JUDGE NATHAN

16 CV 9434

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BIBA KAJTAZI,
Plaintiff,

Against
DREW JOHNSON-SKINNER,
PREET BHARARA,
CHRISTOPHER KALEY,
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND OTHERS UNKNOWN TO THE PLAINTIFF AT THIS TIME,

Defendants.

Civil Action No. _____

COMPLAINT
R.I.C.O.

JURY TRIAL DEMAND
F. R. CIV. P. 38(b)

STATEMENT OF THE CASE

Plaintiff Biba Kajtazi ("Kajtazi") is a defendant in *United States v. Demaj et al.*, case no. 1:16–cr–00289–ALC (SDNY Foley Square), currently an open case. Kajtazi is the victim of an obstruction of justice conspiracy (which is still ongoing) perpetuated by the Defendants herein that resulted in the indictment of Kajtazi.

Defendant Drew Johnson-Skinner (Johnson-Skinner") is fully aware that Kajtazi is totally innocent of the charge. Worse, Johnson-Skinner is attempting to hammer Kajtazi into a preposterous "plea bargain" in order to "cover his (Johnson-Skinner's) tracks" and "sweep this entire sordid affair under the rug."

Johnson-Skinner is also fully aware that Kushtrim Demaj, his informer and chief witness, is a menace to society who is allowed to roam the streets intimidating witnesses

and committing other crimes while his alleged co-defendant, Kajtazi, is being held in confinement until he "breaks" and takes a plea bargain.

Apparently, this type of behavior engaged in by Johnson-Skinner has been engaged in by the courts for over forty (40) years:

> Not too long ago plea bargaining was an officially prohibited practice. Court procedures were followed to ensure that no concessions had been given to defendants in exchange for guilty pleas. But gradually it became widely known that these procedures had become charades of perjury, shysters, and bad faith involving judges, prosecutors, defense attorneys and defendants. This was scandalous. But rather than cleaning up the practice in order to square it with the rules, the rules were changed in order to bring them in line with the practice. There was a time when it apparently seemed plain that the old rules were the right rules. One finds in the RESTATEMENT OF CONTRACTS [n. 3] "... even if the accused is guilty and the process valid, so that as against the State the imprisonment is lawful, it is a wrongful means of inducing the accused to enter into a transaction. To overcome the will of another for the prosecutor's advantage is *an abuse of the criminal law which was made for another purpose*" (emphasis added). The authors of the RESTATEMENT do not tell us what they were thinking when they spoke of the purpose of the criminal law. Nonetheless it is instructive to conjecture and to inquire along the lines suggested by the RESTATEMENT.
>
> [N. 3] *American Law Institute, Restatement of Contracts* (Saint Paul, 1933), p. 652.
>
> Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, Ethics, Volume 86 (1976).

President-elect Donald Trump has pledged to "drain the swamp" in Washington, D.C. Perhaps he should focus on the cesspool in the courthouses, one of which Defendant the Second Circuit Court of Appeals presides.

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to:

   a. Title 28 U.S.C. § 1331, the general federal question statute.

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

b. Title 28 U.S.C. §§ 2201 and 2202, for declaratory and injunctive relief.

> 28 U.S.C. § 2201
>
> (a) In a case of actual controversy within its jurisdiction, … , as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> 28 U.S.C. § 2202
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

c. Title 18 U.S.C. § 1964(c), which states:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

d. Rule 6(a) of the Federal Rules of Criminal Procedure, which states:

> (a) Summoning a Grand Jury.

> (1) *In General.* When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

PARTIES

2. Plaintiff Biba Kajtazi is presently incarcerated at the Metropolitan Correctional Center New York. His mailing address there is: Biba Kajtazi Register # 11315-069, MCC New York, Metropolitan Correctional Center, 150 Park Row, New York, NY 10007.

3. Defendant Drew Johnson-Skinner is an Assistant United States Attorney for the Southern District of New York. His business address is One St. Andrew's Plaza, New York, NY 10007.

4. Defendant Preet Bharara is the United States Attorney for the Southern District of New York. His business address is One St. Andrew's Plaza, New York, NY 10007.

5. Defendant Christopher Kaley is a federal agent. His business addresses are Department of Homeland Security/Federal Bureau of Investigation, Claremont Tower, 11 Centre Place, Newark, NJ 07102 and Department of Homeland Security, 111 Town Square Place, #630, Jersey City, NJ 07310.

6. Defendant the United States Court of Appeals for the Second Circuit has an address of 40 Foley Square, New York, NY 10007.

7. The names and addresses of the other defendants are unknown to the Plaintiff at this time.

FACTS

Background of the Case

8. The background of this case is addressed in the Motion to Dismiss Indictment and Memorandum of Law in Support, attached hereto as **Exhibit A**, and adopted and incorporated herein by reference. Plaintiff Biba Kajtazi ("Kajtazi") filed said motion on October 17, 2016 in case *United States v. Demaj et al.*, no. 1:16–cr–00289–ALC (SDNY Foley Square), as he is a defendant in that action.

9. The illegalities involved with the prosecution of Kajtazi in *United States v. Demaj, supra*, and how each of the above-named Defendants in this action is responsible for perpetrating those illegalities are addressed by name and/or title of each Defendant.

Defendant Assistant United States Attorney Drew Johnson-Skinner

10. Defendant Assistant U.S. Attorney Drew Johnson-Skinner ("AUSA Johnson-Skinner") drew up a proposed written guilty plea agreement, even though he knew and had known that Kajtazi is completely innocent. That guilty plea agreement is attached hereto as **Exhibit B**.

11. Such an action on the part of AUSA Johnson-Skinner is more than merely unethical; it is a felony under 18 U.S.C. § 1503 (obstruction of justice), a predicate act under RICO.

12. Submission of an indictment to a grand jury in order to punish an innocent man, as AUSA Johnson-Skinner did, is a violation of 18 U.S.C. § 1503 as well.

13. Pursuing a criminal case against an innocent man, *knowing* that the man is innocent, as AUSA Johnson-Skinner did, constitutes a series of predicate acts under 18 U.S.C. § 1503 as well.

14. There are two further problems with the acts of AUSA Johnson-Skinner.

15. First, such a prosecution shifts the burden of proof from the government to the defendant, in which case:

a. The defendant must prove there was no agreement.

b. The defendant must prove there was no illegal objective.

c. The defendant must prove there was no overt act done in furtherance of the conspiracy.

16. I.e., in *United States v. Demaj, supra*, AUSA Johnson-Skinner conjectured with no evidence and converted the fact that Kajtazi has a girlfriend in Columbia to overt acts on behalf of a (non-existent) drug-smuggling conspiracy.

17. See email from AUSA Johnson-Skinner dated November 18, 2016 at 2:27 PM, attached hereto as **Exhibit C**.

18. The question here is: did AUSA Johnson-Skinner have the benefit of the information *before* or *after* he presented Indictment No. 16-164 to the grand jury?

19. Justice Jackson tried to warn us of the dangers of conspiracy charges over 60 years ago in *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

> MR. JUSTICE JACKSON, concurring in the judgment and opinion of the Court.
>
> This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the "tendency of a principle to expand itself to the limit of its logic." The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

> The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always "predominantly mental in composition" because it consists primarily of a meeting of minds and an intent.
>
> *Id.* at 445-448, 69 S.Ct. 716, 93 L.Ed. 790 (footnotes omitted).

20. The fact that there was no "meeting of the minds" and "an intent" does not seem to disturb AUSA Johnson-Skinner.

21. The second problem with the prosecution of Kajtazi is that the only witness that Kajtazi is aware of is simply not someone who can be put on the witness stand, for the following reasons

22. See 7-page letter from AUSA Johnson-Skinner, dated September 27, 2016, attached hereto as **Exhibit D** in which AUSA Johnson-Skinner asked that bail be revoked on his own and, more than likely, only *witness.*

23. The obvious questions here are: why is it that an innocent man can't make bail while a government witness (and probably informer) can? Why hasn't AUSA Johnson-Skinner presented *this* evidence to a grand jury? Concealing felonies from the grand jury, as AUSA Johnson-Skinner did, would appear to be another violation of 18 U.S.C. § 1503.

24. From information and belief AUSA Johnson-Skinner intends to file a 21 U.S.C. § 851 enhancement if Kajtazi does not accept his plea offer. Such behavior was addressed some time ago via a memo issued by former U.S. Attorney General Eric Holder, a copy of which is attached hereto as **Exhibit E**, not to mention the fact that coerced pleas

are unconstitutional. *See e.g.*, *Waley v. Johnston*, 316 U.S. 101, 62 S. Ct. 964, 86 L.Ed. 1302 (1942).

25. The reason for the determination of AUSA Johnson-Skinner to plead an innocent man guilty appears obvious as he has to cover up the mess he has made of the underlying case, *United States v. Demaj, supra*, with no concern about protecting the public.

26. It appears that Defendant Preet Bharara, the current United States Attorney in this district, will hold his position during the new President Trump administration until the corruption in his office comes to light. However, U.S. Attorney Bharara may be able to sidestep the resulting public image problem that results by firing and/or indicting AUSA Johnson-Skinner.

Defendant Christopher Kaley

27 Defendant Federal Agent Christopher Kaley ("Defendant Agent Kaley") of the Department of Homeland Security appears to be poised to "say anything" in order to insure the conviction of Kajtazi.

28. *E.g.*, Defendant Agent Kaley might say to the jury, "Based on my training and experience, I would explain that communications heard on a wiretap that used the phrase, "Stop at the supermarket and pick up two boxes of corn flakes and a pair of pliers," is using code words to tell the person on the other end of the conversation to, "Stop at your suppliers and pick up two kilos of cocaine and a snub-nose .38 special revolver."

Defendant United States Attorney Preet Bharara

29. Defendant United States Attorney Preet Bharara ("Defendant Bharara) appears to have postured himself as "tough on crime."

> Preetinder Singh "Preet" Bharara (born 1968) is an Indian-born naturalized American attorney and the U.S. Attorney for the Southern District of New York. Earning a reputation of "Crusader" prosecutor, his office has prosecuted diplomates and people in other countries. He prosecuted nearly 100 Wall Street executives, reached historic settlements and fines with the four largest banks in the US, and closed multibillion-dollar hedge funds for activities including insider trading. He also prosecuted New York state politicians, including the Speaker of the New York State Assembly, Sheldon Silver and the Majority Leader of State Senate, Dean Skelos, and at one time he threatened to prosecute the governor Andrew Cuomo for alleged corruption.
>
> https://en.wikipedia.org/wiki/Preet_Bharara (footnotes omitted).

30. Defendant Bharara has apparently "turned a blind eye" and studiously ignored the corruption underfoot in his own office.

> International investigations
>
> Bharara's office sends out agents to more than 25 countries to investigate suspects of arms, narcotics traffickers and terrorists and brings them to Manhattan to face charges. *One case involved Viktor Bout, an arms trafficker who lived in Moscow and had a deal involving selling arms to Colombian terrorists.* [1] Bharara argues that this aggressive approach is necessary in post 9/11 era. Defense lawyers have criticized the stings calling Bharara's office "the Southern District of the World." They also argue that American citizens would not appreciate other countries treating them in these ways. Countries have not always rushed to cooperate according to a review of secret State Department cables released by WikiLeaks.
>
> On April 13, 2013, Bharara was on a list released by the Russian Federation of Americans banned from entering the country over their alleged human rights violations. The list was direct response to the so-called Magnitsky list revealed by the United States the day before.
>
> *Id.* (footnotes omitted) (emphasis and footnote added).

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[1] The Victor Bout case is noteworthy in that the four conspiracies he was charged with were all—with no exceptions—engaged in exclusively with government agents and informers (conspiring with a government agent or informer is a legal impossibility).

31. Defendant Bharara has participated, encouraged, and/or ignored misconduct by those he supervises in order to obtain convictions to make him and his office look successful. This is all in violation of the obstruction of justice statute, 18 U.S.C. § 1503, a predicate act under RICO.

32. The forms of misconduct by AUSA Johnson-Skinner, whom Defendant Bharara supervises include:

a. Coercing false confessions

b. Lying or intentionally misleading jurors about their observations

c. Failing to turn over exculpatory evidence to defendants

d. Providing incentives to secure unreliable evidence from informants

e. Withholding exculpatory evidence from defense lawyers

f. Deliberately mishandling, mistreating or destroying evidence

g. Allowing witnesses they know or should know are not truthful to testify

Defendant the United States Court of Appeals for the Second Circuit

33 From information and belief, Defendant the United States Court of Appeals for the Second Circuit ("Defendant the Second Circuit") has issued a directive to the lower courts to delay rulings on dispositive motions that should be granted to defendants incarcerated and denied bail, pending trial, until the defendant "breaks" and takes a "plea bargain."

34. *I.e.*, it appears that Defendant the Second Circuit allows a modern version of pressing, also known as *peine forte et dure*, which was both a death sentence and a means of drawing out confessions. Pressing was adopted as a judicial measure during the

fourteenth century and reached its peak during the reign of Henry IV. In Britain, pressing was not abolished until 1772. Obviously this falls short of a death sentence, but Defendant the Circuit trusts the desirable resulting confession will allow them more time for other pursuits.

35. There is another *problem* with Defendant the Second Circuit—judicial dishonesty that has gone uncorrected since its ruling in *United States v. Hansel*, 70 F.3d 6 (2d Cir. 1995), in which it ruled the following:

> Hansel's objection to the presence of a government attorney during the grand jury proceedings fails, because Rule 6(d) of the Federal Rules of Criminal Procedure expressly states that government attorneys may "be present while the grand jury is in session."
>
> *Id.* at 8.

36. The dishonesty arises in that statement because the text of Rule 6(d) was *not* the issue that Hansel raised. The actual issue that Hansel raised is whether Congress actually had the constitutional *authority to enact* Rule 6(d) and codified in Title 28 U.S.C. § 515(a) *in the first place*.

37. At one time this sort of trickery engaged in by the judges who authored the opinion in *United States v. Hansel*, was prohibited:

> 5 U.S.C. § 7301. Executive Order No. 11222 issued May 8, 1965. 30 F.R. 6469.
>
> Any person in government should:
>
> > Uphold the Constitution, laws and regulations of the United States and of all governments therein and never be a party to their evasion. [display in government building]
>
> Public Law 96-303, Sec. 3(3) II, 94 Stat. 855, 856, July 3, 1980.

38. Defendant the Second Circuit has encouraged, and/or ignored misconduct which, in turn, was ignored in the courts below. Criminal defendants had their constitutional and statutory rights violated by government employees with no consequences to those employees. This is all in violation of the obstruction of justice statute, 18 U.S.C. § 1503, a predicate act under RICO. The U.S. Supreme Court was aware 50 years ago of the consequences of unchecked power wielded by the lowest government employee up to the judges entrusted to protect those within their jurisdiction.

> Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886).
>
> *Miranda v. Arizona*, 384 U.S. 436, 459, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

CONCLUSION

39. *I.e.*, the RICO predicate acts complained of herein appear to number in the thousands (if not tens of thousands).

RELIEF REQUESTED

WHEREFORE, Plaintiff Biba Kajtazi respectfully requests the following relief:

1. Trial by jury on all issues triable by jury, Rule 38(b) of the Federal Rules of Civil Procedure.

2. Damages according to proof.

3. That this Court convene a grand jury, pursuant to Rule 6(a) of the Federal Rules of Criminal Procedure to investigate the crimes complained of herein.

4. A declaratory judgement, pursuant to 28 U.S.C. § 2201, that the actions of the defendants named herein violate the due process and equal protection of the rights of the Plaintiff.

5. An injunction, pursuant to 28 U.S.C. § 2202, prohibiting further prosecution of the Plaintiff under criminal case no. 1:16–cr–00289–ALC (SDNY Foley Square) and ordering his immediate release (even if only on bail).

6. Plaintiff's cost of this suit.

7. Any such other relief as this Court deems just, proper, and equitable.

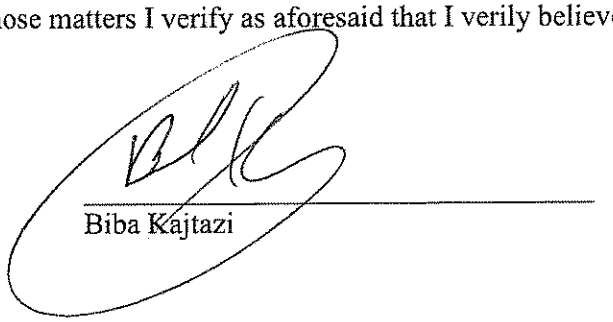
Dated: December 6th, 2016

Respectfully submitted,

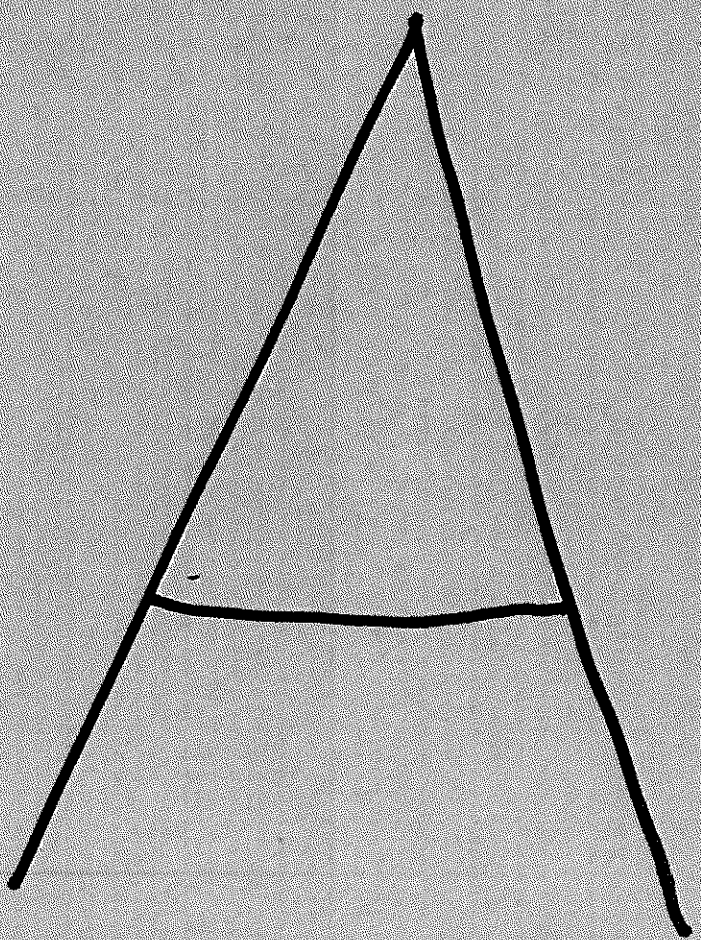
Biba Kajtazi, Register # 11315-069
MCC New York
Metropolitan Correctional Center
150 Park Row
New York, NY 10007

VERIFICATION

I verify under penalty of perjury that I am the Plaintiff in the above-entitled action; I have read the above Complaint and have knowledge of the facts stated there, and the matters and things stated there are true and correct, except as to those matters stated to be on information and belief, and as to those matters I verify as aforesaid that I verily believe them to be true.



Biba Kajtazi



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA, Case No.: S 3 16 cr 0289 (ALC)

Plaintiff, NOTICE OF MOTION

Vs.

BIBA KAJTAZI, et al.

Defendant.

----------X

PLEASE TAKE NOTICE, that upon the affidavit of Anthony Suarez, attorney for Biba Kajtazi, dated October 3rd, 2016 and upon the indictment herein dated April 23, 2016, and upon all prior proceedings, Anthony Suarez, will move this Court at a motion term thereof to be held at the United States Courthouse, for the Southern District of New York, on November 4, 2016 at 10:00 a.m., or on a date convenient for the Court, for the following pretrial relief:

A. An Order pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure dismissing the Indictment based on Insufficient Evidence Before the Grand Jury.

B. An Order pursuant to Rule 6(e)(3) of the Federal Rules of Criminal Procedure to inspect the grand jury minutes.

C. An Order pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure dismissing the indictment for violation of current Apprendi/Ring/Blakely, infra.

D. Order pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure dismissing the Indictment based on Insufficient Evidence of meeting of the minds to support a conspiracy charge.

WHEREAS, Biba Kajtazi respectfully requests that the Court grant the above relief, and such other and further relief as this Court deems just and proper.

Respectfully submitted,

By ss/*Anthony Suarez, Esq.*
Suarez Law Group, P.A.
517 W Colonial Drive
Orlando, Florida 32804
407-841-7373
407-841-7181 Fax
suarez@suarezcti.com

Dated: October 3rd, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

Plaintiff,

Vs.

BIBA KAJTAZI, et al.

Defendant.

----------X

Case No.: S 3 16 cr 0289 (ALC)

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS INDICTMENT AND MEMORANDUM OF LAW

Anthony Suarez, an attorney duly licensed to practice in the State of New York and before the United States District Court for the Southern District of New York, affirms under the penalty of perjury as follows:

1. That I am an attorney with the Suarez Law Group and Associates, attorneys for the defendant Biba Kajtazi, hereinafter "KAJTAZI" and or "defendant" and make this affirmation in support of the pretrial relief requested herein.

2. That the Omnibus motion that was filed on July 1, 2016 (doc. entry # 53) is hereby incorporated with the instant motion.

3. That I am familiar with the facts and circumstances of this case, the sources of my information being conversations with KAJTAZI, meeting with Assistant U.S. Attorney Drew Johnson-Skinner, my review of the indictment, discovery materials provided to date, discs of telephone conversations intercepted, and the **Affidavit of Case Agent Christopher Kaley ("DHS-HS"), herein after ("Kyle Affidavit")** that was used as probable cause to obtain court orders for the wiretaps dated February 8, 2016, and February 18, 2016.

4. That KAJTAZI is charged in Count 1 of the Third Superseding Indictment ("Indictment") with conspiring with 4 others between in or about April 2015, and on or about April 2016, for conspiracy to possess with intent to distribute 5 kilograms or more of a mixture and substance containing cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A); and 846. Mr. Kajtazi is not charged in the remaining second count of the Indictment.

5. The government alleges on page one of the indictment that the amount of cocaine involved in the alleged conspiracy exceeds five kilograms and that the amount of cocaine, according to the government, subjecting the defendant to the penalty provision of Title 21, United States Code, Section 841 (b)(1)(A).

MOTION TO DISMISS THE INDICTMENT

6. Pursuant to Fed. R. Crim. P. 12(b)(2)(3), KAJTAZI makes the following pretrial application to the Court which is: a) in the nature of an objection to this prosecution; and b) an allegation of a defect in its institution because

(a) there are defects in the indictment;
(b) the evidence presented to the grand jury was insufficient;
(c) the evidence presented to the grand jury was obtained in violation of the defendant's rights under the Fourth, Fifth and Sixth Amendment to the United States Constitution;
(d) inadmissible hearsay was presented to the grand jury;
(e) the allegations contained in the indictment fail to give defendant adequate notice of the charges against him impairing his ability to prepare a meaningful defense to the crimes charged
(f) the indictment is defective because it does not set forth sufficient factual allegations and circumstances in violation of current *Apprendi/Ring/Blakely* requirements;
(g) insufficient evidence was presented to the grand jury to support the enhancement provisions claimed by the government to apply.

7. More specifically, KAJTAZI asserts this prosecution violates substantive due process as guaranteed him under the Fifth Amendment to the United States Constitution on the grounds that there is insufficient evidence in the government's case and chief to support that there is five or more kilos of cocaine to trigger the mandatory minimum of ten years to life. See,infra, *Apprendi, Ring, Blakely*'s

requirements established by the U.S. Supreme Court in those precedents and, consequently, the indictment should be dismissed with prejudice.

8. That upon information and belief, the only co-conspirator "Kushtrim Demaj" that had direct contact with KAJTAZI was a confidential informant, thus, lacking the *meeting of the minds* requirements to sustain a conspiracy charge.

9. An Order pursuant to Rule 6(e)(3) of the Federal Rules of Criminal Procedure to inspect the grand jury minutes.

Background of the Case.

10. In 2012, law enforcement agents of the Organized Crime Drug Enforcement Task force ("**OCDETF**") and Department of Homeland Security("DHS") received information, from Kosovo Law Enforcement, that Defendant Kushtrim Demaj had shipped vehicles from the United States to Kosovo, with false vehicle identifications.

11. During this time, a confidential source one (" CS-1") informed DHS agents that an individual, Xhevdet Kelmendi, was interested in sending narcotics to CS-1 in the United States, and in exchange for vehicles that CS-1 would send abroad. Kelmendi informed CS-1 and CS-2 that they (CS-1 and CS-2) should talk to Defendant Kushtrim Demaj about sending vehicles to Kosovo in exchange for narcotics.

12. In 2014, Case Agent Christopher Kaley, of DHS-HIS, instructed CS-1 and CS-2 to meet with Defendant Demaj to discuss the importation of narcotics from Europe and South America in exchange for stolen vehicles to be shipped to Kosovo.

13. As the investigation progressed, the agents, with the aid of confidential sources, made many recordings of telephone conversations discussing the exchange of stolen vehicles for narcotics. Nowhere is KAJTAZI mentioned or heard in those conversations.

14. In April 2015, at the direction of law enforcement-mainly Agent Kaley, CS-2 spoke with Defendant Demaj and complained about a narcotic transaction CS-2 had planned with a supplier of Demaj that had not work.

The **Organized Crime Drug Enforcement Task Force** is a federal drug enforcement program in the United States, overseen by the Attorney General and the Department of Justice. Its Mission Statement is primarily to disrupt major drug trafficking operations and related crimes, such as money laundering, tax and weapon violations, and violent crime. The task force was created in 1982, and employs approximately 2500 agents.

15. On May 20, 2015, at the direction of law enforcement, CS-2 met with Defendant Demaj at a restaurant in the New Rochelle, New York. There, CS-2 gave Defendant Demaj $1,000 in US currency for a prearrange drug sale.

16. That same day, CS-2 informed law enforcement agents that Defendant Demaj instructed CS-2 to follow Defendant Petrit Bicaj to a restaurant in the Bronx, New York. During these conversations CS-2 was wearing a body wire and recording the conversations, in Albanian, on behalf of law enforcement.

17. CS-2 then removed his body wire, for unknown reasons, and entered the restaurant to do the prearrange drug buy. Approximately 30 minutes later, CS-2 return to the vehicle and gave law enforcement agents 24.8 grams of cocaine. CS-2 allegedly stated that Defendant Petrit Bicaj had given him the small package containing the cocaine, but there is no surveillance video or audio to support CS-2 allegations.

18. From August 2015 to January 2016, additional drug purchases were made from Defendant Demaj at the directions of law enforcement. For example:

(a) On August 25, 2015 Demaj sold to CS-2 ninety (90) grams of cocaine.
(b) On September 3, 2015 Demaj sold to CS-2 118 grams of cocaine.
(c) On September 24, 2015 Demaj sold to CS-2 five (5) ounces of cocaine.
(d) On October 2, 2015 Demaj sold CS-2 282 grams of cocaine in exchange for $12,000.
(e) On October 29, 2015 Demaj sold to CS-2 two hundred and eighty two and a half (282.5) grams of cocaine.
(f) On November 5, 2015 Demaj met with CS-2 and provided $6,000 to pay for narcotics.
(g) On January 20, 2016 law enforcement seized 274.3 grams of cocaine from Defendant Demaj in New Rochelle, New York.

19. During the above drug transactions, KAJTAZI was unaware, not connected, or privy to these drug transactions made by Defendant Kushtrim. Nor was KAJTAZI heard on any of the tape recordings discussing the above mentioned drug transactions.

20. Moreover, Demaj and the other codefendants name in this two count indictment, were engaged in selling Oxycodone which is the basis for Count Two of the indictment. KAJTAZI is not included in Count Two of the indictment.

21. The funds to purchase the narcotics from Defendant Demaj were supplied by law enforcement using the services of CS-2. Upon review of discovery, agents provided $12,000 to purchase the five (5) ounces that was sold on October 29, 2015.

If a defendant has one prior drug felony conviction (even felony possession), and the Government files an information pursuant to 21 U.S.C. §851, the mandatory minimum for the drug count increases to twenty years. If he has two prior drug felony convictions, the mandatory minimum sentence is life imprisonment.

Upon information and belief, **Ylbert Mustafa** is the confidential informant (CS-2) that was charged in a federal indictment (12-cr-520 SDNY) for narcotics, robbery, and firearms violations. See copy of indictment as **Exhibit A**. According to the Kyle Affidavit, CS-2 is working as an informant in return for lenience and immigration benefits.

22. On December 10, 2015 CS-1 informed law enforcement that Defendant Demaj played an audio recording between Demaj and KAJTAZI allegedly discussing the distribution of narcotics. CS-1 positively identified KAJTAZI as the person heard over the audio recording. (See Excerpts of the Kyle Affidavit as **Exhibit B**)

23. Based on this information, law enforcement diligently tried to get their confidential sources "CS-1, CS-2, CS-3, and CS-4" to meet with KAJTAZI in order to engage him to discuss criminal activities but were unsuccessful.

24. At one point, one of the government's informants did manage to visit KAJTAZI at his restaurant to discuss the sale of pizzeria equipment. At the end of the conversation, the informant asked KAJTAZI if he knew anyone that could secure narcotics and "make a lot of money". KAJTAZI informed this individual ("CS-2") that he "KAJTAZI" did time and will never get involved in any criminal activities. (See tape recording conversation for *May 19, 2015*)

25. The government, not satisfied with KAJTAZI's response, continued to entice, entrap or set up KAJTAZI through its informants.

26. The Kyle affidavit for wire taps states that Demaj informed CS-2 that KAJTAZI would travel to Colombia to ship cocaine back to the USA. However, approximately 5 trips were made to Colombia by KAJTAZI, while under surveillance, yet not one gram of cocaine was ever shipped by KAJTAZI.

27. Based upon information and belief, it is stated that Defendant Demaj started to work as a confidential source after the last sale and seizure of narcotics on January 20, 2016.

28. After that date, a series of calls were made by Defendant Demaj to KAJTAZI, and engaging him in suspicious-suggested conversations, while KAJTAZI was visiting his girl friend in Colombia.

29, The government relies heavily on the wiretap conversations between Demaj and KAJTAZI dated February, 12, 24, and 25, 2016, while KAJTAZI was in Colombia visiting his girl friend.

30. Demaj demanded that KAJTAZI provide a copy of his plane ticket to "show my man we are serious." (See the Kyle Affidavit as **Exhibit B**)

31. Subsequently, KAJTAZI returned from that trip to the United States without any drugs. KAJTAZI informed Demaj that his girl friend was pregnant and that he wanted to return to Colombia to help her and her family.

32. While in the United States, Demaj continue to convince KAJTAZI to return to Colombia and secure one kilo of cocaine to be shipped to the USA. Demaj even advance $10,000 to KAJTAZI, which was provided by law enforcement through CS-2. (See excerpts of the Kyle Affidavit as **Exhibit B)**

33. On April 24, 2016 while boarding the plane to Colombia, Kajtazi was arrested at the Orlando International Airport, in Florida. Approximately $11,000 in U.S. currency was confiscated and several home products Kajtazi was bringing to his girl friend.

34. On April 24, 2016, Demaj was arrested in the morning and arraigned in the Southern District Court of New York. He was granted bail and released under electronically monitoring device.

35. Kajtazi was not granted bail, as the government argued that he was an escape risk.

36. It is important to note that after several trips KAJTAZI made to Colombia, there was not one bit of contraband or narcotics that was secured by KAJTAZI. Nor is there any evidence or tape recordings to support that KAJTAZI agreed with a non-informant to conspire to possess five kilos or more of cocaine as charged in the indictment.

37. KAJTAZI has informed counsel that he was simply playing along with Demaj to buy time until he sold his properties in the Bronx and pay off Demaj for funds($100,000) Demaj loaned him previously to pay a property lien on one of KAJTAZI's property. That at no time did KAJTAZI ever had the intent to import drugs into the United States.

38. Then on April 20, 2016 KAJTAZI was successful in selling his properties and finally was able to repay Demaj the monies owed to him. That included the $100,000 that was loaned to pay off the property lien, and the loaned $10,000 that Demaj had advance to KAJTAZI; in which the sum of $10,000 the government claims was to be used for the purchase of the [fictitious] kilo of cocaine. (See copy of cancelled check for $ 110,000 payable to Kishtrin Demaj and Closing Statement as **Exhibit C**)

39. Then the very next day, after the sale of KAJTAZI's properties, the government decided to arrest KAJTAZI while boarding the plane to Colombia. Upon information and belief, it appears the government knew that KAJTAZI was not ever going to shipped drugs back the United States since KAJTAZI had return the funds back to DEMAJ. The government decided to arrest KAJTAZI at the Orlando International airport and charge him as a co-conspirator, and implicate him into the drug trafficking activities of Demaj.

40. While out on bail, Demaj contacted undersigned counsel and informed counsel that KAJTAZI was not involved in any drug dealings.

41. In May 2016, Assistant US Attorney Drew Johnson-Skinner informed undersign counsel that Demaj had made an admission upon his arrest that KAJTAZI was not involved.

42. Then on September 27, 2016 the government asked the Court to revoke Demaj's bail for making threats to those he perceived as government "snitches."

43. Additional discovery released on September 27, 2016 reveals that not only was Demaj making threats to potential government witnesses, but that Demaj and his brother Musa were involved in a possible homicide of a young black man in New Rochelle, New York. (See letter from AUSA dated 09/27/16 Doc. Entry # 74)

44. The government knew of the propensity of Demaj's violent behavior from tape telephone conversation recorded on April 9, 2016, yet the government did not bring this to the Court's attention

during the bail hearings and agreed that Demaj be released on bail. (See *exhibit C* of phone transcripts attached to the government's September 27, 2016 letter to the Court requesting to revoke Demaj bail).

45. In the September 27, letter to the Court, the government maintains that Demaj arrange for KAJTAZI to make several trips to Colombia to purchase one kilo of cocaine. This information is misleading as it is not supported by the record.

46. If the government really thought that KAJTAZI was capable of shipping drugs back to the United States, they could have easily allowed KAJTAZI to board the April 24, 2016 flight to Colombia, and alert DEA in Colombia, Bogota to follow him to his alleged drug sources.

WHEREFORE, Defendant KAJTAZI respectfully moves this Honorable Court to dismiss this cause because it violates substantive due process under the Fifth Amendment to the United States Constitution as more fully argued herein.

MEMORANDUM OF LAW

The Fifth Amendment provides, in pertinent part no person shall be "deprived of life, liberty, or property without due process of law." One constitutional treatise author observes "the essential guarantee of the due process clauses is that the Government may not imprison or otherwise physically restrain a person except in accordance with fair procedure. The first due process clause is part of the Fifth Amendment, which is primarily concerned with procedures used to convict someone of crime..." Treatise on Constitutional Law Substance and Procedure, Rotunda, Nowak, & Young, §17.4(a)(b)(1986)(emphasis supplied).

To comport with this due process guarantee, the Government must be restricted to prosecuting individuals only where the procedures are fair. In this case, the Government traveled "beyond the outer limits" of that constitutional boundary.

Here, the Government cannot dispute: a) the substance of OCDETF's mission statement; and b) prior to the CS-2 and DEMAJ offering KAJTAZI the opportunity to commit a crime, KAJTAZI was not engaged in criminal activity falling within the objectives of "OCDETF". The Court then would be entitled to find that affirmatively seeking out individuals like KAJTAZI and entice them into committing drug importation

"falls beyond the outer limits" of legitimate law-enforcement activity amounting to a violation of the Fifth Amendment's due process guarantees.

Moreover, the government made the decision to charge KAJTAZI with over five (5) kilos without evidence and in opposition to the August 12, 2013 memorandum, entitled ***"Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases,"*** which provides that prosecutors should decline to charge the quantity of drugs necessary to trigger a mandatory minimum sentence if a defendant meets certain criteria. (See copy of former U.S. Attorney General Erick Holder's August 12, 2013 Memorandum as **Exhibit D**)

While Kajtazi understands that the memorandum does not create any rights for the accused, it nevertheless encourages federal prosecutors not to charge an amount of drugs, that imposes a mandatory minimums, unless the individuals has a history of *violence* and/or *are supervisors or organizers* of large drug organizations. In the instant case, KAJTAZI does not meet the guidelines provided in the August 12, 2013 memorandum to expose him to a potential life sentence.

Hence, the government, in its overzealous efforts to convict, has used some of the following tactics by a) creating the fiction of wealthy drug buyers that wanted to see KAJTAZI plane ticket; b) creating a fiction that CS-2 had a contact at the airport to help smuggle narcotics; c) selecting a large drug quantity from thin air, not supported by the record, but only to create a sentencing entrapment to trigger mandatory minimum sentences; d) making false reports that KAJTAZI travels regularly to Colombia, at the direction of Demaj, to secure cocaine; e) structuring the scenario for KAJTAZI to bring other individuals to ship drugs into USA; f) using unscrupulous individual as informants (CS-1 And CS-2) that dictate to agents how to proceed with the investigation, and allowing them to remove their body wire

while presumably doing a drug buy; g) arresting KAJTAZI before he ever boarded the aircraft to proceeded to the fictitious drug importation plan that the government knew was not going to happen, thereby leaving open the question whether KAJTAZI really would have done so; and h) promising informant CS-1 that if he help the government make a case against KAJTAZI he would be given immigration benefits; i) naming KAJTAZI to the instant indictment so that KAJTAZI can be held accountable for all the drug sales Demaj did, when the government knew KAJTAZI had no knowledge of those activities; j) most important, violating the Mission Statement of OCDETF by targeting KAJTAZI who was not engaged in the type of illegal conduct OCDETF seeks to intercept, that is, importing narcotics from Colombia.

This Court is well-aware the convictions the Government obtains in these reverse stings generally result in incredibly long periods of incarceration. In these sting operations, the arbitrarily-high fictitious cocaine amounts always exceed five kilograms and, therefore, defendants always are subjected to at least ten-years or more of prison. Some defendants receive mandatory life imprisonment when they have a bad prior record, and the Government files an information under 21 U.S.C. §851. The government also sees individuals like KAJTAZI, as easy bait because they have prior convictions, and can easily score a conviction by mere association to an active drug dealer and calling him a "conspirator".

This Court has the power to declare this particular reverse sting, which has resulted in KAJTAZI being charged in this case, as offending traditional notions of justice and fair play rising to the level of a violation of substantive due process. In other words, in a case such as this one, where the Government elects not to exercise prosecutorial self-restraint, a federal court should intervene to prevent an unconstitutional deprivation of liberty. Deprivations of liberty are unwarranted where the Government itself has agreed it does not seek to deprive liberty from a particular class of individuals. Therefore, when the Government exceeds the outer limits it already has defined as fair to justify the deprivation of

an individual's liberty, but does nothing to pull back from beyond those limits, there is no alternative but for the judicial branch to correct such violations to ensure substantive due process is not violated.

Under the particular facts of KAJTAZI's case, this sting operation should not be countenanced in our system of federal jurisprudence. See, e.g., *Hampton v. United States*, 425 U.S. 484 (1976)(police over-involvement may run afoul of the due process clause of the Fifth Amendment); *United States v. Tobias,* 662 F 2d 381, 387 (5 Cir. Unit B. 1981)("there are the "outer limits" to which Government may go in the quest to ferret out and prosecute crimes)(emphasis supplied). This Honorable Court should recognize this prosecution has violated those "outer limits," as mentioned in Tobias, supra, as well as Fifth Amendment guarantees, thereby warranting dismissal of the indictment in this cause.

THE INDICTMENT SHOULD BE DISMISSED UNDER APPRENDI/RING/BOOKER PRECEDENT

Upon review of the discovery, wiretaps, agents affidavits, cds, and other related discovery, the government lacks evidence to prove that KAJTAZI was involved in conspiracy dealing with five (5) kilos of cocaine or more, and as charged in the indictment.

In *Apprendi v. New Jersey,* 530 U.S. 466, the US Supreme Court held that, under the Sixth Amendment, any fact (other than a prior conviction) that exposes a defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. See *id.* at 490, 120 S.Ct. 2348, 147 L.Ed.2d 435. The High Court applied the rule of *Apprendi* to facts subjecting a defendant to the death penalty, *Ring v. Arizona,* 536 U.S. 584, 602, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556, facts permitting a sentence in excess of the "standard range" under Washington's Sentencing Reform Act (Reform Act), *Blakely v. Washington,* 542 U.S. 296, 304–305, 124 S.Ct. 2531, 159 L.Ed.2d 403, and facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines, *United States v. Booker,* 543 U.S. 220, 243–244, 125 S.Ct. 738, 160 L.Ed.2d 621. *Blakely* and *Booker* bear most closely on the question presented here. See also *Jones v United States* 119 S.Ct. 1215, 1228 (1999) ("any fact that increases

the maxima prescribed statutory maximum must be charged in an indictment, submitted to a jury, and proven beyond reasonable doubt)(emphasis)

In the instant case, the government chose to indict KAJTAZI with conspiracy to distribute over five kilos of cocaine. That section under 841 (b)(1) exposes KAJTAZI to a maximum of life imprisonment. However, there is no evidence that KAJTAZI engage in any conspiracy to possess five kilos or more to trigger the ten to life mandatory sentence. Hence, the government cannot prove the amount of drugs, as alleged in the indictment, and the indictment should be dismiss, or in the alternative, hold a hearing on this issue. See *Jones* at 119 S.Ct 1215-1218. *Supra.*

For these reasons herein, this Honorable Court should dismiss the indictment

THE INDICMENT MUST BE DISMISSED BECAUSE THERE WAS NO MEETING OF THE MINDS

Upon information and belief, based on review of discover and the Affidavit of Agent Kyle, it appears that Demaj became an informant after the last seizure of January 20, 2016. Shortly after this date, several tape recorded calls were made to KAJTAZI engaging him in suspicious activities while KAJTAZI was visiting his girl friend in Colombia. The government relies heavily on those recorded conversation held in the month of February, 2016. Prior to that date, there was no evidence of KAJTAZI being heard discussing illegal activities with anyone.

In *US v. Vasquez* 113 F.3rd 383 (2nd Cir 1997) the court held " It is well-established that an agreement to **conspire** may come into being only when at least two culpable coconspirators agree. A person who enters into such an agreement while acting as an agent of the **government**, either directly or as a confidential **informant**, lacks the criminal intent necessary to render him a *bona fide* co-conspirator". *See, e.g., United States v. Hendrickson,* 26 F.3d 321, 333 (2d Cir.1994).

For this reasons and the reasons stated above, it is respectfully submitted that the instant indictment be dismissed with prejudice.

Respectfully submitted,

By ss/*Anthony Suarez, Esq.*
Suarez Law Group, P.A.
517 W Colonial Drive
Orlando, Florida 32804
407-841-7373
407-841-7181 Fax
suarez@suarezcti.com

I HEREBY CERTIFY a true and correct copy of the foregoing was furnished electronically by the CM/ECF electronic system this 11th day of October to the persons on the attached Service List and to all other persons entitled to electronic notice in this cause.

By ss/*Anthony Suarez, Esq.*
Suarez Law Group, P.A.
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Orlando, Florida 32804
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suarez@suarezcti.com

The Honorable Andrew L. Carter, Jr.
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Clerk, United States District Court
Southern District of New York
500 Pearl Street
New York New York 10007

Drew Johnson-Skinner
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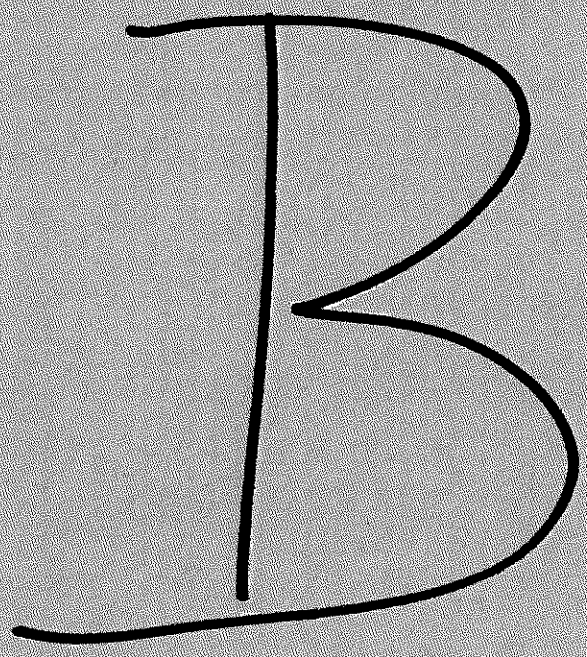

U.S. Department of Justice

United States Attorney
Southern District of New York

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New York, New York 10007

November 8, 2016

BY EMAIL

Anthony Suarez, Esq.
Gustavo Padron, Esq.
517 W. Colonial Drive
Orlando, FL 32804

Re: *United States* v. *Biba Kajtazi*,
S3 16 Cr. 289 (ALC)

Dear Mr. Suarez and Mr. Padron:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from Biba Kajtazi ("the defendant") to the lesser included offense in Count One of the above-referenced Indictment of conspiring to distribute and possess with the intent to distribute one kilogram and more of cocaine, in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(B). This offense carries a maximum term of imprisonment of 40 years, a mandatory minimum term of imprisonment of 5 years, a maximum term of supervised release of life, a mandatory minimum term of supervised release of 4 years, a maximum fine, pursuant to Title 21, United States Code, Section 841(b)(1)(B) and Title 18, United States Code, Section 3571, of the greatest of $5,000,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense, and a $100 mandatory special assessment. In addition to the foregoing, the Court must order restitution as specified below.

In consideration of the defendant's plea to the above offense, the defendant will not be further prosecuted criminally by this Office (except for criminal tax violations, if any, as to which this Office cannot, and does not, make any agreement) for conspiring to distribute and possess with the intent to distribute cocaine, from in or about April 2015 to on or about April 21, 2016, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq.* In addition, at the time of sentencing, the Government will move to dismiss any open Count(s) against the defendant. The defendant agrees that with respect to any and all dismissed charges he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant hereby admits the forfeiture allegation with respect to Count One of the Indictment and agrees to forfeit to the United States, pursuant to Title 21, United States Code, Section 853, any and all property constituting or derived from any proceeds the defendant obtained

directly or indirectly as a result of these offenses and any and all property used or intended to be used in any manner or part to commit or to facilitate the commission of such offenses. It is further understood that any forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon him in addition to forfeiture.

The defendant further agrees to make restitution in an amount ordered by the Court in accordance with Title 18, United States Code, Sections 3663, 3663A, and 3664.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The applicable Guidelines manual is the November 1, 2016 version.

2. The Sentencing Guideline applicable to Count One of the Indictment is U.S.S.G. § 2D1.1.

3. Pursuant to U.S.S.G. § 2D.1(c)(7), because the offense involved at least 2 kilograms but less than 3.5 kilograms of cocaine, the base offense level is 26.

4. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, the Government will move at sentencing for an additional one-level reduction, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 23.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has three criminal history points, calculated as follows:

1. On or about June 19, 1997, the defendant was convicted of distributing and possessing with the intent to distribute cocaine and was sentenced to 120 months' imprisonment. Because this conviction resulted in the defendant being incarcerated within 15 years of the instant offense, three criminal history points are added pursuant to U.S.S.G. §§ 4A1.1(a) and 4A1.2(e)(1).

Accordingly, the defendant's Criminal History Category is II.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's Guidelines range is 51 to 63 months' imprisonment; however, because a mandatory minimum term of 60 months' imprisonment applies, the defendant's stipulated Guideline range is 60 to 63 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 23, the applicable fine range is $20,000 to $5,000,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party in any way suggest that the Probation Office or the Court consider such a departure or adjustment under the Guidelines.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the stipulated Guidelines range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 60 to 63 months' imprisonment and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum. The defendant also agrees not to appeal any fine that is less than or equal to $5,000,000, and the Government agrees not to appeal any fine that is greater than or equal to $20,000. Notwithstanding the foregoing, nothing in this paragraph shall be construed to be a waiver of whatever rights the defendant may have to assert claims of ineffective assistance of counsel, whether on direct appeal, collateral review, or otherwise. Rather, it is expressly agreed that the defendant reserves those rights.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio* v. *United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that, if he is not a citizen of the United States, his guilty plea and conviction make it very likely that his deportation from the United States is presumptively mandatory and that, at a minimum, he is at risk of being deported or suffering other adverse immigration consequences. The defendant acknowledges that he has discussed the possible immigration consequences (including deportation) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration consequences that may result from the guilty plea and conviction, even if those consequences

include deportation from the United States. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including deportation) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section 2241, on the basis of any actual or perceived adverse immigration consequences (including deportation) resulting from his guilty plea and conviction.

It is further agreed that should the conviction(s) following the defendant's plea(s) of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

Apart from any written Proffer Agreement(s) that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

By: _____
Drew Johnson-Skinner
Assistant United States Attorney
(212) 637-1587

APPROVED:

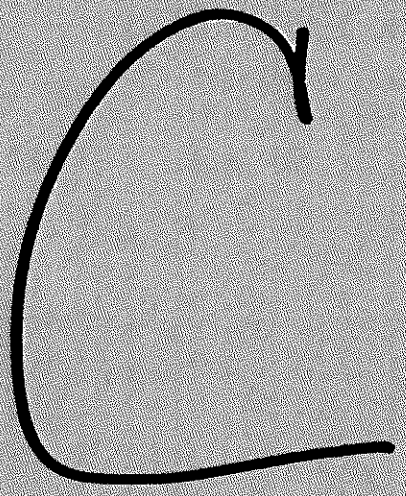
_____
Michael Gerber
Deputy Chief, Narcotics

AGREED AND CONSENTED TO:

_____ _____
Biba Kajtazi DATE

APPROVED:

_____ _____
Anthony Suarez, Esq. DATE
Gustavo Padron, Esq.
Attorneys for Biba Kajtazi



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From: Johnson-Skinner, Drew (USANYS) [mailto:Drew.Johnson-Skinner@usdoj.gov]
Sent: Friday, June 03, 2016 2:13 PM
To: Anthony Suarez
Subject: US v. Kajtazi

Tony,

In an abundance of caution, you should know that in a post-arrest statement, Kushtrim Demaj said in sum and substance that he knew that Kajtazi had flown to Florida to check out a business opportunity and planned to travel to Colombia to meet up with his Colombian girlfriend. He also said in sum and substance that he was not aware of any narcotics activity that Kajtazi was involved in and that he never got involved with Kajtazi and drugs.

Drew Johnson-Skinner
Assistant United States Attorney
Southern District of New York
One St. Andrew's Plaza
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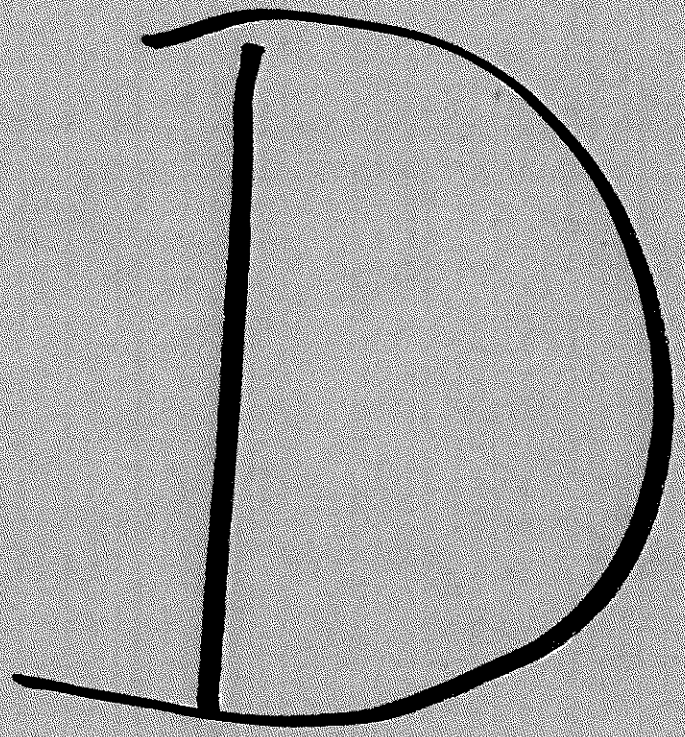

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 27, 2016

BY HAND AND ECF

The Honorable Andrew L. Carter, Jr.
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Re: United States v. Kushtrim Demaj, et al.
S3 16 Cr. 289 (ALC)

Dear Judge Carter:

The Government respectfully submits this letter to request that the Court revoke the bail of defendant Kushtrim Demaj and detain him pending trial. While on bail, Demaj personally contacted and threatened an individual he suspected of being a cooperating witness against him ("Individual-1") and sent a member of his family to visit Individual-1 in person. Further, Demaj recently posted messages on Facebook expressing his desire to retaliate against suspected cooperating witnesses. Accordingly, there is probable cause to believe Demaj committed a felony, to wit, witness tampering, while on release. Demaj poses a serious danger the community and a risk of flight and will not be able to overcome the presumption that he be detained pending trial.

I. Background

On April 25, 2016, the above-referenced Superseding Indictment was unsealed, which charged Demaj in Count One with conspiring to distribute and possess with the intent to distribute five kilograms and more of cocaine, in violation of Title 21, United States Code, Section 841(b)(1)(A), and in Count Two with conspiring to distribute and possess with the intent to distribute oxycodone, in violation of Title 21, United States Code, Section 841(b)(1)(C). Demaj was arrested that same day and presented before Magistrate Judge Frank Maas. The Government consented to the defendant's bail on conditions that included a $250,000 personal recognizance bond co-signed by two financially responsible people and $10,000, home detention with electronic monitoring, travel restrictions and the surrender of travel documents, and strict Pretrial supervision.

II. Legal Standard

Pursuant to 18 U.S.C. § 3148(b), the Court must revoke the defendant's bail if it finds that two conditions are satisfied: First, either that there is probable cause to believe that the defendant has committed a crime while on release or clear and convincing evidence that he has violated some other release condition. *See* § 3148(b)(1); *see also United States* v. *Gotti*, 794 F.2d 773, 776 (2d Cir. 1986). "Probable cause under § 3148(b)(1)(A) requires only a 'practical . . . probability' that the evidence supports a finding 'that the defendant has committed a crime while on bail.'" *United States* v. *LaFontaine*, 210 F.3d 125, 133 (2d Cir. 2000) (quoting *Gotti*). Second, either that there is no combination of conditions of release that will prevent the defendant from fleeing or posing a danger to the safety of the community, or that it is unlikely that he will abide by any condition of pretrial release. *See* § 3148(b)(2). Moreover, if the crime committed by the defendant while on release is a felony, "a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community." § 3148(b). Even when the presumption applies, the Government bears the burden of proof by a preponderance of the evidence as to both risk of flight and danger under § 3148(b). *Gotti*, 794 F.2d at 778; *United States* v. *Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985).

III. Discussion

Both prongs of § 3148(b) are satisfied here. First, there is probable cause to believe the defendant committed a federal felony while on release, to wit, tampering with a witness in violation of 18 U.S.C. § 1512.[1] Second, the defendant is a serious danger to the community and poses a risk of flight, and he will not be able to overcome the rebuttable presumption that no combination of conditions of release that will prevent the defendant from posing a danger to the safety of the community.

A. Demaj Engaged in Witness Tampering, A Felony Offense, While On Release

Shortly after Demaj's arrest and release to home detention, in or about April 2016, Demaj sent his brother-in-law to visit Individual-1 at Individual-1's workplace. Demaj's brother-in-law asked Individual-1, in sum and substance, if Individual-1 knew anything about Demaj's arrest. Demaj's brother-in-law confirmed that Demaj had told him where Individual-1 worked and had sent him to visit Individual-1. Demaj's brother-in-law asked for Individual-1's phone number, which Individual-1 provided.

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[1] Section 1512(b) makes it a crime to, among other things, "knowingly use[] intimidation, threaten[], or corruptly persuade[] another person, or attempt[] to do so, . . . with intent to influence, delay or prevent the testimony of any person in an official proceeding [or] cause or induce any person to withhold testimony . . . from an official proceeding."

Section 1512(d) makes it a crime to, among other things, "intentionally harass[] another person and thereby hinder[], delay[], prevent[], or dissuade[] any person from attending or testifying in an official proceeding" or attempt to do so.

Later that night, Demaj called Individual-1 using a number that Individual-1 did not recognize as Demaj's. Demaj asked Individual-1, in sum and substance, if Individual-1 had any idea about Demaj's arrest. Demaj told Individual-1, in sum and substance, that other people were asking why Demaj had been arrested but Indvidual-1 had not been arrested. Demaj stated, in sum and substance, that he did not work with anyone except for Individual-1 and that Individual-1 should have been arrested too. Demaj asked if Individual-1's drug customer had set them up. Demaj said, in sum and substance, that other people thought that Individual-1 was responsible for the arrests. Based the tone of the phone conversation and Individual-1's experiences with Demaj, Individual-1 understood Demaj to be saying that he suspected that Individual-1 was cooperating.

In the same phone conversation, Demaj said, in sum and substance, that he did not think that Individual-1 would set him up because they knew each other and because Individual-1 had family in a particular foreign country and in the United States. Demaj further stated, in sum and substance, that "life is long" and that the truth would come out about who set him up. Demaj said that he was going to find out soon enough. Individual-1 understood Demaj to be threatening Individual-1 and Individual-1's family.

Demaj asked if Individual-1 could meet with Demaj at Demaj's restaurant. Individual-1 asked Demaj to call him later, and when Demaj did, Individual-1 declined to meet. In an effort to avoid Demaj's suspicions, Individual-1 said that Demaj's brother-in-law could speak to Individual-1's brother. Demaj's brother-in-law visited Individual-1's brother at his workplace and said, in sum and substance, that Demaj suspected Individual-1 was cooperating against him.

That Demaj attempted to tamper with a person he believes to be a witness against him, and continues to intend harm to suspected witnesses, is corroborated by recent postings by Demaj on his Facebook account, which is under the user name "KT Demaj." In early September 2016, Demaj posted a photograph with a caption that stated "I never forget, not the good or the bad that you've done for me." (*See* Screenshots of Facebook postings, attached as Exhibit A hereto).[2] In comments posted on Facebook relating to that picture, another individual wrote: "We will catch them eventually and their neck will break." Demaj responded: "It may take a while, but they're not getting out of it."

In another Facebook posting at about the same time, Demaj posted a photograph with a caption: "The enemy usually disguises themselves as a friend to screw you even more!" (*See* Screenshots of Facebook postings, attached as Exhibit B hereto). In comments posted on Facebook related to that photograph, another person asked Demaj, "Where can I find you?" and Demaj responded that: "I'm here, working on burning the spies and birds of Serbia, God Willing." The Government believes that in this message, Demaj was referring to retaliating against Individual-1. Demaj and Individual-1 are both of a certain culture in which referring to a person as Serbian is an insult. Demaj has since deleted or made private these Facebook postings.

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[2] This caption and the other quoted language in this and the following paragraph were originally written in Albanian. A draft English translation prepared by the Government is provided here and is attached hereto as Exhibit C for the Court's convenience.

Demaj's above-described phone call to Individual-1, his sending another person to visit Individual-1, and his Facebook postings all establish probable cause to believe that Demaj engaged in witness tampering, in violation of 18 U.S.C. § 1512(b) and (d). His thinly veiled threats to Individual-1 that Individual-1 must not have cooperated because they both have family in the United States and abroad was a threat that Individual-1 and his family were at risk if he was cooperating against Demaj. Demaj's reminder that "life is long" and that he will find out who set him up were made to influence Individual-1 not to testify against him. *See United States* v. *LaFontaine*, 210 F.3d 125, 133 (2d Cir. 2000) (noting that the witness tampering statute does not require "physical force" or "threats" to support a tampering charge; "corrupt influence is sufficient"). There can be no other purpose of Demaj's threats to Individual-1. Demaj recently confirmed his intent to harm those he thinks cooperated against him by posting on Facebook that "they're not getting out of it," and that he was going to "burn[] the spies."

B. The Applicable Factors Strongly Favor Detention

Demaj will not be able to overcome the presumption resulting from his commission of a federal felony while on release that "no condition or combination of conditions will assure that [he] will not pose a danger to the safety of any other person or the community." § 3148(b). To the contrary, the applicable factors set forth in § 3142(g) strongly favor detention.[3]

1. Nature and Circumstances of the Offense

The underlying offenses charged against Demaj are extremely serious. He is charged with conspiring to distribute more than five kilograms of cocaine, in violation of Title 21, United States Code, Section 841(b)(1)(A), and conspiring to distribute oxycodone, in

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[3] In addition to the statutory presumption applicable in this case, courts examine four factors under Section 3142(g), see § 3148(b)(2)(A):

> (1) the nature and circumstances of the offense charged, including whether the offense . . . involves . . . a controlled substance . . .; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including-- (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g).

violation of Title 21, United States Code, Section 841(b)(1)(C). The Second Circuit has held that narcotics trafficking presents a serious danger to the community, and should be treated as such for purposes of bail determinations. *See United States* v. *Leon*, 766 F.2d 77, 81 (2d Cir. 1985).

Moreover, the nature and circumstances of Demaj's offense also demonstrate that, if bailed, his return to court cannot be assured. Demaj is facing a mandatory minimum sentence of ten years and a maximum sentence of life imprisonment. A defendant's incentive to flee is particularly acute where the evidence against the defendant is strong and the penalties are severe. *United States* v. *Sabhnani*, 493 F.3d 63, 76 (2d Cir. 2007) (when evidence of a defendant's guilt is strong, and when the sentence of imprisonment upon conviction is likely to be long, a defendant has stronger motives to flee). Here, as described below, the evidence against the defendant is exceptionally strong—and, as a result of his attempts to tamper with a suspected witness, has only increased since the defendant's initial arrest and presentment.

2. The Weight of the Evidence

The evidence against Demaj on the underlying offenses is extremely strong and counsels heavily in favor of detention. The defendant conspired with, among others, co-defendant Biba Kajtazi to attempt to import kilograms of cocaine into the United States from Colombia.

As the Court is aware, and as presented at defendant Kajtazi's detention hearing, judicially authorized wiretaps demonstrate the defendant speaking with Kajtazi about their joint efforts to import drugs to the United States from Colombia. These intercepted conversations and other evidence show that the defendant arranged for Kajtazi to travel to Colombia on several occasions to attempt to procure cocaine for importation to the United States. Cooperating witness testimony at trial will put the intercepted calls into context, including by showing that shortly before Kajtazi's February 2016 trip to Colombia, Demaj had in fact accepted an order, and thousands of dollars in U.S. currency, for a kilogram of cocaine from a customer and had informed the customer that he was sending an associate to Colombia to procure the drugs.

The wiretap evidence is only some of the evidence against Demaj in this case. Physical evidence and witness testimony will establish that Demaj personally distributed what amounted to kilograms of cocaine over the course of numerous in-person transactions in the United States.

Moreover, the evidence against the defendant is even stronger now than it was at the time he was initially arrested and presented because the defendant has since contacted an individual he believes cooperated against him, and threatened that person in an effort to influence or prevent that person from testifying against him, which is proof of the defendant's consciousness of guilt that would be admissible at trial against him. The defendant's efforts to tamper with this suspected witness are further evidence of his guilt, and further increase the risk of flight.

3. The History and Characteristics of the Defendant

The defendant's history and characteristics demonstrate that he poses a danger to the community and a serious risk of flight. While the defendant has no reported criminal history, there are ample reasons to believe that his threats against Individual-1 are not empty ones.

During the course of this investigation, in or about 2014, Demaj informed individuals working with law enforcement on several occasions that, in sum and substance, he once loaned $200,000 to another person and had to "pistol whip" that person when he was not paid back.

Additionally, in calls intercepted in the course of this investigation, Demaj and his brother, defendant Musa Demaj, discussed an assault they were involved in that occurred in the vicinity of the bar Kushtrim Demaj operated in New Rochelle, New York, in or about April 2016. In a recorded call on April 9, 2016, Kushtrim Demaj recounted to Musa Demaj how he instructed Musa Demaj "to throw him [a victim] a couple [of punches]" because Kushtrim Demaj did not want to let the victim leave. (Linesheet, attached hereto as Exhibit D, at 4). Earlier in the conversation, Musa Demaj described how one of the victims of the assault was injured badly: "Not only did he get it good, but I am not sure he will able to keep his eyes open." (Ex. D. at 2). Musa Demaj told Kushtrim Demaj later in the call that it was good that Musa Demaj was friends with a person at the nearby gas station, because he "will delete the cameras," because "had they seen that on camera, I swear on my eyes, they would have caught us." (Ex. D at 6).

This assault was serious enough that Kushtrim Demaj believed a victim could have died from his injuries. In another intercepted call on April 14, 2016, Kushtrim Demaj spoke to another individual and said that a person who got in a fight at his bar had died of a drug overdose. Kushtrim Demaj expressed relief that the death was the result of a drug overdose and not the fight that he and Musa Demaj participated in, because "if any of the kids died from brain damage from a fight or something oh my God, it would've been f***ing over. Thank God, I have been thanking God over and over, you go to f***ing jail for 30 years." (Linesheet, attached hereto as Exhibit E, at 2-3).

4. The Nature and Seriousness of the Danger to Any Person or the Community

Lastly, the fourth factor also weighs strongly in favor of detention.

The defendant poses a serious risk of danger to Individual-1 and any individuals he believes are cooperating witnesses in this case. Demaj engaged in bold and reckless conduct by sending his family member to visit Individual-1, calling Individual-1 to threaten him, and asking Individual-1 to visit him at work, all while on home detention in this case. His recent Facebook messages confirm that he still intends harm to the individual or individuals he believes cooperated against him, and has no regard for who may see those messages. This conduct strongly suggests that no set of conditions will restrain him from attempting to tamper with and threaten witnesses, and attempting to undermine the integrity of the case against him. This threat is only heightened by the fact that the defendant is now aware that the Government knows of his threats against Individual-1.

The defendant's current bail conditions, which include home detention with electronic monitoring, are insufficient to protect against the danger the defendant poses. Home detention allows the defendant to leave his house to purportedly work at his bar/restaurant and other business ventures. The defendant attempted to take advantage of this condition by asking Individual-1 to meet at his bar while he was on release. The defendant was also not deterred from calling Individual-1 to threaten him and posting threatening messages on Facebook while under his current bail conditions. Moreover, electronic monitoring is not a preventative measure and only provides Pretrial Services with notice after a person violates their location conditions. Given all of Demaj's conduct, he cannot be trusted to not attempt to contact, harass, and threaten Individual-1 and any other individuals he suspects to be cooperating against him while on release.

Finally, Demaj's distribution of drugs, of which there is overwhelming evidence, is itself a serious danger to the community and warrants detention in light of all the other circumstances here.

IV. Conclusion

For the foregoing reasons, Demaj's bail should be revoked and he should be detained pending trial.

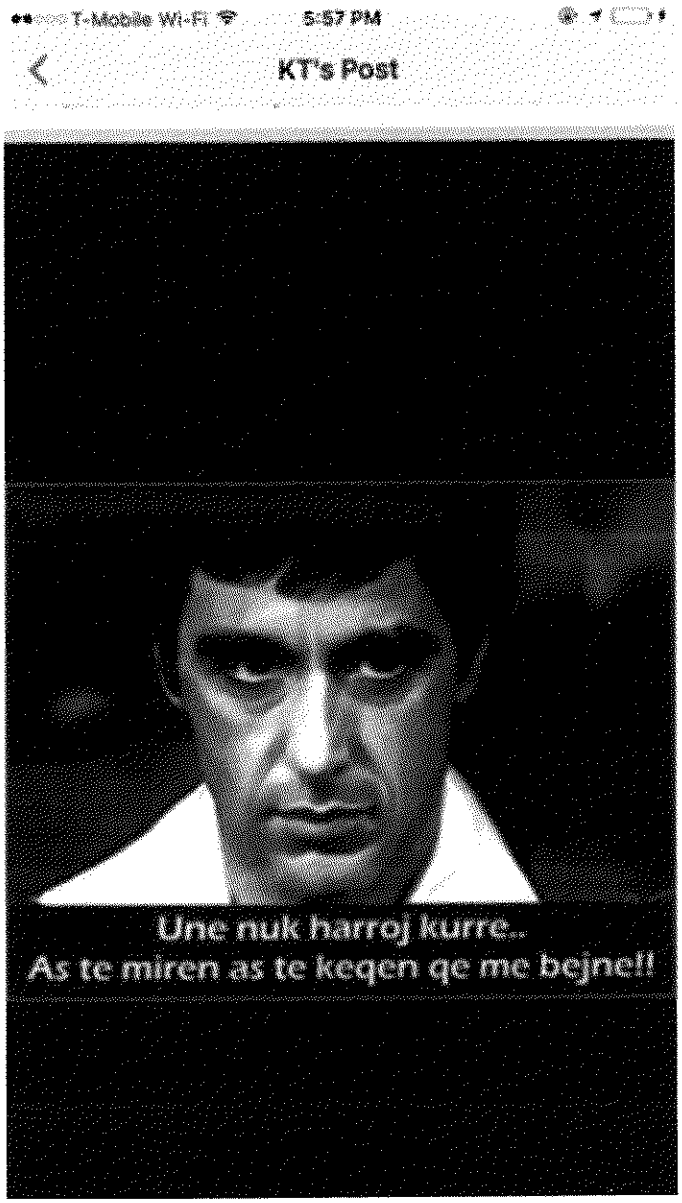
Respectfully submitted,

PREET BHARARA
United States Attorney

By: /s
Drew Johnson-Skinner
Assistant United States Attorney
(212) 637-1587

cc: James Kousouros, Esq. (by ECF)

Exhibit A


T-Mobile Wi-Fi
5:57 PM
KT's Post
Une nuk harroj kurre..
As te miren as te keqen qe me bejne!!

Vlora Kastrati-Shala

E nxojm dikur e i thehet qafa

16 hours ago · Like · Reply

KT Demaj

Veq vonim se pshtim ska

8 hours ago · Like · Reply

Vlora Kastrati-Shala

Jo valla

8 hours ago · Like · Reply

Exhibit B


T-Mobile Wi-Fi
5:57 PM
KT's Post
Armiku "vishet"
shpesh
si mik
per te te
goditur
me mire !!

Gruda Limo
Kut kam bra
17 hours ago · Like · Reply

KT Demaj
Qe tu punu me i djeg shpijunat e zojt e serbise me emen te zoti 🙏
17 hours ago · Like · Reply

Gruda Limo
O djal Ska faj as Serbia as Mali I Zi .as Maqedoni Por kem faj ne of bre burr ne Shqiptarija
17 hours ago · Edited · Like · Reply

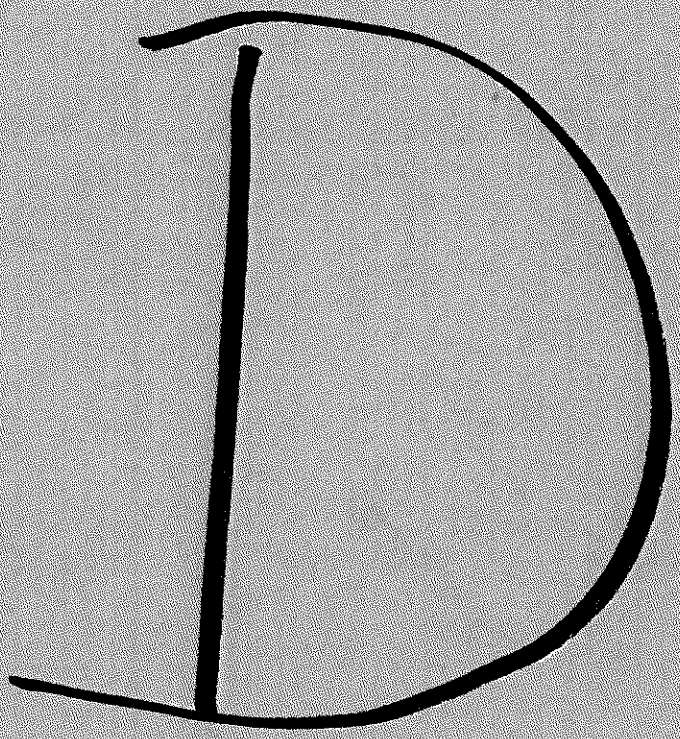


Exhibit C

Draft Translations of Facebook Posts

Screenshot (Exhibit A):	I never forget, not the good or the bad that you've done for me.
Vlora SHALA:	We will catch them eventually and their neck will break (Albanian way of saying they will die—snapped neck etc.)
KT DEMAJ:	It may take a while, but they're not getting out of it.
Vlora SHALA:	No, I swear.
Screenshot (Exhibit B):	The enemy usually disguises themselves as a friend to screw you even more!
Gruda LIMO:	Where can I find you? (Where you at?)
KT DEMAJ:	I'm here, working on burning the spies and birds of Serbia, God Willing.

Exhibit D

Linesheet User: chriskaley

Case:	NK13HR12NK0052	Target:	Kushtrim Demaj	Line:	917-684-6980 Sprint	File Number:	

Session:	23031	Total Duration:	00:16:06	Associate DN:	(917) 405-6681
Start Time:	17:25:57 EDT	Language:	Unknown	Monitor ID:	emerxhushi
Stop Time:	17:42:03 EDT	Complete:	Completed	In/Out Digits:	9174056681
Date:	04/09/2016	Direction:	Outgoing	Subscriber:	DEMAJ, MUSA
Content:	Audio	Classification:	Pertinent	Participants:	DEMAJ, KUSHTRIM "Timmy" DEMAJ, MUSA

Synopsis

MUSA TO KUSHTRIM

MUSA: When I saw him running [PH] like Superman.

KUSHTRIM: Oh yeah?

MUSA: I don't know what the devil was he running for?

KUSHTRIM: Uhuh, what did he do there?

MUSA: No but he talked then with them, closed the door, and put them there. He was telling them don't get out, or what the devil was he was doing with them.

KUSHTRIM: Did they catch the short one?

MUSA: That one no, he escaped behind the counter.

KUSHTRIM: Oh they did not catch that one?

MUSA: No, not that one, but going out on the street a different one was [UI] a different donkey.

KUSHTRIM: Did you fight with him?

MUSA: Not with the one that hit [him], but that one that got out he said how come four people are chasing one you motherfuckers! I said I'll fuck your mother. That one got it good. Not only did he get it good, but I am not sure he will be able to keep his eyes open.

KUSHTRIM: And he too was with them at the bar?

MUSA: It appears that one was the main one.

KUSHTRIM: Oh yeah?

MUSA: It appears that he hit him. Yes, yes that one either hit that guy because he got swollen there inside.

KUSHTRIM: Okay, very good. Anyways they came...

MUSA: You are saying the police did not got the the gas station?

KUSHTRIM: No they did go, and asked what happen, but he said I don't know anything you know, some kids, some kids, they were fighting outside, I don't know what happened.

MUSA: Oh yeah?

KUSHTRIM: Yeah. They came, because they came there first, and said what happened? I said nothing they started an argument here, and I kicked them out, and they went home, nothing else. Are you okay, is everything okay? I said yes, yes everything is okay, and that's it.

MUSA: No because [he] said if there were cameras there at the gas stations, as for us, we would wash our hands of it.

KUSHTRIM: Yes yes, but he said he never turned [PH] it on, never turned [PH] it on.

MUSA: Even that black guy had ran, the guy next door. Even that one ran to get inside and strait towards the counter.

KUSHTRIM: Oh yeah?

MUSA: When I went out, I grabbed him too because he said here are cameras, there are cameras in front.

KUSHTRIM: Who said him?

MUSA: No, they were screaming from outside, it's a camera, you fucking guy you're stupid, you killed him, it's a camera, this way and that way.

KUSHTRIM: And who was with you?

MUSA: Tafa, that black guy was a little bit more that way, and Tallo was that way, but that one we beat him up, that one I beat up by my self, that one Tafa gave a couple [punches], and that one I put him out very good, that animal. Instead of staying quiet and not saying who he is or anything, he said you are five people chasing one. Oh, I'll fuck your mother. I was going to let him go , but Tafa started it also with that one.

KUSHTRIM: With who?

MUSA: With that one over there, then we hit and trashed that poor guy.

KUSHTRIM: Uhuh, alright very good.

MUSA: No that one asked for it, because that one was the main guy, because he was the main guy.

KUSHTRIM: Oh yeah? Because I did not see him, I did not see him at all.

MUSA: Sons of bitches, left and came back .

KUSHTRIM: Yes, they left and came back. Yes, because he told me you don't know me I am going to shut your bar down.

MUSA: No way!

KUSHTRIM: Yes, I said no strong man, go home, it is better you go home.

MUSA: I did not hear him.

KUSHTRIM: No earlier, I told him no man it's better you go home, but you said, you know, all know me there, all know me there and he wanted to move away at first.

MUSA: No.

KUSHTRIM: He wanted... because he was about to go when he saw you that you were leaving, but then I did not want to let him go. I did not want to let him go and said to that, that cucumber, because I did not see you there behind, come on through on a couple [of punches], and he stood there staring at me.

MUSA: No but I don't know, once you said throw him a couple, I was there behind, if I was there near him, I would have caught him. What I thought you were saying not to him him. I did not know what the devil was happening.

KUSHTRIM: No, I wanted to move him away little more, I wanted to move him away, but I did not want to let him go do you understand? I did not want to let him go like that, because he started getting scared and started to leave. Now for me to fix him, I would not have caught him [UI]

MUSA: No.

KUSHTRIM: That's why I said to throw him a couple then... but it's good enough.

MUSA: It's good enough. I was dying laughing with Bosi [PH] did you see how he ran to the car to get away with Tafa.

KUSHTRIM: That motherfucker! I had to go to the Bronx to get him yesterday.

MUSA: But why did you go? He said take me home. I said I swear to God no, why should I take you home, and why did you run away Bos? "But Valon did not let me, I have a court." I said Valoni is okay, come back.

KUSHTRIM: Yes, yes, yes.

MUSA: They were okay, but did you know that they stay there every night?

KUSHTRIM: Who?

MUSA: The police. When they started running there, I thought now they will turn on the lights.

KUSHTRIM: Yes, I-

MUSA: That's why that donkey-

KUSHTRIM: They stay there but these past two weeks they have not stayed. I told that guy earlier we got saved by the grace of God because for the past two days they did not stay there, how come the police are not staying there? No he said they changed their routes and are not staying there as much like they used to.

MUSA: No I thought they would block our cars, but it did not become a big deal. I thought they would block our cars and not let us get out and then...

KUSHTRIM: No, no because they first come to the bar to see if everything is okay. They came there with 4-5 cars. They did not pick up the pen to write the complain because I was open after hours and they have me under the radar for anything that they would give me a problem, because it is still new like that.

MUSA: Yeah.

KUSHTRIM: Anyways, good enough. That one got saved without being fixed like that but, good enough.

MUSA: That one yes, that one yes. This one ate it for that one too.

KUSHTRIM: U-huh.

MUSA: Did Xhavit return there or stayed there?

KUSHTRIM: Yes, yes, Xhavit returned here and we stayed till late. We stayed with Xhavit till late with the workers too.

MUSA: It's a shame that that one got beaten in the beginning, I did not know who hit him or what happen.

KUSHTRIM: That young guy?

MUSA: Yes that one who's head they had swollen in the beginning.

KUSHTRIM: I don't know, I did not see them till..

MUSA: They were sons of bitches, even Tally [PH] gave them a couple when he got out in the beginning.

KUSHTRIM: Yes, that's what he said, that's what Petrit said too.

MUSA: Even he gave him a couple .

Linesheet User: chriskaley

Case: NK13HR12NK0052 Target: Kushtrim Demaj Line: 917-684-6980 Sprint File Number:

KUSHTRIM: And Valon did he give any?

MUSA: Valoni said I left him like that when I saw you kicking him, I thought you were going to kill him. Even Valon... but this one aimed to grab him like that to enter behind the counter. I said slow down, there are cameras! How can you enter someone behind the counter? That one just kept his head down, and him there got out from behind, he was telling that black guy don't let them enter your store. And this black guy then... as he was leaving... because I grabbed him too because I thought if the police come not to ... and said the black guy said shut the fuck up, and turned that way with that other one.

KUSHTRIMI: Which black guy, that worker?

MUSA: That black guy with red gym outfit that works next door I believe.

KUSHTRIM: Oh Dante.

MUSA: And said I am friends with the one at the gas station and will delete the cameras.

KUSHTRIM: Oh yeah?

MUSA: Yeah he said don't worry because that one at the gas station he is my friend.

KUSHTRIM: Oh, oh, good enough so far he did not tell or say anything.

MUSA: No because he maybe spoke to him and had they seen that on camera, I swear on my eyes, they would have caught us.

KUSHTRIM: Yeah, yeah.

MUSA: Good thing it did not become a big deal.

Conversation continues about KUSHTRIM selling MUSA's car. MUSA says he needs the money fast. MUSA asks if BIBA sold his place and gave KUSHTRIM the money.

KUSHTRIM says no he [BIBA] still did not finish with the closing and thinks it will be done by next week.

MUSA says MUSA needs to send quite few over there [possibly Kosovo] and was hopping not to stop the work over there.

KUSHTRIM asks if MUSA has to send all of it to Kosovo?

MUSA says MUSA needs to send all of it there.

Conversation about workers in Kosovo who are building apartments/vacation homes in Kosovo. MUSA is impressed with the workers and their work.

KUSHTRIM says apartments are better because you can rent them out and collect the money as

opposed to having a restaurant/hotel. KUSHTRIM asks MUSA how many are you fixing 11?

MUSA says 11, 4 will be ready by the end of the month and ready to rent. MUSA says MUSA got the tickets leaving on 4th of July [to Kosovo], I am also going earlier, but when I go to have all fixed and ready by June or July. MUSA asks KUSHTRIM how much did you pay for your tickets [to Kosovo]

KUSHTRIM says no not yet but God willing will go, but has to see when.

MUSA says I got two tickets one to leave on the 4th of July and return on the 20th, and again leave on 15th [of August] and return on September 7th.

EOC.

A. Bajcinca

END

Exhibit E

Linesheet User: chriskaley

Case: NK13HR12NK0052	Target: Kushtrim Demaj	Line: 917-684-6980 Sprint	File Number:

Session:	23805	Total Duration:	00:09:53	Associate DN:	(917) 284-1700
Start Time:	11:30:30 EDT	Language:	Unknown	Monitor ID:	emerxhushi
Stop Time:	11:40:23 EDT	Complete:	Completed	In/Out Digits:	9172841700
Date:	04/14/2016	Direction:	Outgoing	Subscriber:	BELMONTE, JUDITH
Content:	Audio	Classification:	Pertinent	Participants:	BELMONTE, JUDITH DEMAJ, KUSHTRIM "Timmy"

Synopsis

KUSHTRIM to BRENDON BELMONTE

KUSHTRIM asking what BRENDON is doing.

BRENDON tells KUSHTRIM that he is in the CITY right now and tells him that he is very pissed off and wants to break somenone's neck. BRENDON keeps complaining that he had a really bad night a day before and tells KUSHTRIM how he wants to snap at someone literally and break their neck. BRENDON says if he would take a vacation right now he would leave for a week to get away. Brendon expresses anger by wanting to literally break someone's neck and now he is in QUEENS and not in the CITY.

Minimization

Conversation c about BRENDON complaining how he wants to snap at someone. Literally, I really don't get it right now, really don't

BRENDON: tells KUSHTRIM that he wants to buy like 10 KILOS of COKE or something.

KUSHTRIM: Huh?

BRENDON: I wanna buy like 10 KILOS of COKE.

KUSHTRIM: Yeah, you wanna hear something crazy? KUSHTRIM says he was in MANHATTAN and the manager at the bar calls tells him that one of the kids that got in the fight at the bar he died, and I said what? Yes he said he died, then I said, holly fuck you know that comes back to me. Yo I flew from the fucking city, I didn't know how I got in the bar. It was another kid that was at the bar but he was just there and had nothing to do with that. He had brain injury, I said I was just gonna kill him, I told him I was gonna kill you because he [BEN] said the kid died of brain injury.

BRENDON tells KUSHTRIM if he wants to hear something funny, that TUESDAY night at some BAR in Connecticut, some some Albanian guy started a fight and they hit a girl and ran her over, and she is in intensive care, and she might die.

KUSHTRIM says Oh my God where?

BRENDON says at SCORES.

KUSHTRIM says, oh man, let me tell you something, if any of these kids died from the fight, it will be fucking over. If any of the kids died from brain damage from a fight or something oh my God, it would've

Linesheet User: chriskaley

Case: NK13HR12NK0052	Target: Kushtrim Demaj	Line: 917-684-6980 Sprint	File Number:

been fucking over. Thank God, I have been thanking God over and over, you go to fucking jail for 30 years. This fucking kid died of overdose.

BRENDON, says this world is nuts.

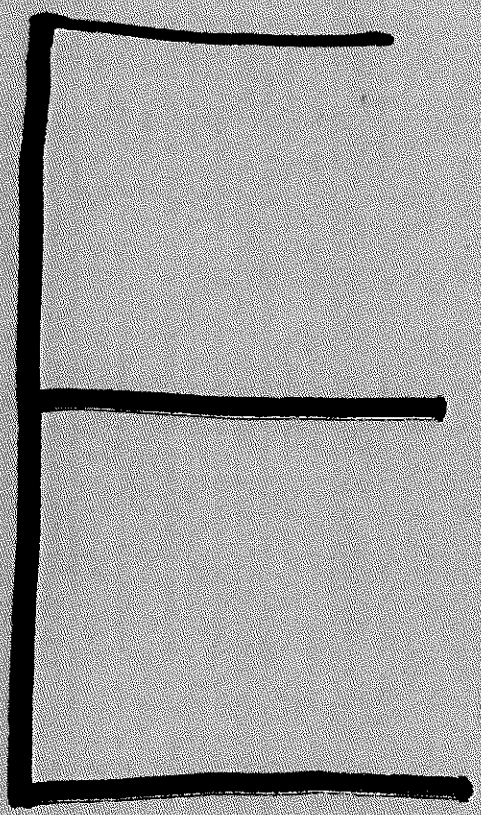
KUSHTRIM says its not worth it with the bar all these things.

Social conversation

Minimization

EOC
E.Merxhushi

END



Office of the Attorney General
Washington, D. C. 20530

August 12, 2013

MEMORANDUM TO THE UNITED STATES ATTORNEYS AND
ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION

FROM: THE ATTORNEY GENERAL

SUBJECT: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases

In *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the Supreme Court held that any fact that increases the statutory mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt. This means that for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty.

The Supreme Court's decision in *Alleyne* heightens the role a prosecutor plays in determining whether a defendant is subject to a mandatory minimum sentence. To be sure, the exercise of discretion over charging decisions has always been an "integral feature of the criminal justice system," *United States v. LaBonte*, 520 U.S. 751, 762 (1997), and is among the most important duties of a federal prosecutor. Current policy requires prosecutors to conduct an individualized assessment of the extent to which charges fit the specific circumstances of the case, are consistent with the purpose of the federal criminal code, and maximize the impact of federal resources on crime. When making these individualized assessments, prosecutors must take into account numerous factors, such as the defendant's conduct and criminal history and the circumstances relating to the commission of the offense, the needs of the communities we serve, and federal resources and priorities.[1] Now that our charging decisions also affect when a defendant is subject to a mandatory minimum sentence, prosecutors must evaluate these factors in an equally thoughtful and reasoned manner.

It is with full consideration of these factors that we now refine our charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders. We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution. Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation. Moreover, rising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs. These reductions in public safety spending require us to make our public safety expenditures smarter and more productive.

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[1] These factors are set out more fully in my memorandum of May 19, 2010 ("Department Policy on Charging and Sentencing") and Title 9 of the U.S. Attorneys' Manual, Chapter 27.

For all these reasons, I am issuing the following policy[2]:

Continuation of Charging and Sentencing Policies: Pursuant to my memorandum of May 19, 2010, prosecutors should continue to conduct "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime." While this means that prosecutors "should ordinarily charge the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," the charges always should reflect an individualized assessment and fairly represent the defendant's criminal conduct.

Certain Mandatory Minimum Sentencing Statutes Based on Drug Quantity: Prosecutors should continue to ascertain whether a defendant is eligible for any statutory mandatory minimum statute or enhancement. However, in cases involving the applicability of Title 21 mandatory minimum sentences based on drug type and quantity, prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets each of the following criteria:[3]

- The defendant's relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;
- The defendant is not an organizer, leader, manager or supervisor of others within a criminal organization;
- The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and
- The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.

Timing and Plea Agreements: If information sufficient to determine that a defendant meets the above criteria is available at the time initial charges are filed, prosecutors should decline to pursue charges triggering a mandatory minimum sentence. However, if this information is not yet available, prosecutors may file charges involving these mandatory minimum statutes pending further information and a determination as to whether a defendant meets the above criteria. If the defendant ultimately meets the criteria, prosecutors should pursue a disposition that does not require a Title 21 mandatory minimum sentence. For example, a prosecutor could ask the grand jury to supersede the indictment with charges that do not trigger the mandatory minimum, or a defendant could plead guilty to a lesser included offense, or waive indictment and plead guilty to a superseding information that does not charge the quantity necessary to trigger the mandatory minimum.

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[2] The policy set forth herein is not intended to create or confer any rights, privileges, or benefits in any matter, case, or proceeding. *See United States* v. *Caceres*, 440 U.S. 741 (1979).

[3] As with every case, prosecutors should determine, as a threshold matter, whether a case serves a substantial federal interest. In some cases, satisfaction of the above criteria meant for low-level, nonviolent drug offenders may indicate that prosecution would not serve a substantial federal interest and that the case should not be brought federally.

Advocacy at Sentencing: Prosecutors must be candid with the court, probation, and the public as to the full extent of the defendant's culpability, including the quantity of drugs involved in the offense and the quantity attributable to the defendant's role in the offense, even if the charging document lacks such specificity. Prosecutors also should continue to accurately calculate the sentencing range under the United States Sentencing Guidelines. In cases where the properly calculated guideline range meets or exceeds the mandatory minimum, prosecutors should consider whether a below-guidelines sentence is sufficient to satisfy the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). In determining the appropriate sentence to recommend to the Court, prosecutors should consider whether the defendant truthfully and in a timely way provided to the Government all information the defendant has concerning the offense or offenses that were part of the same course of conduct, common scheme, or plan.

Recidivist Enhancements: Prosecutors should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions. When determining whether an enhancement is appropriate, prosecutors should consider the following factors:

- Whether the defendant was an organizer, leader, manager or supervisor of others within a criminal organization;
- Whether the defendant was involved in the use or threat of violence in connection with the offense;
- The nature of the defendant's criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses;
- Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels;
- Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants; and
- Other case-specific aggravating or mitigating factors.

In keeping with current policy, prosecutors are reminded that all charging decisions must be reviewed by a supervisory attorney to ensure adherence to the Principles of Federal Prosecution, the guidance provided by my May 19, 2010 memorandum, and the policy outlined in this memorandum.

Office of the Attorney General
Washington, D. C. 20530

September 24, 2014

TO: DEPARTMENT OF JUSTICE ATTORNEYS

FROM: THE ATTORNEY GENERAL

RE: Guidance Regarding § 851 Enhancements In Plea Negotiations

The Department of Justice's charging policies are clear that in all cases, prosecutors must individually evaluate the unique facts and circumstances and select charges and seek sentences that are fair and proportional based upon this individualized assessment. "Department Policy on Charging and Sentencing," May 10, 2010. The Department provided more specific guidance for charging mandatory minimums and recidivist enhancements in drug cases in the August 12, 2013, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases." That memorandum provides that prosecutors should decline to seek an enhancement pursuant to 21 U.S.C. § 851 unless the "defendant is involved in conduct that makes the case appropriate for severe sanctions," and sets forth factors that prosecutors should consider in making that determination. Whether a defendant is pleading guilty is not one of the factors enumerated in the charging policy. Prosecutors are encouraged to make the § 851 determination at the time the case is charged, or as soon as possible thereafter. An § 851 enhancement should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty. This is consistent with long-standing Department policy that "[c]harges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant's conduct." "Department Policy on Charging and Sentencing," May 19, 2010.

While the fact that a defendant may or may not exercise his right to a jury trial should ordinarily not govern the determination of whether to file or forego an § 851 enhancement, certain circumstances -- such as new information about the defendant, a reassessment of the strength of the government's case, or recognition of cooperation -- may make it appropriate to forego or dismiss a previously filed § 851 information in connection with a guilty plea. A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea, however, is inappropriate and inconsistent with the spirit of the policy.