UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

NOTICE OF MOTION
Indictment No: 16-CR-0289

v.

BIBA KAJTAZI, et al,

Defendants.

S I R S:

COMES NOW the defendant, Biba Kajtazi by and through his attorney, Anthony Suarez, hereby moves this Court for the following relief:

I. Motion to Exclude Statements by Non-testifying Co- conspirators.

II. Motion for a Bill of Particulars.

III. Motion for Revelation of Identity of Informants.

IV. Motion for Discovery Pursuant to Rule 16 and Notice of Intention Pursuant to Rule 12.

V. Motion to Compel Production of *Brady* Material.

VI. Motion for Disclosure of Evidence Pursuant to Rules 404(b), 608 and 609 of the Federal Rules of Evidence.

VII. Motion for Disclosure of Witness Statements.

VIII. Motion for Preservation of Rough Notes and Other Evidence.

IX. Motion for Grand Jury Transcripts.

X. Motion to Controvert Interception Orders and Suppress Evidence

XI. Motion For Leave to Join in Co-defendants' Motion.

XII. Motion to Voir Dire Government Experts Outside the Presence of the Jury

XIII. Motion for Audibility Hearing

XIV. Motion for Severance

XV. Motion for Leave to Make Other Motions

DATED:

Respectfully submitted,

By s/Anthony Suarez, Esq

TO: ASSISTANT UNITED STATES ATTORNEY
One Andrew Plaza
New York , New York 14202

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

BIBA KAJTAZI,

Defendant.

DEFENDANT BIBA KAJTAZI'S PRE-TRIAL MOTIONS

Indictment No: 16 CR 0289

ANTHONY SUAREZ., ESQ., being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York; and I represent the defendant, Biba Kajtazi herein (the Indictment is attached as Exhibit "A").

2. Defendant Biba Kajtazi files the following motions and requests for relief:

3. As background, Mr. 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 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.

4. The motions filed and included (and referred to as numbered) below should be considered separate motions and requests for relief, but are filed together in one pleading for the convenience of the Court and opposing counsel.

I

MOTION TO SUPPRESS STATEMENTS OBTAINED ON April 21, 2016

5. On April 21, 2016 agents of the federal government and the Orlando Police Department arrested Mr. Biba Kajtazi while boarding a flight at the Orlando International Airport.

6. The indictment stems from probable cause based on wire taps conversations between Mr. Kajtazi and Kustrim Demaj and other statements made in violation of the 4th and 5th amendments. Moreover, any statements attributed to Mr. Kajtazi may have been attained by law enforcement personnel effectuating his arrest, and the possibility he may not have been advised of his Miranda rights while being subjected to custodial interrogation. The suppression on the wire tap conversation are argue herein in a separate motion below.

7. Counsel requests notice of the intention to use any such statements, if applicable, and a full description of the circumstances in which they may have been made, as well as any documents pertinent to this issue.

8. Accordingly, Mr. Kajtazi moves to suppress any statements taken in violation of his Fifth Amendment rights; or in the alternative, requests that a hearing be conducted to resolve any outstanding factual issues.

II

MOTION TO EXCLUDE STATEMENTS BY NON-TESTIFYING CO-CONSPIRATORS

9. Pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), and the Sixth Amendment to the United States Constitution, Mr. Kajtazi respectfully requests that the

Court bar the admission into evidence of all post-arrest statements by non-testifying co-conspirators/co-defendants which may implicate him in any way.

10. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant's Sixth Amendment right of cross-examination was violated when a non-testifying co-defendant's confession, implicating the defendant, was introduced at their joint criminal trial. *Bruton*'s protection of defendants' Sixth Amendment confrontation and cross-examination rights remains a linchpin of joint criminal trials.

11. Although in *Richardson v. Marsh*, 481 U.S. 200 (1987), the Supreme Court approved the use of non-testifying co-defendant confessions where all reference to the defendant's existence are eliminated and a limiting instruction is used, the continued vitality of *Bruton* and broad protections of the Sixth Amendment were demonstrated by the Supreme Court's recent decision in *Gray v. Maryland*, 523 U.S. 185 (1998). There, the Court applied *Bruton* to a case where reference to the defendant's existence was eliminated in the confession, but deletions in the confession were marked with a blank or "deleted." The Court found that the defendant's Sixth Amendment rights were violated. *Cf. Lilley v. Virginia*, 527 U.S. 116 (1999) (admission of non-testifying accomplice's confession violated Confrontation Clause).

12. Because he has not received discovery of any post-arrest statements by co-conspirators or co-defendants, Mr. Kajtazi cannot know whether the government will seek to use such evidence against him, or even if such statements exist. Therefore, Mr. Kajtazi makes this motion to exclude any such statements, and requests leave to amend and supplement it, and to file an additional memorandum of law or memorandum in support, after he has received full discovery and can apply the applicable authorities to the facts presented.

III

MOTION FOR A BILL OF PARTICULARS

13. Mr. Kajtazi requests an Order, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, requiring the government to provide a written bill of particulars as requested below.

14. The Indictment charges Mr. Kajtazi with conspiring with others to possess and possession with intent to distribute cocaine, but does not list any overt acts or any acts Mr. Kajtazi allegedly committed in furtherance of the conspiracy. It does not list particular dates on which Mr. Kajtazi did anything in furtherance of the conspiracy, nor does it state what drugs from which date take from Mr. Demaj or any other person is attributed to Mr. Kajtazi. From the discovery that Defendant's has it has been determined that a confidential informant was acting along with Mr. Demaj in obtaining and selling of cocaine. It is further understood that a government informant had Mr. Demaj's taped conversations of Mr. Demaj with Mr. Kajtazi, and that government informant requested from Mr. Demaj that Mr. Demaj provide proof of Mr. Kajtazi's travel to Columbia. It is further understood that government informant requested Mr. Demaj to have Mr. Kajtazi prove he could ship something such as coffee from Columbia. The Defendant requested confirmation, that government informants requested Mr. Kemaj the above stated acts.

15. As the Court well knows, Rule 7(f) of Federal Rules of Criminal Procedure permits the Court to direct the filing of a bill of particulars. As recognized by the Second Circuit, the bill of particulars has three functions: (1) to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial; (2) to avoid or minimize the

danger of surprise at the time of trial; and (3) to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague, and indefinite for such purposes. *United States v. GAF Corp.*, 928 F.2d 1253 (2d Cir. 1991); *United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988); *United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987). The particulars requested are also necessary because the charges in the indictment are so general that they do not advise the defendant of the specific acts of which he is accused. *United States v. Torres*, 901 F.2d 205 (2d Cir. 1990).

16. Without such specification as to the nature of his allegedly improper conduct, Mr. Kajtazi is without ability to prepare for trial and the danger of surprise at trial is greatly increased. *See, also, United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987) (prosecutor was required to advise the defendant, through a bill of particulars, which specific documents they intended to rely upon in a mail fraud prosecution).

17. As recognized by the Court in *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989),

> Prior to 1966, Rule 7(f) limited bills of particulars to those situations in which the moving party demonstrated the cause for his request. By amending the rule in 1966 to eliminate the cause requirement, the drafters expressly sought "to encourage a more liberal attitude by the courts towards bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases." Fed. R. Crim. P. 7 Advisory Committee's note to 1966 amendment. Consistent with this shift, the case law now recognizes that motions for bills of particulars should be granted whenever an indictment's failure to provide factual or legal information significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial.

18. In accordance with these principals, we request that the specified particulars be supplied as without such information counsel's ability to prepare a defense is significantly

impaired and it is likely that prejudicial surprise at trial will occur.

19. For the reasons set forth above, and for the additional reasons set forth below, the defendant requests the following particulars as to each count (i.e., each separate conspiracy):

a. A list of all unindicted co-conspirators, regardless of whether the government intends to call any co-conspirator as a witness at trial. *See United States v. DeGroote*, 122 F.R.D. 131, 137-39 (W.D.N.Y. 1988) (collecting cases);

United States v. Feola, 651 F. Supp. 1068, 1133-34 (S.D.N.Y. 1987), *aff'd.*, 875 F.2d 857 (2d Cir. 1989) (mem.);

b. The specific times, dates and locations when and where Mr. Kajtazi and other co-conspirators combined and agreed to possess with intent to distribute the controlled substance in question.

c. Where "elsewhere" the co-conspirators allegedly conspired;

d. How the co-conspirators, including Mr. Kajtazi, knowingly, willfully and unlawfully combined, conspired and agreed together to possess with intent to distribute the controlled substances in question;

e. List all uncharged overt acts taken by the co-conspirators, including Mr. Kajtazi;

f. List the exact weight of all controlled substances that Mr. Kajtazi allegedly conspired with co-conspirators to possess with intent to distribute, and the date(s) on which he conspired to possess each amount of cocaine;

g. Particularly describe the significance of April 2015 as the alleged date of the commencement of the conspiracy, if the exact date is not known to the grand jury;

h. Whether or not any individual present during the commission of any alleged overt acts was acting for the government, and the names, or names then used or similar identification, or any such person;

i. The names, to the extent known, of any persons present when the overt and substantive acts allegedly took place;

j. The dates, to the extent known, when each defendant joined the conspiracy, and the date on which the conspiracy ended, including the dates when each defendant left the conspiracy, if different than the alleged ending date. *See United States v. Feola*, 651 F. Supp. 1068, 1134 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 857 (2d Cir. 1989); *United States v. Scott*, 93-CR-26E (W.D.N.Y. 1994); and,

k. Was Mr. Demaj arrested or detained on October 29, 2015 or January 20, 2016?

l. The quantity of controlled substance distributed and possessed by each defendant and each co-conspirator during the course of the alleged conspiracy to the extent that this information will be presented by the government at trial.

20. Whether to grant a bill of particulars rests within the sound discretion of the district court. *United States v. Panza,* 750 F.2d 1141, 1148 (2d Cir. 1984). A bill of particulars is particularly important in complex cases, such as conspiracy cases covering an extended period of time. See, e.g., *United States v. Davidoff,* 845 F.2d 1151 (2d Cir. 1988). The fact that evidentiary details or the government's theory of the case may be revealed is insufficient reason to deny a reasonable request for a bill of particulars. *United States v. Greater Syracuse Board of Realtors*, 438 F. Supp. 376 (N.D.N.Y. 1977). *United States v. Calvi*, 830 F. Supp. 221 (S.D.N.Y. 1993), is instructive regarding both the necessity and the importance of a bill of particulars:

> An order directing filing of a bill of particulars in regard to this rather detailed indictment would be inappropriate in view of the United States Attorney having responded to all other discovery requests of the defense, and no claim of inadequacy of that response having been made.
>
> The prosecution is in the best position to know in advance of trial whether any of its evidence is likely to produce surprise making it difficult for the defense to cross-examine the applicable witnesses

> or otherwise defend the case with full vigor. If such a risk exists, it will be in the interest of the United States to furnish further information in advance of trial to avoid the need for a continuance during the trial to alleviate any adverse consequences which may flow from such surprise.
>
> Rule 7(f) of the Federal Rules of Criminal Procedure does not require the United States Attorney to furnish a three dimensional the event that actual unfair surprise can be shown, an appropriate continuance may be considered.

Id. at 223. *Calvi* directly correlates the need for a bill of particulars with the amount of detail in the indictment. Although the reported decision in *Calvi* does not set forth the indictment *in toto*, the indictment there was obviously much more detailed than the indictment here, which does little more than track the statutory language over a period of years. Here, the Indictment is fairly characterized as "bare bones," and in order to adequately prepare a defense to these charges and for trial, the Court should order the government to file a bill of particulars providing the information requested above.

The discovery material given to Defendant Biba Kajtazi sets forth several dates when other Defendant's none of which is Biba Kajtazi possessed drugs or transferred drugs. It is unknown of the government's intent to alleged if any or all of those transactions are attributed to Biba Kajtazi

IV

MOTION FOR REVELATION OF IDENTITY OF INFORMANTS

21. Defendant Kajtazi hereby moves this Court, pursuant to the provisions of Rule 16 of the Federal Rules of Criminal Procedure and the Fifth Amendment to the United States Constitution, for an Order requiring the government to disclose the following information:

> (a) The identity of any and all informants possessing information which may be material to defendant's alleged guilt or innocence;

(b) The identity of any and all informants who were present at any of the events which are described in the instant indictment;

(c) Any and all government reports containing information received from any informant referenced above which may be material to the instant case.

22. This motion is made on the grounds that the informants are percipient witnesses to the allegations contained in the instant indictment, and may also possess exculpatory and exonerating information. With respect to item (c), Mr. Kajtazi requests these reports on the ground that, to the extent he has been unable to review reports containing factual information relayed by that informant, he has been unable to lay proper factual foundation for the disclosure of the informant. At a minimum, defendant seeks to have all reports described above submitted in camera to the Court for review and subsequent disclosure to counsel. In the event that the Court does not compel disclosure of this information and the identities of the informants, defendant respectfully requests that all government reports be sealed and made part of the record in the instant case.

23. Mr. Kajtazi believes that Mr. Demaj became an agent of the government at some point in the investigation, and as such was already working to avoid prosecution.

A. The Government is Obliged to Disclose the Identity and Whereabouts of Informants and to Make Them Available to the Defense.

24. In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623 (1957), the United States Supreme Court held that whenever an informant's testimony may be relevant and helpful to the accused's defense, his or her identity must be revealed. The *Roviaro* Court set forth the following general standard for disclosure:

> Where the disclosure of an informant's identity or the contents of his communications is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must be waived. In these situations, the trial court may require disclosure and, if the government withholds the information, dismiss the action.

Roviaro v. United States, supra, 353 U.S. at 60-61.

25. The Court made clear that, while there is no fixed rule with respect to disclosure, four considerations are relevant: (1) the crime charged; (2) the possible defenses; (3) the possible significance of the informant's testimony; and (4) other relevant factors.

26. The "relevant and helpful" language of *Roviaro* has been interpreted by the Second Circuit "to require disclosure when it is material to the defense." *DiBlasio v. Keane*, 932 F.2d 1038, 1041-1042 (2d Cir. 1991). The *DiBlasio* Court recognized that:

> The judge must consider a number of factors in determining whether the informant's testimony is material: "the crime charged, the possible defenses, the possible significance of the informant's testimony and other relevant factors."

Citing, *United States v. Saa*, 859 F.2d 1067, 1073 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089, 109 S.Ct. 1555 (1989), *quoting*, *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623 (1957).

27. Similarly, the Ninth Circuit requires disclosure of the identity of an informant when he or she is a percipient witness. Thus, in *United States v. Cervantes*, the Court recognized that a "percipient witness" must be disclosed:

> The government acknowledges that the informant Duque was a percipient witness to the transaction. It therefore supplied Cervantes with the informant's identity. *See*, *Roviaro v. United States.*

28. *United States v. Cervantes*, 542 F.2d 773, 775 (9th Cir. 1976) (en banc). The same result was reached in *United States v. Hernandez*:

> In light of [the informant'[s] role in the narcotics transaction with which appellants were charged, it cannot be said that disclosure of Smith's identity would not have been "relevant or helpful" to the

> appellant's defense . . . Because [the informant] was a participant in the events that were critical to the prosecution's case, no claim could be raised under *Roviaro*, nor was it raised, that [the informant's] identity could be lawfully withheld from the appellants. [Citations omitted].

United States v. Hernandez, 608 F.2d 741, 744-745 (9th Cir. 1979); *see also, United States v. Miramon*, 443 F.2d 361, 362 (9th Cir. 1971).

29. The law is also clear that where an informant's testimony is essential to a fair determination, the government may be required to disclose his identity and address, if any. *United States v. Roberts,* 388 F.2d 646 (2d Cir. 1968). *See also, United States v. Anderson*, 509 F.2d 724 (9th Cir. 1975) (within the court's discretion to compel disclosure even when use of the informant goes only to probable cause). Further, the need for disclosure and production of the informant is mandated when the indictment contains a conspiracy charge and the informant could have information regarding either knowing membership in the conspiracy or possible entrapment. *United States v. Miramon, supra; Lopez-Hernandez v. United States*, 394 F.2d 820 (9th Cir. 1968); *Alexander v. United States*, 362 F.2d 379 (9th Cir. 1966).

30. Obviously, it is not defendant Kajtazi's burden to prove what the informant would actually say if disclosed since the informant's unavailability makes that burden impossible to discharge in all cases. *See, e.g., United States v. Miramon, supra*, where disclosure should have been made because the informant "might have corroborated the (defendant's story)." *Id.* at 362. As stated by the Court in *United States v. Day, supra*: "No matter how inert his role of participation he might still possess information relevant to a fair determination of the issues".

31. As to all informants, the defense is entitled to a revelation of their whereabouts and addresses prior to trial so that sufficient investigation into their background can be made. As stated by the Court in *United States v. Hernandez, supra*:

> We recognize that the address of a principal witness, as [the informant] most assuredly was, is an integral element of identity for without such information, little meaningful inquiry can be made into the background information affecting credibility.

United States v. Hernandez, 608 F.2d 741, at 745 (9th Cir. 1979).

32. In this case, therefore, the location and present whereabouts of any and all informant[s] must be immediately disclosed so that an investigation may be made into the credibility and background of the informant[s] prior to trial. Further, any purported government assertion that there is some unspecified danger to informant[s] is insufficient to justify withholding the information concerning his or her whereabouts. As *Hernandez* makes clear, the decision concerning potential "danger" must be made only after an evidentiary hearing. *Hernandez, supra*, 608 F.2d at 745, fn.3.

33. Finally, the government's obligation is not fully satisfied by merely disclosing the identity and location of the informant[s]. The defense here specifically requests that the informant[s] be produced. The Ninth Circuit has held that government has an obligation to "accomplish this or show that, despite reasonable efforts, it was not able to do so". *United States v. Hart*, 546 F.2d 798, 799 (9th Cir. 1976) (en banc). *See also, United States v. Cervantes, supra; Velarde-Villa Real v. United States*, 354 F.2d 9 (9th Cir. 1965).

34. For the reasons cited above, it is apparent that each of the informant[s] in this case is a material witness. The government should be ordered to disclose the identity of that witness and his or her whereabouts, and to make those witnesses available to the defense. Failure to do so would require dismissal of the case.

B. Upon a Proper Showing, the Defendant is Entitled to Pre-Trial Access to Prosecution Witnesses.

35. Mr. Kajtazi recognizes that the general rule is that in a non-capital case, the accused has no constitutional right to require production of the names and addresses of prospective witnesses. *See, e.g., United States v. Cole*, 449 F.2d 194, 198 (8th Cir. 1971), *cert. denied*, 405 U.S. 931, 92 S.Ct. 991 (1972). However, it should be noted that this rule is suffering from increasing erosion. For example, in *United States v. Baum*, 482 F.2d 1325 (2d Cir. 1973), the Second Circuit held that it was reversible error to deny pre-trial disclosure of the identity of a witness to the defendant's similar criminal conduct. *See also, United States v. Allstate Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974) (rule of *Baum* adopted and approved). Moreover, an order requiring pretrial disclosure of government witnesses is a proper exercise of judicial authority. *See, United States v. Richter*, 488 F.2d 170, 173-174 (9th Cir. 1973) (affirming the authority of the trial court to order pre-trial discovery of prospective government witnesses); *United States v. Jackson,* 508 F.2d 1001, 1006-1007 (7th Cir. 1975) (a trial court can enter and order sua sponte and without a showing of materiality requiring pre-trial disclosure of prospective government witnesses.

36. The United States Supreme Court first addressed the disclosure of government witnesses in *Alford v. United States*:

> Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; and that facts may be brought tending to discredit the witness by showing that his testimony in chief as untrue or biased . . . . Prejudice ensues from a denial of

> the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Citations omitted]. *Alford v. United States*, 282 U.S. 687, 688, 51 S.Ct. 218, 219 (1931).

37. Subsequently, in *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748 (1967), the Supreme Court reconsidered the rule of *Alford v. United States* and held that the failure to disclose the address of a primary prosecution witness was a denial of the defendant's Sixth Amendment right to confront and cross-examine witnesses. The Court stated:

> The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. Id. at 750.

38. Therefore, it is the defendant's position that an accused has the right to know the identity and location of prospective government witnesses so that he may interview them prior to trial in order to put such witnesses in proper setting for purposes of credibility and cross-examination.

39. Based, then, on the reasons cited above, it is respectfully requested that the identity and location of the prospective government witnesses be disclosed and that they be produced by the government prior to trial.

40. Disclosure of informant information in this prosecution is essential to a fair determination of the charges filed against the defendant. Much of what the government's evidence in this case appears to be is based on cocaine and heroin trafficking that in no way is tied to Mr. Kajtazi. Mr. Kajtazi is entitled to know whether these government informants, who are criminals based on their actions in purchasing drugs and participants in and witnesses to criminal activity – have any knowledge of whether Mr. Kajtazi was involved in alleged criminal activity.

41. In addition, the defense demands the following information about all informants:

a. All evidence affecting the issues of bias or credibility;

b. Their criminal records, *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980);

c. All promises or consideration of any kind given to the informants, *Giglio v. United States*, 405 U.S. 150 (1972);

d. Identification of the informants' prior testimony, *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975);

e. Evidence of psychiatric treatment of each informant or cooperating witness or person, *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983);

f. Evidence of the informants' narcotic habits, *United States v. Fowler*, 465 F.2d 664 (D.C. Cir. 1972);

g. Whether the informants are being compensated, including favorable plea agreements, in return for their cooperation with the government. *United States v. Morell*, 524 F.2d 550 (2d Cir. 1975); and,

h. A review of the informant file kept by the authorities for each informant.

42. The inherent unreliability of the testimony of an accomplice or government informant underscores the need for complete disclosure of information relating to credibility. *See United States v. Bagley*, 473 U.S. 667 (1985); *Perkins v. LeFevre*, 642 F.2d 37 (2d Cir. 1981); *United States v. Caldwell*, 466 F.2d 611 (9th Cir. 1972). Put another way, "[t]he use of informants to investigate and prosecute persons is fraught with peril." *United States v. Bernal-Obeso,* 989 F.2d 331 (9th Cir. 1993). For these reasons, the identifies and information requested above should be disclosed by the government to Mr. Kajtazi.

V

MOTION FOR DISCOVERY PURSUANT TO RULE 16 AND NOTICE OF INTENTION PURSUANT TO RULE 12

43. The government has provided some voluntary discovery, including reports of examinations of narcotics, and wiretap applications, orders, and logs.

44. However, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A)(B)(C) & (D), the defendant now moves to compel discovery of any items or information to which the defendant is entitled. *Specifically*, this request includes, but is not limited to, the following:

a. copies of any and all records, including reports and/or logs, relating to the alleged conspiracy and the arrest of all co-conspirators;

b. copies of all records, including reports and/or logs, regarding radio transmissions from the officers at any search warrant or arrest scene regarding the investigation;

c. copies of any and all reports relating to the booking process in this case;

d. copies of any reports and/or test results relating to determination of drug quantity or type of drug;

e. copies of any and all photographs taken relating to this investigation;

f. copies of any and all documents and photographs seized on the day of any searches in this case;

g. inspection of all items seized from the defendant on the day of his arrest;

h. disclosure of the names and identities of expert witnesses the government intends to call at trial, their qualifications, subject of testimony, and reports, and the results of tests, examinations or experiments which are material to the preparation of the defense or which are intended for use by the government as evidence-in-chief at the trial;

i. a copy of any search warrant or arrest warrant applied for and/or issued or denied during the course of this investigation (whether state, federal or local); and

j. pursuant to Rule 12(d) of the Federal Rules of Criminal Procedure, the defendant requests written notification of any evidence that the government intends to use in its case-in-chief that may, in any way, be subject to a motion to suppress and which the defendant is entitled to discover pursuant to Rule 16.

45. Pursuant to Rule 16, Mr. Kajtazi requests that the government provide them with discovery as provided by that Rule, to the extent that they have not already done so. Mr. Kajtazi notes that the government has not provided the defense access to many discovery documents in their possession. Nevertheless, this motion is brought to preserve the defendant's discovery rights.

46. Rule 12(b) establishes a procedure for notifying a defendant of the government's intention to use certain evidence at trial. The express purpose of this procedure is to afford an opportunity for submission of pre-trial motions seeking the suppression of such evidence [Rule 12(b)(1) and (2)]. Specifically, Rule 12(b)(4)(B) provides that at the defendants request, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), he may request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

47. To the extent that the government complied with Rule 12(b), they need only so note on the disclosure notice.

48. Therefore, pursuant to Rule 12(b), request is hereby made for the immediate disclosure by the government of a notice setting forth any evidence which the defendant may be entitled to discover under Rule 16 which the government intends to utilize at trial, including, but not limited to:

Statements of Defendants

49. Mr. Kajtazi hereby requests notification of any relevant written or recorded statements made by the defendants, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendants whether before or after arrest in response to interrogation by any person then known to the defendants to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendants the substance of any other relevant oral statement made by the defendants whether before or after arrest in response to interrogation by any person then known by the defendants to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to

bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

Defendant's Prior Record

50. Mr. Kajtazi hereby requests a copy of his prior criminal record, if any, as is within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

Documents and Tangible Objects

51. Mr. Kajtazi requests the following: (1) any tangible items within the government's possession, custody and/or control which the prosecutor intends to use as evidence in chief; (b) any tangible items within the government's possession, custody and/or control which was obtained from the defendants or which belong to the defendants; (c) any tangible items within the government's possession, custody and/or control which is material to the preparation of the defendant's defense; and (d) any and all recordings of any conversations which pertain to any of the facts alleged in the instant Indictment.

Intercepted Communications

52. Mr. Kajtazi hereby requests notification of the existence of any and all Title III surveillance, or any electronic surveillance conducted pursuant to federal, state or local

warrant, including any intercepted communications (audio and/or video intercepts) or evidentiary leads derived there from, and a statement as to whether they were acquired in the presence or absence of court authorization.

1. If acquired by warrantless means, disclosure is requested as to the following:

(a) specifications of the name and address of the participant in each such communication who ostensibly consented to interception of same;

(b) reproduction of any technical or physical surveillance logs respective of each communication so intercepted;

(c) reproduction of any transcripts purporting to memorialize the content of each communication so intercepted; and

(d) any instructions by the supervising agency to each participant who purportedly consented to the interception.

2. As to each and every intercepted communication, counsel further seeks an opportunity to examine and inspect the electronic equipment used to intercept and record each communication constituting the subject of electronic surveillance.

3. If acquired by eavesdrop order(s), disclosure and duplication is requested as to the following:

(a) each eavesdrop order and each amendment and extension order;

(b) the application and all other supporting documents which preceded each such eavesdrop, amendment and/or extension order;

(c) all progress reports which relate to any eavesdrop, amendment and/or extension order;

(d) any technical and/or physical surveillance logs;

(e) all minimization instructions to the executing agency(s); and

(f) all sealing order(s) which relate to any of the aforementioned orders.

Search and Seizure

53. In order to preserve his rights, to the extent not yet provided, Mr. Kajtazi hereby seeks notification of whether any evidence to be offered at trial consists of or was derived from the "fruits" of any search and/or seizure authorized by virtue of a judicial and/or administrative search warrant.

54. In the event that any such evidence consists of or was derived from the "fruits" of any judicial and/or administrative search warrant as referred to above, request is made for:

(a) a copy of each such search warrant;

(b) a copy of each written search warrant application together with any supporting affidavit(s);

(c) a copy of each voice recording, stenographic transcript and/or longhand record with respect to any oral search warrant application;

(d) a copy of any search warrant inventory return;

(e) the exact time and date when the United States government entered into the investigation of the defendant or any co-defendant relative to the instant matter; and

(f) whether the United States Government, including any police officials or United States prosecutors, had any involvement in the instant case, including communication or correspondence with Canadian officials at the time any search warrants were issued.

55. In the event that any evidence was acquired in the fashion(s) referred to above, request is made for any item consisting of, derived from and/or purporting to memorialize the "fruit" of any search and/or seizure.

Identification

56. Mr. Kajtazi requests notification of whether any evidence to be offered at trial relates to or is derived from an identification of defendant Kajtazi's person, voice, handwriting, his picture and/or a composite sketch purporting to embody his facial features.

57. In the event that any such evidence will be offered at trial, a statement is requested setting forth the following:

(a) the exact date, time and place where the identification proceeding occurred; and

(b) the substances of the identification proceeding to include the names of all persons present thereat.

58. If any such evidence to be offered at trial relates to non-corporeal identification proceedings, request is made for access to any and all pictures, sketches, voice exemplars, and/or handwriting specimens utilized during the course of any such identification proceeding.

Reports of Examinations and Tests

59. Mr. Kajtazi respectfully requests disclosure of any and all results of any physical, mental and/or scientific examinations, tests and/or experiments within the prosecution's possession, custody and/or control which are either intended by the prosecution to be used as

evidence in chief or which are material to the defense preparation and have not been previously provided.

***Jencks* Material**

60. Mr. Kajtazi respectfully requests disclosure of *Jencks* material (18 U.S.C. 3500) at least 30 days in advance of trial so as to permit its meaningful use by the defense.

61. It is respectfully requested that the defense motion for discovery and inspection pursuant to Rule 16, and notice of intention be granted.

VI

MOTION TO COMPEL PRODUCTION OF *BRADY* MATERIAL

62. Pursuant to the prosecution's obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976), *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), Mr. Kajtazi hereby moves the Court for the immediate disclosure of all exculpatory and/or impeaching material in the prosecution's possession, custody or control or which is otherwise known to the prosecution, including, but not limited to, the following:

(a) Any and all information and/or material which tends to exonerate Mr. Kajtazi or which tends to show that he did not knowingly commit any offenses alleged in the indictment.

(b) Any and all evidence which tends to impeach the credibility of any prospective government witness (including co-defendants), including, but not limited to:

(1) Any and all records or information revealing prior criminal convictions or guilty verdicts or juvenile adjudications, including but not limited to, relevant "rap sheets" of each witness the prosecutor intends to call at trial;

(2) Any and all records and information revealing prior or subsequent misconduct, unethical conduct, criminal acts or bad acts of any witness, including co-defendants, the prosecutor intends to call at trial;

(3) Any and all allegations of prior or subsequent misconduct, unethical conduct, criminal acts or bad acts of any witness, including co-defendants, the prosecutor intends to call at trial of which the prosecutor knows or through the exercise of reasonable diligence should have reason to know;

(4) Any and all consideration or promises of consideration given during the course of the investigation and preparation of this matter by any law enforcement officials, including prosecutors or agents, police or informers, to or on behalf of any witness, including co-defendants, or on behalf of a relative of any such witness or co-defendant, the government intends to call at trial, or any such consideration or promises expected or hoped for by any such witness, or relative of any witness, at any future time. Such "consideration" refers to anything which arguably could be of value or use to a witness, or relative of the witness, including but not limited to: formal or informal, direct or indirect, leniency; favorable treatment or recommendations or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, administrative, regulatory, disciplinary or other matter involving the state or federal government or agency thereof, any association, (including legal association), any other authority, or other parties; civil, criminal or tax immunity grants; relief from

forfeiture; payments of money, rewards or fees, witness fees and special witness fees; provisions of food, clothing, transportation, legal services, alcohol or drug related rehabilitation services or other benefits; placement in a "witness protection" program; informer status of the witness; letters to anyone informing the recipient of the witness' or the relative's cooperation; recommendations concerning licensing, certification or registration; recommendations concerning federal aid or benefits; promises to take affirmative action to help the status of the witness or co-defendant, or relative of the witness or co-defendant, in a profession, business or employment or promises not to jeopardize such status; aid or efforts in securing or maintaining the business or employment of a witness, or a relative of the witness; and anything else which arguably could reveal any interest, motive or bias of the witness in favor of the prosecution or against any defendant or which could act as an inducement to testify or to color his testimony;

(5) Any and all statements -- formal and informal, oral or written -- by the prosecution, its agents and representatives to any person (including counsel for such persons) whom the prosecution intends to call as a witness at trial pertaining in any way to the possible or likely course or outcome of any government action -- state or federal, civil or criminal -- or licensing, matters against the witness, including co-defendants, or anyone related by blood or marriage to the witness;

(6) Any statements read or made by the government to the departments of pre-trial services or probation in connection with the prosecution or conviction of any prosecution witness or potential prosecution witness;

(7) Any and all threats, express or implied, direct or indirect, or other coercion directed against any witness, or against a relative of such witness, whom the prosecutor intends to call at trial; criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against any such witness, or relative of such witness; any probationary,

parole, deferred prosecution or custodial status of any such witness, or relative of such witness; and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions involving any such witness, or relative of such witness or co-defendant, and the state or federal government, any agency thereof or any regulatory body or association or over which the state or federal government, agency, body or association has real, apparent or perceived influence;

(8) A list of any and all requests, demands or complaints made of the government by any witness, including co-defendants, which arguably could be developed on cross-examination to demonstrate any hope or expectation on the part of the witness or co-defendant for favorable governmental action in his behalf or on behalf of a relative of such witness (regardless of whether or not the government has agreed to provide any favorable action);

(9) With respect to each witness and/or co-defendant the government intends to call at trial, or any member of the immediate family of any such witness, copies of all indictments, complaints or informations brought against such person by the federal, or any state or local government, all administrative, disciplinary, regulatory, licensing, tax, customs, or immigration proceedings brought by the federal, or any state or local government, or by any regulatory body or association, and, state what counts or actions have been the subject of guilty pleas, convictions, consent decrees, dismissals, or understandings to dismiss at a future date; the date or dates on which pleas of guilty, if any, took place; and the names of the judges or hearing officers before whom such pleas were taken. If the government does not have copies of all indictments, complaints, or proceedings, state the dates and places of arrests, hearings, indictments, and information, the charges brought, and the disposition of those charges or matters so far as it is known to the government;

(10) With respect to each witness and/or co-defendant the government intends to call at trial, or any member of the immediate family of any such witness, a written summary of all charges or proceedings which could be brought by the federal, or any state or local government, but which have not or will not or which the witness believes have not or will not be brought because the witness is cooperating with or has cooperated with the government, or for any reason. Include copies of all memoranda of understanding between the government and its witnesses, whether by way of a letter to the attorney for a witness or otherwise;

(11) Any material not otherwise listed which reflects or evidences the motivation of any witness and/or co-defendant either to cooperate with the government or any bias or hostility against any defendant; the existence and identification of each occasion on which a witness has testified before any court, grand jury, administrative, regulatory, disciplinary body or other association, or otherwise officially narrated herewith, in the investigation, the indictment or the facts of this case, and any testimony, statements or documents given by the witness regarding same;

(12) All judicial proceedings in any criminal cases, and all regulatory, association or disciplinary proceedings of which the government knows or through the exercise of reasonable diligence should have reason to know in which testimony by any person has been given, regarding the misconduct, criminal acts or bad acts of any witness the government intends to call at the trial of this action;

(13) Any statements or documents, including but not limited to, judicial, regulatory, administrative, disciplinary, association or grand jury testimony, or federal, state or local tax returns, made or executed by any potential prosecution witness or co-defendant in the trial in this action, which the prosecution knows or through the exercise of reasonable diligence should have reason to know, is false;

(14) Any and all records pertaining to any civil lawsuits, arbitration proceedings or other proceedings between any defendant and any witness, or any company with which any defendant or any government witness may have been affiliated, including, without limitation, records or statements pertaining to the investigation, conduct and disposition of such litigation;

(15) Copies of all medical and psychiatric reports known to the prosecutor or which can reasonably be known to the prosecutor concerning any witness and/or co-defendant the prosecutor intends to call at trial which may arguably affect the witness' credibility or his ability to perceive, relate or recall events;

(16) All documents and other evidence regarding drug or alcohol usage and/or dependency by any individual the government intends to call as a witness at trial, including but not limited to records relating to treatment of such individual in any federal, state, city or military drug or detoxification program;

(17) Any written or oral statements, whether or not reduced to writing, made by any potential prosecution witness and/or co-defendant which in any way contradicts or is inconsistent with or different from other oral or written statements he has made;

(18) Any requests prepared by the prosecution for permission to grant formal or informal immunity or leniency for any witness and/or co-defendant, whether or not such request was granted;

(19) The same records and information requested in items "(1)" through "(18)" with respect to each non-witness declaring whose statements will be offered in evidence at trial pursuant to Fed. R. Evid. 806;

(20) Copies of any and all records of law enforcement agencies reflecting intradepartmental disciplinary action taken against any law enforcement official or agent who will testify at trial;

(21) Copies of any and all records of any law enforcement or other governmental agency reflecting any commendations, awards or recognition or any kind, or requests for any commendations, awards or recognition of any kind made to or by any government agent or law enforcement officer for any work, action or conduct in connection with the investigation and prosecution of this case.

(c) The name and address and written or oral statements made by any person, including co-defendants, with knowledge and information concerning the events charged in the indictment and whose version of the same events is contrary to, or non-supportive of, the accusations set forth in the indictment.

(d) The name and address and any written or oral statement made by any persons and/or co-defendants the government reasonably believes has information helpful to the preparation of the defense.

(e) The name and address and any written or oral statement made by any witnesses or co-defendants to the offense charged in the indictment whom the government does not intend to call as witnesses in this case.

63. Due process, as the constitutional phrase has been interpreted, requires that the government not suppress evidence favorable to a defendant or discrediting to its own case, and, upon request, that it disclose to the defense all such information. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976); *Pyle v. State of Kansas*, 317 U.S. 213, 63 S.Ct. 177 (1942). The requirement of disclosure extends to candor by the government witnesses as well as matters which relate more directly to guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972); *Napue v. People of the State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959). *See also, Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105, 89 S.Ct. 908 (1969).

64. The *Brady* rule grew out of a realization by the Supreme Court that the defendant's abilities for acquiring evidence are disproportionate to those of the government. Most defendants have neither the manpower nor the access and contacts available to the government in its investigation of crime. Thus, the prosecution is obliged to share the proceeds of its discovery with the defense where that evidence is favorable to the latter's cause. Indeed, the importance of *Brady* has been so strongly enforced that the Supreme Court, in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985), unequivocally extended the duty of disclosure to information which may be used by the accused for impeachment at trial.

A. Time of Disclosure.

65. Effective preparation for trial is the cornerstone of effective representation of criminal defendants and disclosure of information which, in any of a variety of ways, impeaches the witness' credibility is consequently required before trial in order to enable effective preparation. As the Court in *United States v. Pollack* pointed out:

> Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure. [Citations omitted].

United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir. 1976).

66. The need for pre-trial disclosure of *Brady* material has been highlighted in several cases. In *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993), irreconcilable discrepancies between the informer's actual record and government representations about the prior record indicated the informer had misled his government handlers. The court vacated the conviction and remanded for an evidentiary hearing "to restore the parties" to their "pre-trial" position and to

ascertain whether the informer had lied to the government. 989 F.2d at 336-337. *See also, United States v. Bejasa*, 904 F.2d 137, 140 (2d Cir. 1990), *cert. denied*, 498 U.S. 921, 111 S.Ct. 299 (1990) (a government file which contained impeachment material regarding a prosecution witness should have been produced "prior to" the witness' testimony); *Gorham v. Wainwright*, 588 F.2d 178 (5th Cir. 1979) (under certain circumstances, delayed revelation of discoverable evidence may deny a defendant an effective defense); *United States v. Opager*, 589 F.2d 799 (5th Cir. 1979) (harm was done by the pre-trial failure of the government to disclose the whereabouts of the informant; crucial importance was given to pretrial opportunity to interview and/or investigate potential witness); *Grant v. Alldredge,* 498 F.2d 376, 381-382, n.5 (2d Cir. 1974) (failure of government to disclose before trial that bank teller picked out photograph of another individual was error); *United States v. Baxter, et al.,* 492 F.2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945 (1974) (delay in turning over requested favorable evidence is unconstitutional when delay in disclosure substantially prejudiced the preparation of the defense); *Clay v. Black*, 479 F.2d 319 (6th Cir. 1973) (per curiam) (pre-trial disclosure of an FBI scientific report would have permitted defense to establish necessary claim of custody to introduce certain blood stains); *United States v. Polisi*, 416 F.2d 573 (2d Cir. 1969) (the importance of *Brady* is to measure the effects of the suppression upon the defendant's preparation for trial); and *Hamric v. Bailey*, 386 F.2d 390 (4th Cir. 1967) (to be effective, disclosure must be made at a time when disclosure would be of value to the accused).

67. Numerous district courts have ordered such discovery both before and after the 1975 amendments to the Federal Rules of Criminal Procedure. *See, United States v. Thevis, supra* (delaying disclosure of *Brady* materials useful for impeachment until the night preceding the testimony is insufficient); *United States v. Five Persons*, 472 F.Supp. 64 (D.N.J. 1979) (by adoption

of a standard order, district judges declared that the rights to due process and a fair trial require availability of *Brady* material within 10 days after arraignment); *United States v. Goldman*, 439 F.Supp. 337 (S.D.N.Y. 1977) (if exculpatory evidence is produced for the first time at trial, defendant may not have an adequate opportunity to effectively utilize the material; all *Brady* material to be provided "immediately"); *United States v. Dillard*, 419 F.Supp. 1000 (N.D. Ill. 1976) (in light of complex decisions of strategy and preparation, it is better practice to require disclosure in advance of trial); *United States v. Quinn*, 364 F.Supp. 432 (N.D. Ga. 1973), *aff'd on other grounds*, 514 F.2d 1250 (5th Cir. 1975), *cert. denied*, 424 U.S. 955, 96 S.Ct. 1430 (1976) (*Jencks* Act timetable cannot control release of information to which defendant is constitutionally entitled).

68. The due process requirements of disclosure are reinforced by a federal court's supervisory powers. In this federal prosecution, this Court can ensure that justice is administered properly in the federal courts by requiring immediate disclosure of the information sought, including impeachment materials.

B. <u>Impeachment Evidence</u>.

69. Mr. Kajtazi has itemized likely sources of impeaching information within the knowledge or reach of government counsel. *United States v. Agurs, supra.* Disclosure of this information is necessary in order for defense counsel to conduct an appropriate investigation and to conduct interviews and otherwise prepare for such trial proceedings as jury selection, opening statements and cross-examination.

70. At issue, from an impeachment standpoint, are the general principles of crediting and discrediting witnesses. Counsel can identified "five main lines of attack upon the credibility of a witness":

> The first, and probably the most effective and most frequently employed, is an attack by proof that the witness on a previous occasion has made statements inconsistent with his present testimony. The second is an attack by a showing that the witness is partial on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt. The third is an attack upon the character of the witness. The fourth is an attack by showing a defect of capacity in the witness to observe, remember or recount the matters testified about. The fifth is proof by other witnesses that material facts are otherwise than as testified to by the witness under attack.

1 McCormick on Evidence §33, at 111-12 (4th ed. 1992) (footnotes omitted).

71. Discovery should extend to production of so-called "rap sheets" of the witnesses as well as any information concerning criminal conduct of prospective witnesses. Indeed, in requiring the production of this type of information, the Court in *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991), described the government's obligation as "a constitutionally derived duty to search for and produce impeachment information . . . ."

72. The Supreme Court has recognized ". . . that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. at 419, 115 S.Ct. at 1555 (1995). The *Kyles* decision was followed by the Second Circuit in *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) ("the individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation"). *Kyles* was also followed by the Ninth Circuit in *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995). The *Hanna* Court vacated the conviction and remanded for an evidentiary hearing to explore "inconsistencies" between the arresting officer's testimony and his conversations with fellow officers. *Id.* at 1460-1461.

73. Mr. Kajtazi specifically requested the substance of any and all inducements, promises, compensation or consideration, broadly defined, which the government has held out to witnesses or which a witness subjectively anticipates to receive in exchange for testimony or assistance. In this specific case form the early production of discovery material, it appears that on October 29, 2015 – 282.5 grams of cocaine were "seized from Kusthrim Demaj in his Ft. Lee, NJ home and then on January 20, 2016 – 274.3 grams of cocaine were seized from Mr. Kusthrim Demaj at 628 North Avenue, New Rochelle, NY yet Kusthrim Demaj was not detained but free to "commence" conversations in February, 2016 with Biba Kajtazi.

Whereas, the government has indicated that Kusthrim Demaj is not a cooperating witness, it is difficult to understand how with seizures of cocaine from Kusthrim Demaj in October, 2015 and January, 2016 he was still free to commence conversations with Biba Kajtazi in February, unless he was given "consideration" by the agent of the government, or other confidential informant of the government.

74. The government has a constitutional obligation to disclose any and all consideration which is held out to a witness or which the witness subjectively hopes for and anticipates since such consideration directly gives rise to the inference of bias or interest. *See, generally, United States v. Mayer*, 556 F.2d 245 (5th Cir. 1977) (cross-examination of a prosecution witness who has had prior dealings with the prosecution or other law enforcement officials "ought to be given the largest possible scope [citation omitted];" conviction reversed). *Id.* at 248. A common example of such matter which must be disclosed to the defense is the making of promises or the holding out of other inducements for a witness to cooperate and testify against the defendant. *See, e.g., United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977); *Annunziato v. Manson*, 566 F.2d

410 (2d Cir. 1977); *Boone v. Paderick*, 541 F.2d 447 (4th Cir.), *cert. denied*, 430 U.S. 959, 97 S.Ct. 1610 (1977); and *United States v. Tashman*, 478 F.2d 129 (5th Cir. 1973).

75. The duty of the government to disclose this information is an affirmative one and the ignorance of one prosecutor as to promises made to a government witness by another prosecutor does not excuse the failure to disclose. *Giglio v. United States, supra.* The obligation to disclose includes the total compensation or benefits paid to or expected by each witness. *United States v. Leja*, 568 F.2d 493 (6th Cir. 1977). The government must disclose both "the stick and the carrot," including threats to prosecute. *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976).

76. Numerous examples exist which make the principle of "consideration" clear. *United States v. Sutton, supra* (witness rendered a statement as an inducement to government informant); *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979) (witness' attorneys fees paid by State of Florida); *United States v. DiCarlo*, 575 F.2d 952 (1st Cir. 1978), *cert. denied*, 439 U.S. 834, 99 S.Ct. 115 (1978) (assistance in the business world); *United States v. Garza*, 574 F.2d 299 (5th Cir. 1978) (information provided would result in no other indictments, heroin conspiracy indictment dismissed, bond in prior conviction on appeal would be lowered); *United States v. Croucher*, 532 F.2d 1042 (5th Cir. 1976) (error to refuse defense counsel to cross-examine informer about prior arrests, other than ones resulting in convictions for felonies or misdemeanors involving moral turpitude); *United States v. Bonanno*, 430 F.2d 1060 (2d Cir. 1970), *cert. denied*, 400 U.S. 964 (1971) (failure to disclose outstanding indictment); and *Patriarca v. United States*, 402 F.2d 314 (1st Cir.), *cert. denied*, 393 U.S. 1022, 89 S.Ct. 633 (1969), *rehearing denied*, 393 U.S. 1124, 89 S.Ct. 987 (1969) (information provided would be brought to the attention of prosecution in other pending action; family assigned to protective custody). These examples, of course, are only intended to make the principle clear and do not exhaust the range of possibilities.

77. The defendants have moved for specific information regarding the prior occasions when each witness gave testimony or otherwise made statements relative to the facts in this action. Witnesses' statements which are at least, in part, exculpatory and/or important for impeachment should be produced. *United States v. Miller*, 529 F.2d 1125 (9th Cir. 1976), *cert. denied*, 426 U.S. 924, 96 S.Ct. 2634 (1976); *United States v. Quinn, supra; United States v. Five Persons, supra;* and *United States v. Thevis, supra.* Witnesses' statements or other information which has been recorded on so-called 302 Forms by agents of the government which contain exculpatory material should also be disclosed. *Brady v. Maryland, supra.*

78. Likewise, Mr. Kajtazi's request for the substance of all occasions known to the government on which an informer, accomplice or co-conspirator has previously testified, even if no direct relationship to the instant case is apparent, should be granted. A defendant should be afforded the widest possible latitude in investigation and cross-examination. In *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975), the point is clearly illustrated. There, a defendant was charged in an Iowa proceeding with a drug offense. The conviction was obtained with the involvement of a paid informer who had worked in such a capacity in other jurisdictions, including Michigan. In light of the witness' modus operandi and his desire to maintain a continuing relationship as an informant with the law enforcement agencies, and his bias, it was a denial of due process to have refused to provide the defendant access to the informant's testimony in an earlier proceeding involving a separate drug sale in Michigan. Similarly, it amounts to a denial of due process in this instance to refuse to provide the requested information in this case.

79. It has also been held that where a government employee serves as a prosecution witness, the defendant is entitled to have access to his or her government personnel file

in order to ascertain whether there is information within it which could be of impeaching nature. *United States v. Deutsch*, 475 F.2d 55, 58 (5th Cir. 1973), *rev'd on other grounds, United States v. Henry*, 799 F.2d 203 (5th Cir. 1984). Similarly, in *United States v. Morell*, 524 F.2d 550, 552-55 (2d Cir. 1975), the Court of Appeals held that defense counsel were entitled to impeaching information in the confidential file of an informant witness. *See also, United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946). As pointed out by one commentator, "This information is extremely valuable to the criminal or civil practitioner in thoroughly investigating and preparing any cases where the credibility of a police officer is at issue." Snyder, Discovery of Police Personnel Files in Criminal Proceedings, 52 Fla. Bar. J. 119, 122 (1979).

80. In sum, the right of counsel for the accused to confront, cross-examine and impeach is cherished and remains the means by which "the scope and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105 (1974) (Burger, C.J.). Our specific requests for impeaching information are highly material for precisely this venerable mission. *See*, generally, *United States v. Opager*, 589 F.2d 799 (5th Cir. 1979). Therefore, the prosecution should be ordered to disclose the requested information or to show good cause for their failure to comply. *United States v. Agurs*, 427 U.S. 97, 106, 96 S.Ct. 2392 (1976); *Brady v. Maryland*, 373 U.S. 83,

83 S.Ct. 1194 (1963).

81. It is respectfully requested that the defense motion for pre-trial disclosure of all *Brady* material be granted.

82. The recent decision by the Second Circuit in In re United States (*United States v. Coppa*), 267 F.3d 132 (2d Cir. 2001) does not change or limit the District Court's ability to order pre-trial disclosure of *Brady* and impeachment evidence. Indeed, the Second

Circuit in *Coppa* made clear that "[t]his case presents no occasion to consider the scope of a trial judge's discretion to order pretrial disclosures as a matter of sound case management." *Coppa*, 267 F.3d at 146. In a multi-defendant, multi-conspiracy, multi-drug case such as this, sound case management requires early disclosure of impeachment and *Brady* material. *Cf. United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001) (right to waive undisclosed *Brady* material cannot be waived through plea agreement), *cert. granted*, 122 S.Ct. 803 (2002).

83. Counsel specifically reserves the right to make additional requests for the material covered above at the time this motion is argued, or at such other time as the existence of such materials shall become known to counsel for the defendant, and it is respectfully requested that the prosecution be admonished that its duty under *Brady/Giglio* is a continuing one.

VII

MOTION FOR DISCLOSURE OF EVIDENCE PURSUANT TO RULES 404(b), 608 AND 609 OF THE FEDERAL RULES OF EVIDENCE

84. Pursuant to Rules 12(b)(4), (d)(1) and (2) of the Federal Rules of Criminal Procedure, and Rules 104(a) and 404(b) of the Federal Rules of Evidence, the defendants respectfully request that the government notify the defendant of any evidence that the government contends would be admissible under Rule 404(b) of the Federal Rules of Evidence.

85. The defendants also request pretrial disclosure of any other evidence the government intends to use to impeach the defendants' credibility if they should choose to testify. In the event the government intends to use such evidence, the defendants request a pretrial hearing to determine the admissibility of such evidence.

86. The defense should be put on notice of the exact nature of this evidence, the witnesses pertaining thereto, the documents in support thereof, and the theory upon which the

government asserts that admissibility rests. By so notifying the defense in advance of trial, the defendant can file appropriate motion(s) *in limine* prior to trial and afford the Court the occasion to make pretrial determinations regarding the admissibility of any potential Rule 404(b) evidence proffered by the prosecution.

87. The defense requests discovery of all information pertaining to the character and/or conduct that may be used to impeach any witness the government intends to call.

88. The pretrial determination of the admissibility of this evidence question will serve to ensure the smooth operation of the trial, eliminate possible extraneous objections and assist both the government and defense counsel in the presentation of evidence.

VIII

MOTION FOR DISCLOSURE OF WITNESS STATEMENTS

89. Under 18 U.S.C. § 3500 (the "Jencks Act"), a defendant is entitled to witness statements after the witness has completed his or her testimony on direct examination. This Court has, on a case-by-case basis, invoked its discretion to require production of Jencks Act statements in advance of the trial so that unnecessary delays will not take place during the course of the trial.

90. Mr. Kajtazi requests the Court to order the government to deliver to counsel immediately, but in no event not later than four weeks prior to the date of the trial, the following:

> a. any statement, however taken or recorded, or a transcription thereof, if any, made by the witness(es) to a grand jury;

b. any written statement made by a witness that is signed or otherwise

c. adopted or approved by the witness;

d. any stenographic, mechanical, electrical or other recording transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement;

e. any and all rough notes of witness interview(s) taken or obtained in any investigation of the defendant including federal, state, local and other investigations whether or not the contents thereof have been incorporated in official records;

f. any notes and memoranda made by government counsel during the interviewing of any witness intended to be called by the government in its direct case. *Goldberg v. United States*, 425 U.S. 94, 101-108 (1976); and,

g. all surveillance reports made or adopted by a witness. *United States v. Petito*, 671 F.2d 68, 73 (2d Cir. 1932).

91. In addition to avoiding unnecessary delays, sufficient pretrial delivery of *Jencks* material also insures that the defendant's fundamental rights to a fair trial and due process are safeguarded.

IX

MOTION FOR PRESERVATION OF ROUGH NOTES AND OTHER EVIDENCE

92. Mr. Kajtazi moves for an order of this Court requiring all government agents and officers who participated in the investigation of the defendants in this case to retain and preserve all rough notes taken as part of their investigation whether or not the contents of the notes are incorporated in official records.

93. This motion is made so the trial court can determine whether disclosure of the notes is required under *Brady*, *Agurs*, *Giglio* and/or the Jencks Act (18 U.S.C. §3500) or the

Fifth and/or Sixth Amendments of the United States Constitution.

94. Mr. Kajtazi also requests an order of this Court requiring the government to preserve and protect from destruction, alteration, mutilation or dilution any and all evidence acquired in their investigation of the defendants.

X

MOTION FOR GRAND JURY TRANSCRIPTS

95. Mr. Kajtazi moves the Court, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(C)(i), for disclosure of transcripts of all testimony before and all exhibits considered by the grand jury that indicted Mr. Kajtazi. The Court should order production of the transcripts because defendant has a particularized need for the transcripts, outlined below, which outweighs the grand jury policy of secrecy. *See, e.g., Pittsburgh Plate Glass Company v. United States* , 360 U.S. 395, 400 (1959); *see also, e.g., Dennis v. United States*, 384 U.S. 855, 868-75 (1966).

96. Specifically, Mr. Kajtazi is the subject of a bare bones Indictment that does not state any particular acts or overt acts that he allegedly committed in the course of the conspiracy. Except for the names of law enforcement officers and others in various interception applications, Mr. Kajtazi has no information as to who the witnesses against him will be. The particularized need justifying disclosure is so that Mr. Kajtazi is informed of what evidence actually exists against him, and so he can intelligently make a decision as to his course of action. For these reasons, the grand jury transcripts and evidence should be disclosed to Mr. Kajtazi.

97. Specifically, it should be determined of the Grand Jury was instructed on the hearsay nature of the conversations on audio tapes of Kusthrim Demaj and Biba Kajtazi. If the Grand Jury was made aware of the fact that Kusthrim Demaj was not interpreting the language on the tapes, but rather a third par\ty non participant making the interpretation. Was the Grand Jury properly instructed on per missal or impermissible hearsay?

XI

MOTION TO CONTROVERT INTERCEPTION ORDERS AND SUPPRESS EVIDENCE

98. Several telephone conversations in which Mr. Kajtazi was an alleged participant were recorded during the execution of a series of interception orders, making him an aggrieved person as defined by 18 U.S.C. §2510(11).[1] Mr. Kajtazi moves to controvert the pertinent interception orders and to suppress the intercepted communications pursuant to 18 U.S.C. §2518(10)(a).

99. Counsel has been provided with various interception applications, orders, ten-day reports and sealing orders. However, as it will be set forth herein, counsel does not have all such documentation. As a consequence, your deponent will endeavor to controvert the interception orders but, counsel reserves his right to supplement, or otherwise modify, this motion when the government provides the information sought herein.

100. The following is a summary of all of the orders issued which are relevant to the instant case and known to the defense:

a. On or about August 24, 2015, the Hon. James Cott United States District Judge, Southern District of New York (SDNY), issued an Order Pen Register a 60-day period, occurring over cellular telephones assigned call 917-407-9616 numbers assigned to Biba Kajtazi.

b. On or about October 28, 2016, the government obtained a "Renewal" of Pen Register of the same number 917-407-9616 more than 60 days had passed from obtaining the original order and order and obtaining a new order. NO valuable information was

obtained and no renewal should have been granted or new petition granted.

c. On December 21, 2015, a renewal of the Pen Register request was signed by Christopher Kaley for the same number of Biba Kajtazi 917-407-9619.

101. In addition to the foregoing, several interception applications refer to various pen register and trace and trap devices. Counsel requests that the government provide the defense with all information pertaining to trace and trap or pen register devices, including the results of any such orders, the orders themselves and any applications requesting such orders.

102. Counsel has not been provided with all of the interception applications, orders, ten-day reports and sealing orders as set forth above,

103. As a consequence, counsel requests that the following information be provided to the defense so that counsel may supplement its motion to controvert the interception orders and suppress evidence obtained:

1. A copy of each and every search warrant issued which are relevant to this case.

2. A copy of each and every written search warrant application together with any supporting affidavit.

3. A copy of each voice recording, stenographic transcript and/or long hand record with respect to any oral search warrant application.

4. A copy of any search warrant inventory return.

5. The time and date when the United States Government entered in to the investigation of the defendant and/or any co-defendant relative to the instant matter.

6. Whether the United States Government, including any police officers, officials or United States prosecutors had any involvement in the instant case.

7. In addition to the foregoing, provide the following to the defense relative to any pen register and trap and trace device orders and any interception orders, etc.

   a. A copy of all tape recordings which are the subject of all intercepted conversations on each of the interception orders listed above.

   b. Any and all progress reports.

   c. All minimization directive and/or orders.

   d. Copies of any all warrants, applications and supporting affidavits.

   e. Copies of any transcripts prepared by the government relative to any intercepted conversations whether the government believes it will use such statements or not.

   f. Copies of any and all sealing orders.

   g. The results of any trace and trap or pen register device as listed above.

   h. All logs and surveillance reports.

104. The calls alleged to involve Mr. Kajtazi, which make up the bulk of the government's case against him, were intercepted during the months of April of 2016. The communications were purportedly between Mr. Kajtazi and co-defendant Kustrim Demaj and were intercepted pursuant to the Demaj . interception orders.

105. Each application for these two interception orders is supported by an affidavit submitted by Agent Christopher Kaely, Task Force Agent with the ICE. A review of each affidavit reveals that they rely upon, and incorporate by reference,

each of the previous interception applications and orders, as outlined above, to supply the necessary probable cause for their issuance. At the beginning of this probable cause chain is the Demaj I interception order.

106. Recordings of unlawfully intercepted communications may not be used as evidence in any trial pursuant to 18 U.S.C. §2515. In the instant case, the defendant did not consent to the monitoring and recording of his conversations nor was there any consent given by any other individual to monitor and record his conversations.

107. 18 U.S.C. §2518(3) provides that an interception order may only be granted where:

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense …;
>
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> (d) … there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

108. Furthermore, 18 U.S.C. §2518(5) provides that no interception order "may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization."

109. A review of the Demaj I interception application reveals that sufficient probable cause did not exist for the issuance of that interception order. Furthermore,

the appropriate necessity to obtain certain interception orders was not presented. Additionally, it is clear that the interception orders should have terminated upon the attainment of the investigative objectives, which occurred well before the purported communications between Mr. Kajtazi and Mr. Demaj took place.

A. Failure to Establish The Requisite Necessity

110. The Federal Wiretap Statue requires that each application for an interception order must contain a "full and complete statement" establishing that normal investigative procedures have been tried and failed or, that they appear reasonably unlikely to succeed. 18 U.S.C. §2518(1)(c).

111. In the *United States v. Lilla*, 699 F2d. 99 (2d Cir. 1983), the Second Circuit Court of Appeals suppressed the fruits of a New York State-issued eavesdrop warrant. In pertinent part, the *Lilla* Court observed as follows:

> [t]he requirement of a "full and complete statement" regarding procedures attempted or considered prior to the application for a wiretap serves both to underscore the desirability of using less obtrusive procedures and to provide courts with some indication of whether any efforts were made to avoid needless invasion of privacy. Like other courts, we reject generalize the in conclusionary investigative procedures indicating that they would prove unsuccessful.

Id. at 104.

112. The *Lilla* Court also recognized the observation by the United States

Supreme Court that the necessary requirement is:

> ...simply designed to assure that wire tapping is not resorted to in the situation where traditional investigative techniques would suffice to expose the crime. U*nited States v. Kahn*, 415 US 143, 153(n)(12)(1974).

Id. at 102.

> Indeed, the Court went on to explicitly recognize that Congress has articulated a preference for more conventional investigative techniques such as informant infiltration, physical surveillance and pen registers.

113. It was, therefore, the intent of Congress that the "full and complete statement" be based upon the particular investigation at hand. Indeed, the Ninth Circuit Court of Appeals has recognized that the reason for requiring factual allegations regarding necessity:

> Is to prevent the government from making general allegations about classes of cases and thereby sidestepping the requirement that there be necessity in the particular investigation in which an wiretap is sought.

United States v. Ippolito, 774, F2d. 1482, 1486 (9th Cir. 1985).

114. The Second Circuit Court of Appeals in *Lilla*, *supra*, rejected generalized and conclusory statements that other investigative procedures would prove unsuccessful. Holding that the eavesdrop application failed to establish the statement of necessity, the court rejected the government's generalized intention that a far reaching conspiracy was involved as the authorities failed to establish that the narcotics distribution activity at issue constituted any thing other than a "small time narcotics case." *United States v. Blackmon*, 273 F3d. 1204 (9th Cir. 2002).

115. Conclusory statements are insufficient to allow agents to utilize interception of communications as a first line of investigation. *United States v. Kalustian*, 529

F2d. 585 (9th Cir. 1975); *United States v. Ippolito*, 774 F2d. 1482, 1486 (9th Cir. 1985).

116. For example, in the *United States v. Castillo-Garcia*, 117 F3d. 1179, 1194 (10th Cir. 1997, overruled on other grounds by *United States v. Ramirez-Encarnacion*, 291 F.3d 1219 (10th Cir. 2002), the court found that the necessity requirement was not met when the affidavit relied on conclusory language asserting that no visual surveillance could take place without endangering the investigation. *See, also United States v. Carneiro*, 861 F2d. 1171, 1180 (9th Cir. 1988) (affidavits asserting difficulty of the investigation, lack of informants, and difficulty of physical surveillance did not satisfy necessity requirements because agents had not attempted to conduct traditional investigation, find informants or conduct physical surveillance until after the wiretap had already begun).

117. Here, the interception order application failed to sufficiently establish that an interception order was necessary. As a result, that order should be controverted and, in as much as the subsequent orders relied upon it, they should be controverted as well.

118. Similarly, the interception order wire tap., orders should be controverted as well. Each of the applications for those orders was supported by an affidavit of Agent Kaley. Certainly, by the time of the wire tap order, application, the claims that traditional law enforcement techniques have been tried and unsuccessful are belied by the information provided by Agent Kaly.

119. Observations of any meetings of Kusthrim Demaj and Biba Kajtazi were never attempted. Pole cameras could have been placed at 189th Street in the Bronx where Mr. Petrit Becaj allegedly took C-2 to sell drugs and where Biba Kajtazi works. No attempt was made to monitor Biba Kajtazi's normal place of business nor Kusthrim Demaj's place of business to monitor there traffic.

120. Therefore, for reasons set forth herein, this court must controvert the interception orders and suppress from use in evidence any communications obtained by such orders; or, in the alternative, conduct a hearing to resolve the factual issues raised herein.

Mr. Kusthrim Demaj is the ringleader of the organization, making decisions regarding purchasing of drugs and distribution to others such as Mr. C-2 or other co-conspirators.

121. Regarding the goals of ascertaining the location of stored drugs and the distribution of the proceeds of the conspiracy, it is clear that such information would only be made available through the use of traditional law enforcement techniques, such as arrests, cooperation and/or search warrants. After all, numerous interception orders had been acquired and thousands of calls monitored and recorded. It should have been obvious that these goals were not going to be attained by simple interception of communications especially since drugs were seized directly from Kusthrim Demaj on October 29, 2015 and January 20, 2016.

Investigation had been attained before the interception orders wherein Mr. Kajtazi's purported communications were monitored and recorded had been approved.

122. An evidentiary hearing to determine the factual information relative to whether and under what circumstances the government's investigation had obtained its objective. *United States v. Castellano*, 610 F2d. 1359, 1435 (S.D.N.Y. 1985).

D. <u>Defendant Reserves Right to Conduct a *Franks* Hearing</u>

123. As noted above, though much information has been provided to the defense, much information has been requested. As such, counsel reserves the right to ask for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154. As we have set forth above, agents have asserted that interception orders are necessary as an alternative to traditional investigative

techniques in conclusory terms.

124. In the event that information obtained through the discovery process warrants it, counsel reserves the right to request a *Franks* hearing.

XII

MOTION FOR LEAVE TO JOIN IN CO-DEFENDANTS' MOTIONS

125. This motion to adopt any motions filed by Mr. Kajtazi's co-defendants and is made in the interest of judicial efficiency. Permitting Mr. Kajtazi to join in his co-defendant's motions that apply to him either factually or legally will avoid duplicative filings by defense counsel. Mr. Kajtazi asks that he be deemed to join in any motion filed by a co-defendant unless he gives notice to all parties and the Court that he will not join the motion.

126. Wherefore, Mr. Kajtazi respectfully requests that the Court enter an order allowing him to adopt the motions filed by his co-defendants in this action.

XIII

MOTION TO *VOIR DIRE* GOVERNMENT EXPERTS OUTSIDE THE PRESENCE OF THE JURY

127. Mr. Kajtazi moves the Court to issue an order allowing him to *voir dire* any proposed government experts at trial outside the presence of the jury.

128. Rule 104 of the Federal Rules of Evidence states that preliminary questions regarding the competency of a person called as a witness "shall be determined by the Court."

129. A defendant is entitled to challenge the competence of the government's proposed experts and the admissibility of his/her testimony. *See, In re Chicago Flood Litig.*, No.

93 C 1214, 1995 U.S. Dist. LEXIS 10305, at *27 (N.D. Ill. July 19, 1995) (when question raised regarding basis for proffered expert testimony, court permitted voir dire outside the jury's presence).

130. A *voir dire* examination outside the presence of the jurors is the preferred method for determining the competency of an offered expert witness. *See, e.g., United States v. 68.94 Acres of Land*, 918 F.2d 389, 391 (3d Cir. 1990); *see also, e.g., United States v. Snow*, 552 F.2d 165, 168 (6th Cir. 1977) (defense counsel examined government expert outside of presence of jury regarding qualifications); *United States v. Henson*, 486 F.2d 1292, 1303 (D.C. Cir. 1973) (en banc) (voir dire of government expert outside the presence of the jury).

131. In the present case, complete discovery has not been received from the government, including the names of and summaries by the government's proposed experts, if any, pursuant to Rule 16 of the Federal Rules of Criminal Procedure. Therefore, this motion is made so that if the government subsequently identifies any experts (such as to identify questioned substances), defense counsel may *voir dire* the expert outside of the presence of the jury.

132. Therefore, Mr. Kajtazi requests that he be permitted to *voir dire* any government expert or experts outside the presence of the jury, as to both competency and admissibility.

XIV

MOTION FOR AUDIBILITY HEARING

133. Mr. Kajtazi moves the Court to hold an audibility hearing to determine whether any recordings that the government seeks to introduce at his trial are audible. The government has not formally identified what recordings it will introduce at trial. Once it

does so, an audibility hearing should be held.

134. As the Court is aware, if portions of any recording are unintelligible, and the unintelligible portions are so substantial as to render the recording as a whole untrustworthy, the recording must be suppressed. *See United States v. Arango-Correa*, 851 F. 2d 54, 58 (2d Cir. 1988); United *States v. Aisenberg*, 120 F. Supp.2d 1345 (M.D. Fla. 2000). Therefore, in advance of trial, the Court should conduct a hearing to determine the audibility of the recordings the government plans to introduce at trial.

XV

MOTION FOR SEVERANCE

135. Federal Rule of Criminal Procedure 14 permits a district court to sever the defendants "[i]f it appears that a defendant or the government is prejudiced by a joinder of defendants in an indictment. . . or by such joinder by trial together. . . " *See*, *United States v. Hernandez*, 85 F.3d 1023, 1028 (2d Cir., 1996).

136 In *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 993, 938 (1993), the Supreme Court advised that a district court should grant a severance under Rule 14 where there is a serious risk that a joint trial would compromise a specific trial right of a defendant or prevent the jury from making a reliable judgment about guilt or innocence:

> Such a risk might occur when evidence that the jury should not consider against the defendant and that would not be admissible if the defendant were tried alone is admitted against a co-defendant, for example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that the defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. *See*, *Kotteakos v. United States*, 328 U.S. 750, 774-775, 66 S.Ct. 1239, 1252-1253, 90 L.E.d. 1557 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against co-defendant also might

> present a risk of prejudice. *See*, *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.E.d.2d 476 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. *See*, eg., *Tifford v. Wainwright*, 588 F.2d 954 (CA5 1979)(*per curiam*). The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here.

137. The Second Circuit has long held that there is no precise test with respect to which factor should be utilized to resolve a Rule 14 motion. See, *United States v. Moten*, 564 F.2d 620, 627 (2d Cir. 1977), cert. denied, 434 U.S. 959, 974, 98 S.Ct. 489, 531 (1977). No single factor is itself dispositive; instead, the Court must decide whether the jury would be "reasonably able" to consider the evidence as to each defendant separately, independent of the evidence against his co-conspirator. The standard formulated in *United States v. Kahaner*, 203 F.Supp. 78, 81-82 (S.D.N.Y. 1962), aff'd., 317 F.2d 459 (2d Cir. 1963), cert. denied, 375 U.S. 836, 84 S.Ct. 74 (1963), is often relied upon:

> The ultimate question is whether, under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the Court's admonitory instructions and accordingly to collate and appraise independent evidence against each defendant solely upon the defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him?

138. The Court should sever Mr. Kajtazi's trial from his co-defendants because the risk of prejudicial spillover to Mr. Kajtazi is tremendous. Fed. R. Crim. P. 14. The Second Circuit has long recognized that "spillover prejudice" may require severance. *See*, eg., *United States v. Locascio*, 6 F.3d 924, 947 (2d Cir. 1993).

139. At a joint trial there would be a large quantity of prejudicial and damaging evidence which would be presented against the co-defendants which would certainly cause

substantial "spillover" prejudice to defendant Ahmed.

140. Mr. Kajtazi is charged only in Count 1 of this Indictment. A review of voluntary discovery so far received, as well as the criminal complaint which originally charged him in connection with this prosecution, reveals that he is alleged to have very little if any contact with any of the co-defendants. Indeed, there is very little evidence suggesting a knowing participation in a conspiracy of any nature. Trial of the other co-defendants will undoubtedly create spillover prejudice to Mr. Kajtazi.

141. The prejudice concomitant with a case's complexity is "particularly injurious" to defendants charged in a small proportion of the counts and who are implicated by only bits and pieces of the evidence. *United States v. Branker*, 395 F.2d 881, 882 (2d Cir. 1968). In *United States v. Capra*, 501 F.2d 267, 281 (2d Cir. 1964), *quoting*, *United States v. Rizzo*, 491 F.2d 215, 218 (2d Cir. 1974) *cert. denied*, 415 U.S. 990, 94 S.Ct. 2399 (1975), the Second Circuit stated that where the evidence against the "minor" defendants who request severance is "so little or so vastly disproportionate in comparison to that admitted against the remainder of the defendant[s]," the likelihood of spillover prejudice is greatly enhanced. *See*, *United States v. Gilbert*, 504 F.Supp. 565 (S.D.N.Y. 1980).

142. Mr. Kajtazi is no more than a minor defendant in the instant case. Therefore, "inevitable prejudice" to Mr. Kajtazi will result by the inexorable accumulation of evidence against the co-defendants herein. *United States v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965). As such, the Court should issue an order severing the indictment to avoid unnecessary prejudice to Mr. Kajtazi.

143. Therefore, for the reasons set forth above, defendant respectfully requests that an order severing the instant indictment be issued, together with such other and further

relief as this Court may deem just and proper.

XVI

MOTION FOR LEAVE TO MAKE OTHER MOTIONS

144. Mr. Kajtazi respectfully moves the Court for an order allowing him to make further and additional motions which may be necessitated by due process of law, by the Court's ruling on the relief sought herein, by additional discovery provided by the government or investigation made by the defense, and/or by any information provided by the government in response to the defendant's demands.

145. The specific requests contained in these motions are not meant to limit or preclude future requests by the defendant for further relief from this Court as appropriate. The reason additional motions should be allowed is that filing these motions at this time would not be an efficient use of the Court's and the parties' time and resources, as many of these motions may not be necessary based on what evidence the government does or does not intend to introduce at trial, or by other pre-trial developments in this case. Additionally, other motions may be required depending on the Court's rulings on the motions made *supra* and other information or documents disclosed by the government.

146. Specifically, Mr. Kajtazi reserves the right to make the following motions at an appropriate time in the case, in addition to other motions that may be appropriate: 1) motions *in limine* related to evidence the government, Mr. Kajtazi or co-defendants intend(s) to introduce at trial; 2) *ex parte* motion pursuant to Federal Rule of Criminal Procedure 17(b)/(c) for an order allowing the pretrial production of documents; 3) motion pursuant to Federal Rule of Criminal Procedure 15(a) for pre-trial deposition of a witness; 4) motion for pre-trial production of government summaries pursuant to Federal Rule of Evidence 1006; 5) motion

for a supplemental jury questionnaire or for counsel participation in *voir dire*; 6) motion for additional peremptory challenges; 7) Federal Rule of Criminal Procedure Rule 29 motions at trial; and, 8) motion for various non-pattern jury instructions.

147. For the foregoing reasons, the Court should issue an Order permitting Mr. Kajtazi to make other motions as requested above.

DATED: 7/1/16

Respectfully submitted,

Anthony Suarez

TO:

Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

Indictment No. _____

v.

BIBA KAJTAZI, Et al,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on June __2016 I electronically filed defendant's Omnibus Motion dated June____2016 on behalf of the interested parties with the Clerk of the District Court using the CM/ECF system.

I hereby certify that on June____2016 copy of the foregoing was also delivered to the following using the CM/ECF System.

ASSISTANT UNITED STATES ATTORNEY