UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 15-CR-20339-GAYLES

UNITED STATES OF AMERICA

vs.

MATTHEW PISONI, MARCUS PRADEL,
and VICTOR RAMIREZ.
_____/

DEFENDANTS' JOINT MOTION FOR NEW TRIAL

Because new evidence has come to light which reveals that the Court's pretrial ruling on the Government misconduct in this case was based on incomplete and affirmatively false evidence presented to the Court by the prosecution team, Defendants Pisoni, Pradel, and Ramirez jointly file this motion for new trial pursuant to Rule 33. Newly- discovered evidence produced after the sentencing in this matter lays bare that the misconduct revealed at the pretrial hearing was only the tip of the iceberg.

To be clear, ***this Motion is based on evidence that is additional to, and different from, the evidence previously presented to this Court.*** This new evidence undermines the integrity of the prior proceedings before this Court, and requires that the convictions in this matter be vacated and dismissed. In the alternative, the Court should order a new trial with an untainted prosecution team.

INTRODUCTION

Before trial in this case, the defense discovered that the prosecution used an informant to repeatedly invade the defense camp, obtaining privileged attorney-client and work-product materials. The information the Government acquired included details about confidential defense strategy from the other defendants who thought they were sharing information with a co-defendant subject to a Joint Defense Agreement ("JDA").

The Government evaded dismissal or disqualification by repeatedly making two central assertions that formed the underpinning of the Court's decision not to dismiss: 1) the Government insisted that it did not know that the informant was continuing to meet repeatedly with the defense team while actively soliciting information at these meetings, and instead expressly told the Court it had avoided knowing about the meetings, and 2) the Government insisted that it did not obtain any privileged information from the informant. It is now clear that neither of these assertions were true -- and the Government knew it at the time of the hearing.[1]

[1] In addition, the Government told this Court that it did not know there was a Joint Defense Agreement in place. The new evidence clearly establishes that members of the prosecution team exchanged emails in which they expressly acknowledged there was a joint defense, in advance of the hearings at which they told the Court they did not know about the joint defense. Because the Court already found, despite the Government's insistence to the contrary, that the Government knew about the JDA, this particular misrepresentation is not

This Motion is based on new evidence produced by a different set of lawyers at the U.S. Attorney's office than those who presented the case. The evidence was identified and obtained during an investigation by the U.S. Attorney's Office and the Office of Professional Responsibility. This evidence unequivocally reveals that the trial prosecutors and agents were well aware, right from the beginning, that both of the primary assertions made to this Court were false and that the truth was far different than what they told the Court:

- **Not only did the Government know that Leon was meeting with the other defendants, but the lead prosecutor and one of the agents personally approved each such contact in advance; and**

- **Before the hearings at which they repeatedly insisted through argument and testimony that they never received any privileged information, the prosecution team exchanged emails amongst themselves acknowledging that they had possession of written privileged information that they knew Leon got from another defendant, and also that they knew the information Leon was giving them orally came at least in part from the other Defendants. They also stated their intent to obtain further privileged information from Leon "verbally."**

The prosecution's misconduct "goes to the integrity of this whole proceeding," D.E. 226 at 20, and necessitates dismissal or disqualification.

---

the primary focus of this Motion. It does, however, provide additional compelling evidence of the Government's lack of candor to the Court during the prior proceedings.

STANDARD OF REVIEW

A district court may grant a defendant's motion for a new trial based on newly- discovered evidence within three years of the verdict. Fed. R. Crim. P. 33. Newly discovered evidence "need not relate directly to the issue of guilt or innocence to justify a new trial, but may be probative of another issue of law." *United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006) (internal quotations omitted). Evidence that would afford reasonable grounds to question the integrity of the verdict, such as "evidence that goes to prosecutorial misconduct," may be grounds for a new trial based on newly-discovered evidence. *United States v. Scrushy*, 721 F.3d 1288, 1304, 1308 (11th Cir. 2013). Where the newly-discovered evidence consists of information known to the Government but improperly withheld from the defense, the defendant does not have to demonstrate that the evidence probably would have resulted in an acquittal. *United States v. Augurs*, 427 U.S. 47, 111 (1976); *United States v. Librach*, 602 F.2d 165, 169 (8th Cir. 1979); *United States v. Kahn,* 472 F.2d 272, 287 (1972).

If a motion for new trial is filed while an appeal is pending, the district court has jurisdiction to entertain the motion. *See United States v. Cronic*, 466 U.S. 648 (1984); *United States v. Khoury*, 901 F.2d 975 (11th Cir. 1990). The Eleventh Circuit Court of Appeals may entertain a motion to remand the case

if this Court chooses to certify its intention to grant the motion for a new trial. *Id.*

STATEMENT OF FACTS

Background

In November 2014, four businessmen who ran a sweepstakes newsletter marketing business became aware that they were under investigation by the U.S. Government for alleged criminal violations. These men (Matthew Pisoni, Marcus Pradel, Victor Ramirez, and John Leon) each hired lawyers, and on November 7, 2014, the four men met with the four lawyers and entered into a written Joint Defense Agreement signed by all of the putative defendants (including John Leon) and their lawyers. D.E. 226 at 16-17; D.E. 162-1. The JDA provided that all shared information would remain privileged and confidential, that such information could not be shared with anyone other than the participants, that anyone seeking to withdraw from the Agreement would have to provide 48 hours notice, and that upon withdrawal all privileged materials previously received would have to be returned. D.E. 162-1.

Indictment

On May 7, 2015, the defendants were charged with one count of conspiring to commit mail fraud in violation of 18 U.S.C. § 1349, four counts of mail fraud in violation of 18 U.S.C. § 1341, one count of conspiracy to commit money

laundering in violation of 18 U.S.C. § 1956(h), and six counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(I). In addition, Co-Defendant Ramirez was charged with one count of structuring in violation of 18 U.S.C. § 371. D.E. 3.

On August 20, 2015, after a status conference, the parties met and unanimously agreed that they all would be bound by an oral joint defense agreement. D.E. 226 at 58, 110-11. Attorney Bogenschutz went around the table and confirmed with each lawyer and client one by one that they agreed to participate in the JDA. *Id.* at 58, 130. Attorney Louis also confirmed with everyone that they all were bound by the agreement, and that nothing said in the room could ever be shared with prosecutors or agents. *Id.* at 111. On another occasion with all parties present, Bogenschutz again asked everyone to confirm they were bound by a joint defense agreement. *Id.* at 83-84. In addition, the previous written agreement was still in effect between the defendants and was never revoked. *Id.* at 83, 114, 129, 171, 175.

The defendants and lawyers continued to act pursuant to the JDA, meeting frequently and sharing information and ideas. Leon and his lawyer Omar Guerra Johannson were active participants throughout this process. *See, e.g., id.* at 141, 175, 180-81.

Motion to Dismiss

On April 20, 2016, Pisoni and his lawyer received a phone call from one of the other lawyers advising that a superseding indictment against Leon had just been filed. *Id.* at 72. The lawyers called lead prosecutor H. Ron Davidson, who advised that Leon had agreed to cooperate, had signed a plea agreement on February 17, and had been meeting regularly with the Government and sharing information.

As a result of these shocking discoveries, on June 29, the Defendants filed a Motion to Dismiss Indictment Based on Government Invasion of the Defense Camp and to Request an Evidentiary Hearing in Support Thereof. D.E. 162. In that motion, after laying out the relevant facts (as they were known at that point), the Defendants asked the Court to dismiss the Indictment as a result of the prosecution's misconduct and violation of the Defendants' Fifth and Sixth Amendment rights. *See also* D.E. 169, 174.

On August 3, the Court conducted an initial hearing on the motions to dismiss and for production of notes. D.E. 198. The Court heard argument, determined it would conduct an evidentiary hearing, and granted the Defendants' joint motion for production of all rough notes. D.E. 198 at 46.

On October 17 and November 1, this Court held a two-day evidentiary hearing on the motion to dismiss. D.E. 226, 227. At this hearing, the defense

began to uncover the depth of the invasion into the defense camp (though it would later be discovered that the full story was not being shared). They learned that on January 20, 2016, Leon began discussing the possibility of cooperating with the Government, D.E. 227 at 142, and formally entered into a plea agreement on February 17. *Id.* at 21. On that day and on at least six occasions thereafter, the Government met with and debriefed Leon.

Throughout this period, Leon had continued to meet and talk with the other defendants and their lawyers, acting as if nothing had changed and that he was still part of the Joint Defense Agreement.

During the hearings and in its written order, this Court made factual findings that the Government did, in fact, invade the defense camp and obtain privileged information. *See, e.g.,* D.E. 226 at 19-20, 23; D.E. 227 at 221, 242-44. However, based on the Government's assurances that it had acted in good faith, that it did not know it was obtaining privileged information, and that the Government had independent sources of the privileged information (all assertions that we now know to be false in whole or part), the Court found that dismissal was too extreme a remedy because it did not find adequate proof of substantial prejudice. D.E. 227 at 245. Instead, the Court struck Leon from testifying in the trial. *Id.*

Motion to Disqualify

Subsequently, the Defendants filed a motion to challenge this lesser remedy (which was not a remedy that the Defendants had specifically sought) because it left in place the very prosecution team which had received the improper information from Leon. The defense expressed concern that the prosecution team would be able to utilize the confidential information (including defense trial strategies) against the Defendants during the trial.

In December 2016, counsel for the Defendants contacted the U.S. Attorney's office to discuss the need for disqualification of the prosecution team. D.E. 269, at 17. The Government indicated on several occasions that it was open to discussing the matter, but put off further conversations due to the fact that the lead prosecutor was tied up in another trial. *Id.* at 18. Defense counsel continued to attempt further communications and sent the prosecution a draft motion.

Finally, on April 26, 2017, when no resolution had been reached with the prosecution and Pisoni retained new counsel, the Defendants filed a Joint Motion to Disqualify the Prosecution Team, Compel Additional Prosecution Team Discovery, and for a Taint Hearing. D.E. 238. In this motion, the Defendants argued that as a result of the Court's findings that Leon had shared improper information with the prosecution team, the additional remedy of

disqualification of the prosecution team was required given that the case was not going to be dismissed. The defense also sought additional discovery to determine to what extent the prosecution was utilizing the information it already had received, and a *Kastigar*-type hearing to investigate the depth of the taint. *Id.* at 8.

The Government vigorously opposed any further relief, reverting to its prior argument that the defense had failed to prove that the Government had learned defense strategies or obtained privileged information. D.E. 245 at 5. At the May 10, 2017 hearing on Defendants' Motion, it likewise backtracked on its recognition that Leon had, in fact, orally provided it with post-indictment information.[2] *E.g.,* D.E. 269 at 16. The Court denied the Defendants' motion.

Trial and Sentencing

The trial began on June 26, 2017, and was prosecuted by the same prosecution team (agents and prosecutors) that was responsible for improperly invading the defense camp. The jury delivered its verdict on July 26, 2017. D.E. 342. It acquitted the Defendants on all counts except Count 1, conspiracy to

[2] These assertions to the Court in 2017 are remarkable given that the prosecution team was simultaneously giving contrary testimony to OPR. For example, [redacted] Sealed Ex. 8 at 15.

commit mail fraud. *Id.* Pisoni and Ramirez were sentenced to 84 months in federal prison, and Pradel received 78 months. D.E. 458.

The New Disclosures

On January 9, 2018, the Government filed a Notice to Correct Record. D.E. 509. In the Notice, the Government disclosed that during a "post-conviction review of case materials," it discovered that it had provided inaccurate information to the Court during the hearings. *Id.* The Government revealed that contrary to the testimony and arguments made to the Court, the Government had, in fact, obtained written documents from John Leon during the period when Leon was secretly invading the defense camp. *Id.*

As a result of this disclosure, the Defendants moved for the Government to produce the investigation reports, interviews, emails, and associated documents relevant to the Government's post-trial investigation into the actions of the prosecution team. D.E. 551.

The tainted prosecutors were then (finally) removed from the case, and new Government counsel took over. These new prosecutors made the following additional limited disclosures, acknowledging that the disclosures were a result of the Government's own investigation into the matter:

1. [redacted]

[redacted]

2. [redacted]

On March 21, 2018, the Government filed a Response to Defendants' Joint Motion to Reconsider Order Denying Bond Pending Appeal Based On Newly Discovered Evidence. D.E. 554. The Government stated that "[g]iven the unique circumstances and procedural posture of this case, the present stay of appellate proceedings, and the anticipated continued litigation before this Court arising from the government's Notice to Correct Record, the government does not object to defendants Pisoni, Pradel, and Ramirez remaining on bond

pending appeal." *Id.*

On June 11, 2018, the Court granted continued bond pending appeal. D.E. 568. The court of appeals stayed the appeal pending further order.

Additional Disclosures

Subsequently, on January 23, 2019, and pursuant to the Court's Sealed Order Requiring Disclosure of OPR Materials and Setting Briefing Schedule, D.E. 620, the Government provided 12 additional items procured from the Office of Professional Responsibility's (OPR) investigation into this matter, including internal emails and the testimony of AUSA Levitt and Agents Masmela and Burnham. *See* Sealed Ex. 3-10 (subset of document production). These documents are redacted, sometimes in the midst of what appears to be relevant testimony, and thus do not provide a complete picture of what transpired. They do, nonetheless, reveal that the Government's misconduct was far more significant than previously known, and that the misconduct revealed at the evidentiary hearing barely scratched the surface.

These revelations, discussed in detail below, make clear that the Government knew full well that Leon was providing information he got from the other defendants and lawyers; that AUSA Davidson told the defense attorneys and the Court that Leon's meetings happened without his knowledge when in fact he personally approved every one in advance; that the prosecutors were

fully aware of the joint defense when they argued to the Court that they did not know; that the Government received and had in its possession not only the written timeline and corporate blueprint, but also a set of handwritten notes from Leon containing joint defense information; and that the agents and prosecutors had internal communications about these documents in their possession in the months before the hearing, yet testified and argued that they had nothing.

ARGUMENT

THE CASE SHOULD BE DISMISSED, OR IN THE ALTERNATIVE SET FOR A NEW TRIAL WITH A DIFFERENT PROSECUTION TEAM, DUE TO THE GOVERNMENT'S LACK OF TRUTHFULNESS IN THE PRIOR PROCEEDINGS AND ITS KNOWING INVASION INTO THE DEFENSE CAMP.

The new disclosures regarding the Government's shocking invasion of the Defendants' fundamental and essential rights under the Fifth and Sixth Amendment to the United States Constitution, and the Government's substantial misrepresentations during previous proceedings on this issue, require that the case should be dismissed or in the alternative that a new trial should be ordered with an untainted prosecution team. *See Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding that Sixth Amendment rights are fundamental and essential to a fair trial). The Sixth Amendment's protections "apply equally to an 'indirect and surreptitious interrogation' made possible

through the use of informants." *United States v. Terzado-Madruga*, 897 F.2d 1099, 1109 (11th Cir. 1990), *quoting Massiah v. United States*, 377 U.S. 201 (1964) (Sixth Amendment violation where prosecutor allowed informant to continue his normal associations in order to obtain incriminating information). "It is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951).

Because the Government's infiltration of the defense camp and the inaccurate testimony and argument it offered to this Court before trial "go[] to the integrity of this whole proceeding," D.E. 226 at 20, the charges against the Defendants should be dismissed or the case should be set for a retrial with a new, untainted prosecution team. *See O'Brien v. United States*, 386 U.S. 345, 345-46 (1967) (vacating and remanding for new trial where agents overheard confidential information on wiretap, even though the information had not been passed along to the prosecuting attorneys); *Black v. United States*, 385 U.S. 26, 29 (1966); *United States v. Levy*, 577 F.2d 200, 208-10 (3d Cir. 1978); *Coplon*, 191 F.2d at 760; *United States v. Marshank*, 777 F. Supp. 2d 1507, 1519-20 (N.D. Cal. 1991); *United States v. Peters*, 468 F. Supp. 364, 366 (S.D. Fla. 1979)*; State of Delaware v. Robinson*, 2018 WL 2085066, Case No. 1411017691 (Sup. Ct. Del. May 1, 2018).

A. The Government Improperly Obtained Substantial Privileged Information From The Defense Camp.

1. The Government violated the Defendants' essential rights in allowing Leon to invade the defense camp.

It is important to begin with a reminder of the significance of the underlying issue presented here: that what happened in this case is the most egregious sort of invasion of the defense camp, where "a member or confidant of the defense team acts effectively as an informant for the government regarding defense preparation and strategies in the case." *United States v. Levy*, 2010 WL 2541881, at *3 (S.D. Fla. 2010). This type of "intrusion by the Government on the confidential relationship between a criminal defendant and his attorney, either electronically or through an informant, violates a defendant's Sixth Amendment right to counsel." *Levy*, 2010 WL 2541881, at *3; *United States v. Zarzour*, 432 F.2d 1, 3 (5th Cir. 1970). It is just the sort of "glaring government intrusion" that "warrant[s] court intervention." *United States v. Posner*, 637 F. Supp. 456, 459-60 (S.D. Fla. 1986).

This Court and the Supreme Court have condemned the use of informants to invade the attorney-client relationship. "[R]egardless of who initiates the conversation, the Sixth Amendment is violated whenever a government informant actively engages a defendant in conversation that is likely to elicit incriminating statements about the defendant's upcoming trial." *Terzado-*

Madruga, 897 F.2d at 1110. "[A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171 (finding Sixth Amendment violation where prosecution used informant to obtain investigatory material without counsel being present). *See also Fisher v. United States*, 425 U.S. 391, 402 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

As this Court described it (without even knowing the full scope), this invasion was "pretty extraordinary. This is not the norm for a defendant to – a cooperating defendant to participate in meetings with codefendants and counsel where they are discussing the case, whether there is a joint agreement or not. I mean, that's pretty unusual." D.E. 226 at 16-17. The new revelations render the invasion more than just extraordinary and unusual, but unquestionably unconstitutional. "Because privacy is so vital to these preparatory efforts, the prosecution is forbidden to eavesdrop or plant agents to hear the councils of the defense. . . . The prosecution's secret intrusion offends both the Fifth and Sixth Amendments." *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966).

That brings us to what is new, and what compels a different outcome than before. Perhaps worse than the actual invasion itself is the recent revelation

that the primary arguments to evade dismissal that were advanced by the Government to this Court were knowingly untrue. Not only did John Leon attend numerous privileged meetings with his co-Defendants and their lawyers, but he did so with the blessing and approval of the prosecution team before each and every such meeting. *See, e.g.* Sealed Ex. 4 at 21, 62, 78-80. During these meetings, he actively and purposefully sought to obtain as much privileged information as he could, and he then took this information back and reported it in at least six separate debriefing sessions to the very same prosecutors and agents who tried the case against Pisoni and his co-Defendants. These Government representatives actively solicited and received this information, *knowing* that at least some of the information they were getting was privileged. *See*, *e.g.:,* Sealed Ex. 5 at 86; Sealed Ex. 8 at 15.

a. The Government not only knew that Leon was meeting with the defense, but expressly authorized each such meeting one at a time.

The Government repeatedly argued to the Court that its actions were not improper because it followed a "don't ask, don't tell" policy, intentionally did not seek to know whether Leon was meeting with the others, and in fact did not know of any meetings except perhaps the first. For example, Davidson argued to the Court that the Government didn't know about the meetings, prompting the following exchange with the Court during which the Court interrupted

Davidson in the midst of his argument to pin him down on this very issue:

> Court: But despite that, there were few to several meetings which occurred for which you are telling me the Government was not aware or which I heard today that the Government was not made aware.
>
> Davidson: *Correct, Your Honor, we were not told about the subsequent meetings. . . .*
>
> * * *
>
> Court: At a minimum, there were – just the fact that there were meetings that the Government was not made aware of by Mr. Leon or Mr. Guerra. Right?
>
> Davidson: *Correct, yes.*

D.E. 227 at 221. In addition to Davidson telling the Court directly that they did not know about the meetings and that "[t]here is no evidence we have done anything wrong here," *id.* at 223, AUSA Levitt elicited the following testimony under oath from Agent Burnham:

> Levitt: Was there any conversation of any future meetings of the defendants and Mr. Leon?
>
> Burnham: No.

D.E. 227 at 130. Levitt also questioned Agent Masmela who testified as follows:

> Levitt: What about other meetings?
>
> Masmela: I was only aware of one meeting.
>
> * * *

Levitt: And at any point in time after February 17th, did you ask him whether or not he and his lawyers were attending any meetings with codefendants and counsel?

Masmela: No.

* * *

Levitt: And he didn't tell. Correct?

Masmela: Correct.

D.E. 227 at 143-45. *See also* D.E. 162-2 (June 3 email to defense team asserting that this was the first day the prosecutors learned of "any meetings" and that it had been the agents who authorized them.).

These assertions were blatantly false when made. [redacted]

[redacted]

Leon's testimony was corroborated by his lawyer Omar Guerra Johansson, a member of the bar. [redacted]

[redacted]

The truth thus is directly contrary to the sworn testimony of the agents and prosecutors during the evidentiary hearing, and to the arguments made in the Government's papers. It is contrary to the false representation AUSA Davidson made to the defense attorneys in a June 3 email when they inquired about what had transpired. Sealed Ex. 3 at 64; Sealed Ex. 5B at 43. It is contrary to the information AUSA Davidson initially gave his supervisors in June and September. [redacted]

[redacted]

At the time of the evidentiary hearings in late 2016, the Court did, of course, condemn the fact of the meetings between Leon and the Co-Defendants. As the Court stated about the Government's actions: "I got to say, you know, apart from the legality of it, it's pretty distasteful to have a cooperator participating in private discussions between codefendants or former codefendants and their counsel. . . [T]o allow Mr. Leon to continue to participate in these meetings – it's really problematic and in a way I'm not really sure the Government understands." D.E. 198 at 20-21.

The substantial difference, however, is that the Court now knows that each such meeting was individually approved by the lead prosecutor, before it took place, one by one. And that several members of the prosecution team affirmatively and directly misled the Court on this very point. With this new knowledge, the situation is more than "pretty distasteful." It is sanctionable

[3] At around this time, AUSA Davidson was "basically trying to do a CYA" and suggested to Agent Masmela that he should write a report taking responsibility for having authorized Leon's invasions when in fact it was AUSA Davidson who had authorized them. Agent Masmela, not surprisingly, did not do so. Sealed Ex. 3 at 81-82.

misconduct that has tainted the whole proceedings and almost certainly would have resulted in disqualification of the trial team if it had been known to the Court at the time.

c. The Government knew it had possession of documents and information it denied having.

Throughout the pre-trial litigation, the Government repeatedly and consistently argued both that it never took possession of any written material and that it did not knowingly obtain any privileged information from Leon. Here are just some of the assertions that were made to the Court:

- "Leon never disclosed any post-indictment conduct, defense strategies, or materials subject to work product." Gov't Response in Opposition to Motion to Dismiss, D.E. 169, at 3.
- "Leon never shared privileged information with the United States." *Id.*
- "There is no evidence that the United States obtained confidential information pertaining to trial preparations and defense strategy as a result of any alleged intrusion . . ." *Id.* at 4.
- "[A]ny timeline of events that Leon provided to the agents was something Leon knew first hand from his experiences during the conspiracy." *Id.* at 5.
- "The United States . . . cautioned Leon to provide only pre-indictment information. The Memoranda of Interviews show that Leon complied with those instructions." *Id.* at 9.
- "We didn't get text messages.[4] We didn't get the timeline. We didn't get

[4] If the Government did not get text messages, it was not for lack of trying. The Government's notes reveal that they were anticipating receiving Leon's text messages

anything." D.E. 227 at 229.

- "Your Honor, you have two sworn law enforcement officials who I submit have testified truthfully before Your Honor that they never asked, they never inquired, they were never given, they didn't want. We don't want the text messages. We don't want your timeline. We don't want anything to know about what's going on." *Id.* at 226.

- "The Defendants fail to note that, after two days of hearings during which they attempted to prove that the United States learned 'defense strategies' and obtained 'privileged information,' this Court rejected that claim." D.E. 245 at 5.

- The Government argued in May 2017 that it would be unfair to disqualify them "based on a 'guess' that perhaps Leon had given us privileged information to which he should not otherwise have disclosed.'" D.E. 269 at 16.

Every one of these statements was knowingly false at the time it was made. The newly-discovered evidence reveals that the trial team purposefully took possession of two written privileged written documents from Leon, repeatedly discussed having that information amongst themselves, and knowingly received other privileged information orally. [redacted]

from Leon's lawyers. D.E. 227 at 96.

[redacted]

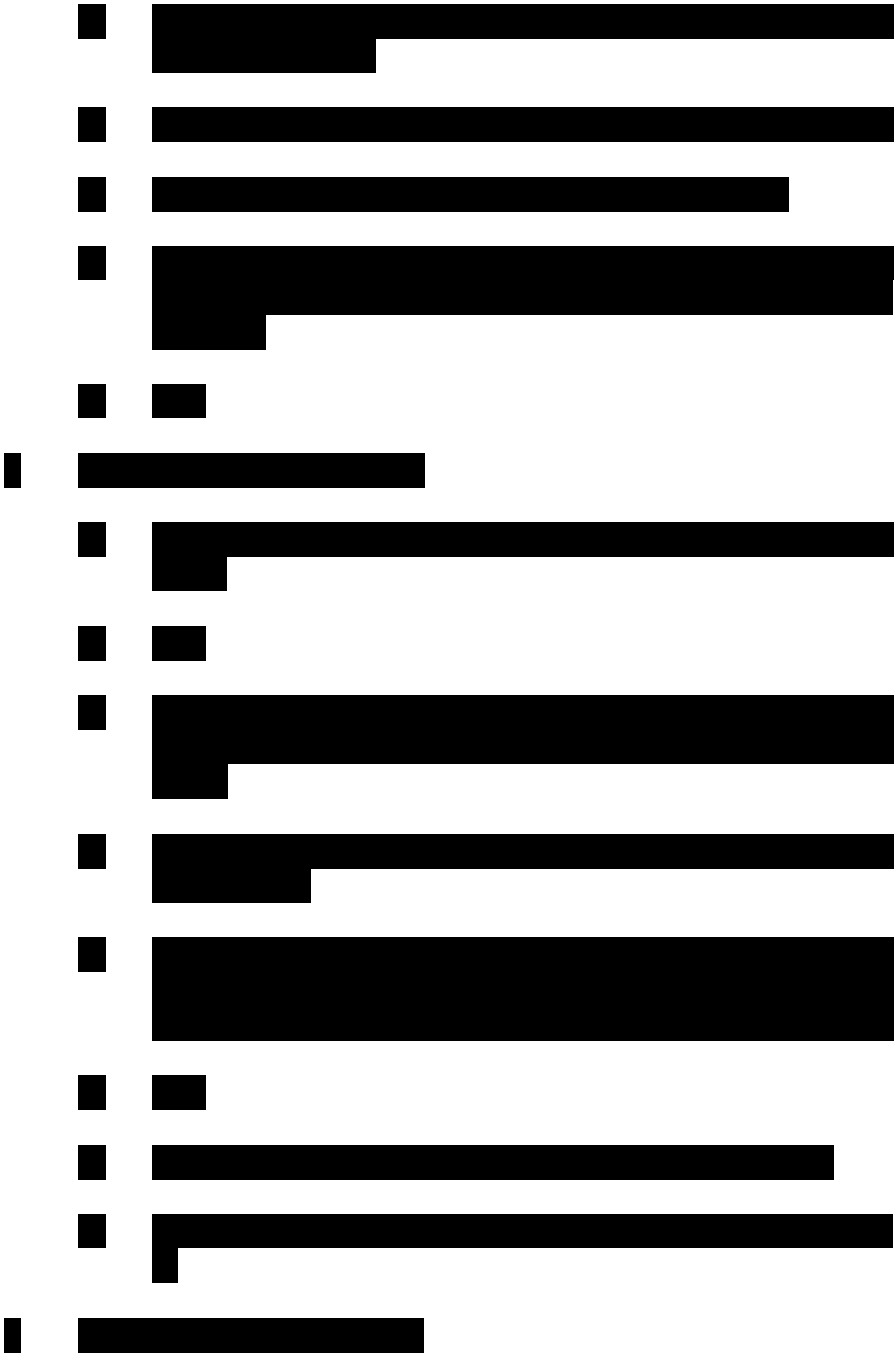
[5] The document included not only a "timeline" but a seven page corporate blueprint which contained over 100 pieces of individual information, and which had been created by the defense for the purpose of getting their attorneys up to speed on every single aspect of the business (including relevant witnesses, bank accounts, operational details, etc.).

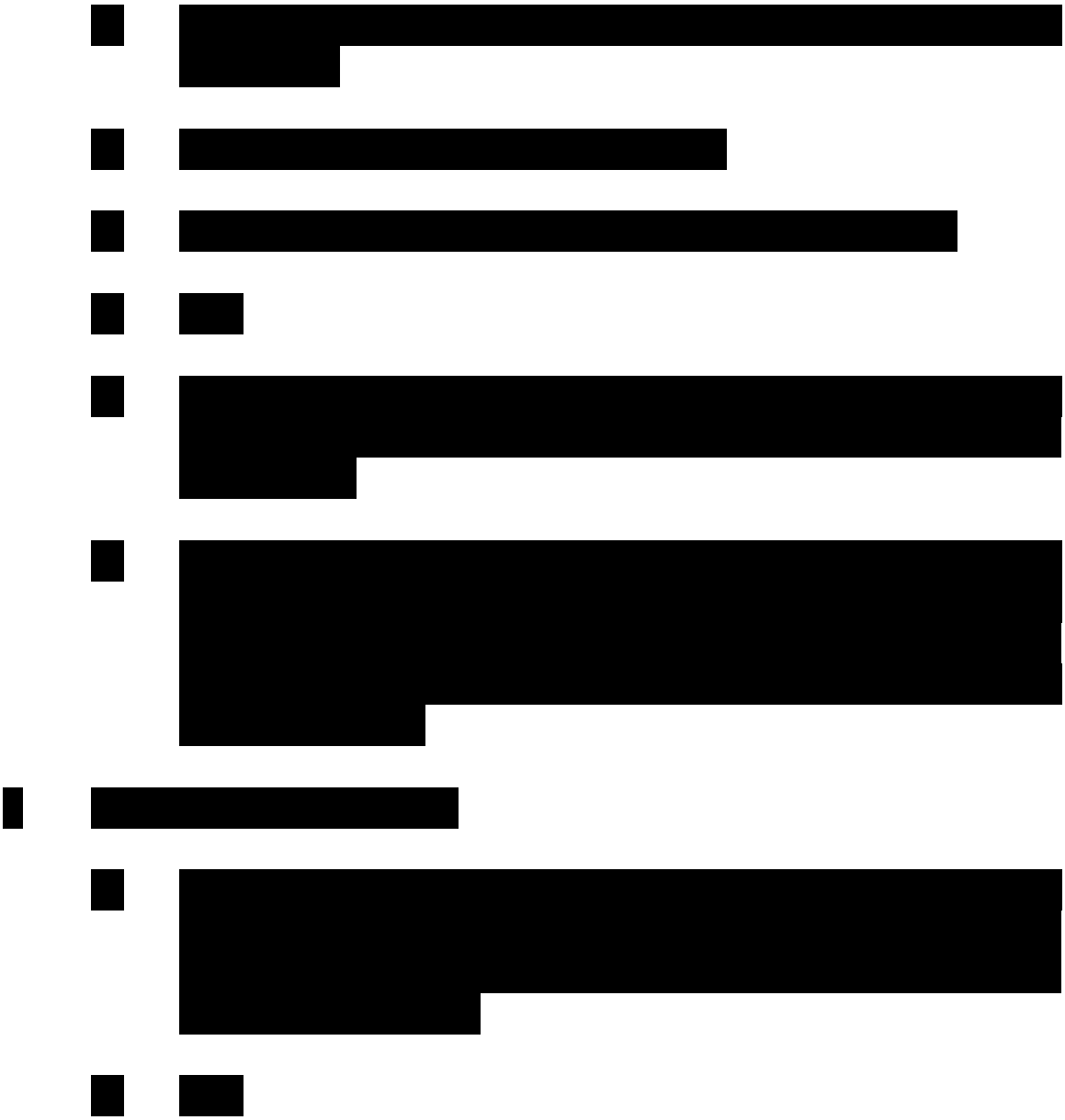
[redacted]

Yet instead of telling Leon he could not provide information from the timeline and corporate blueprint that was prepared with or by Pradel, the Government instead proceeded to listen while Leon basically read the document aloud. [redacted]

In addition to the privileged information that the Court already found was provided orally, the new disclosures reveal that the Government did, in fact, take possession of the written timeline and corporate blueprint in February 2016, and were engaged with it and/or discussed amongst themselves that it was in their possession numerous times from then until the hearings in October/November 2016:

- [redacted]
- [redacted]





This new testimony and evidence reveals that AUSA Levitt and AUSA Davidson knew full well they had taken possession of the timeline and corporate blueprint from Leon, and that they had scrambled to find it before the hearing, realizing it had been misplaced. Yet unbelievably, at the hearing they flat out stated this was not the case and even chastised the defense for not being able

to demonstrate precisely what Leon communicated to the prosecution team. *See, e.g.,* D.E. 226 at 14; D.E. 227 at 229. AUSA Levitt (who knew he himself had received the document from Leon and had it [redacted] asked Pradel the following questions at the evidentiary hearing:

> Q. You provided a corporate tree to the Court that was never provided to the Government. Isn't that correct?
>
> Q. Okay. Do you have any information that he transmitted that corporate tree to any member of the Government?
>
> Q. So it wasn't provided to the Government, as far as you know?

D.E. 227 at 31-32. AUSA Levitt also asked misleading questions of Agent Burnham which elicited answers he knew to be false.

> Q. To your knowledge, did any member of the United States Attorney's Office receive a copy of the timeline?
>
> A. No.
>
> * * *
>
> Q. Okay. And to this day, do you know if that timeline has ever been turned over to any member of the Government, to your knowledge?
>
> A. As far as I know, it's never been turned over to the Government.

Id. at 122. The same thing happened during AUSA Levitt's examination of Agent Masmela:

> Q. A copy wasn't provided to any of the members of the

Government team at [the February 17] meeting, was it?

A. No. I know that it was mentioned and right away we were told not to even bring it out, not even to mention it.

Id. at 175.

[redacted]

[redacted]

[redacted]

[redacted]

So despite having internally acknowledged that Leon was sharing "joint defense" information that Leon "would not have had" but for his invasion of the defense camp, having taken physical possession of the written document, having asked and been told that the information came from Pradel, having in their possession written notes provided by Leon, having reassured each other that they could "make sure that Leon communicates to us verbally everything of importance," knowing they had orally received privileged information, and having internally debated and discussed these matters while withholding relevant information from supervisors who had gotten involved to get to the bottom of the situation, the line prosecutors repeatedly argued to the Court throughout this time period that these things were not so.

2. As a result of their actions, this prosecution team obtained substantial privileged information including defense strategy which they had available to them at trial.

Even without a finding that the Government obtained and used privilege information, the Court should grant a new trial based on this new evidence that affords reasonable grounds to question the integrity of the verdict, including "evidence that goes to prosecutorial misconduct." *United States v. Scrushy*, 721 F.3d 1288, 1304, 1308 (11th Cir. 2013) (standard for new trial motion that does not relate to guilt or innocence is whether new evidence "afford[s] reasonable grounds to question . . . the integrity of the verdict"). Because the newly-discovered evidence consists of information that was known to the Government but improperly withheld from the defense and the Court, the defense does not have to demonstrate that the evidence probably would have resulted in an acquittal. *United States v. Augurs*, 427 U.S. 47, 111 (1976); *United States v. Librach*, 602 F.2d 165, 169 (8th Cir. 1979); *United States v. Kahn,* 472 F.2d 272, 287 (1972).

This misconduct includes not only the two primary topics discussed in this Memo, but also the Government's lack of candor regarding its knowledge of the joint defense. The Government expressly told the Court that its actions were not improper because it did not know there was a joint defense in place. *See, e.g.,* D.E. 227 at 218 ("And from the Government's perspective, there is no

evidence we knew that Mr. Leon was a member of the defense team."); 223 ("We didn't even know about the joint defense agreement."); 228 ("Again, if you bifurcate the issues, Government misconduct, based on the information we had at the time, we didn't know about a joint defense agreement.").

The new evidence reveals that these arguments were knowingly false. [redacted]

Although the Court previously found that the Government seemingly knew of the joint defense, there is a substantial difference between the Court's finding that the Government knew at some level that there had to be a joint

defense in place, and the current awareness that the prosecution team had expressly discussed orally and in writing the existence of a joint defense multiple times amongst themselves in the specific context of evaluating whether they had received privilege information, and then argued the precise opposite to the Court.

Moreover, putting aside the prosecutorial misconduct, it is now beyond dispute that the Government *did* obtain significant oral and written privileged information from the defense team, and used that information at trial.

First, because the new disclosures make clear that it is impossible to know the full scope of the improper knowledge that the Government obtained, or to trust the trial team's representations, *all* of the information Leon provided to the Government must be assumed to be tainted. "[I]t is highly unlikely that a court can . . . arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself." *Levy*, 577 F.2d at 208-10 (finding that "the only appropriate remedy is the dismissal of the indictment" where there was actual disclose of defense strategy, especially when the trial has already taken place).

As the Government recognized during the evidentiary hearing, Leon was

"very eager – a person eager to please the Government. He is clearly trying to give us information." D.E. 227 at 223. Conceded AUSA Davidson, Leon's "mind has been somewhat murkied because he has reviewed discovery, he has spoken with his codefendants, he has heard conversations, he knows a lot and it is kind of challenging to discern whether he knows from his own cooperation or from his own participation or from some other source." *Id.* at 225.

The Government's case agent testified that he simply did not know the source of Leon's information and whether what he told them came from pre-indictment knowledge or from his invasion of the defense camp: "I assume he had a wealth of information from being involved, but could I tell you what was from his memory and what was not, no." *Id.* at 88. When asked if there is any way to tell from the MOIs or notes whether Leon's information was independent or derived from privileged joint defense information, the agent admitted, "I don't think there is any way to know." *Id.* at 92.

But we now know much more. It now is crystal clear that both Leon and his lawyer provided specific privileged information going to the core of the joint defense that the Government did not already know. This fact eviscerates the premise of the Court's prior ruling. At the prior hearing, the Court concluded that he "simply cannot find that under the circumstances that there is prejudice in this case that would warrant dismissal, specifically because the Government

. . . already knew this information." D.E. 227 at 244-45. The Court stated that it could not grant dismissal "without some specific proof." *Id.* We now have that specific proof.

The new disclosures shed light on the fact that in addition to the written material discussed above, Leon orally shared at least six different categories of privileged information not previously known to the Government with the very same prosecution team that went on to try the case, *and that the prosecution team knew the information it was receiving was privileged at the time they received it.* These categories include a) oral information from the timeline/corporate blueprint document; b) substantive information about how the defendants planned to prove their advice of counsel defense; c) other defense theories; d) "Post-Indictment" information; e) information about witness identities and details, and f) material to respond to the motion to dismiss.

a. The Timeline/Corporate Blueprint

At one of his first debriefs, Leon orally shared with the prosecution team detailed information that came directly from a document that we now know the [redacted] Sealed Ex. 1. Leon solicited a copy of this 8 page

timeline and 7 page corporate blueprint[7] from Pradel on January 20 (the day he started talking with the Government about cooperating), and then again on February 12, obviously for the purpose of sharing it with the Government.

[redacted]

[7] The last one and a half pages of this document was a list of eleven negative events that took place during the course of the business's operation. During the Motion to Dismiss hearings, the prosecution proferred that it had prior knowledge of 4 of the 11 items on the list. It did not, however, provide any evidence that it had prior knowledge or an alternative source for the remaining 7 items (or much of the other 100 unique pieces of information in the blueprint), all of which were relevant and privileged. The Government's possession of this information was not known in the prior proceedings.

At the hearing, the Government argued that "at the time he gave us the timeline, we didn't know that he was actually giving us the timeline, we didn't know that he was actually giving us something that might have been privileged. We didn't know that he did not have a distinct memory of these things." *Id.* at 222.

But we now know that this was not a true statement. [redacted]

And, of course, the point is not only whether the prosecution team knew at the time that they were getting privileged information (as we now know they certainly did know). Just as relevant, and inescapable, is that they *did* get privileged information, as a result of their own choices and actions. [redacted]

[redacted]

[redacted]

b. Advice of Counsel Defense

Leon and the prosecution team also had a discussion of unknown length that the agent summarized in his notes as "advice of counsel defense, issues with." This reference (left out of the Government's MOI) indicates that Leon provided the Government with information about the flaws in the defense's advice of counsel defense, which was the main defense on which the defendants relied. This is information he could *only* have received from joint defense meetings. In fact, Leon repeatedly initiated these conversations at the joint defense meetings, in retrospect obviously for the purpose of obtaining information he could then share with the Government. D.E. 227 at 240. The Government has tried to explain away this reference in the agent's notes by pointing out that it was independently aware that the defendants would be raising an advice of counsel defense. But this reference reveals that the conversation was not merely about the *fact* that there would be an advice of counsel defense, but rather it referred to the *substance* of the advice of counsel defense – how it would be proved, and what the defense perceived as the weaknesses in the argument. This went to the core of the defense strategy.

While it is true that this issue was discussed at the previous hearing, much

more is known now. [redacted] In accepting information from a defense lawyer who the prosecution team knew had obtained the information pursuant to a joint defense, the Government knowingly gained an unacceptable and impermissible advantage at trial.

We now also know that the Government did, in fact, use privileged information at trial. The prosecution team also got specific privileged information from Leon that it used during their cross-examination of the Defendants' attorney and sole witness, Robbie Birnbaum, to poke holes in the advice of counsel defense. The Government's rough notes acknowledge that Leon never personally met or spoke with Birnbaum. Yet during his March 11 debrief, Leon gave the Government privileged information that Birnbaum had lied to a postal inspector and told the inspector that he did not represent Starbright, one of the related subsidiary corporations. D.E. 162-8 at 6. The Government brought out this sword against Birnbaum at trial, first inquiring about one line in Birnbaum's billing statement with an obscure reference to Starbright, Trial Vol. 15 at 114-16, then asking questions of Birnbaum to elicit

that he untruthfully told a Philadelphia postal inspector that he did not represent Starbright. *Id.* at 116-19. This was a line of inquiry that came *directly* from information improperly provided by Leon, and this use of privileged information was unknown at the time of the previous hearing.

c. Other Defense Theories and Information

The new evidence reveals that Leon gave the Government information about what Pradel said to the other defendants in lockup regarding a retired postal inspector who was helping the defense. [redacted]

Leon shared at least two other defense theories with the Government. First, the MOI from February 17 states that Leon told the agents that "Pisoni had a theory on how the criminal investigation and the FTC investigation would play out." D.E. 226 at 206; D.E. 162-4 at 8. This is obviously post-indictment information.

Second, the MOI says "Defense theory, we don't have who's mail." When questioned about why he wrote this, he testified as follows:

> Somehow the topic of a seizure in the UK came up and I believe we were asking, you know, what Mr. Leon knew about that seizure and I don't remember whether it was Mr. Leon or Mr. Guerra [Leon's lawyer] mentioned that the group defendants and defense attorneys . . . they communicated to us that they thought we wouldn't know whose mail that was or that we thought it was the defendants' but it was, in fact, someone else's. . . . Honestly, I don't know if they said this is the defense's theory, I don't know, but I kind of took it to mean that.

D.E. 227 at 95-96. This is blatant sharing of privileged defense strategy during a Government debrief, stated in a way that reveals that the Government *knew* that they were being provided with information from the other defendants and lawyers. And then the Government went on to have follow up interviews with third party witnesses to develop this privileged information that they learned from Leon.

d. Self-described "Post Indictment" Information

The Government's contention that all of the discussions at these meetings referred to pre-indictment information is belied by the Government's own MOI, which has an entire section titled "Post Indictment." D.E. 162-4 at 8. As the agent admitted, this was "a section referring to information provided that took place post indictment." D.E. 227 at 133-34. It contains 7 bullet points, including facts about what the other defendants had recently said and were thinking about the case and the strategy they should be following. D.E. 162-4 at 7-8. *See*

also id. at 11 (revealing that just before the indictment was issued, which is after the JDA was entered into, Pisoni made statements about defense strategy regarding a postal inspector who had issued an unfavorable report). In the face of this self-described "Post Indictment information," it is hard to conceive of how the Government can continue to argue that they did not know that post-indictment privileged information was being shared.

e. Information about Witness Identities and Details

Leon shared with the Government the identity of several witnesses and/or details about these witnesses that Leon was aware of solely through his interactions with the other defendants and defense counsel, and not due to his prior knowledge. This information includes the identity of or information regarding the following individuals and entities:

- Sheldon Lustigman
- Andrew Lustigman
- Daniel Breen
- Renee Passadore
- Josh Houle
- Marvin Rua
- Scott Kramer
- Konrad Brown
- Company DIC
- Company BAM
- Company Spin
- Company Magellan
- Unnamed former postal inspector hired to review the mailings who wrote an unfavorable report.

See D.E. 238 at 9-10.

The Government claims that it had at least some of this information from other sources, and that Leon knew at least some of this information independently. *See* D.E. 245 at 6, 7. But the timing and circumstances reveal that Leon got substantial information at privileged joint defense meetings that happened *after* he began cooperating (but before the defense team knew he was acting as a spy). Moreover, some of this information was provided to the Government at debriefs that took place *after* the Government had received objections to the invasion of the defense camp.

For example, on June 9th Leon told the Government to look for an email regarding Naoko Cook that had been discussed extensively during a joint defense meeting as an important impeachment document. Leon did not know about the email at the time it was sent, and learned about it only during JDA meetings. D.E. 226 at 45, 204-05. While the Government had the email as part of its millions of discovery pages, it did not know this was a document on which the defense planned to rely. But when given the information by Leon, it starred that point in the notes.

During Leon's July 12th meeting with the Government (for which the Government could not provide any rough notes), the MOI reveals that Leon provided information concerning various individuals and entities (Renee

Passadore, Josh Houle, Daniel Breen, Magellan, and Global Collect) about which he had no independent knowledge other than what was gleaned during joint defense meetings.

On July 27, Leon discussed two witnesses (Rob Holcomb and Christina Day) about whom he had learned information from the defense investigator and from the other defendants on April 14. He had never previously mentioned these individuals to the prosecution, and brought them up only after he received a privileged list of possible defense witnesses.

Leon's disclosures also led the Government to information that it may have had, but did not know was important. For example, the Government may have known about witness Dawn Colleta, but only after meeting with Leon in February did it choose to interview her. [redacted] The difficulty of untangling all of this is precisely why the prosecution team should have been disqualified.

The Government had some information about defense witnesses, but grilled Leon to obtain specifics it did not know. During the period Leon was working with the Government, he was privy to the ongoing work of the defense

investigator, Paul Smerechniak, who began working with the defense on March 14, 2016 (after Leon had secretly began cooperating with the Government). D.E. 226 at 150-152. We now know that as a result of Davidson's instructions and with his approval, Leon attended these meetings, and he participated actively in these meetings with the investigator. *Id.* at 167-68. The investigator worked with the defendants on developing the defense and investigating potential witnesses, among other matters. He had specific conversations with Leon and the other defendants about the specific areas of knowledge of each individual and who would be good and bad witnesses. *Id.* at 156-57, 160. Leon did not have pre-indictment knowledge about many of these witnesses as they were outside the area of his primary work responsibilities. *Id.* at 197.

The Government did not prove its independent knowledge of these matters at the hearings on the Motion to Dismiss. And it opposed the Defendants' request for further discovery and an evidentiary hearing to explore these issues. *Id.* at 1. We now know it was able to get this privileged information by authorizing continuing meetings between Leon and the other defendants, and by accepting privileged information it knew to be coming from the other defendants. The Government thus cannot satisfy its burden to demonstrate that the information it obtained was not tainted. *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1114 (11th Cir. 1990).

f. Material To Respond To Dismissal Motion

When the Government received the defense's motion to dismiss, alleging that the Government acted improperly in meeting with Leon and obtaining privileged information he had obtained while under a JDA, it called Leon in. "At this point he was interviewed and he was debriefed about the motion so *there was certain arguments that the defense was making and here he was asked about it specifically*." D.E. 227 at 165-66 (emphasis added). [redacted] In other words, knowing that Leon had improperly invaded the defense camp, the Government called him in to talk about his invasion of the defense camp and how they should respond to the defense's specific arguments.

B. The Government's Possession Of Privileged Information Substantially Prejudiced The Defendants.

The defense in this case was unfairly prejudiced by the Government's actions. "Prejudice is presumed because defense strategy was actually disclosed to the Prosecution Team." *Robinson*, 2018 WL 2085066, at *11. *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995) ("[W]e hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification

for doing so, a prejudicial effect on the reliability of the trial process must be presumed. . . . [O]ur per se rule recognizes that such intentional and groundless prosecutorial intrusions are never harmless because they 'necessarily render a trial fundamentally unfair.'"), *quoting Rose v. Clark*, 478 U.S. 570, 577 (1986); *see also United States v. Crow Dog*, 399 F. Supp. 228, 237 (N.D. Iowa 1975) (noting that it would be a violation of Sixth Amendment where defense strategy is passed on to agents or prosecuting attorneys), *aff'd* 532 F.2d 1182 (1976). "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942) (superseded by statute on other grounds). Similarly, the United States Court of Appeals for the Third Circuit has held that there is a per se violation of the Sixth Amendment where "there is a knowing violation of the attorney-client relationship and where confidential information is disclosed to the government." *United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978); *see also State v. Lenarz*, 22 A.3d 536, 542 (Conn. 2011) (holding that there is a rebuttable presumption of prejudice when the prosecution reads "privileged materials containing trial strategy," even when the prosecutor's conduct is unintentional).

In a prior filing, after arguing that it did not possess any privileged information, the Government cited cases that in the absence of such possession,

no Sixth Amendment violation could be found. *See* D.E. 169 at 6-7, citing *United States v. Aulicino*, 44 F.3d 1102, 1117 (2d Cir. 1995)(attendance at joint defense meeting of defendant in negotiations to cooperate with government does not require hearing on Sixth Amendment violation without showing that cooperating defendant had provided privileged information); *United States v. Hsia*, 81 F. Supp. 2d. 7, 16–20 (D.D.C. 2000) (even knowing intrusion into the attorney-client relationship during plea negotiation with co-defendant's attorney does not constitute violation without showing that communications actually passed to government). Now that we know the Government did, in fact, possess privileged information, its own cases support the need for dismissal.

Once a defendant demonstrates that confidential communications were conveyed as a result of government intrusion into the attorney-client relationship, it is the Government's burden "to show that the defendant was not prejudiced; *that burden is a demanding one." United States v. DeCologero*, 530 F.3d 36, 64 (1st Cir. 2008). The Government (and not the defense) bears the burden of proving that "there has been and there will be no prejudice to the defendants as a result of these communications." *Mastroianni*, 749 F.2d at 908. "The burden on the government is high because to require anything less would be to condone intrusions into a defendant's protected attorney-client communications." *Id.* at 908. *See also United States v. Danielson*, 325 F.3d 1054,

1059 (9th Cir. 2003) ("[T]he government has the 'heavy burden' of proving non-use of [the] trial strategy information."); *Terzado-Madruga*, 530 F.3d at 1114 (challenged evidence is only admissible if the prosecution can show "that it derived from a lawful source independent of the illegal conduct.").

When assessing whether the defendant was prejudiced, it is not necessary for there to have been a demonstrable direct effect on the trial proceedings. "The threat of significant harm required by *Weatherford* does not, however, have to amount to 'prejudice' in the sense of altering the actual outcome of the trial." *Briggs v. Goodwin*, 698 F.2d 486, 494 (D.C. Cir. 1983), *reversed on other grounds by* 712 F.2d 1444 (D.C. Cir. 1983). This is especially so when prosecutorial misconduct is involved. *See Augurs*, 427 U.S. at 111. Where the newly-discovered evidence consists of information known to the Government but improperly withheld from the defense, the defendant does not have to demonstrate that the evidence probably would have resulted in an acquittal. *Augurs*, 427 U.S. at 111; *Librach*, 602 F.2d at 169; *Kahn,* 472 F.2d at 287.

This Court's previous choice to assign the burden of proof to the defense, which was an error invited by the Government, should be revisited. The lead prosecutor argued at the hearing on the defense's motion to disqualify, "[w]e believe Mr. Leon knew this information during the conspiracy because we asked him, tell us what you know during the conspiracy and that's what we want to

know. He said I knew about this during the conspiracy. *Disprove that then.* Two days of hearing, put on a witness to say Leon didn't know this." D.E. 269 at 14 (emphasis added). *See also* D.E. 227 at 231 ("Incidentally, it's their burden to prove prejudice.").

Putting aside that "disproving that" was not the defense's burden, the newly-discovered evidence unquestionably does "disprove that." It proves that the prosecution team had direct knowledge that Leon was providing information that he got from other defendants and that he was continuing to attend privileged defense meetings without revealing that he was a Government witness. It proves that the Government specifically authorized these invasions knowing that a joint defense existed.

C. In Light Of The Recent Disclosures, Disqualification Of The Witness Was An Insufficient Remedy.

The Government's primary argument against dismissal was that it did not receive any post-indictment information from Leon. But as set forth above, and as the Government now has admitted, this argument was false. The prosecution team personally received from Leon significant post-indictment information including defense strategy – both orally and in writing. And then the Government lied about it to the Court. "There is no doubt that there was a violation of the defendants' Sixth Amendment right to the effective assistance

of counsel by reason of the government's illegal conduct." *Peters*, 468 F. Supp. at 367. In light of these admissions, the foundation of the Government's argument against dismissal has crumbled to dust, and dismissal is clearly warranted.

In *Weatherford v. Busey*, the Supreme Court identified two circumstances that help to establish a material Sixth Circuit violation requiring a significant remedy. *Weatherford v. Busey*, 429 U.S. 546 (1977). Both of these factors are present here: 1) Leon passed on to the prosecuting attorney "details and information regarding the plaintiff's trial plans, strategy, [and information] having to do with the criminal action pending" against the Defendants. *Id.* at 548, 554 (internal quotation omitted); 2) Leon intentionally invaded the attorney-client relationship for the purpose of learning what he could about the defense plans in order to pass that information to the prosecutors. *Id.* at 557.

The defense has conclusively shown that the prosecution team possessed and used significant confidential information. But even if it had not, "the appellants need not prove that the prosecution actually used the information obtained. The prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those

decisions. Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is 'inherently detrimental, . . . unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice.'" *Briggs*, 698 F.2d at 494-95, *quoting Weatherford*, 429 U.S. at 556.

Especially given the new disclosures that eviscerate the arguments the Government made to avoid dismissal initially, this case should now be dismissed. *See O'Brien*, 386 U.S. at 345-46 (vacating and remanding for new trial where agents overheard confidential information on wiretap, even though the information had not been passed along to the prosecuting attorneys); *Black*, 385 U.S. at 29 (vacating and remanding for new trial where federal agents overheard confidential information on wiretap); *Marshank*, 777 F. Supp. 2d at 1519-20 (dismissing case where prosecution collaborated with informant attorney to build a case against a defendant, without warning the defendant or the court, and where it "went so far as to participate in efforts to mask the conflict of interest from the defendant."); *Sabri*, 978 F. Supp. at 147 (dismissing indictment due to Government's interference with the attorney-client relationship).

The case of *State of Delaware v. Robinson* is instructive. In *Robinson*, the

prosecuting attorneys, who suspected that defense counsel had improperly shared certain information with the defendant, seized attorney-client privileged documents from the defendant's prison cell without seeking court approval and without establishing a taint team to review the materials. *Robinson*, 2018 WL 2085066, at *4. Finding that the lead trial prosecutor had actively participated in the relevant meetings, *id.* at *5, and that the prosecution's actions allowed it to improperly learn details of the defendant's defense strategy, *id.* at *4, the court concluded that the prosecution had invaded the defendant's Sixth Amendment right to counsel. Significant to the court's findings was the fact that, like here, "the State took no steps to screen the Prosecution Team to protect the integrity of the attorney-client privilege." *Id.* at *10. In considering the appropriate remedy, the court noted that "[w]ithin the *Weatherford* framework, prejudice may be presumed if defense strategy was actually disclosed to the Prosecution Team. In addition, a deliberate interference with the attorney-client relationship can constitute a Sixth Amendment violation even without a showing of prejudice." *Id.* at *11. The court found that "[d]ismissal is the only remedy that can adequately address the substantial prejudice suffered by Defendant and ensure that the State will not violate the rights of criminal defendants in the future." *Id.* at *10.

In the alternative to dismissal, the verdict should be vacated and the case

retried with a new prosecution team. *See Wheat v. United States*, 486 U.S. 153, 160 (1988) ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."). *See also McPartland v. ISI Inv. Services, Inc.*, 890 F. Supp. 1029, (M.D. Fla. 1995) (disqualifying attorneys due to disclosure of confidential information). The Government itself acknowledged before its misbehaviour came to light that a lack of candor justifies disqualification. D.E. 245 at 9, citing *United States v. Horn*, 811 F. Supp. 739, 751-52 (D.N.H. 1992) (disqualifying lead prosecutor), *rev'd on other grounds by* 29 F.3d 754, 758 (1st Cir. 1994).

Government prosecutors "shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B. *See also* 28 C.F.R. § 77.4 ("A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.").

Under Fla. Bar Rule 4-4.4(a), a lawyer may not "knowingly use methods of obtaining evidence that violate the legal rights" of another, including through "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." Fla. Bar Rule 4-4.4(a) and comment. "[W]hat is required for

disqualification is a showing that there is a 'possibility' that an unfair informational advantage was obtained, not a showing of specific prejudice." *Walker v. GEICO Indemnity Company*, 2017 WL 1174234, at *12, Case No. 6:15-CV-1002 (M.D. Fla. 2017) (disqualifying counsel due to review of privileged information that was inadvertently obtained).

This Court previously concluded that disqualification of the prosecution team was not warranted because "the Government already knew the bulk of the information that Mr. Leon tried to provide. So what – I know it's kind of hard to identify what the Government knows but what clearly was revealed to the Government that they wouldn't have already known?" D.E. 269, at 8. We now know this was not so, and that the Government intentionally let Leon continue to obtain privileged information, made sure to obtain that information orally, obtained information it did not otherwise have, and then lied to the Court about it. *See* Sealed Ex. 1.

Moreover, it is not enough that the Government knew the "bulk of" the information that was provided, if the remainder of the information it improperly obtained – which included defense strategy – was privileged. It was the Government's burden to prove that *none* of the evidence presented was derived directly or indirectly from the privileged information. *See United States v. Hampton*, 775 F.2d 1479, 1485-86 (11th Cir. 1985).

Much like in *United States v. Horn*:

> The government contends that its conduct caused no prejudice to the defendants because it was already aware from communications with defense counsel and from defense pleadings [w]hat the defense strategy was . . . Regardless of the prior general knowledge which the government had about defense strategy, the court finds . . . that the defendants have been and will continue to be prejudiced by the government's misconduct in [obtaining attorney-client privileged documents] because they provided an important insight into defense tactics, strategy, and problems. The government has thus failed to meet its burden of showing that there has been and will be no prejudice to the defendants as a result of the government's conduct.

Horn, 811 F. Supp. at 751-52.

The Government's choice to have the same attorneys whose conduct was under review handle the proceedings involving their actions further demonstrates a "seeming indifference to the serious constitutional issues at stake throughout these proceedings." *Robinson*, 2018 WL 2085066, at *14.

Given the information contained in the Government's post-trial disclosures, it is clear that the *minimum* remedy for the Government's misconduct and lack of candor to the Court must be disqualification of the trial team. The prosecution team personally took possession of confidential documents that it *knew* came from the other defendants, then told the Court it did not. The prosecution team personally approved every contact Leon had with the joint defense team, then told the Court it did not know about the meetings.

As such, the very cases that the Government previously distinguished on the basis of a lack of Government misconduct are now squarely applicable. *See* D.E. 245 at 8-9 (arguing that *United States v. Omni Int'l Corp.*, 634 F. Supp. 1414 (D. Md. 1986) and *Horn*, 811 F. Supp. at 741, were not applicable because the prosecution was disqualified in those cases as a result of false testimony and a lack of candor by the Government). *See also Richards v. Jain*, 168 F. Supp. 2d 1195, 1209 (W.D. Wash. 2001) (disqualification of counsel appropriate where taint on the proceedings could not be removed because "disclosure of privileged information cannot be undone."); *County of Los Angeles v. Superior Ct.,* 222 Cal. App. 3d 647, 657-58, 271 Cal. Rptr. 698,705 (Ct. App. 1990) ("Having become privy to an opposing attorney's work product, there is no way the offending attorney could separate that knowledge from his or her preparation of the case."). In both *Richards* and *Maldonado*, cases with similar but less egregious factual scenarios, counsel were disqualified.

CONCLUSION

The unavoidable truth is that during the prior hearing on prosecutorial misconduct, the Government offered knowingly false argument and testimony to the Court. Something needs to be done to ensure further misconduct of this nature does not occur,[8] and to remedy the substantial prejudice to these defendants resulting from the Government's invasion into the defense camp. As the Supreme Court has recognized, "[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser*, 315 U.S. at 71. In order for that duty to be upheld, the Defendants respectfully request that this Court vacate their convictions and dismiss the case, or in the alternative, that this Court vacate the convictions and order a new trial with unbiased prosecutors and agents who do not have the benefit of improperly-obtained privileged defense strategy.

[8] The Government's "persistent refusal to accept any responsibility for improper conduct in this matter raises serious concerns that, absent a significant sanction, the [Government] may engage in additional abuses in the future." Robinson, 2018 WL 2085066, at *14.

Respectfully submitted

RICHARD C. KLUGH, P.A.

/S/ RICHARD C. KLUGH
RICHARD C. KLUGH
Fla. Bar No. 305294

40 N.W. 3rd Street
Penthouse One
Miami, Florida 33128
Telephone (305) 536-1191

MARKUS/MOSS PLLC

/S/ DAVID OSCAR MARKUS
DAVID OSCAR MARKUS
Fla. Bar No. 119318

MONA E. MARKUS
Fla. Bar. No. 153648

40 N.W. 3rd Street
Penthouse One
Miami, Florida 33128
Telephone (305) 379-6667

SEITLES & LITWIN, P.A.

/S/ MARC DAVID SEITLES
MARC DAVID SEITLES
Fla. Bar No. 0178284

40 N.W. 3rd Street
Penthouse One
Miami, Florida 33128
Telephone (305) 403-8070