missing the first page. Request No. 15, D. 878 at 21. If there are missing pages from these reports, the government shall endeavor to locate and produce them in the same timeframe.

obligation to produce Giglio information and, pursuant to Local Rule 116.2 and this Order, they shall complete such production of such information as to Weeks, Stephen Flemmi, John Martorano and their other anticipated trial witnesses by May 20, 2013.

Finally, Bulger seeks any and all copies of Bulger's letters and calls from Plymouth County Correctional Facility that the government has not yet produced. Request No. 35, D. 878 at 29. The government has not responded to this specific request. The Court notes that Fed. R. Crim. P. 16(a)(1)(B)(i) requires the government to produce "any relevant written or recorded statement by the defendant if statement is within government's possession, custody or control" and government counsel "knows, or through due diligence could know, that the statement exists" and Fed. R. Crim. P. 16(a)(1)(E)(ii) requires production of any such calls or records if "the government intends to use the item[s] in its case-in-chief at trial." If either or both of these scenarios apply here, the Court orders the government to produce these materials.

IV. Conclusion

For the aforementioned reasons, the Court DENIES in part and GRANTS in part the motions of the defendant, James J. Bulger, D. 847, 878 and 883, regarding various discovery requests. To the extent that the Court has ordered production of certain documents, the government shall make such production by May 20, 2013.

/s/ Denise J. Casper
U.S. District Judge

your Honor. I believe the government's brief on the statute passed by the Congress is a fair and correct reading of the statute.

THE COURT: And lastly, Mr. Carney, it did occur to me, frankly, when I read over your witness list, there were a number of witnesses where it was hard to see, and counsel has already mentioned a few of them, including Judge Stearns, Director Mueller, Mr. Margolis, where it was hard for me to see how they would be witnesses for the defense other than on the immunity issue, which I clearly -- although I know you strongly disagree -- I clearly said you're precluded from raising at this trial.

MR. CARNEY: We fully except that your Honor has ruled that we cannot present immunity as a defense to these criminal charges. We do not dispute that.

We are able to call witnesses for other reasons, and that's why those witnesses are on the list. To go further would be to reveal trial strategy, but we do not intend to argue that Mr. Bulger can be found not guilty because he received -- or reached an immunity agreement with an authorized representative.

THE COURT: When you say you intend not to argue, you also intend not to elicit testimony in that regard?

MR. CARNEY: I can't make that representation with certainty at this point.

THE COURT: But, counsel, haven't I already ruled on this issue?

MR. CARNEY: You ruled that he cannot present an immunity defense. As I say, we are not going to interpose an immunity defense. But these witnesses, we believe, have other relevant testimony.

THE COURT: Well, counsel, I understand you may have them on your witness list for other reasons, but to the extent that you were putting them on the witness list to either argue
05:33 an immunity defense or put on evidence to put the immunity defense before the jury, I do think in light of my ruling that you're foreclosed from doing so.

MR. CARNEY: I would agree in both respects.

MR. KELLY: One final point on that --

THE COURT: Were you done, Mr. Carney?

MR. CARNEY: If you were done.

THE COURT: I'm done. I'm done. Thank you.

MR. CARNEY: Done, as well.

THE COURT: Mr. Kelly.

05:34 MR. KELLY: I assume, then, that that also goes with respect to trying to refer to them in opening or elicit testimony as to a public authority or entrapment by estoppel defense, because that, too, was -- there was a deadline set and the deadline wasn't met. So if that's the other reason he's trying to present these witnesses, that should also be barred.

unrelated to this one, but, you know, again, it's a *non sequitur*. What's the basis of discoverability for those documents? He wants to claim that there's some kind of secret deal. Again, this is a fiction he makes up. He creates a straw man, and then he wants the government to knock it down. No such document exists, no such agreement exists, we can't produce discovery for every foolish notion that the defense comes up with in this case.

So there is no basis for this request. There is no basis for the claim that we have not complied with our discovery obligations. There is no legal basis for the issuance of these subpoenas. They should be quashed.

MR. CARNEY: May I respond briefly, your Honor?

THE COURT: Very briefly, counsel.

MR. CARNEY: We've just seen over the last couple of days an exact example of what I'm talking about.

A trooper with 15 years' experience in the organized crime unit of the State Police makes an allegation that John Martorano is being protected from investigation for ongoing criminal activity that he has engaged in.

THE COURT: Which, counsel, having looked at the reports that were produced to me in camera, were found to be, and I'm quoting now, "false and not factual."

MR. CARNEY: The reason it was found to be false and non-factual is because they don't want this to be true.

If it's just a matter of interviewing someone and having the person deny that he engaged in criminal conduct and that's the end of it, well, then let's have the government interview Jim Bulger. He'll tell them that he's not involved in criminal conduct, and we'll all --

THE COURT: Counsel, let me be clear what I'm referring to.

I'm not now referring to the materials that have been produced to you, but the records of extensive investigation of the anonymous letter that was provided by the trooper that I think both parties are aware of his identity that involved interviews and investigation that I think is fair to describe as extensive, that as a result of that investigation found that the allegations were false and not factual.

And what they did result in, counsel, is the Giglio production that was made to you on May 14th, and I think I noted on the record yesterday that I had been given a copy of what had been provided to you on May 14th with an attachment of the documents that related to allegations and investigation of whether or not Mr. Martorano was engaged in further criminal conduct.

And, counsel, here, what this began with is not just an anonymous allegation, but an anonymous allegation that after extensive investigation was found to be false and fraudulent -- false and not factual, as I said.

And, counsel, it's an unsubstantiated claim, which when it resulted in further investigation in regarding Mr. Martorano's criminal activity, which seems to be at the core of what the Court should be concerned about, those documents were produced to defense counsel.

And I just want to get back to the point that I was focused on yesterday.

MR. CARNEY: May I just respond to your Honor first --

THE COURT: Well, let me add one thing, and then I'll let you respond to both things, counsel.

11:57

At the end of the day, in regards to this anonymous claim, it doesn't go to core Brady; that is, it doesn't bear upon your client's innocence or guilt. You were right to frame it, I think, as an issue of whether or not it amounts to promises, rewards or inducements.

I put to you the question yesterday about how does this reflect on Mr. Martorano's state of mind, because that seems to be the core issue, counsel, whether or not what he expected to get, how he's been induced in whatever way, and what he expects to get in return for his cooperation and testimony.

11:58

And so even if any of the anonymous allegation were proven to be factually true, which I submit to you is not the case here --

MR. CARNEY: How does your Honor know that?

Excuse me for interrupting, but how do you know that? You haven't interviewed the trooper. You haven't sat in a room and heard his allegations. Maybe you would find differently if you spoke to him.

We --

THE COURT: But, counsel -- and counsel --

MR. CARNEY: We sacrifice that for what the jury is supposed to hear.

The government wants to cover this up and hide it. That's the theme of the last 20 years. And every time a trooper or an FBI agent gets up and says, hey, wait a minute, why are we doing this, this isn't right, they get crushed like a bug, and that's what's happening to this trooper.

We're entitled to get this information so that we can present him and his assertions to the jury, and they may say, you know what, we believe this trooper and we don't believe these other people who are saying, oh, it's not substantiated.

They have a personal interest, a personal interest that his allegations not become public, that they not be able to be presented by us to the jury.

If this trial is a search for truth, we need to be able to present witnesses who challenge the government view and orthodoxy in this case so that they can hear from the trooper, and if that jury says, you know what, we believe him, we believe that his supervisors are trying to prevent him from

presenting this allegation publicly and they are doing it by saying we find it unsubstantiated, we don't believe it. So because they don't believe it, no one else can have access to it, and that's just denying the jury a fair assessment of the evidence and my client a fair trial.

THE COURT: But, counsel, and I understand you feel very strongly about this matter.

MR. CARNEY: I do feel strongly.

THE COURT: And I do understand that, counsel, and that was expressed even before you raised your voice.

MR. CARNEY: I didn't mean to be --

THE COURT: It's understood. I understand how strongly you feel about this matter and I've given it --

MR. CARNEY: Let the jury decide.

THE COURT: But, counsel, here --

MR. CARNEY: Let the jury decide where the truth is, not your Honor without looking at anything.

THE COURT: But, counsel -- but counsel -- but counsel, at the beginning and end of the day, I have to assess whether or not the standards have been met here. This is a matter that I should just note for the record, I alluded to this yesterday, but let me make this clear on the record, as the record stands before me now, this anonymous letter was received by a member of the U.S. Attorney's Office on October 2nd. Two days later it was filed under seal and *ex parte* to

this court with information about an investigation being made of this anonymous allegation. And in December, after completion of that allegation (sic.) in which this determination was made that there wasn't a basis in fact for the allegations, the government sought a protective order that was issued by the court.

And I know, counsel, that you're coming back to an argument and allegation about cover-ups by the government, but I don't think that those steps reflect a cover-up by the government.

12:02

MR. CARNEY: Why weren't we told? They get the stuff last October. If they're saying there's nothing to be concerned about, that the allegation was false, give it to us. If it's so patently false, if it's got no substance to it, then just give it to us. But, instead, after getting it in October, here it is, how many months later, nine months later, they still haven't given it to us. They're hiding it, and respectfully, they go to the Court and say, This has not been substantiated, therefore, it is of no value to the defense, and therefore, we shouldn't have to give it to them.

12:02

They're making these decisions because they want to hide this -- this is what the cover-up is. This is what's going on constantly --

THE COURT: Counsel, I understand -- counsel -- counsel.

P R O C E E D I N G S

(The following proceedings were held in the robing room before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on June 11, 2013.)

THE CLERK: Criminal action 99-10371, United States v. James Bulger.

03:04 MR. CARNEY: This is Jay Carney with Hank Brennan, your Honor.

THE COURT: Good afternoon.

MR. HAFER: Good afternoon, your Honor. Zach Hafer and Brian Kelly for the United States.

THE COURT: Good afternoon to you, as well.

Counsel, I know that you're in the midst of preparing for the rest of the week.

As I said at sidebar, I just wanted to give you the benefit of my final thoughts on this matter.

03:04 Mr. Carney, I think you got a sense of where I was going in court and what I was focused on, but let me just give you my final thoughts, and this is in regards to what I now have as several motions pending before me, dockets 979, 987, and 994.

I'm not going to repeat, counsel, all that I said on

the record earlier. I'm going to rely in part on what I said earlier today when we addressed this issue and then just add a few additional things.

I want to say, as I think I began to say this afternoon, that I have given this matter careful consideration, and I do, Mr. Carney and to the members of the U.S. Attorney's Office that are on this call, I understand how strongly the parties feel about their respective positions, and I've taken that into consideration as well.

03:05 Mr. Carney, again, I'm not going to repeat everything I said before, but I guess at a basic level I just fundamentally disagree with the position I think you took in regards to unsubstantiated and, in fact, discredited allegations being required to be produced as a matter of Brady and Giglio.

And I would cite here to -- well, there's certainly a number of cases I could cite to, but the two I will cite to is the 2nd Circuit in United States v. Locascio, 6 F.3d 924, 949 (2d. Cir. 1993), the 7th Circuit in United States v. Souffrant, 03:06 338 F.3d 809, 823 (7th Cir. 2003). I think there are a number of --

MR. CARNEY: Can I have the page cite again, please, your Honor?

THE COURT: I believe it's 823.

MR. CARNEY: Thank you.

THE COURT: Those are but two of the cases that I think I could cite for this proposition that unsubstantiated allegations are not required to be produced as a matter of Brady or of Giglio. I think those cases framed it in terms of Brady.

As I noted for the record here, the anonymous letter, which was the source of what these motions were brought forward in regards to, were brought to the Court's attention earlier in this case in the submission that was filed *ex parte*, and Judge Stearns issued a protective order in regards to this material in January of this year after notification of the investigation, not only about the source of the anonymous letter, but about the allegations made in regards to whether or not a member of the State Police was serving to protect Mr. Martorano from further prosecution investigation for any ongoing criminal activity.

I think the court's initial ruling in this matter in allowing the protective order was well-founded for the reasons I've already stated on the record earlier today, and I will also note, as I think I did today, that I was also provided with materials regarding the investigation that was made on both of those topics, not just the source of the letter, but also whether or not there was any factual basis to the allegations themselves. There were quite a number of witnesses interviewed in this regard, there were a number of exhibits

that were reviewed, and the course of that investigation took place over several months.

I think it's fair to characterize it as a full-fledged investigation that was conducted promptly after the U.S. Attorney's Office received the anonymous letter and submitted it to the State Police for investigation.

As a result, the allegations made anonymously were determined to be not just unsubstantiated, but -- I think I used this language in court -- but, quote, false and not factual.

Moreover, the allegations were made by a trooper that arose from information he alleged he received from several individuals about Mr. Martorano's alleged criminal activity. That information was further investigated, and those are the reports that I understand, both from the government's representations and from you, Mr. Carney, have been produced, and I have seen the May 14, 2013 discovery letter that attached -- well, I imagine it attached several things, but I've seen the attachments that included those reports.

Even if any of these allegations had been proven true, that is, the allegations about alleged protection of John Martorano, the relevance here would be as to whether or not they are promises, rewards or inducements. That's, Mr. Carney, how you framed this to begin with, and that's I think the proper frame of reference. And there the issue is what the

state of mind of Mr. Martorano is, what he understood he was being induced to do or promising to get or being rewarded with in exchange for his cooperation and his testimony. And there's no suggestion in what I have -- what's been provided for me or the letter that any promise, reward, or inducement, even assuming any of these allegations were true, was ever communicated to Mr. Martorano.

I would also note just -- and obviously, the attorneys on both sides of this case have been living with this case and breathing this case for much longer than I have been, but I certainly had the benefit of seeing your motion papers on various discovery issues during the time that the case has been in my session, and having read quite a bit of the historical materials in this case, I think that on this record there's more than ample opportunity for cross-examination and perhaps vigorous cross-examination of Mr. Martorano about his credibility, based not only on his past criminal conduct but even in light of inquiry in regards to the recent Giglio production, and also opportunity to ask him about promises, rewards, or inducements.

I don't think this is a situation where the defendant is being prohibited or barred from cross-examining a key government witness, and I think that there's more than ample fodder to do that here in regards to Mr. Martorano.

For all of these reasons, counsel, and all of the

reasons I've previously stated on the record, I'm going to deny the motions, again, Docket 979, 987, and 994.

In light of this ruling, counsel, I've also considered the motion to quash that was filed or orally moved for in court by the attorneys representing the State Police.

I understood, Mr. Carney, that there were two categories you were seeking, one was records and documents related to this anonymous letter matter; but, two, the category of just broader documents in regards to Mr. Martorano, Mr. James Martorano, Mr. Nee, and Mr. Weeks.

03:13

It's well-settled, I think, in this circuit and in other circuits that Rule 17 cannot be used to effectuate Rule 16 discovery, and I cite here United States v. Henry, 482 F.3d 27, 30 (1st Cir. 2007), and United States v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980); that is, that Rule 17 can't be used to bypass Rule 16 discovery practice, discovery motion, and by the same token, it doesn't either reduce or enlarge the government's obligations to produce Brady and Giglio materials.

But for all of the reasons that I've stated in regards to the defendant's motion, defendant's motions, rather, I'm going to allow the motion of the State Police to quash the subpoenas in regards to both categories.

03:14

Mr. Carney, I know that you are, I'm sure, very displeased with my decision, but know at least that I gave it careful consideration, and although you might have a different

Not only the fact of the manner in which he bullied Mr. Albano, but also the fact that this was a case that the impropriety was on behalf of FBI agents, including Mr. Condon, Mr. Rico, who handled the case.

It's no coincidence that Mr. Condon is Mr. Morris' friend. It's no coincidence that Mr. Condon shows up at a private social gathering at Mr. Morris' house years later for dinner with Mr. Bulger.

There is a link between Mr. Condon, Mr. Rico, this
03:38 case, and Mr. Morris.

So for him to talk about a relationship with Mr. Condon and the way he described it on direct examination, which I think will be contradicted on cross-examination, does draw that causal chain. There is an inference based on the evidence that he is acting, the baton has been passed from Mr. Rico and Mr. Condon to Mr. Morris.

THE COURT: Counsel, I'm going to allow you to ask to the extent that you're trying to show that he's been untruthful in regards to these efforts, but to the extent that you're
03:39 attempting to go into the whole Limone matter, I'm going to listen carefully to the questions, but based on the proffer that's been made on either side, I'm not going to allow you to go that far.

MR. BRENNAN: I understand.

Thank you.

MR. BRENNAN: Your Honor --

THE COURT: Sustained.

MR. BRENNAN: Should we come to sidebar now or --

THE COURT: I'll hear you at sidebar.

SIDEBAR CONFERENCE:

THE COURT: Briefly.

MR. BRENNAN: I'm going to move for a mistrial. This has been a repetitive act by the prosecutor in this case. The leading, suggestiveness, the speeches to this jury, not just during objections but during these questions, at some point becomes so overwhelming that it becomes unfair. I've tried to limit my objections the best I can to legal bases, and many times I haven't even put out a sufficient legal basis because I'm trying to be respectful of the Court.

There's a difference between cross-examination and direct examination and leading. The intentional and knowing effort to try to make a speech to the jury repeatedly so far compromises the defendant's right to a fair trial that I think that the only thing that can be done at this point, since the government won't heed caution to the Court's repeated instructions not to do it, is to ask for a mistrial, so that's what I'm doing.

MR. WYSHAK: Well, I think we have just had --

THE COURT: And keep your voice down.

MR. WYSHAK: We've just listened to at least an hour,

if not an hour and a half, of cross-examination whose relevance is questionable and was only designed to imply to this jury that this witness and the FBI and the Department of Justice were somehow responsible for the murder of Brian Halloran and Michael Donahue because of some kind of misfeasance or omission, and I think that we are entitled to respond to that accusation on redirect of the witness. And to the extent that the defense seeks to try to blame the government --

THE COURT: And keep your voice down, Mr. Wyshak.

10:51 MR. WYSHAK: -- for the murder of this individual, I think that we should have an opportunity to inquire whether or not this witness thinks that anything he did do or didn't do justified the murder of Mr. Halloran and Mr. Donahue.

THE COURT: But I don't think his opinion is relevant to this jury, and I think, to the extent that I heard you both on the relevance of the cross-examination -- and, Mr. Wyshak, I sustained a number of your objections during the course of that cross-examination -- I think it was appropriate for Mr. Brennan to inquire about the scope of the investigation to the extent 10:51 it went to what, if any, information was provided to Mr. Connolly, and so forth and so on. So I'm not going to review all of the previous objections. I do think it is objectionable to make essentially arguments to the jury through this witness. If you want to ask this witness about whether Mr. Bulger or Mr. Flemmi remained the targets of his continued

investigation, I think that's fair game, but I sustain the objection that Mr. Brennan posed at this point.

To the extent, Mr. Brennan, that you're moving for a mistrial, I deny that motion. I've taken the appropriate action, which is I have sustained the objection. I -- well, I've sustained the objection. I don't think that there is material prejudice to your client. I've asked all counsel to limit the explanation they give me on objections unless I ask for it. I suspect that Mr. Wyshak will continue to attempt to 10:53 restrain any speaking objections, but I'll deny the motion.

MR. WYSHAK: And, your Honor, I would also like to, you know, just so the record is clear, again, I think that the entire cross-examination of this witness or a majority of it is, as much of the cross-examination of several other witnesses has been in this case, is designed towards a jury nullification; and I think that that is inappropriate for the defense to aim for a jury nullification, to ask this jury to decide this case not based on the merits but because there's some allegation of government misconduct or government 10:53 misfeasance. And, you know, again, I think that my questioning is fair response to their strategy in this case.

THE COURT: Well, I've sustained the objection. I think the objection is well founded. Mr. Wyshak, I've sort of addressed the objections as to the scope of cross-examination. If you want to raise that issue generally with me outside of

answers Mr. Flemmi gave.

THE COURT: Counsel, I will say, though, I don't see how eliciting questions that relate to potential impeachment of Mr. Flemmi about the truthfulness or untruthfulness of his prior trial testimony opens the door to a defense as a matter of law which, as you know, we had extensive hearings about pretrial.

I'm following your argument, counsel, but I'm not sure how it leads to the conclusion that I should revisit the issue 08:52 of whether or not a defense of immunity can be raised at trial.

MR. KELLY: And, your Honor, I think --

THE COURT: Let me let Mr. Carney finish, and then I'll hear from you, Mr. Kelly.

Mr. Carney.

MR. CARNEY: There are two issues raised by your Honor's question. The first is whether your Honor would conclude that the evidence is sufficient for the Court to instruct on the defense of immunity. That's one issue. But the issue we're talking about today is whether in the 08:53 defendant's testimony he can allude to conversations he had with Jeremiah O'Sullivan that indicated that Mr. Bulger would be granted immunity from federal prosecution in return for Mr. Bulger doing something. Mr. Bulger did what he was expected to do.

Now, whether he can offer testimony from the witness

stand, I think now, is clear. If I asked Mr. Bulger the identical questions that the prosecutor asked Mr. Flemmi, how can that possibly be barred?

I would analogize it to this situation: Let's say that a defendant is offering self-defense as a justification for a shooting, but the law, according to a pretrial ruling by the judge, would not entitle him to a self-defense instruction because, perhaps, he didn't flee, he had an opportunity to run away and he didn't. At trial the defendant, nonetheless, could
08:54 testify that before he shot the victim he was in fear of his life, because that's a fact. It may not as a matter of law justify an instruction because of the prerequisites that must be shown for self-defense, but can the defendant say what his state of mind was before he shot the victim? I submit that that's a part of the basic evidence regarding that incident, and he would be allowed to testify to that.

My point is, in this trial, it's a separate issue, whether the Court would instruct on immunity and permit the jury to find that that is a defense, from the defendant being
08:55 permitted to answer the same questions on the witness stand that the prosecutor posed to Mr. Flemmi.

THE COURT: I understand the distinction you make. Obviously, my question was focused on the first issue, about instruction as a matter of law. I understand the distinction you're making. I'll have to think about the second, counsel,

but I understand the distinction. But I don't think, as things stand now, it's opened the door to the first. I'll think further about the second issue that you raise.

MR. CARNEY: I would ask the Court respectfully --

MR. KELLY: Your Honor, if we could address the Court as well.

THE COURT: Yes.

Mr. Carney.

MR. CARNEY: I know how diligent and thorough the Court is, and we have the transcript of Mr. Flemmi's testimony. And I think the record should reflect the extraordinary work put in by the court's court reporters. The Court previously authorized daily transcript for certain witnesses, and we know how hard these people are working during the day, and I just think your Honor should know that we get these transcripts on a daily basis through their hard work.

Having said that, we do have the transcript of Mr. Flemmi's testimony available to your Honor, and I would request that the Court simply look at the questions asked by Mr. Wyshak that focused on immunity.

The point I'm making is, if he can ask Flemmi those questions, why can't I ask Mr. Bulger those questions?

Thank you.

MR. KELLY: Your Honor, briefly. First of all --

THE COURT: Mr. Kelly.

what Mr. Kelly did, if I recall correctly.

MR. KELLY: In that regard, your Honor, to the extent the defense has interviewed him and taken a statement through its investigator, we would again request reciprocal discovery of any reports that they have constituting his statements.

THE COURT: Okay. Is Mr. Brennan addressing this?

MR. BRENNAN: We don't have a report from an investigator regarding Mr. Kelly.

THE COURT: But you otherwise are complying with reciprocal discovery obligations, counsel, in regards to all of the defense witnesses or in regards to all the defense witnesses you're going forward on?

MR. BRENNAN: Yes, I think we've turned over the documents we're going to use and any documents for our witnesses.

THE COURT: In regards to, and I may be mispronouncing his name, Mr. Cherkas and Mr. Masella, both who I understood were being offered as to Mr. Martorano, and I did go back to Mr. Martorano's cross-examination as to Mr. Cherkas. There's no denial of his going to see Mr. Cherkas about money owed. I think there was some discussion about whether that was a collection or about determining where that debt ended up, and I think there was cross-examination in regards to betting with Mr. Masella.

I looked at both Rule 404(b) in regards to prohibited

use of evidence of another alleged crime of wrong, but I also thought about this in terms of 608(b) based on what the proffer that was given to me here, being alleged misconduct to show veracity. Again, for the reasons I cited before in regards to *Beauchamp*, I do think this is a collateral matter.

The third witness that I think was being offered also as to Mr. Martorano was Trooper Orlando. Mr. Carney, I gave you my thoughts yesterday. I don't want to rehash everything I said yesterday, and I don't want to rehash everything I said on the record in regards to your motion, 979, which is the earlier motion for discovery in regards to this matter or what I said on the record at two junctures on June 11th, 2013 in denying that motion for discovery.

As I suggested yesterday, in denying the motion for discovery, I don't see a further basis, especially now that I have the benefit of the development of the record in this case, I don't see any basis for admitting this testimony.

I understood the distinction you were making about forbearance of investigation, but I think at best this is still 608(b) utter misconduct evidence. I also think the argument about effect on Mr. Martorano about any of this is attenuated here, but I did understand, Mr. Carney, the argument that you were making, and I think all of your objections are preserved on this matter for appellate purposes.

Counsel, give me one second because I know there were

AO 245B(05-MA) (Rev. 06/05) Judgment in a Criminal Case
Sheet 1 - D. Massachusetts - 10/05

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA
V.
JAMES J. BULGER

JUDGMENT IN A CRIMINAL CASE

Case Number: **1: 99 CR 10371 - 03 - DJC**

USM Number: 02182-748

J.W. Carney, Henry B. Brennan
Defendant's Attorney

☑ Additional documents attached
Transcript Excerpt of Sentencing Hearing

☐

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1ss, 2ss, 3ss, 5ss, 6ss - 26ss, 27ss, 39sss, 40sss, 42sss, 45sss, 48sss after a plea of not guilty.

The defendant is adjudicated guilty of these offenses: Additional Counts - See continuation page ☑

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1962(d)	Racketeering Conspiracy	01/01/00	1ss
18 USC § 1962(c)	Racketeering	01/01/00	2ss
18 USC § 1951	Extortion Conspiracy "Rent"	12/31/96	3ss
18 USC § 1956(h)	Money Laundering	08/31/99	5ss
18 USC § 1956(a)(1)(B)	Money Laundering		6ss-26ss

The defendant is sentenced as provided in pages 2 through 12 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/14/13
Date of Imposition of Judgment

Denise J. Casper
Signature of Judge

Denise J. Casper
Judge, U.S. District Court
Name and Title of Judge

November 19, 2013
Date

AO 245B(05-MA) (Rev. 06/05) Judgment in a Criminal Case
Sheet 1A - D. Massachusetts - 10/05

DEFENDANT: **JAMES J. BULGER**
CASE NUMBER: **1: 99 CR 10371 - 03 - DJC**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1956	Money Laundering	07/31/96	27ss
18 USC § 924(c)	Possession of Firearms in Furtherance of Violent Crime	12/31/99	39sss
18 USC § 924(c)	Possession of Machine Guns in Furtherance of Violent Crime	12/31/99	40sss
26 USC § 5841	Possession of Unregistered Machine Guns	12/31/99	42sss
18 USC § 922(o)	Transfer and Possession of Machine Guns	12/31/99	45sss
18 USC § 922(k)	Possession of Firearms with Obliterated Serial Numbers	12/31/99	48sss

AO 245B(05-MA) (Rev. 06/05) Judgment in a Criminal Case
Sheet 2 - D. Massachusetts - 10/05

DEFENDANT: **JAMES J. BULGER**
CASE NUMBER: **1: 99 CR 10371 - 03 - DJC**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: life

followed by a consecutive minimum mandatory term of 5 years, and a consecutive minimum mandatory term of life. This term consists of terms of life on Counts 1ss and 2ss, 240 months on Counts 3ss, 5ss, 6ss-26ss,

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JAMES J. BULGER**
CASE NUMBER: **1: 99 CR 10371 - 03 - DJC**

ADDITIONAL IMPRISONMENT TERMS

and 27ss, terms of 120 months of Counts 42sss and 45sss, and a term of 60 months on Count 48sss, all to be served concurrently. This also consists of a term of 60 months on Count 39sss, and life on Count 40sss, to be served consecutively to all other terms of imprisonment imposed and consecutively to one another.

DEFENDANT: **JAMES J. BULGER**
CASE NUMBER: **1: 99 CR 10371 - 03 - DJC**

SUPERVISED RELEASE

☑ See continuation page

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 5 year(s)

on Counts 1ss, 2ss, 39sss and 40sss and 3 years on Counts 3ss, 5ss-27ss, 42sss, 45sss, 48sss to be served concurrentlv.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 tests per year, as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer:
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **JAMES J. BULGER**
CASE NUMBER: **1: 99 CR 10371 - 03 - DJC**

ADDITIONAL ☑ SUPERVISED RELEASE ☐ PROBATION TERMS

The defendant shall not have any contact with any of the victims or family members of the victims.

The defendant is to pay the balance of any restitution imposed according to a court-ordered repayment schedule.

The defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the Probation Office while any financial obligations remain outstanding.

The defendant is to provide the Probation Office access to any requested financial information, which may be shared with the Financial Litigation Unit of the U.S. Attorney's Office.

Continuation of Conditions of ☐ Supervised Release ☐ Probation

DEFENDANT: **JAMES J. BULGER**
CASE NUMBER: **1: 99 CR 10371 - 03 - DJC**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ $3,100.00	$	$ $19,510,276.43

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
See attachment		$19,510,276.43	

☐ See Continuation Page

TOTALS	$ $0.00	$ 19,510,276.43

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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Sheet 6 - D. Massachusetts - 10/05

DEFENDANT: **JAMES J. BULGER**
CASE NUMBER: **1: 99 CR 10371 - 03 - DJC**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ $3,100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

☐ See Continuation Page

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

See attached orders of forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Constitutional Provisions

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statutes

18 U.S.C. § 1962(d) Racketeering Conspiracy:

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(c) Racketeering Substantive Offense

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1963 Criminal Penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law--
(1) any interest the person has acquired or maintained in violation of section 1962;
(2) any--
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;
any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.
The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.
(b) Property subject to criminal forfeiture under this section includes--
(1) real property, including things growing on, affixed to, and found in land; and
(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.
(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.
(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution

of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to

seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;
(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and
(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.
(h) The Attorney General may promulgate regulations with respect to--
(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;
(2) granting petitions for remission or mitigation of forfeiture;
(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;
(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;
(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and
(6) the compromise of claims arising under this chapter.
Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.
(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may--
(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.
(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.
(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.
(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.
(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.
(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.
(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may

present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. § 1956(a) Laundering of Monetary Instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of

unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
(A)(i) with the intent to promote the carrying on of specified unlawful activity; or
(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
(B) knowing that the transaction is designed in whole or in part--
(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
(ii) to avoid a transaction reporting requirement under State or Federal law,
shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.
(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--
(A) with the intent to promote the carrying on of specified unlawful activity; or
(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--
(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
(ii) to avoid a transaction reporting requirement under State or Federal law,
shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in

subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.
(3) Whoever, with the intent--
(A) to promote the carrying on of specified unlawful activity;
(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
(C) to avoid a transaction reporting requirement under State or Federal law,
conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term “represented” means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

18 U.S.C. § 1956(h) Money Laundering Conspiracy

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1951 Interference with Commerce by Threats or Violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
(b) As used in this section--
(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 982 Criminal Forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.
(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate--
(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or
(B) section
471 , 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487 , 488, 501, 502, 510,542, 545, 555, 842, 844, 1028, 1029, or 1030 of this title,
shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.
(3) The court, in imposing a sentence on a person convicted of an offense under--
(A) section 666(a)(1) (relating to Federal program fraud);
(B) section 1001 (relating to fraud and false statements);
(C) section 1031 (relating to major fraud against the United States);
(D) section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);

(E) section 1341 (relating to mail fraud); or
(F) section 1343 (relating to wire fraud),
involving the sale of assets acquired or held by the the[1] Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.
(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.
(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate--
(A) section 511 (altering or removing motor vehicle identification numbers);
(B) section 553 (importing or exporting stolen motor vehicles);
(C) section 2119 (armed robbery of automobiles);
(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or
(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);
shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.
(6)(A) The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act or section 555, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section 1028 of this title if committed in connection with passport or visa issuance or use, shall order that the

person forfeit to the United States, regardless of any provision of State law--
(i) any conveyance, including any vessel, vehicle, or aircraft used in the commission of the offense of which the person is convicted; and
(ii) any property real or personal--
(I) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted; or
(II) that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted.
(B) The court, in imposing sentence on a person described in subparagraph (A), shall order that the person forfeit to the United States all property described in that subparagraph.
(7) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.
(8) The court, in sentencing a defendant convicted of an offense under section 1028, 1029, 1341,1342, 1343, or 1344, or of a conspiracy to commit such an offense, if the offense involves telemarketing (as that term is defined in section 2325), shall order that the defendant forfeit to the United States any real or personal property--
(A) used or intended to be used to commit, to facilitate, or to promote the commission of such offense; and
(B) constituting, derived from, or traceable to the gross proceeds that the defendant obtained directly or indirectly as a result of the offense.
(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).
(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain

the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

18 U.S.C. § 924(c) Possession of Firearms in Furtherance of Violent Crimes

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
(i) be sentenced to a term of imprisonment of not less than 5 years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
(B) If the firearm possessed by a person convicted of a violation of this subsection--
(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.
(C) In the case of a second or subsequent conviction under this subsection, the person shall--
(i) be sentenced to a term of imprisonment of not less than 25 years; and
(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.
(D) Notwithstanding any other provision of law--
(i) a court shall not place on probation any person convicted of a violation of this subsection; and
(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of

imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.
(2) For purposes of this subsection, the term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.
(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and--
(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
(4) For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.
(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--
(A) be sentenced to a term of imprisonment of not less than 15 years; and
(B) if death results from the use of such ammunition--
(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and
(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

<u>18 U.S.C. § 922(k) Possession of Firearms with Obliterated Serial Numbers</u>

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(o) Transfer and Possession of Machineguns

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
(2) This subsection does not apply with respect to--
(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

26 U.S.C. § 5841 Registration of Firearms

(a) Central registry.--The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include--
(1) identification of the firearm;
(2) date of registration; and
(3) identification and address of person entitled to possession of the firearm.
(b) By whom registered.--Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.
(c) How registered.--Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the

firearm, and such authorization shall effect the registration of the firearm required by this section.
(d) Firearms registered on effective date of this Act.--A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.
(e) Proof of registration.--A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

26 U.S.C. § 5845(a) Definitions

For the purpose of this chapter--
(a) Firearm.--The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of Title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon

26 U.S.C. § 5861(d) Prohibited Acts

It shall be unlawful for any person-- **(d)** to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or. . .

26 U.S.C. § 5871 Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.

18 U.S.C. § 2 Conspiracy

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 3231 District Courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. § 1291 Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Rules

Federal Rule of Criminal Procedure 12:

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

Advisory Committee Notes to Federal Rule of Criminal Procedure 12

1944 Adoption

Note to Subdivision (a). 1. This rule abolishes pleas to the jurisdiction, pleas in abatement, demurrers, special pleas in bar, and motions to quash. A motion to dismiss or for other appropriate relief is substituted for the purpose of raising all defenses and objections heretofore interposed in any of the foregoing modes. “This should result in a reduction of opportunities for dilatory tactics and, at the same time, relieve the defense of embarrassment. Many competent practitioners have been baffled and mystified by the distinctions between pleas in abatement, pleas in bar, demurrers, and motions to quash, and have, at times, found difficulty in determining which of these should be invoked.” Homer Cummings, 29 A.B.A.Jour. 655. See also, Medalie, 4 Lawyers Guild R. (3) 1, 4.

2. A similar change was introduced by the Federal Rules of Civil Procedure (Rule 7(a)) which has proven successful. It is also proposed by the A.L.I. Code of Criminal Procedure (Sec. 209).

Note to Subdivision (b)(1) and (2). These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver. (Cf. Rule 12 of Federal Rules of Civil Procedure, 28 U.S.C., Appendix.)

In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12(g) of Federal Rules of Civil Procedure, 28 U.S.C. Appendix.) Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc. The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc.

In the other group of objections and defenses, which the defendant at his option may raise by motion before trial, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc. Such matters have been heretofore raised by demurrers, special pleas in bar and motions to quash.

Note to Subdivision (b)(3). This rule, while requiring the motion to be made before pleading, vests discretionary authority in the court to permit the motion to be made within a reasonable time thereafter. The rule supersedes 18 U.S.C.A. § 566a [now 18 U.S.C.A. §§ 3288, 3289], fixing a definite limitation of time for pleas in abatement and motions to quash. The rule also

eliminates the requirement for technical withdrawal of a plea if it is desired to interpose a preliminary objection or defense after the plea has been entered. Under this rule a plea will be permitted to stand in the meantime.

Note to Subdivision (b)(4). This rule substantially restates existing law. It leaves with the court discretion to determine in advance of trial defenses and objections raised by motion or to defer them for determination at the trial. It preserves the right to jury trial in those cases in which the right is given under the Constitution or by statute. In all other cases it vests in the court authority to determine issues of fact in such manner as the court deems appropriate.

Note to Subdivision (b)(5). 1. The first sentence substantially restates existing law, [former] 18 U.S.C. § 561 (Indictments and presentments; judgment on demurrer), which provides that in case a demurrer to an indictment or information is overruled, the judgment shall be respondeat ouster.

2. The last sentence of the rule that "Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations" is intended to preserve the provisions of statutes which permit a reindictment if the original indictment is found defective or is dismissed for other irregularities and the statute of limitations has run in the meantime, 18 U.S.C. § 587 [now 18 U.S.C. § 3288] (Defective indictment; defect found after period of limitations; reindictment); Id. 18 U.S.C. § 588 [now 18 U.S.C. § 3289] (Defective indictment; defect found before period of limitations; reindictment); Id. 18 U.S.C. § 589 [now 18 U.S.C. §§ 3288, 3289] (Defective indictment; defense of limitations to new indictment); Id. 18 U.S.C. § 556a [now 18 U.S.C. §§ 3288, 3289] (Indictments and presentments; objections to drawing or qualification of grand jury; time for filing; suspension of statute of limitations).

1974 Amendment

Subdivision (a) remains as it was in the old rule. It "speaks only of defenses and objections that prior to the rules could have been raised by a plea, demurrer, or motion to quash" (C. Wright, Federal Practice and Procedure: Criminal § 191 at p. 397 (1969)), and this might be interpreted as limiting the scope of the rule. However, some courts have assumed that old rule 12 does apply to pretrial motions generally, and the amendments

to subsequent subdivisions of the rule should make clear that the rule is applicable to pretrial motion practice generally. (See e.g., rule 12(b)(3), (4), (5) and rule 41(e).)
Subdivision (b) is changed to provide for some additional motions and requests which **must** be made prior to trial.
Subdivisions (b)(1) and (2) are restatements of the old rule.
Subdivision (b)(3) makes clear that objections to evidence on the ground that it was illegally obtained must be raised prior to trial. This is the current rule with regard to evidence obtained as a result of an illegal search. See rule 41(e); C. Wright, Federal Practice and Procedure: Criminal § 673 (1969, Supp.1971). It is also the practice with regard to other forms of illegality such as the use of unconstitutional means to obtain a confession. See C. Wright, Federal Practice and Procedure: Criminal § 673 at p. 108 (1969). It seems apparent that the same principle should apply whatever the claimed basis for the application of the exclusionary rule of evidence may be. This is consistent with the court's statement in *Jones v. United States*, 362 U.S. 257, 264, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960):
This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. (Emphasis added.)
Subdivision (b)(4) provides for a pretrial request for discovery by either the defendant or the government to the extent to which such discovery is authorized by rule 16.
Subdivision (b)(5) provides for a pretrial request for a severance as authorized in rule 14.
Subdivision (c) provides that a time for the making of motions shall be fixed at the time of the arraignment or as soon thereafter as practicable by court rule or direction of a judge. The rule leaves to the individual judge whether the motions may be oral or written. This and other amendments to rule 12 are designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970); see especially §§ 5.2 and 5.3. It also is the procedure followed in those jurisdictions which have used the

so-called “omnibus hearing” originated by Judge James Carter in the Southern District of California. See 4 Defender Newsletter 44 (1967); Miller, The Omnibus Hearing--An Experiment in Federal Criminal Discovery, 5 San Diego L.Rev. 293 (1968); American Bar Association, Standards Relating to Discovery and Procedure Before Trial, Appendices B, C, and D (Approved Draft, 1970). The omnibus hearing is also being used, on an experimental basis, in several other district courts. Although the Advisory Committee is of the view that it would be premature to write the omnibus hearing procedure into the rules, it is of the view that the single pretrial hearing should be made possible and its use encouraged by the rules.

There is a similar trend in state practice. See, e.g., *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 133 N.W.2d 753 (1965); *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965).

The rule provides that the motion date be set at “the arraignment or as soon thereafter as practicable.” This is the practice in some federal courts including those using the omnibus hearing. (In order to obtain the advantage of the omnibus hearing, counsel routinely plead not guilty at the initial arraignment on the information or indictment and then may indicate a desire to change the plea to guilty following the omnibus hearing. This practice builds a more adequate record in guilty plea cases.) The rule further provides that the date may be set before the arraignment if local rules of court so provide.

Subdivision (d) provides a mechanism for insuring that a defendant knows of the government's intention to use evidence to which the defendant may want to object. On some occasions the resolution of the admissibility issue prior to trial may be advantageous to the government. In these situations the attorney for the government can make effective defendant's obligation to make his motion to suppress prior to trial by giving defendant notice of the government's intention to use certain evidence. For example, in United States v. Desist, 384 F.2d 889, 897 (2d Cir.1967), the court said:

Early in the pre-trial proceedings, the Government commendably informed both the court and defense counsel that an electronic listening device had been used in investigating the case, and suggested a hearing be held as to its legality.

See also the "Omnibus Crime Control and Safe Streets Act of 1968," 18 U.S.C. § 2518(9):

The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

In cases in which defendant wishes to know what types of evidence the government intends to use so that he can make his motion to suppress prior to trial, he can request the government to give notice of its intention to use specified evidence which the defendant is entitled to discover under rule 16. Although the defendant is already entitled to discovery of such evidence prior to trial under rule 16,rule 12 makes it possible for him to avoid the necessity of moving to suppress evidence which the government does not intend to use. No sanction is provided for the government's failure to comply with the court's order because the committee believes that attorneys for the government will in fact comply and that judges have ways of insuring compliance. An automatic exclusion of such evidence, particularly where the failure to give notice was not deliberate, seems to create too heavy a burden upon the exclusionary rule of evidence, especially when defendant has opportunity for broad discovery under rule 16. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance (Approved Draft, 1971) at p. 116:

A failure to comply with the duty of giving notice could lead to the suppression of evidence. Nevertheless, the standards make it explicit that the rule is intended to be a matter of procedure which need not under appropriate circumstances automatically dictate that evidence otherwise admissible be suppressed. Pretrial notice by the prosecution of its intention to use evidence which may be subject to a motion to suppress is increasingly being encouraged in state practice. See, e.g., *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 264, 133 N.W.2d 753, 763 (1965):

In the interest of better administration of criminal justice we suggest that wherever practicable the prosecutor should within a

reasonable time before trial notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial. We also suggest, in cases where such notice is given by the prosecution, that the defense, if it intends to attack the confession or admission as involuntary, notify the prosecutor of a desire by the defense for a special determination on such issue.

See also *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 553-556, 141 N.W.2d 3, 13-15 (1965):

At the time of arraignment when a defendant pleads not guilty, or as soon as possible thereafter, the state will advise the court as to whether its case against the defendant will include evidence obtained as the result of a search and seizure; evidence discovered because of a confession or statements in the nature of a confession obtained from the defendant; or confessions or statements in the nature of confessions.

Upon being so informed, the court will formally advise the attorney for the defendant (or the defendant himself if he refuses legal counsel) that he may, if he chooses, move the court to suppress the evidence so secured or the confession so obtained if his contention is that such evidence was secured or confession obtained in violation of defendant's constitutional rights. * * *

The procedure which we have outlined deals only with evidence obtained as the result of a search and seizure and evidence consisting of or produced by confession on the part of the defendant. However, the steps which have been suggested as a method of dealing with evidence of this type will indicate to counsel and to the trial courts that the pretrial consideration of other evidentiary problems, the resolution of which is needed to assure the integrity of the trial when conducted, will be most useful and that this court encourages the use of such procedures whenever practical.

Subdivision (e) provides that the court shall rule on a pretrial motion before trial unless the court orders that it be decided upon at the trial of the general issue or after verdict. This is the old rule. The reference to issues which must be tried by the jury is dropped as unnecessary, without any intention of changing current law or practice. The old rule begs the question of when a jury decision is required at the trial, providing only that a jury is necessary if “required by the Constitution or an

act of Congress." It will be observed that subdivision (e) confers general authority to defer the determination of any pretrial motion until after verdict. However, in the case of a motion to suppress evidence the power should be exercised in the light of the possibility that if the motion is ultimately granted a retrial of the defendant may not be permissible. Subdivision (f) provides that a failure to raise the objections or make the requests specified in subdivision (b) constitutes a waiver thereof, but the court is allowed to grant relief from the waiver if adequate cause is shown. See C. Wright, Federal Practice and Procedure: Criminal § 192 (1969), where it is pointed out that the old rule is unclear as to whether the waiver results only from a failure to raise the issue prior to trial or from the failure to do so at the time fixed by the judge for a hearing. The amendment makes clear that the defendant and, where appropriate, the government have an obligation to raise the issue at the motion date set by the judge pursuant to subdivision (c).

Subdivision (g) requires that a verbatim record be made of pretrial motion proceedings and requires the judge to make a record of his findings of fact and conclusions of law. This is desirable if pretrial rulings are to be subject to post-conviction review on the record. The judge may find and rule orally from the bench, so long as a verbatim record is taken. There is no necessity of a separate written memorandum containing the judge's findings and conclusions.

Subdivision (h) is essentially old rule 12(b)(5) except for the deletion of the provision that defendant may plead if the motion is determined adversely to him or, if he has already entered a plea, that that plea stands. This language seems unnecessary particularly in light of the experience in some district courts where a pro forma plea of not guilty is entered at the arraignment, pretrial motions are later made, and depending upon the outcome the defendant may then change his plea to guilty or persist in his plea of not guilty.

1975 Enactment

A. Amendments Proposed by the Supreme Court. Rule 12 of the Federal Rules of Criminal Procedure deals with pretrial motions and pleadings. The Supreme Court proposed several amendments to it. The more significant of these are set out below.

Subdivision (b) as proposed to be amended provides that the pretrial motions may be oral or written, at the court's discretion. It also provides that certain types of motions must be made before trial.

Subdivision (d) as proposed to be amended provides that the government, either on its own or in response to a request by the defendant, must notify the defendant of its intention to use certain evidence in order to give the defendant an opportunity before trial to move to suppress that evidence.

Subdivision (e) as proposed to be amended permits the court to defer ruling on a pretrial motion until the trial of the general issue or until after verdict.

Subdivision (f) as proposed to be amended provides that the failure before trial to file motions or requests or to raise defenses which must be filed or raised prior to trial, results in a waiver. However, it also provides that the court, for cause shown, may grant relief from the waiver.

Subdivision (g) as proposed to be amended requires that a verbatim record be made of the pretrial motion proceedings and that the judge make a record of his findings of fact and conclusions of law.

B. Committee Action. The Committee modified subdivision (e) to permit the court to defer its ruling on a pretrial motion until after the trial only for good cause. Moreover, the court cannot defer its ruling if to do so will adversely affect a party's right to appeal. The Committee believes that the rule proposed by the Supreme Court could deprive the government of its appeal rights under statutes like section 3731 of title 18 of the United States Code. Further, the Committee hopes to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary.

The Committee also modified subdivision (h), which deals with what happens when the court grants a pretrial motion based upon a defect in the institution of the prosecution or in the indictment or information. The Committee's change provides that when such a motion is granted, the court may order that the defendant be continued in custody or that his bail be continued for a specified time. A defendant should not automatically be continued in custody when such a motion is granted. In order to continue the defendant in custody, the court must not only

determine that there is probable cause, but it must also determine, in effect, that there is good cause to have the defendant arrested. House Report No. 94-247.

1983 Amendment

Rule 12(i). As noted in the recent decision of *United States v. Raddatz*, 447 U.S. 667 [100 S.Ct. 2406, 65 L.Ed.2d 424] (1980), hearings on pretrial suppression motions not infrequently necessitate a determination of the credibility of witnesses. In such a situation, it is particularly important, as also highlighted by *Raddatz*, that the record include some other evidence which tends to either verify or controvert the assertions of the witness. (This is especially true in light of the *Raddatz* holding that a district judge, in order to make an independent evaluation of credibility, is not required to rehear testimony on which a magistrate based his findings and recommendations following a suppression hearing before the magistrate.) One kind of evidence which can often fulfill this function is prior statements of the testifying witness, yet courts have consistently held that in light of the Jencks Act, 18 U.S.C. § 3500, such production of statements cannot be compelled at a pretrial suppression hearing. *United States v. Spagnuolo*, 515 F.2d 818 (9th Cir.1975); *United States v. Sebastian*, 497 F.2d 1267 (2nd Cir.1974); *United States v. Montos*, 421 F.2d 215 (5th Cir.1970). This result, which finds no express Congressional approval in the legislative history of the Jencks Act, see *United States v. Sebastian*, supra; *United States v. Covello*, 410 F.2d 536 (2d Cir.1969), would be obviated by new subdivision (i) of rule 12.

This change will enhance the accuracy of the factual determinations made in the context of pretrial suppression hearings. As noted in*United States v. Sebastian*, supra, it can be argued most persuasively that the case for pre-trial disclosure is strongest in the framework of a suppression hearing. Since findings at such a hearing as to admissibility of challenged evidence will often determine the result at trial and, at least in the case of fourth amendment suppression motions, cannot be relitigated later before the trier of fact, pre-trial production of the statements of witnesses would aid defense counsel's impeachment efforts at perhaps the most crucial point in the case. * * * [A] government witness at the suppression hearing may not appear at trial so that defendants

could never test his credibility with the benefits of Jencks Act material.

The latter statement is certainly correct, for not infrequently a police officer who must testify on a motion to suppress as to the circumstances of an arrest or search will not be called at trial because he has no information necessary to the determination of defendant's guilt. See, e.g., *United States v. Spagnuolo*, supra (dissent notes that "under the prosecution's own admission, it did not intend to produce at trial the witnesses called at the pre-trial suppression hearing"). Moreover, even if that person did testify at the trial, if that testimony went to a different subject matter, then under rule 26.2(c) only portions of prior statements covering the same subject matter need be produced, and thus portions which might contradict the suppression hearing testimony would not be revealed. Thus, while it may be true, as declared in *United States v. Montos*, supra, that "due process does not require premature production at pre-trial hearings on motions to suppress of statements ultimately subject to discovery under the Jencks Act," the fact of the matter is that those statements--or, the essential portions thereof--are not necessarily subject to later discovery.

Moreover, it is not correct to assume that somehow the problem can be solved by leaving the suppression issue "open" in some fashion for resolution once the trial is under way, at which time the prior statements will be produced. In *United States v. Spagnuolo*, supra, the court responded to the defendant's dilemma of inaccessible prior statements by saying that the suppression motion could simply be deferred until trial. But, under the current version of rule 12 this is not possible; subdivision (b) declares that motions to suppress "must" be made before trial, and subdivision (e) says such motions cannot be deferred for determination at trial "if a party's right to appeal is adversely affected," which surely is the case as to suppression motions. As for the possibility of the trial judge reconsidering the motion to suppress on the basis of prior statements produced at trial and casting doubt on the credibility of a suppression hearing witness, it is not a desirable or adequate solution. For one thing, as already noted, there is no assurance that the prior statements will be forthcoming. Even if they are, it is not efficient to delay the continuation of the trial to

undertake a reconsideration of matters which could have been resolved in advance of trial had the critical facts then been available. Furthermore, if such reconsideration is regularly to be expected of the trial judge, then this would give rise on appeal to unnecessary issues of the kind which confronted the court in *United States v. Montos*, supra--whether the trial judge was obligated either to conduct a new hearing or to make a new determination in light of the new evidence.

The second sentence of subdivision (i) provides that a law enforcement officer is to be deemed a witness called by the government. This means that when such a federal, state or local officer has testified at a suppression hearing, the defendant will be entitled to any statement of the officer in the possession of the government and relating to the subject matter concerning which the witness has testified, without regard to whether the officer was in fact called by the government or the defendant. There is considerable variation in local practice as to whether the arresting or searching officer is considered the witness of the defendant or of the government, but the need for the prior statement exists in either instance.

The second sentence of subdivision (i) also provides that upon a claim of privilege the court is to excise the privileged matter before turning over the statement. The situation most likely to arise is that in which the prior statement of the testifying officer identifies an informant who supplied some or all of the probable cause information to the police. Under *McCray v. Illinois*, 386 U.S. 300 [87 S.Ct. 1056, 18 L.Ed.2d 62] (1967), it is for the judge who hears the motion to decide whether disclosure of the informant's identity is necessary in the particular case. Of course, the government in any case may prevent disclosure of the informant's identity by terminating reliance upon information from that informant.

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendment

The amendment to subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f) [sic], 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extended Rule 26.2, Production of Witness Statements, to other proceedings or hearings conducted under the Rules of Criminal Procedure. Rule 26.2(c) now explicitly states that the trial

court may excise privileged matter from the requested witness statements. That change rendered similar language in Rule 12(i) redundant.

2002 Amendments

The language of Rule 12 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The last sentence of current Rule 12(a), referring to the elimination of "all other pleas, and demurrers and motions to quash" has been deleted as unnecessary.

Rule 12(b) is modified to more clearly indicate that Rule 47 governs any pretrial motions filed under Rule 12, including form and content. The new provision also more clearly delineates those motions that *must* be filed pretrial and those that *may* be filed pretrial. No change in practice is intended.

Rule 12(b)(4) is composed of what is currently Rule 12(d). The Committee believed that that provision, which addresses the government's requirement to disclose discoverable information for the purpose of facilitating timely defense objections and motions, was more appropriately associated with the pretrial motions specified in Rule 12(b)(3).

Rule 12(c) includes a non-stylistic change. The reference to the "local rule" exception has been deleted to make it clear that judges should be encouraged to set deadlines for motions. The Committee believed that doing so promotes more efficient case management, especially when there is a heavy docket of pending cases. Although the rule permits some discretion in setting a date for motion hearings, the Committee believed that doing so at an early point in the proceedings would also promote judicial economy.

Moving the language in current Rule 12(d) caused the relettering of the subdivisions following Rule 12(c).

Although amended Rule 12(e) is a revised version of current Rule 12(f), the Committee intends to make no change in the current law regarding waivers of motions or defenses.

Federal Rule of Criminal Procedure 16

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

• the statement is within the government's possession, custody, or control; and

• the attorney for the government knows--or through due diligence could know--that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) Organizational Defendant. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) Defendant's Prior Record. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for

the government knows--or through due diligence could know--that the record exists.

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows--or through due diligence could know--that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) Expert witnesses.--At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the

government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert witnesses.--The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if--

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) Failure to Comply. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

Federal Rule of Evidence 103(d)

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

Federal Rule of Evidence 608(b)

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
(1) the witness; or
(2) another witness whose character the witness being cross-examined has testified about.
By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.