UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, vs. **FRANCIS RAIA and DIO BRAXTON,** Defendants.	Criminal No.: 18-657 (WJM)

BRIEF ON BEHALF OF DEFENDANT, FRANCIS RAIA, IN SUPPORT OF PRETRIAL MOTIONS

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Statement of Facts

The indictment charges defendant, Frank Raia, and co-defendant, Dio Braxton, with a conspiracy to commit mail fraud in connection with Hoboken's November 5, 2013, municipal election. According to the indictment, Raia, a resident of Hoboken, was a candidate for the Hoboken City Council, running as part of a slate that included other candidates for the Council, as well as a candidate for Mayor. Raia was also the chairperson of a political action committee.

The indictment alleges that the ballot for the November 5, 2013 election included a referendum on whether Hoboken should maintain its existing rent control protections. Raia allegedly supported a "yes" vote on the referendum.

The defendants are alleged to have conspired, along with unidentified "others" to bribe voters by paying them to apply for and cast their mail-in ballots in support of the Slate and in favor of the rent control referendum. Some voters allegedly received ballots by U.S. mail. The indictment alleges that, at Raia's direction, Braxton and others promised voters, "including Voter 1, Voter 2, and Voter 3, that they would be paid approximately $50 by check if they submitted a mail-in ballot for the November 5 Election." A PAC, allegedly at Raia's direction, paid a company to print checks for voters.

Defendant maintains that he committed no offense. Any payments made were to persons working for Defendant's campaign.

Point 1

A BILL OF PARTICULARS IS NEEDED BY DEFENDANT IN ORDER TO ALLOW HIM TO PREPARE HIS DEFENSE AND TO ENSURE HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS.

Defendant is entitled to a bill of particulars because the indictment does not provide him with sufficient notice of the charges to defend himself. The indictment alleges that defendant conspired with "others," without identifying who the "other" co-conspirators are. The indictment also charges, at its core, that three unidentified voters were promised they would be paid $50 by check if they submitted mail-in ballots for the November 5 election. Whether the U.S. mails were used in connection with their votes is not specified. Knowing whether these unidentified voters used the mails is a critical element of the mail fraud violation charged in the indictment. 18 U.S.C., Section 1952(a)(3). The indictment specifically notes that certain persons did not use the mails, but instead had their vote-by-mail applications delivered to the Clerk's Office. Nowhere in the indictment does it specify the dates on which the allegedly unlawful acts were committed.

The failure of the indictment to provide such minimal information as the identities of the voters, the identity of the participants in the offenses alleged, the specific dates on which the offenses allegedly occurred, the places where the offenses occurred, the identity of each specific wrongful act attributed to defendant, and the actual harm effect by defendant's conduct substantially undermines defendant's ability to prepare a defense. This failure to particularize the charges against defendant, deprives him of his Sixth Amendment right to a fair trial, and of his Fifth Amendment right to due process.

Clearly, greater specificity than that which has been supplied is required of the government. Rule 7(f) of the Federal Rules of Criminal Procedure specifically permits the Court to order that a Bill of Particulars be provided:

> (f) Bill of Particulars: The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

The foregoing rule is to be "liberally interpreted" to enable the accused to meet the charges against him. United States v. O'Connor, 237 F.2d 466, 475-76 (2d Cir. 1955). The purpose for requiring a bill of particulars to be provided was recognized by the Third Circuit in United States v. Addonizio, 451 F.2d 49, 63-64 (3d Cir.), cert. denied, 405 U.S. 936 (1972):

> The purpose of the bill of particulars is to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense.

It is not enough, in refusing to require a bill of particulars, merely to find that such a bill is not needed because the indictment sets forth the "bare minimum" of the elements of the offense charged. United States v. Glaze, 313 F.2d 757, 761 (2d Cir. 1963). Nor is it sufficient to hypothesize that the defendant was aware of his wrongful acts and that therefore only minimum notice is required in the indictment to remind him of his wrongdoing; such speculation is inconsistent with the presumption of defendant's innocence. United States v. Smith, 16 F.R.D. 372, 374-75 (D.C.W.D. Mo. 1954). As the Court in Smith noted:

> Being presumed to be innocent, it must be assumed 'that he [the defendant] is ignorant of the facts on which the pleader founds his charges. This conclusion seems to me to be elementary, fundamental and inescapable.'

Id. at 375 (citation omitted).

There is no reason why the government, if it can support its charges, should not be required to identify each of the three alleged voters who were allegedly bribed in exchange for their votes, and whether they used the United States mail. The government must supply sufficient information so that defendant will have notice of every wrongful act that the government intends to prove against him, the places where each alleged wrong occurred, the means by which each alleged offense was accomplished, the names of the persons who

participated in each wrong alleged, the precise dates of each offense, and the actual harm caused by each wrong alleged. Courts have routinely required the government to supply to defendants the identities of all participants in the particular offense charged. See, e.g., United States v. Williams, 113 F.R.D. 177 (M.D. Fla. 1986) (directing that the identity of all unindicted co-conspirators required); United States v. Mannino, 480 F. Supp. 1182 (S.D.N.Y. 1979) (directing government to provide identity of co-conspirators); United States v. Hubbard, 474 F. Supp. 64 (D.D.C. 1979) (directing government to provide identity of co-conspirators); United States v. Ahmad, 53 F.R.D. 194 (M.D. Pa. 1971) (directing government to specifically identify all conspiratorial acts).

The need for such basic information as the names of the three voters whose names are not specified, whether they used the United States mail, the identities of persons allegedly participating with defendant, the specification of all wrongful acts, and the dates of all wrongful acts alleged is particularly critical here so that defendant can investigate all necessary avenues of defense and effectively develop responses to the government's charges. Because a separate rule of evidence applies to co-conspirator statements, defendant is entitled to know the identities of any "unindicted co-conspirators", who are referred to as such in the indictment.

Defendant is also entitled to know specifically when he allegedly exercised corrupt undue influence. The indictment, rather than supplying such minimal information, merely alleges that the various offenses occurred over a span of time. Other courts have recognized the need for specific dates and have ordered the prosecution to disclose such information. See, e.g., United States v. Holman, 490 F. Supp. 755, 762 (E.D. Pa. 1980) ("the exact date and place, if known to the Government, of each event alleged in the indictment"); United States v. Ahmad, 53 F.R.D. 194, 201-03 (M.D. Pa. 1971) (date, time and place of meetings); United States v. Hughes, 195 F. Supp. 795, 800 (S.D.N.Y. 1961) (date of each purchase in fraud case).

It is also crucial that defendant be advised whether the wrongful acts alleged in the indictment are the only offenses which the government intends to prove at trial. It will be difficult enough for defendant to investigate the specific offenses charged, without also having to

be surprised at trial by proofs relating to offenses not even alleged in the indictment. See, e.g., United States v. Ahmad, 53 F.R.D. 194 (M.D. Pa. 1971). See also United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988) (conviction reversed where bill of particulars denied); United States v. Bortnovsky, 820 F.2d 572 (2d Cir. 1987) (conviction reversed where court abused discretion in denying bill of particulars).

Because vital information necessary for defendant's defense is missing from the indictment, defendant requests that this Court order the government to supply a bill of particulars setting forth, among other things, the specific wrongs committed, the date of each wrongful act alleged, whether the mails were used with respect to each such act, any statements defendant is alleged to have made that are inculpatory or that are in furtherance of the conspiracies alleged, the place of each offense, the names and addresses of any persons participating in or witnessing each of the alleged offenses, and the means by which the alleged offenses were accomplished.

Point 2

THE GOVERNMENT MUST FORTHWITH TURN OVER TO DEFENDANTS ALL "BRADY AND "GIGLIO" MATERIAL OR THE INDICTMENT MUST BE DISMISSED

This Court's scheduling order requires the Government to provide "exculpatory evidence, within the meaning of Brady v. Maryland, 373 U.S. 83 (1963)." The Government's obligations to supply directly exculpatory information under Brady also encompasses information in the Government's possession that is impeaching of Government witnesses. Giglio v. United States, 405 U. S. 150 (1972).

Although certain exculpatory information has been produced by the Government to the defendant, there is likely more, including impeachment information under Giglio v. United

States, 405 U.S. 150 (1972). In Giglio, the Supreme Court ordered a new trial because the government failed to disclose to defense counsel an immunity agreement which had been entered into by the prosecution with a critical government witness. After citing Brady for the proposition that irrespective of the prosecutor's good faith, the suppression of material evidence by the prosecution justifies a new trial, the Court stated:

> When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Id. at 154

The Court then noted:

> Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it. Id. at 154-55

The indictment against defendant makes reference to Lizaida Camis. Defendant has reason to believe that Ms. Camis entered into a plea agreement with the government, signed a cooperation agreement, and testified before the grand jury. Defendant has not been supplied with any materials relating to plea or cooperation agreements with respect to Ms. Camis, nor with any grand jury testimony.

Other witnesses, such as the three unidentified voters who were allegedly paid $50 apiece, were believed to have worked on Defendant's campaign and were paid for their work, not their votes. The strength of the Government's case against defendant will strongly depend upon the credibility of the Government's witnesses. With respect to each Government witness, defendant is entitled to receive copies of the following: any inconsistent statements given by the witness; any testimony of the witness before the grand jury; any statements exculpatory of defendants made by the witness; any transcripts from prior trials; any surveillance reports or

surveillance notes reflecting statements of the witness inconsistent with the witness's conduct or inconsistent with other statements made by the witness; any FBI-302 reports reflecting inconsistencies in the statements of the witness; any other interview notes of agents of Government attorneys reflecting statements of the witness that are inconsistent or exculpatory of defendants; any statements of the witness inconsistent with the statement of any other witness; questions and answers given by the witness during a polygraph examination; any materials reflecting the witness's bias, motive or prejudice against defendants; psychiatric reports concerning the witness, which reflect a mental or emotional problem of any kind or which reflect an inconsistency in statements made by the witness; confessions of the witness; records of participation in the federal witness protection program, including a complete description of any benefits received by the witness; records of any monies paid by the Government to the witness for any purpose; evidence of any promises made by the Government to the witness; evidence of any threats made by the Government to the witness; evidence of any benefits conferred by the Government upon the witness; federal, state, local and foreign criminal histories of the witness; evidence of other "wrongs or bad acts" of the witness; records of any convictions or of sentences received or of a reduction in any sentence received by the witness; plea agreements between the witness and any federal, state, local or foreign Governmental agency; immigration records of the witness; plea transcripts concerning the witness; sentencing transcripts concerning the witness; cooperating agreements with the witness; the names and docket numbers of other cases in which the witness has testified; immunity agreements and orders relating to the witness; and evidence of crimes where no formal proceedings were instituted as a result of the cooperation of the witness. To the extent that such information exists, defendants are entitled to the production of the material immediately, pursuant to this Court's standing order.

If, in response to this motion, the Government seeks to draw a distinction between evidence which is directly exculpatory and evidence which could be used to impeach the credibility of critical Government witnesses, this Court must reject such an explanation as artificial and unreasoned. Such a distinction, if urged by the Government, is one which has been squarely rejected by decisions of the United States Supreme Court and of the United States Court of Appeals for the Third Circuit.

In United States v. Bagley, 437 U.S. 667 (1985), the Supreme Court specifically noted that the distinction between materials directly affecting the guilt or innocence of a criminal defendant and materials affecting the credibility of crucial government witnesses was spurious:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. **Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule.** Id. at 490 (emphasis supplied).

Similarly, in Carter v. Rafferty, 826 F.2d 1299, 1305 (3d Cir. 1987), the Third Circuit held that "in addition to exculpatory evidence, the "*Brady rule covers evidence that might be used for impeachment purposes*." See also Landano v. Rafferty, 670 F. Supp. 570, 584 (D.N.J. 1987) ("The Brady rule has been extended to include impeachment evidence as well as exculpatory evidence.").

In United States v. Higgs, 713 F.2d 39 (3d Cir. 1983), the Third Circuit again recognized that the Brady doctrine mandates disclosure of impeachment evidence. Citing Giglio, the Court stated:

> The rule laid out in Brady requiring disclosure of exculpatory evidence applies both to materials going to the heart of the defendant's guilt or innocence and to materials that might well alter

> the jury's judgment of the credibility of a crucial prosecution witness. Id. at 42.

In United States v. Starusko, 729 F.2d 256 (3d Cir. 1984), the Third Circuit specifically recognized that it was this Circuit's "longstanding policy" to encourage the "early production" of Brady materials. Id. at 261.

Under the Jencks Act, 18 U.S.C. Sec. 1500, witness statements are not required to be produced by the Government until after the witness testifies. Despite that rule, most courts in this District requite pretrial disclosure of Jencks Act materials in order to avoid undue delay at trial prompted by a defendant's request to investigate a freshly disclosed witness statement. Should the Government, in response to this motion, contend that witness statements which simultaneously fall within the purview of Giglio and the Jencks Act, 18 U.S.C. §1500, are not subject to pretrial disclosure, that argument has been specifically rejected in this District. United States v. Rogers, Crim. No. 84-335, Slip Op., (D.N.J. May 17, 1985). Moreover, the various Third Circuit decisions cited herein acknowledge the salutary practice of the District Courts within this Circuit to encourage the early production of discovery materials. Finally, because the rule of Giglio is constitutionally compelled, the timing of the turnover of such materials is governed by the Fifth and Sixth Amendment requirements of due process and of a fair trial, rather than by the arbitrary times established by statute.

Not only is defendant entitled to the immediate production of Brady, Giglio and Jencks materials by the Government, but he is also entitled to those materials in a usable form. For example, to the extent that critical Government witnesses have testified at previous trials where their credibility was either drawn into question or was impeached, defendant is entitled to transcripts of the witnesses' prior testimony.

Defendant has strong reason to believe that the Government is in possession of information that is directly exculpatory of him or impeaching of Government witnesses. The Government has an immediate obligation to supply all such information to defendant.

Point 3

DEFENDANT IS ENTITLED TO A PRELIMINARY HEARING ON ANY EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS THAT THE GOVERNMENT INTENDS TO INTRODUCE INTO EVIDENCE AT TRIAL AGAINST HIM

Defendant is entitled to have the Government disclose all Rule 404(b) evidence that it is seeking to introduce at trial. Rule 404(b) permits this Court, under certain circumstances, to admit evidence or evidence of "other crimes, wrongs or acts" that fit the standard articulated in the Rule. Rule 404(b) must be read in conjunction with Rule 104 of the Federal Rules of Evidence. Under Rule 104, this Court is required to make a preliminary determination on the admissibility of any evidence of other crimes, wrongs or acts that the government intends to introduce at trial pursuant to Evidence Rule 404(b). In light of this Court's duty to make a preliminary determination of the admissibility of any proffered Rule 404(b) evidence, defendant would respectfully request that the Court order the government to provide a detailed proffer of any evidence it seeks to have admitted under the rule, and to explain why it believes the evidence is admissible and for what purpose. See United States v. Baum, 482 F.2d 1325, 1331-32 (2d Cir. 1973); United States v. Flecha, 442 F. Supp. 1044, 1046 (E.D. Pa. 1977), aff'd without op., 577 F.2d 729 (3d Cir. 1978).

Pretrial disclosure of Rule 404(b) evidence is vital not only for defendant to investigate the evidence identified but also to argue effectively against the evidence in his opening statement to the jury. Early determinations of the admissibility of "other crimes" evidence serves the

salutary purpose of avoiding unnecessary delay during trial. See United States v. Baum, 482 F.2d 1325, 1332 (2d Cir. 1973). See also Riggs v. United States, 280 F.2d 750, 753 (5th Cir. 1960) (condemning concealment until trial of prior bad act not disclosed in indictment); United States v. Kelly, 420 F.2d 26, 29 (2d Cir. 1969) (pretrial disclosure avoids "trial by ambush"). Of necessity, such evidence must be weighed by this Court at trial against the danger that it would create "unfair prejudice" to the trial of defendant. United States v. Lebovitz, 669 F.2d 894, 901 (3d Cir.), cert. denied, 454 U.S. 929 (1982).

In United States v. Baum, 482 F.2d 1325 (2d Cir. 1973), a conviction was reversed and a new trial was ordered because the defendant had not been given an opportunity in advance of trial to prepare to rebut "other crimes evidence" that the government intended to introduce. Defendant's motion for disclosure of names, addresses and phone numbers of government witnesses was denied before trial. Id. at 1329. The Court held that the nature of the evidence of other crimes in the case "required that the defense be given a fair opportunity to meet it." Id. at 1331. Admission of the highly charged evidence of similar criminal acts, which neither the trial judge nor defendant had seen in advance, unfairly surprised the defendant, requiring a new trial. Id. at 1331-32. See also United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977) (government required prior to trial to provide identities of victims of defendant's other crimes).

The Supreme Court has established guidelines for the District Courts to follow before admitting other crimes evidence. See, e.g., Huddleston v. United States, 485 U.S. 681 (1988). Because any evidence of "other crimes" introduced by the government will likely require substantial investigation by defendant, it is respectfully submitted that this Court must order the detailed disclosure of such information immediately if defendants are to receive a fair trial.

Point 4

THE GOVERNMENT SHOULD BE COMPELLED TO PRESERVE ALL ROUGH NOTES, REPORT DRAFTS, AND FINAL REPORTS PREPARED BY ANY GOVERNMENT AGENT OR WITNESS IN CONNECTION WITH THE INVESTIGATION WHICH CULMINATED IN THE INDICTMENT AGAINST DEFENDANT

Defendant requests that this Court enter an order directing the government to preserve all rough notes, interview notes, report drafts and final reports that were prepared by any federal, state or local government agent in connection with the investigation that led to this indictment. These notes must be preserved because some of the notes might not only exculpate defendant directly, but would be material to the cross-examination of various government witnesses. In United States v. Vella, 562 F.2d 275 (3d Cir. 1977), the Third Circuit held:

> The rough interview notes of FBI agents should be kept and produced so that the trial court can determine whether the notes should be made available to the [defense] under the rule of Brady v. Maryland, 373 U.S. 83 (1963), or the Jencks Act.

See also United States v. Niederberger, 580 F.2d 63, 71 (3d Cir.), cert. denied, 439 U.S. 980 (1978); United States v. Canalenson, 546 F.2d 309, 314 n.3 (9th Cir. 1974), cert. denied, 430 U.S. 918 (1977).

The category "rough notes," in addition to encompassing rough interview notes, also encompasses handwritten drafts of agents' reports. The government has an obligation to retain and, upon motion, to make available to the Court both the rough notes and the drafts of reports of its agents to determine whether they should be disseminated to defendants. See United States v. Ammar, 714 F.2d 238, 259 (3d Cir.), cert. denied, 464 U.S. 936 (1983). The government's failure to protect and preserve evidence may, depending upon the circumstances, constitute grounds for reversal. See United States v. Testamark, 570 F.2d 1162, 1165 (3d Cir. 1978).

For all these reasons, the government should be instructed to preserve the rough notes, rough interview notes, draft reports and final reports of all of the federal, state and local

government's agents involved in the investigation that culminated in this indictment against defendant.

Point 5

DEFENDANT SHOULD BE GIVEN ACCESS TO THE GRAND JURY TRANSCRIPTS IN ORDER TO EVALUATE THE INTEGRITY OF THE PROCESS AND TO IDENTIFY FOR THE COURT ANY IRREGULARITIES THAT MAY HAVE OCCURRED.

Under the Fifth Amendment to the United States Constitution, an accused is guaranteed the right be indicted by a grand jury before being required to stand trial:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ..

United States Constitution, Amendment V.

When the framers of the Constitution included the foregoing language in the Bill of Rights "they were not engaging in a mere verbal exercise." United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972). Rather, they recognized that the grand jury was essential to implementing "basic liberties." United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983). The grand jury was devised to "provide a fair method for instituting criminal proceedings," Costello v. United States, 350 U.S. 359, 362 (1956), to serve "as a protector of citizens against arbitrary and oppressive governmental action," United States v. Calandra, 414 U.S. 338, 343 (1974), and to assure the "protecti[on] of citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 686 (1972).

In order to accomplish these various purposes, it is essential that the grand jury act "independently of either prosecuting attorney or judge," Stirone v. United States, 361 U.S. 212, 218 (1960); that it be "independent and informed," Wood v. Georgia, 370 U.S. 375, 390 (1962); and that it be charged to "clear the innocent, no less than to bring to trial those who may be guilty." United States v. Dionisio, 410 U.S. 1, 16-17 (1973).

Despite the requirement that the grand jury act independently and that it serve as a buffer against oppressive governmental action, it has so often become prey to prosecutorial manipulation that the historic independence of the institution has been compromised. United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983). This erosion of the independence of the grand jury stems from the active role that the prosecution plays in the proceedings. Id. It is the prosecutor who prepares the indictment, calls and examines witnesses, advises the grand jury as to the law, and is in attendance throughout the investigation. Id.

Though the prosecutor is actively involved in the proceedings of the grand jury, he or she does not have an absolute license to advocate a particular position. Rather, the prosecutor must act as "an administrator of justice." United States v. Gold, 470 F. Supp. 1336, 1346 (N.D.Ill. 1979). In that capacity, the prosecutor has the obligation to preserve "the fairness, impartiality, and lack of bias" of the grand jury. Id. He or she may not inflame the passions of the grand jurors against any person, See, e.g., United States v. Serubo, 604 F.2d 807, 818 (3d Cir. 1979), nor may he or she ask gratuitous questions that serve "no other purpose than calculated prejudice." United States v. Samango, 607 F.2d 877, 883 (9th Cir. 1979).

Where prosecutors have infringed upon the independent functioning of the grand jury, courts have not hesitated to exercise their supervisory powers in ordering indictments dismissed. See generally, Gershman, Prosecutorial Misconduct Sec. 2.2(b) (1986); Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment--A Basis for Curbing Prosecutorial Misconduct, 45 Ohio State L.J. 1077 (1984); Note, Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence, 39 U. Chicago L. Rev. 761 (1972) [hereinafter cited as "Undue Influence"]; Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1658 (1963) [hereinafter cited as "Supervisory Power"]. Thus, indictments have been dismissed: where Courts have found that attenuated hearsay was introduced before the grand jury, United States v. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); cf. United States v. Hodge, 496 F.2d 87 (5th Cir. 1974) (remanded to determine whether sworn testimony received at any time); where slanted and suggestive questions were

asked of witnesses, see, e.g., United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); United States v. Roberts, 481 F. Supp. 1385 (C.D. Calif. 1980); United States v. Samango, 607 F.2d 877, 883 (9th Cir. 1979); where the purpose of questioning was to impugn and discredit a witness, United States v. DiGrazia, 213 F. Supp. 232, 235 (N.D. Ill. 1963); cf. United States v. Serubo, 604 F.2d 807, 818 (3d Cir. 1979); where the prosecuting attorney was also a grand jury witness, United States v. Gold, 470 F. Supp. 1336, 1346 (N.D. Ill. 1979); United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978); compare United States v. Birdman, 602 F.2d 547 (3d Cir. 1979) (indictment not dismissed where no prejudice shown); where the prosecutor failed to introduce exculpatory evidence, United States v. Roberts, 481 F. Supp. 1385 (C.D. Calif. 1980); where the prosecutor attempted to discourage the exercise of the statutory rights of an individual, United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977); where unsworn testimony was introduced, United States v. Carcaise, 442 F. Supp. 1209 (M.D. Fla. 1978); and where prosecutorial neglect resulted in prejudicial pre-indictment delay, United States v. Morrison, 518 F. Supp. 917 (S.D.N.Y. 1981).

In each of the foregoing cases in which indictments were dismissed because of prosecutorial misconduct, the Courts found that the misconduct constituted an interference with the independent functioning of the grand jury. See, e.g., United States v. Hogan, 712 F.2d 757, 762 (2d Cir. 1983).

Although, as a general proposition, the secrecy of grand jury transcripts is maintained, Rule 6(e) of the Federal Rule of Criminal Procedure does provide for exceptions to the rule. These exceptions include the use of transcripts to demonstrate colorable claims of grand jury misconduct, and to support a "particularized need" demonstrated by defendant, which outweighs the general rule of secrecy. See Fed. R. Crim. P. 6(e)(3). See also Douglas Oil Company v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979); Pittsburgh Plate Glass Company v. United States, 360 U.S. 395, 399 (1959); U.S. Industries, Inc. v. United States District Court, 345 F.2d 18, 21 (9th Cir.), cert. denied, 382 U.S. 814 (1965).

In determining the appropriateness of the disclosure requested, this Court is required to apply the "particularized need" standard. See, e.g., Dennis v. United States, 384 U.S. 855 (1966). Under this standard, the Court must weigh the need for disclosure of the information requested against the need for secrecy of grand jury matters. Douglas Oil Company v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979). There is a lesser burden in demonstrating the need for disclosure as the considerations justifying secrecy become less relevant. Id. One circumstance under which the need for secrecy is diminished is where, as here, the grand jury has completed its work. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940); See also United States v. Mahoney, 495 F. Supp. 1270, 1272 (E.D. Pa. 1980).

In Dennis v. United States, 384 U.S. 855 (1966), the Supreme Court directed the release of grand jury transcripts where a particularized need, in that case, to cross-examine witnesses, had been shown. In ordering certain grand jury transcripts to be released to defendants for use in cross-examination, the Court found that a prior in camera review by the Court was unnecessary. In so finding, the Court reasoned that "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate." Id. at 875.

Here, one reason defendant needs the grand jury transcripts is to determine whether the government had valid grounds to indict him. Defendant needs the information to establish that there was no mail fraud committed and that voters who were paid rendered services to defendant's campaign. Moreover, to the extent that a co-defendant or unindicted co-conspirator does not appear at trial, if any information is contained in the grand jury transcripts, which would impeach the credibility of a co-conspirator who allegedly inculpates defendant, then defendant would have a right to this information under Rule 806 of the Federal Rules of Evidence. See United States v. Wali, 860 F.2d 588 (3d Cir. 1988).

The transcripts will also contain the prosecutor's legal instructions to the grand jury. If these instructions were defective, the grand jury may have indicted defendant based upon a misunderstanding of the law. There is not even an arguable privacy interest in withholding this information. Unless defendant is given access to the grand jury transcripts, his rights to due

process, to a fair trial, and to the confrontation of witnesses will be infringed. Moreover, he will be unable to challenge the prosecutor's conduct within the grand jury room which may have wrongly led to this indictment.

Because unusual circumstances exist that imperil the due process, air trial and confrontation rights of defendant, a particularized need has been demonstrated that requires production of the grand jury transcripts. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959) (discussing particularized need standard). See also Dennis v. United States, 384 U.S. 855, 868-75 (1966); United States v. Procter & Gamble, 356 U.S. 677, 683 (1958). A sufficient factual proffer has been made by defendant to justify the relief sought, and defendant urges this Court to grant his request to review the grand jury transcripts.

Point 6

THE GOVERNMENT SHOULD BE REQUIRED TO DISCLOSE TO DEFENDANT THE NAMES OF ALL INFORMANTS USED IN ITS INVESTIGATION.

Defendant believes that various informants were used by the government in conducting its investigation, and that some of these persons are not merely informants, but witnesses. With respect to each informant, defendant requests disclosure of his or her name and last known address so that a request for an interview can be made. Such disclosure is vital to the protection of defendant's rights at trial. This is particularly so here because the informants involved may be critical witnesses to certain events alleged by the government to be criminal. Under these circumstances, because it is reasonably probable that the informants can give testimony that is relevant and material to the defense, disclosure is mandated. United States v. McManus, 560 F.2d 747, 751 (6th Cir. 1977), cert. denied, 434 U.S. 1047 (1978). See also United States v.

Opager, 589 F.2d 799 (5th Cir. 1979); United States v. Silva, 580 F.2d 144 (5th Cir. 1978); United States v. Himnandez-Berceda, 572 F.2d 680 (9th Cir. 1978).

This Court, in determining whether to require such disclosure, must balance the defendant's need for the information against the government's asserted need for confidentiality. Roviaro v. United States, 353 U.S. 53 (1957). It is crucial that the government's informants be identified so that a proper defense can be prepared. It is respectfully submitted that the balancing this Court must perform in determining whether informant information must be released weighs in favor of defendant and mandates disclosure of the identity of any informant used by the government against defendants.

Point 7

PURSUANT TO FED. R. CRIM. P. 17(C), DEFENDANT SHOULD BE AFFORDED THE RIGHT TO SERVE DOCUMENTARY SUBPOENA REQUESTS ON ENTITIES AND PERSONS WHO MAY HAVE INFORMATION GERMANE TO HIS DEFENSE.

Defendant seeks an Order pursuant to Fed. R. Crim. P. 17(c), permitting him to serve a documentary subpoena upon relevant persons and entities in advance of the trial date. As the United States Supreme Court has held, a criminal defendant has both a constitutional right to obtain evidence which bears upon the determination of either guilt or punishment and a Sixth Amendment right to process and a Sixth Amendment right to process. See California v. Trombetta, 467 U.S. 479, 485 (1984) (Due Process Clause of Fourth Amendment requires prosecution to turn over exculpatory evidence) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963) & United States v. Agurs, 427 U.S. 97, 112 (1976)). Rule 17(c) implements both the

right to obtain the evidence and to require its production. See In re Martin Marietta Corp., 856 F.2d 619, 621 (4th Cir. 1988).

In cases such as the matter at bar, where evidence relevant to guilt or punishment is in a third party's possession and is too massive for the defendant to adequately review unless obtained prior to trial, pre-trial production through Rule 17(c) is necessary to preserve the defendant's constitutional right to obtain and effectively use such evidence at trial. See United States v. Murray, 297 F.2d 812, 821 (2d Cir.) (interpreting Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951), as saying that Rule 17(c) permits pretrial production if it is necessary for the moving party to use the material as evidence at trial), cert. denied, 369 U.S. 828 (1962). Rule 17(c) has been recognized as a "convenient and time saving tool for trial preparation." United States v. Malizia, 154 F. Supp. 511, 513 (S.D.N.Y. 1951), cert. denied, 449 U.S. 1126 (1981). See also United States v. Cuthbertson, 630 F.2d 139, 144 (3d Cir. 1980) ("Rule 17(c) is designed as an aid for obtaining relevant evidentiary material that the moving party may use at trial."). Unlike the Government, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena, and is entitled to have these documents reviewed prior to trial. As one court has noted,

> The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, only apply to documents in the government's hands; accordingly, Rule 17(c) may well be a proper device for discovering documents in the hands of third parties.

United States v. Tomison, 969 F. Supp. at 593, n.14.

In order to prepare for trial, defendant needs to inspect documents that are not part of the discovery that has been provided. For the foregoing reasons, defendant respectfully requests that the Court grant permission to serve subpoena requests in advance of trial and for the subpoenas to be returnable to defendant's counsel's offices prior to trial.

Point 8

ANY POST-CONSPIRACY OR POST-ARREST STATEMENTS MADE BY CO-DEFENDANT BRAXTON, LIZAIDA CAMIS, OR ANY ALLEGED CO-CONSPIRATOR OF DEFENDANT TO THE GOVERNMENT, WHICH REFER TO DEFENDANT, MUST BE SUPPRESSED UNDER BRUTON V. UNITED STATES.

Dio Braxton, the co-defendant of Defendant Raia, made various statements about defendant Raia to the Government. Braxton testified before the grand jury and he had given to Government investigators statements that post-dated the conspiracy. Similarly, Lizaida Camis, who is referred to in the indictment and is likely an unidentified co-conspirator of defendant, is believed to have made statements to the government, which post-date the alleged conspiracy. Any statements made by Braxton, Camis, or any unidentified co-conspirator of defendant that inculpated him must be suppressed under Bruton v. United States, 391 U.S. 123 (1968). In Bruton, the United States Supreme Court held that the admission of a co-defendant's post-conspiracy confession implicating the defendant constituted reversible error where the co-defendant did not testify.

Any post-conspiracy or post-arrest statements made by Braxton, Camis, or any unidentified co-conspirator of defendant to the Government or the Grand Jury, inculpatory of defendant must be suppressed. Should the Government suggest in response to this motion that post-conspiracy or post-arrest statements can be redacted to avoid reference to defendant, any such redaction could not be accomplished without the clear suggestion that the statement, no matter how recast, was a reference to defendant Raia.

In Gray v. Maryland, 523 U.S. 185 (1998), the Supreme Court held that the use of the co-defendant's statement at defendant's trial, when the statement substituted defendant's name with the word "deleted" and other symbols, violated defendant's Sixth Amendment confrontation

rights. The Court found that "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration" closely resembles Bruton's unredacted statement and therefore the same result is required. Gray 523 U.S. at 192. The juror "need only lift his eyes to the co-defendant, sitting at counsel table" to determine to whom the deletion refers. Gray 523 U.S. at 193; United States v. Richards, 241F.3d 335, 341 (3d Cir.), cert. denied, 533 U.S. 960 (2001).

In Richards, the Third Circuit held that Bruton's mandates were violated when the co-defendant's statement was redacted to substitute defendant's name with a reference to the co-defendant's "friend." Richards and the co-defendant, Greenaway, were charged with the robbery of an armored van. "Greenaway's statement referred to the existence of three participants in the crime -- Greenaway, the 'insideman,' and 'my friend.' Since the 'inside man' was easily identified as the driver of the Brink's van, the reference to 'my friend' sharply incriminated Richards, the only other person involved in the case." 241 F.3d at 341.

There were two cases, both outside of this Circuit, where courts held that a co-defendant's statement was incapable of redaction. In United States v. McKay, 70 F. Supp. 2d 208 (E.D.N.Y. 1999), defendant Brian McKay was charged in several counts with extortion, money laundering, income tax evasion and conspiring to steal funds from H.U.D. Id. at 210. The co-defendant, his nephew, was charged with one count of providing "false statements." In response to the defendant's objection to the use of his nephew's statement at a joint trial, the Government argued that it only intended to offer the portion of the statement implicating the nephew and therefore defendant's constitutional rights were protected. Id. at 213. The court disagreed and held that the co-defendant's confession was inextricably intertwined with defendant's involvement in the fraud scheme to allow even a portion of it to be used at a joint trial. Mckay, 70 F. Supp 2d at 213.

Since the Government represented that it intended to use the co-defendant's statement in its prosecution of Mckay, a severance was required. Id.

Finally, in United States v. Lavalee, 290 F. Supp. 90 (N.D.N.Y. 1968), the district court granted defendant's Habeas petition and held that the use of the co-defendant's redacted statement violated defendant's Sixth Amendment rights. In Lavalee, defendant and his co-defendant, Swine, were charged with the robbery and assault of an elderly woman. Id. at 94. During the trial, the police officers who testified concerning the co-defendant's statements were ordered to use the word" 'he' or 'the other person or something else," but not the defendant's name. Id. When one of the detective's testified to the co-defendant's statement concerning his partner's participation in the crime he referred to the partner as "this other person" and "his friend." Id.

Another officer testified that while the co-defendant was being brought to the police station he said the following: "they had went out looking for something of value; they came to this apartment and Swine went up, climbed the fire escape and broke the window with his elbow. He went into the apartment and let someone else through the door, and they were surprised by a woman who lived in the apartment." Id.

Finally, a patrolman testified similarly to the officer, concluding his testimony with the statement: "He let the other fellow in." Id. The court held that this factual scenario might be a "classic example of a situation wherein any method of redaction would be patently impractical." Lavalee 290 F. Supp. at 94. The court found that it was impossible to "accept the contention that the jury did not know that these statements concerning 'the other fellow' or 'his friend' meant the defendant. Id. "It would be an insult to the intelligence of our jurors to believe that this sincere attempt at camouflage deluded them into the belief that 'the other person' in the particular setting

could be a person other than Joseph." (the defendant) Id. "Simple logic would lead to the conclusion that in the dilemma of this trial setting, the testimony about 'another person' could not be erased from the jurors' mental processes and could only mean it was Joseph. Otherwise, they would have to think the prosecution was deliberately from the beginning trying the wrong man as the other second person." Id. at 95. Although the Second Circuit overturned the decision, it did so on a harmless error analysis. The Court did not overrule the district court's determination that the redacted statement ran afoul of Bruton.

Given that only two persons are charged in this indictment, and given the scheme alleged, it would be impossible to disguise any statement made by Braxton or others about defendant Raia, without the jury knowing that Mr. Raia was the person being referred to. Under these circumstances, any post-conspiracy statements made by Braxton or any unidentified co-conspirator of defendant to the Government or to the Grand Jury, which were inculpatory of defendant, must be suppressed.

Point 9

DEFENDANT SHOULD BE SEVERED FROM CO-DEFENDANT BRAXTON, AND BRAXTON SHOULD BE IMMUNIZED BY THIS COURT SO HE MAY OFFER EXCULPATORY TESTIMONY ABOUT DEFENDANT.

Co-defendant Braxton offered grand jury testimony and made a statement to the Government that are exculpatory of defendant. Braxton stated that no payments were made to any person in exchange for their vote. He also stated that persons who were paid worked for the campaign. As a co-defendant, Braxton has the right to refuse to testify under the Fifth Amendment. If that right is asserted, defendant will be deprived of Braxton's exonerating testimony. Under the circumstances, this Court should sever the

defendants and immunize Braxton so that he may testify on behalf of defendant. If judicial immunity is required to vindicate the right of a defendant to a fair trial, the immunity should be granted. Government of the Virgin Islands v. Smith, 615 F.2d 694 (3rd Cir. 1980). Here, the government's decision to join the defendants in one indictment, knowing that co-defendant Braxton exonerated defendant in his statements to law enforcement and the grand jury, directly violates the right of defendant to a fair trial. Accordingly, the defendants should be severed and co-defendant Braxton must be granted a judicial immunity so that he may testify on behalf of defendant.

Point 10

THE GOVERNMENT MUST BE ORDERED TO SUPPLY DEFENDANT WITH A WITNESS LIST.

Although a defendant is not entitled as a matter of right to a list of government witnesses, United States v. Addonizio, 451 F.2d 49, 62 (3d Cir. 1972), this Court has the authority to require the Government to disclose prior to trial the names of its anticipated witnesses. See United States v. Climatemp, Inc., 482 F. Supp. 376, 389-90 (N.D. Ill. 1979), aff'd, United States v. Reliable Sheet Metal Works, Inc., 705 F.2d 461 (7th Cir. 1983).

In the circumstances here, where the acts alleged do not involve violence and there is no threat of retribution to witnesses, it is of vital importance to defendants' right to a fair trial to know who will be testifying for the Government. Defendant may want to interview such persons, may need to interview others based upon who the witnesses are, and may need certain documentary evidence, depending upon who the witnesses are. Unless defendant is advised of the names of the potential witnesses against him, he will not be able to properly prepare their defense in advance of trial. Accordingly, the Government must be directed to disclose to defendant the names of its anticipated witnesses.

Point 11

DEFENDANT HEREBY INCORPORATES BY REFERENCE ALL THOSE FACTUAL AND LEGAL ARGUMENTS, WHICH HAVE BEEN RAISED BY DEFENDANT'S CO-DEFENDANT, AND WHICH ARE NOT INCONSISTENT WITH DEFENDANT'S RIGHTS. HE SEEKS LEAVE TO JOIN IN ALL SUCH MOTIONS.

To the extent they are consistent with his factual and legal arguments, defendant incorporates by reference all factual and legal arguments raised by his co-defendant, and he seeks leave to adopt and join in all such arguments.

CONCLUSION

For all the foregoing reasons, the pretrial motions of defendant Raia must be granted.

Law Offices of Alan L. Zegas

/s/ Alan L. Zegas
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Dated: February 19, 2019