IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v- Case No.: 19-CR-227

JOSEPH BONGIOVANNI,
PETER GERACE, JR.,

Defendants.

UNITED STATES OF AMERICA,

-v- Case No.: 23-CR-37

PETER GERACE, JR.,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR DISMISSAL AND/OR THE IMPOSITION OF OTHER SANCTIONS

Dated: May 22, 2024

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[REDACTED VERSION]

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I. INTRODUCTION

The US Attorney's Office for the Western District of New York (US Attorney's Office) has interfered with various constitutional protections afforded to Peter Gerace under the Fifth and Sixth Amendment. Among the most egregious violations are those related to Mr. Gerace's Right to Counsel and related protections and privileges.

The government has repeatedly encroached on Mr. Gerace's right to counsel. Early in the case, the government created a conflict for Mr. Gerace's original attorney, Joel Daniels, by presenting false allegations manufactured by a key government witness who

has repeatedly demonstrated a propensity for fabricating allegations against Mr. Gerace and any person associated with him, including legal counsel. This resulted in the withdrawal of Mr. Gerace's first attorney, a highly-respected member of the bar.

Last year, as Mr. Gerace remained detained pending trial, and with a January 2024 trial date quickly approaching, the government crossed several lines that are drawn by our constitution to provide Mr. Gerace with a fair opportunity to defend himself through his representation of counsel and their agents.

First, in November, the US Attorney's Office subpoenaed an investigator hired to work for and at the direction of Mr. Gerace's prior counsel, Steven Cohen, as part of the defense team. In order to secure compliance with its subpoena, the government bypassed constitutional protections and DOJ protocol by pushing the false narrative that Mr. Lawrence was not an investigator for the defense.

Then, utilizing tangible evidence obtained from Mr. Lawrence, the government hastily launched an investigation into several individuals, including Mr. Gerace's current co-lead counsel, Eric Soehnlein.

The government moved to disqualify Mr. Soehnlein in a motion that was poorly researched and factually incomplete. The government knew that the motion would delay Mr. Gerace's ability to proceed with trial. As anticipated, Mr. Gerace was severed from Joseph Bongiovanni, his co-defendant, and he was unable to proceed on his January 2024 trial date.

After approximately five months of litigation related to the government's motion to disqualify, this Court denied the government's motion finding that there was no reasonable possibility that Mr. Soehnlein was involved in or a witness to a crime.

The matter seemingly resolved, Mr. Soehnlein was able to communicate with his client for the first time in nearly half a year, and despite the lengthy setbacks, the defense was in the process of regrouping and planned to file motions related to speedy trial and other dispositive motions so this case could quickly advance towards dismissal or a trial.

The US Attorney's Office then, to the surprise of everyone, filed a new motion to disqualify Mr. Soehnlein which did not provide any new evidence or information. It merely attempted to repackage its arguments and take another shot at Mr. Soehnlein and Mr. Gerace's constitutional protections, which he has already fought very hard to protect.[1]

The actions of the government surrounding the litigation to disqualify Mr. Soehnlein have been branded by bad faith, including: (1) the manner in which the Lawrence recording was obtained; (2) the manner in which the first motion to disqualify was made, including legal omission of safe harbor and factual omission of May 13

[1] In order to defend against the government's first motion to disqualify Mr. Soehnlein, Mr. Gerace was subjected to lengthy proceedings which have already added more than half a year of time to his pretrial detention. Of course, the alternative would have been to acquiesce to the government's attack on his right to choose Mr. Soehnlein as his counsel, which would have also caused enormous delay and forfeited his constitutional right to counsel of his choice.

conference; and (3) the manner in which the more recent motion to disqualify has been brought.

Although the issue of bad faith was alluded to during the course of prior argument, the defense has not previously moved for relief based on a finding of bad faith, and the Court has not requested briefing on the issue.

However, given the posture that the case is now in, it is appropriate for this Court to consider whether this ongoing line of litigation against Mr. Soehnlein is based on intentional or reckless behavior indicative of bad faith by the government.

Such a determination invites dismissal of the indictment, and/or other sanctions, including disqualification of the US Attorney's Office, attorney fees, and other relief.

II. BACKGROUND

This case started in 2019 with the indictment of Joseph Bongiovanni. Peter Gerace was charged in the second Superseding indictment in 2021, over three years ago. The history of this case is lengthy and convoluted.

This section of the memorandum addresses only the background information that is relevant to the government's historical and ongoing attempts to interfere with Mr. Gerace's constitutional right to counsel of his choice.

This section provides supplemental background information for Mr. Gerace's Response to the US Attorney's new motion to disqualify Mr. Soehnlein, filed separately,

and the cross-motions for relief, addressed below, including the request for dispositive relief including dismissal of the indictment.

The five sub-sections of background information are: (A) Prior Interference with Defense Counsel; (B) Subpoenaing a Defense Investigator Without a Crime Fraud Order; (C) The Motion to Disqualify Eric Soehnlein; (D) The May 1, 2024 Status Conference; and (E) The Government's New Motion to Disqualify Eric Soehnlein.

A. PRIOR INTERFERENCE WITH DEFENSE COUNSEL

Before the recent efforts by the US Attorney's Office to have Mr. Soehnlein removed, the government made other attacks on defense counsel. In those prior instances, the government seemingly relied on one of its most notoriously incredible witnesses, Katrina Nigro.

The history of the government's behavior related to defense counsel is relevant because it establishes a pattern of conduct and it directly bears on the determination regarding whether the US Attorney's Office has engaged in strategy to intentionally or recklessly interfere with defendants' right to counsel in this case.

1. The Government's Reliance on Katrina Nigro, a Witness with Substantial Credibility Issues

The government has repeatedly made charging decisions and strategic decisions based on information and testimony provided by Mr. Gerace's ex-wife, Katrina Nigro. Unfortunately, Ms. Nigro has displayed a propensity to fabricate allegations against not

only her ex-husband, but anyone that she believes is within his orbit, including his counsel. Despite knowing that Ms. Nigro is completely unreliable, as demonstrated by her constant revisions of her stories, the government has relied upon Ms. Nigro's falsities in at least one instance that resulted in Mr. Gerace being deprived of his right to counsel of his choice.

a. Nigro's Relevant Communication with Federal Agents and Grand Jury Testimony

It appears that Ms. Nigro met with federal agents for the first time on [redacted] Mr. Bongiovanni had been indicted. Ms. Nigro and Mr. Gerace had just went through an "acrimonious" divorce. Dkt. # 856 at 74.

[redacted]

During that interview, Ms. Nigro made rambling, wide-ranging allegations. [redacted]

[redacted]

[redacted][2]:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[2] This is not an all-inclusive list of Ms. Nigro's fabrications. This list is provided to highlight a couple of significant examples of altered testimony, including examples that related to defense attorneys.

[redacted]

it appears federal prosecutors did not follow up with Ms. Nigro for almost a year.

On [redacted], Ms. Nigro had a follow up meeting. During this meeting, Ms. Nigro informed federal authorities that [redacted]

[redacted]

[redacted]

On [redacted] Ms. Nigro met with the FBI and federal prosecutors to [redacted]

On [redacted], Ms. Nigro met with federal authorities to discuss [redacted]

On [redacted] At this point, Mr. Gerace had been

[4] On October 11, 2019, Ms. Nigro was driving under the influence and at approximately 9 p.m. that evening, she crossed the double yellow line on Bowen Road in the Town of Aurora and drove head-on into another vehicle containing multiple bystanders. Two individuals in the other vehicle were injured.

charged and Mr. Daniels had formally appeared on his behalf. [redacted]

At some point prior to [redacted], Ms. Nigro apparently sat for an interview with Lou Michel from The Buffalo News to discuss Mr. Gerace in an apparently attempt to gain publicity from this case.[5]

On [redacted], federal authorities questioned Ms. Nigro about [redacted]

[5] The defense has not yet been able to locate any article regarding this interview.

[redacted]

Throughout much of [redacted] there was contact between Ms. Nigro and the FBI regarding [redacted]

On [redacted], Ms. Nigro met with federal authorities. In that meeting, Ms. Nigro made several statements that directly [redacted]

On [redacted] Ms. Nigro was interviewed by the authorities again. In that interview, [redacted]

[redacted]

At this time, no 3500 exhibits have been provided in regard to any additional trial preparation in advance of the Bongiovanni trial, but the departure in her testimony at trial suggests that at some point prior to trial, she changed the material facts within her stories, again, and before testifying at trial, she had settled on a more reasonable narrative.

b. Nigro's Trial Testimony

After severance of defendants, the case against co-defendant Bongiovanni proceeded to trial in February 2024. During its opening statement, on four occasions, the government promised the jury that it would hear about "envelopes of cash" or "cash envelopes" provided by Mr. Gerace to Mr. Bongiovanni. Tr. of Gov't Opening Statement at 7:24, 63:16, 66:20, 91:12. The government also promised the jury it would hear from Ms. Nigro about envelopes being passed to Bongiovanni. *Id*. at 63:16-21.

At trial, Ms. Nigro was the only witness who testified about envelopes, and her testimony concerned only two instances where she claimed to provide Mr. Bongiovanni

[6] [redacted]

with envelopes—much different when the government promised testimony in the opening statement of envelope exchanges happening "every so often."

Ms. Nigro further admitted she did not know what was in the envelopes, nor was she told what their purpose was. She testified that she "could just feel it" was cash. *Id*. at 47:11.

Ms. Nigro further testified that these incidents occurred in 2015 in about three-month increments before and after she and Mr. Gerace encountered Mr. Bongiovanni at a dinner on Hertel Avenue. *Id*. at 66:21, 69:1. Ms. Nigro also testified about a supposed birthday card that was given by Mr. Gerace to Mr. Bongiovanni; she initially claimed that it contained $5,000 and made comments about the size of the gift. On cross exam, however, Ms. Nigro acknowledged she actually did not know the amount of money that was in the envelope. The $5,000 figure was just entirely made up. *Id*. at 58.

Not surprisingly, Ms. Nigro's trial testimony departed wildly from prior statements. [redacted]

c. Ms. Nigro's Propensity to Lie

Ms. Nigro's statements and testimony have frequently changed on both material and collateral issues. She has made inconsistent statements about [redacted]

The clear falsity of Ms. Nigro's testimony, and the outlandishness of the allegations, should frame the way the government handled allegations as they related to Mr. Bongiovanni's former counsel, Mr. Cambria, and Mr. Gerace's former counsel, Mr. Daniels. The allegations were unbelievable on their face, but at every turn, the government learned additional facts that should have called the credibility of Ms. Nigro into question.

Rather than perform a proper analysis of the allegations, the government allowed the allegations against Mr. Gerace's counsel to rest for fifteen months, and then

[redacted]

weaponized the allegations at a time and in a manner that did irreparable damaged Mr. Gerace's Sixth Amendment Rights, including the right to counsel of his choice and speedy trial rights.

2. Disqualification of Paul Cambria, Bongiovanni's Counsel[8]

Before Mr. Gerace was charged in the Second Superseding Indictment, the Government prosecuted Mr. Bongiovanni for over 16 months. During this time, the government made its first attack on defense counsel, specifically Mr. Bongiovanni's counsel of choice, Paul Cambria[9].

The details surrounding the government's efforts to disqualify Mr. Cambria were described by co-defendant's counsel in its Speedy Trial Motion. Dkt. # 916-1 (Redacted version of Memorandum in Support of Mr. Bongiovanni's Speedy Trial Motion).

When the government moved to disqualify Mr. Cambria at the beginning of the case, Mr. Bongiovanni opposed the disqualification, and the parties litigated Mr. Cambria's ability to continue as Mr. Bongiovanni's counsel. Dkt. # 28, 31.

[8] Although the efforts to remove Mr. Cambria do not directly implicate Mr. Gerace's constitutional rights, they are relevant as background information, because they are the starting point in a pattern of conduct to eliminate or compromise the defendants' first choice of counsel.

[9] Paul Cambria is a well-known and accomplished attorney from Buffalo, NY who has handled many high-profile cases, nationally. Andrew Z. Galarneau and Nicole Peradotto et al, *Larger Than Life: Why Paul Cambria, Lawyer to The Famous, Can't Stop Proving Himself,* The Buffalo News, June 22, 1997, https://tinyurl.com/BN062297. He has previously served as President of the New York State Association of Criminal Defense Lawyers Member and Chairman of the Criminal Justice Section of the New York State Bar Association. *See* https://tinyurl.com/CambriaBio.

Although various submissions related to this issue remain sealed from the docket, it is clear from the government's recent Response to the Mr. Bongiovanni's Speedy Trial motion, and other sources both public and otherwise, that the government initially took the position that Mr. Cambria had a conflict of interest due primarily to representation of other individuals by other attorney(s) within his firm.

On December 9, 2019, the Buffalo News reported Mr. Cambria as predicting that "it's part of a strategy to get rid of the more experienced defense attorneys." Phil Fairbanks, *Prosecutors try to disqualify noted defense lawyer in mob case*, The Buffalo News, Dec. 9, 2019, https://tinyurl.com/BN120919.

Had the government's disqualification efforts been confined to those conflict issues arising from other clients within his firm, they could likely have been resolved with appropriate precautions and thorough *Curcio* waivers. The issue of whether the conflict was waivable was never decided though, because upon information and belief, [redacted]

On February 28, 2020, Mr. Cambria moved to withdraw. Dkt. # 37.

In moving to withdraw, Mr. Cambria "echoed [his earlier] statements but indicated the protracted legal battle over his status was proving to be a distraction for his client." Phil Fairbanks, *Paul Cambria Withdraws from Defense of DEA Agent Linked to Mob Case*, The Buffalo News, Mar. 10, 2020, https://tinyurl.com/BN031020.

[redacted]

3. Disqualification of Joel Daniels, Gerace's Counsel

The first act of interference by the government against Mr. Gerace's choice of counsel was regarding well-respected and distinguished counsel, Joel Daniels.[10]

[10] Among the many awards Mr. Daniels has received, he was most recently the 2022 recipient of the Charles H. Dougherty Civility Award, an award provided to an attorney who demonstrates integrity, civility and decorum. *See* BAEC 135h Annual Awards Celebration | Charles H. Dougherty Civility Award - Joel Daniels, https://youtu.be/8WDu8e9BXP8 (last accessed May 20, 2024). Mr. Daniels record regarding ethics and civility is also replete with other accomplishments. When New York State Chief Judge Johnathan Lippman created the Commission on Statewide Attorney Discipline to conduct a comprehensive review of the state's attorney disciplinary system, hearings were held in August 2015 to determine what is working well and what can work better in the New York's attorney discipline process. Mr. Daniels was one of the well-respected lawyers who was asked to provide valued insight at one of the hearings. List of hearing speakers available at https://tinyurl.com/DanielsHearings.

[redacted] Mr. Gerace was not indicted until over a year later. In the interim, Mr. Daniels had communicated with members of the US Attorney's Office prior to charges being filed against Mr. Gerace.

Mr. Gerace was indicted on February 25, 2021. Dkt. # 89. The government did not move to conflict off Mr. Daniels. Mr. Daniels negotiated the terms of Mr. Gerace's release and appeared for him on March 4, 2021. Dkt. # 95. The Court set a scheduling order for pre-trial motions to be filed by July 7, 2020. Dkt. # 97. It was not until June 25, 2020, two weeks before substantial pretrial filings were due, that the government raised a conflict for Mr. Daniels to represent Mr. Gerace based on [redacted] Dkt. # 135.

The conflict against Mr. Daniels was one of the government's own making. In the grand jury, [redacted].[11]

[redacted]

[11] The information provided to the defense is that the government later elicited an admission from [redacted] comments regarding Mr. Daniels were false. If that is in fact the case, it is not entirely clear when that occurred.

At that time, Mr. Gerace felt he could not waive the conflict. [redacted], and that was too steep of a risk, so Mr. Gerace parted ways with his first choice of lead counsel.

Mr. Daniels was discharged as counsel on August 10, 2021. Dkt. # 177.

B. SUBPOENAING A DEFENSE INVESTIGATOR WITHOUT A CRIME FRAUD ORDER

On October 31, 2023, the United States Attorney's Office for the Western District of New York issued a grand jury subpoena seeking documents and testimony from Paul Lawrence, Mr. Gerace's prior private investigator in three criminal cases in this federal district court: 19-cr-227; 23-cr-37; and 23-cr-60[12]. The subpoena was signed by AUSA Tripi, the lead Assistant US Attorney in the prosecution of Mr. Gerace. (Exhibit B at 20-21.)

On November 1, 2023, Mr. Lawrence was served with the grand jury subpoena dated October 31, 2023. The subpoena sought Mr. Lawrence's testimony before the grand jury one week later on November 8, 2023. *Id.*

The subpoena also sought the following materials: [redacted]" *Id.*

[12] In preparing his defense, upon information and belief, Mr. Cohen and Mr. Gerace engaged the services of Paul Lawrence in early 2023. Mr. Lawrence worked at the direction of Mr. Cohen for several months during 2023. After Mr. Cohen was relieved of representing Mr. Gerace, Mr. Lawrence continued to work with Mr. Gerace's current counsel in investigating issues in this case and preparing Mr. Gerace's defense.

After, current counsel for Mr. Gerace learned of the subpoena, Mr. Lawrence was advised to retain counsel. Mr. Lawrence retained Mr. Eoannou.

Mr. Gerace confirmed to his counsel (1) that Mr. Gerace understood Mr. Lawrence to be part of the defense team; (2) that Mr. Gerace understood his communication with Mr. Lawrence to be privileged; (3) that Mr. Gerace understood any material produced by Mr. Lawrence, while acting at the direction of his counsel, was privileged; and (4) Mr. Gerace was not willing to waive any privilege related to Mr. Lawrence.

In conjunction with Mr. Eoannou, the defense drafted a Motion to Quash the Subpoena based on Mr. Gerace's standing to assert privilege regarding his defense investigator.

On November 6, 2023, the defense contacted chambers for this Court via email to advise the Court that the defense investigator had been subpoenaed and that Mr. Gerace did not waive his privilege. The defense inquired regarding the procedural steps to address the subpoena. The US Attorney's Office was copied on the email. (Exhibit B at 002-003.)

AUSA Tripi responded indicating that the motion would have to go to Judge Arcara because it was related to a grand jury matter. He added that "in a prior Court filing, counsel for Gerace stated in an affidavit that [redacted]

See Cohen Affidavit, August 14, 2023 (under seal), ECF No. 604-1. Thus, to the extent there is now a representation that this is the Gerace 'defense investigator,' such claim seems contradictory to prior sworn Gerace defense team representations." (Exhibit B at 002.)

Upon receipt of AUSA Trip's email, the defense located the filing by prior counsel and reviewed its contents for context. Mr. Cohen did not explicitly [redacted], but the content of the affidavit does appear to make that implication.

However, Mr. Cohen, Mr. Lawrence, and Mr. Gerace had all clearly advised the current defense team upon substitution of counsel that Mr. Lawrence was part of the defense team.[13]

The defense contacted AUSA Tripi via email. (Exhibit B at 004.) Initially believing that AUSA Tripi had relied on that affidavit in good faith and was not merely using it as a pretext to elicit testimony from the defense investigator, the defense acknowledged the content of Mr. Cohen's affidavit, but informed AUSA Tripi that the implication drawn from that affidavit is [redacted]

[13] Consistent with those representations, prior to the US Attorney Office's decision to subpoena Mr. Lawrence, the current defense team had at least one phone conference with Mr. Lawrence in which he was assigned investigative tasks based on his role as a member of the defense team.

Consistent with the belief that AUSA Tripi was acting in good faith, the defense asked for time to look into [redacted] what the defense knew to be factually accurate - that Mr. Lawrence was a member of the defense team and that he received direction by Mr. Cohen. The defense did not request that the subpoena be withdrawn or delayed indefinitely at that time. It was only requested that compliance be delayed from Wednesday, November 8, 2023, to Monday, November 13, 2023.

The Government refused to delay the return date of the subpoena and did not seek to discuss the issue further.

Defense counsel made an expedited effort to secure evidence that corroborated and confirmed that Mr. Lawrence was indeed part of the defense team for the duration of his involvement in this case and was consistently treated as such by prior counsel.

This evidence included an email sent in June 2023 from Mr. Cohen to Mr. Lawrence specifically indicating that Mr. Lawrence is part of the defense team.

Counsel for Mr. Gerace filed a Motion to Quash on the morning of November 7, 2024, requesting [redacted]

[redacted]

The following morning, [redacted]

[redacted]

Although the government has not provided [redacted]

> On or about August 11, 2023, *an investigator working with Gerace Attorney 1*, a person known to the Grand Jury and referred to herein as "Investigator 1," *was instructed by Gerace Attorney 1 to interview Crystal Quinn's mother and a friend of Crystal Quinn's mother* in order to generate and obtain statements which would advance a narrative that Crystal Quinn had been suicidal prior to her death.
>
> Case no. 23-cr-00099, Dkt. # 24 at 25-26 (emphasis added).

If, [redacted] he confirmed that he was acting at the direction of Mr. Cohen, [redacted] that Mr. Lawrence was part of the defense team.

[redacted] establishing that the interviews were conducted on behalf of Mr. Cohen would confirm that material associated with those interviews, including notes and/or tangible evidence, such as the recording, would be attorney work-product.

[redacted]

The government did not possess a crime fraud order when it secured Mr. Lawrence's compliance with its subpoena on November 8, 2023.[15]

Even though it appears that the US Attorney's Office [redacted] the government did not return the recording or delay its review until authorized to do so by a crime fraud order.

Instead, it appears that the US Attorney's Office immediately reviewed the recording and drew certain conclusions regarding the content of the recording. Then, based on the government's interpretation of those comments, without seeking to interview Mr. Lawrence again for clarification, the government used the recording as the basis to seek disqualification of Mr. Soehnlein.

C. THE MOTION TO DISQUALIFY ERIC SOEHNLEIN

1. The Initial Filing

In the late evening hours of November 21, 2023, two days before the Thanksgiving holiday, the government filed a sealed, *ex parte* motion to disqualify Mr. Soehnlein. Dkt. 666.

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[15] [redacted] then it certainly appears the Government acted without the authorization of such an order in November 2023.

The motion was made less than one week before Mr. Gerace and the defense team were to be provided with important Jencks disclosures relating to protected witnesses for the upcoming January 8, 2024 trial. By its own admission, the timing of that deadline drove the government's decision to file the motion to disqualify. {{ The government immediately used the motion as a vehicle to argue for more restrictions on the dissemination and sharing of discovery. Dkt. 697 at p. 22-23.}} *See, e.g.*, Dkt. 679 at 22. The Gerace defense team responded by filing a motion to unseal the motion to disqualify. Dkt. 670.

The following morning, and before the defense was aware of the allegations in the motion, a federal agent on the Gerace/Bongiovanni trial called Mr. Soehnlein. Feigning that the call was made in error, he expressed his view that Mr. Soehnlein should have a conversation with federal prosecutors – a move that, of course, would require Mr. Soehnlein to leave the defense team and discontinue his representation of Mr. Gerace.

The Court attempted to schedule a conference the following afternoon, but because of an incident on the Peace Bridge, the Court closed early, and due to the Thanksgiving holiday, the first appearance on the matter could not be scheduled until November 28, 2023. Dkt. 679.

At the November 28th appearance, the government argued: (1) the analysis of a *per se* conflict was "purely a matter of law" that required no judicial factfinding (Dkt. 679

at 3); and (2) that "grand jury secrecy" required that the allegations against Mr. Soehnlein be kept *ex parte* and not be shared with Mr. Gerace or his counsel. *Id.*

Both assertions made by the government were wrong as a matter of law.[16] *Fulton* and the other cases the government relied upon require judicial fact-finding like any other conflict inquiry.

Furthermore, it became clear that much of the motion referenced grand jury proceedings merely as background information, and the factual substance of the motion could have been disclosed[17], particularly when the motion so aggressively threatened to encroach on Mr. Gerace's Sixth Amendment protections.

During the appearance, this Court expressed skepticism regarding the ground and manner in which the government brought its motion. The government's position

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[16] The defense relies upon and adopts the briefing and oral argument on the Motion to Disqualify as part of the Record on this motion.

[17] To that point, at that appearance, the following colloquy occurred:

> Mr. Tripi: Yes. That is the ongoing grand jury investigation. The facts that have been redacted from the proposed filing. So, he would be able to see the case law that we cited, because you got to remember, Your Honor
>
> The Court: No, it's not going to happen. That's not going to happen. He needs to know.
>
> Mr. Tripi: Well Judge, he does. They moved to quash. They moved to quash. They know. They have access to the recordings, the drafts, and they lived through the – he lived through the events. So he does know –
>
> The Court: So he can figure it out for himself?
>
> Mr. Tripi: He can figure out a good portion of it.
>
> Dkt. # 679 at 6.

appeared to be "heavy handed," "incredibly unfair," and "wholly unprecedented." Dkt. # 679 at 7. The Court also expressed doubts that the government was "duty bound" to act as it had, inviting the government to provide any law or case to support its position in that regard. *Id*. at p. 12.

All parties acknowledged that the motion would likely delay the January 8, 2024, trial date.

Following the November 28th appearance, the government continued to maintain that it could not share the allegations with Mr. Gerace or counsel.

At an appearance on December 1, 2023, "[t]he Court proposed that the Government withdraw its' Motion to Disqualify and submit a new motion that includes only the facts that are relevant to disqualification." Dkt. # 686.

The parties appeared back in court the following week on December 8, 2023. AUSA Tripi indicated that the government had still not made a decision about how to proceed on the motion. Dkt. # 687. At that appearance, the Court also directed the Government to provide the defense with "everything as it relates to Attorney Soehnlein" so that the defense could be apprised of, and weigh in on, the allegations.

In the weeks that followed, the defense team became aware that prosecutors had reached out to Mr. Lawrence's attorney to discuss the statements made on the recording. Upon information and belief, Mr. Lawrence's attorney, Mr. Eouannou, consistently

represented to prosecutors at the US Attorney's Office that, if asked, Mr. Lawrence would exculpate Mr. Soehnlein. The government did not seek to interview Mr. Lawrence.

2. The Revised and Superseding Motion to Disqualify

On December 12, 2023 – three weeks after the government's initial motion -- the government filed a Revised and Superseding Motion to Disqualify Attorney Soehnlein. Dkt. # 691. The government represented the motion included [redacted]

The briefing on the motion was in excess of seventy pages. It was wholly wrong on the law and on the facts in several respects, including, but not limited to:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

In retrospect, more glaring than the factual and legal inaccuracies, was the factual and legal *omissions* from the government's 71-page motion.

The government did not reference the May 17, 2023, colloquy on the record before Judge Sinatra where Mr. Gerace's attorneys, Mr. Soehnlein and Mr. Cohen, [redacted] In other words, that conference eviscerates the government's theory that the witness list was filed with the corrupt intent of causing the judge to recuse himself. The colloquy occurred in the presence of and with the participation of AUSA Cooper, a member of the government's trial team.

Perhaps even more importantly, the government's motion failed to address or even reference 18 U.S.C. 1515(c), the safe harbor provision to the Obstruction of Justice statutes designed to protect defense attorneys for bona fide legal work done on behalf of their clients.

Simply put, to make its argument to disqualify Attorney Soehnlein, the government misconstrued or ignored applicable case law, declined to interview a witness that the government knew would exculpate Mr. Soehnlein, ignored facts that were

readily available to the government that would exonerate Mr. Soehnlein, and clearly misconstrued the record of the court appearance from June 21, 2023.

3. The Government's Supplement to its Motion

On January 6, 2024, the government filed a supplement to its motion to disqualify. Dkt. # 711. The supplement is noteworthy in multiple respects.

[redacted]

[redacted]

The supplemental filing did not rectify the omissions within the original motion. The government again failed to reference the safe harbor provisions and it did not advise this Court of what occurred during the May 2023 conference despite the necessary context that it would provide.

4. The Defense's Response

On February 20, 2024, the defense filed its response to the government's motion to disqualify. Dkt. # 771 and 773.

The defense response highlighted misrepresentations and ommissions of fact and law in the government's moving papers.

[redacted]

[redacted]

5. The Government's Reply

In its Reply, the government [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

6. Oral Argument

The Court held oral argument on March 15, 2024. Dkt. # 824.

The Court allowed the government to present initial arguments at which time, the government immediately sought to justify the filing of the motion to disqualify Mr. Soehnlein.

> MR. COOPER:
>
> The government came into possession of information, decisions were made by the Department of Justice as to how that was going to be pursued, and that put the attorneys on this trial team in a position to file the motion that we filed.
>
> I think if you take nothing else away from today's oral argument, it should be that the government has acted from day one in good faith to discharge our obligations to this

> Court and that Mr. Gerace receives his constitutional right to conflict-free counsel.
>
> Dkt. # 824 at 5.

This Court responded, noting that "is open to disagreement." *Id*. As the Court moved into its questions, it noted the government had not cited the safe harbor provision, and this Court questioned whether that was done intentionally to circumvent inclusion of safe harbor into the Court's analysis.

When pressed, AUSAs Cooper and Chalbeck initially argued that they did not believe the safe harbor applied.[21]

Under further questioning, AUSA Chalbeck admitted that she really had just "missed the Safe Harbor Provision" and gave the implication that nobody on the government's trial team, the signatories to the motion, were aware of it. Dkt. # 825 at 6.

The Court narrowed in on another instance that could be perceived as judge shopping, but it was based on actions by the US Attorney's Office.

> THE COURT:
>
> I'm sorry, there were cases filed that were clearly related to this case without related case forms from your office, right? The -- the Gogolack case, and several others that are related to

[21] The position advocated by the trial team is diametrically opposed to the position of the Department of Justice. Section 1720 of the United States Attorney's Resource Manual, the first section dealing with obstruction offenses, cautions Assistant United States Attorney's to be cognizant of the safe harbor provision in any obstruction of justice analysis, stating: "Congress made it clear that the bona fide provision of legal representation services in connection with or in anticipation of an official proceeding does not constitute an obstruction of justice offense."

> Gogolack. In fact, the ones that were related Gogolack were filed with related case forms after Gogolack was filed, related after it was assigned to Judge Sinatra, then related case forms were filed.
>
> Now, the fact that related case forms were not filed in Gogolack and the other cases related to the Gerace case, that can't possibly be an attempt to judge shop, can it?
>
> Dkt. # 825 at 10-11.

AUSA Tripi stated "I'll handle that" and provided an explanation:

> MR. TRIPI:
>
> When we had a -- when we had Crystal Quinn die in Wellsville, New York, that is all we knew. In fact, I think as this Court knows, it was her attorney that notified me that she was dead. The circumstances, the situation, were all unknowns. So we looked into it.
>
> The very first charge, though, was a drug and gun case charging Simon Gogolack. At that point in time, it would have been premature and borderline disingenuous to relate Mr. Gogolack's case to Mr. Gerace's case.[22]
>
> Dkt. # 825 at 11-12.

[22] Of course, shortly after Simon Gogolack was charged, it was apparently obvious to everyone in the courtroom that this was a related case. *See e.g.* Dan Herbeck, *Judge assigns new attorney to man under scrutiny in Pharaoh's strip club probe*, The Buffalo News, Sept. 7, 2023, https://tinyurl.com/BN090723. And less than a month after Mr. Gogolack had been charged, members of this trial team were making public comments about allegations of witness tampering. *See e.g.* Dan Herbeck, *Prosecutors say Wellsville man tampered with government witnesses*, The Buffalo News, Sept. 14, 2023, https://tinyurl.com/BN091423 ("'This case is as serious as it gets,' [AUSA] Cooper told the judge. He added that the charges filed against Gogolack so far 'are only the tip of the iceberg.'")

The discussion moved on to other points, including that the Court's view that a speedy trial dismissal might be required if these issues were not be quickly resolved:

> THE COURT:
>
> Mr. Gerace is in jail, and it seems to me that there's a pretty strong defense argument that if I grant this motion, that his right to a speedy trial, especially given what I see to be, as Mr. Personius said better than I could, a very flimsy case against Mr. Soehnlein. Given that flimsy case, isn't there a pretty strong defense argument for at least constitutional speedy trial violations for Mr. Gerace who's presently incarcerated?
>
> Dkt. # 825 at 33.

AUSA Chalbeck alluded to a case from the 2nd Circuit that indicated "where the government in good faith brings potential, actual, or per se conflicts to the Court's attention, and the appropriate inquiry is conducted, especially in an actual or per se conflict context… that time does not count against the government for the purposes of speedy trial." Dkt. # 825 at 34.

The discussions with the government repeated returned to the safe harbor provisions, and the government maintained its position that "[t]he constellation of available facts goes to corrupt motive."

However, the government continued to ignore many of the available facts, including the conference with Judge Sinatra on the May 17, 2023, five weeks before the witness list was filed, which Mr. Personius pointed out "categorically establish that there was zero possibility that Mr. Soehnlein was involved in any type of obstruction."

The government's strategy regarding the May 17 conference was apparently to ignore it altogether. It never provided any rebuttal to the point that the discussion on that date eviscerates any possibility that Mr. Soehnlein and Mr. Cohen filed the witness list with the expectation that it would cause recusal.

7. The Government's Unsolicited Letter Brief

More than five weeks after oral argument, the government filed further briefing on April 22, 2024, stylized as a letter, without leave of Court or a procedural basis to do so. Dkt. # 886.

The government's letter was submitted five weeks after the disqualification motion was fully briefed and submitted to the Court. The Government had not make any request to file supplemental briefing.

Specifically, in the government's letter, it argued that it brought the motion to disqualify Attorney Soehnlein in good faith. The Court has not requested briefing on that issue.

Three days later, the defense brought a motion to strike the government's supplemental brief. Dkt. # 888. However, the submission was filed within minutes of the Court filing its Decision and Order, which rendered the defense's motion moot. Dkt. # 892.

8. This Court's Decision to Deny the Government's Motion

On April 25, 2024, after due deliberation, this Court denied the government's motion for disqualification. Dkt. #889.

The Decision and Order was thorough and clear. It fully reviewed the government's allegations, but appropriately considered them within the context of the safe harbor provision and Mr. Gerace's Sixth Amendment protections.

In regard to the safe harbor provisions, this Court did recognize that any mention of the safe harbor provision was "conspicuously absent from the government's 70-page opening brief" (Dkt. 889 at 26), but it accepted an explanation provided by a member of trial team that identified herself as the principal author of the brief and "she 'missed the [s]afe [h]arbor [p]rovision' and that '[i]t was not an attempt to conceal anything from the Court.'" Dkt. 889 at 26, FN 16.

That said, the Court also noted that it "has serious concerns about the fact that in a brief accusing a well-respected member of the bar of a crime, no supervisor at the United States Attorney's Office noticed the omission of a legal provision that could absolve him[23]." *Id*.

[23] Indeed, despite the attempts of one trial team member to fall on the proverbial sword, the government's opening brief was brought by Trini E. Ross, the US Attorney, signed by the three members of the office's trial team, and Corey R. Amundson, signed by a trial attorney from his division assigned to this case.

This Court went to great lengths to consider the Sixth Amendment implications of granting a government motion to disqualify counsel under these circumstances, where the government seeks to ignore and attorney's legitimate legal strategy and threaten prosecution over speculation of a corrupt intent.

> What the Court gleans from this admittedly sparse caselaw is that while lawyers cannot use their J.D.s to escape prosecution for criminal conduct, it is equally important that a lawyer not risk prosecution for conduct that is objectively within the bounds of the rules of professional responsibility. This is even more crucial in the context of criminal defense where the client's Sixth Amendment right is at stake. In order for criminal defense attorneys to keep a singular focus on their clients' interests—as the Constitution requires—they must not fear prosecution based on an action that some prosecutor might think has a secret, ulterior motive.
>
> The case before this Court is precisely the type of case about which the courts in *Cintolo* and *Cueto* cautioned.26 It is a case in which criminal liability hinges on the government being "permitted to inquire into the motives of criminal defense attorneys" for an action that they had a reasonable justification—and arguably an obligation—to take. *See Cueto*, 151 F.3d at 634; *Cintolo*, 818 F.2d at 995; see also *Stevens* Transcript at 10 ("There is an enormous potential for abuse in allowing prosecution of an attorney for the giving of legal advice.").
>
> Allowing prosecution of defense counsel in this type of case "would chill the client's right to receive objective unbiased

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And the government's opening brief was not the first submission in this matter. It was a replacement for the *ex parte* filing, which presumably also omitted any reference to the safe harbor act and which the government wanted this Court to consider without response from the defense.

When a decision was made to file a superseding brief, there were likely internal discussions involving other prosecutors to determine the content of the superseding submission, and yet, not a single reference to the safe harbor provisions were included in the Superseding motion.

> advice by placing the lawyer who advocates an aggressive strategy, but not one who advocates a collaborative strategy, in legal jeopardy." Brief of Amicus Curiae New York Council of Defense Lawyers in Support of Petitioner, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 435901, at *3. Moreover, it would "create[] the risk that the unscrupulous defendant (the one most frequently in need of legal representation) will at some point turn around and attempt to use his attorney's advice against the attorney." Id. at *15. That prospect is particularly troubling given that most, if not all, seasoned defense attorneys have had the experience of zealously representing a client who ultimately is convicted—either at trial or by pleading guilty—and who subsequently files a habeas petition accusing the attorney of misconduct. And "[i]n that event"—if a mixed-motive prosecution is allowed—"all that would stand between the attorney and criminal investigation is the judgment of a prosecutor." *Id*.
>
> For all those reasons, this Court finds that Soehnlein's actions are protected by the safe harbor provision, and, for that reason, there is not a reasonable possibility that he committed a crime in submitting Gerace's witness list. Therefore, even if there is a conflict of some sort, there is no *per se* unwaivable conflict.
>
> Dkt. # 889 at 39-41.

Although the Court denied the government's motion, it did address the government's concerns that the Court was going to make a bad faith finding at that time:

> This Court has noted several examples of instances in which, if the sides were flipped, the government could be accused of having a corrupt ulterior motive. See Docket Item 825 at 6-11, 36. The Court gave those examples not to accuse the government of "bad faith"—as the government complains in its supplemental letter submission, Docket Item 886 at 6-9—but to prove a point: All lawyers' strategic decisions are at times vulnerable to a suspected corrupt motive. And that is

> why the safe harbor must protect them all—those who have the discretion to begin a criminal investigation and prosecution and those who do not.
>
> Dkt. # 889 at 30, FN 22.

Thus, although during oral argument the Court had cited several examples of actions the government took which could be subject to a bad faith inquiry, the Court did not make any finding of bad faith when it issued its Decision and Order.

Furthermore, while a defendant is entitled to relief when the government's representatives and agents act in bad faith, those government attorneys who engage in such behavior also stand to receive the personal protection of the safe harbor, even if they are effectively immune from prosecution by virtue of their positions.

In any event, the Decision and Order appeared to bring finality to the five-month ordeal, which had damaged the progress of the Mr. Gerace's trial preparation, prevented him from having his trial in January 2024, and extensively extended the amount of time that Mr. Gerace has remained subject to pretrial detention.

The Court found "that even *if* there is a conflict—actual or potential—in Soehnlein's continued representation of Gerace, it is not an unwaivable per se conflict." Dkt. # 889 at 18 (emphasis added). The only remaining issue appeared to be in consideration of the safe harbor analysis, whether the government still maintained that Mr. Soehnlein has any conflict at all.

> This Court will schedule a status conference to discuss the question of whether Soehnlein has a potential or lesser actual conflict that requires a full-blown *Curcio* hearing and, if necessary, will order further briefing on that question. Gerace, through counsel, has made clear his view that "[t]here is no conflict." Docket Item 771 at 33. *But the government has not yet had an opportunity to address whether there is still a conflict* in light of this Court's analysis of the safe harbor provision.
>
> Dkt. # 889 at 18, FN 9 (emphasis added).

The status conference was subsequently scheduled for May 1, 2024.

D. THE MAY 1, 2024 STATUS CONFERENCE

Following this Court's Decision and Order, the parties appeared for a status conference on May 1, 2024. The Court addressed the issue of whether the government still maintains that a conflict exists, and whether parties believe that a *Curcio* hearing should be held to confirm that Mr. Gerace is willing to waive the hypothetical conflict.

The defense indicated that it had no opposition to a *Curcio* inquiry being conducted even though it did not believe a conflict truly exists.[24]

The government was asked about its position regarding whether a conflict still exists, and in response, AUSA Trippi suggested that a *Curcio* colloquy was appropriate.

[24] Mindful that Mr. Gerace has been willing to complete a full *Curcio* colloquy, the defense had no objection to holding a hearing out of an abundance of caution, particularly because it appeared to be the fastest way to move this matter forward. The drafting and filing of submissions regarding whether a conflict even exists, necessitating a *Curcio* hearing, seemed to be an unnecessary endeavor.

The Court asked whether the government felt a full colloquy was necessary, and the government indicated that it thought so, but would submit something, in writing, if it believed that anything other than the normal Curcio colloquy would be necessary.

At no point did the government articulate or allude to any ongoing argument that Mr. Soehnlein had a non-waivable conflict that is immune to the impact of a *Curcio* waiver. To the contrary, the government indicated that it anticipated it would request a *Curcio* hearing be held, clearly suggesting that if there are lingering conflict issues, they are waivable.

A date for a *Curcio* hearing was set for May 15, 2024.

E. THE GOVERNMENT'S NEW MOTION TO DISQUALIFY ERIC SOEHNLEIN

On the evening of May 6, 2024, the government filed a new motion seeking to re-litigate the issue of Mr. Soehnlein's disqualification, hereafter referred to as the government's Second Motion to Disqualify.[25]

The motion was filed on behalf of Trini E. Ross, United States Attorney for the Western District of New York by A.U.S.A. Joseph M. Tripi. Unlike most historical motion practice in this case, Corey R. Amundson, the Chief of the Public Integrity Section of the

[25] The government's filing is labeled as "Motion and Memorandum to Address Conflict." The title of the motion does not mention disqualification, and there is no Notice of Motion indicating that the Government is seeking disqualification. Nonetheless, as discussed below, the government's new motion argues that there is still a conflict; that it is non-waivable; and that disqualification is required.

Department of Justice Criminal Division did not sign onto the motion. See e.g. Dkt. # 666 at 2 (original Motion to Disqualify Attorney Soehnlein); *see also* Dkt. # 890 (recent motion to Interview Juror from Bongiovanni trial).

The government's Second Motion to Disqualify is a significant departure from what could be anticipated based on the discussion at the May 1st status conference.

The motion does not comment on the proposed components of a *Curcio* colloquy. Instead, the government has changed its position from the May 1 status conference and argued that Mr. Soehnlein has a non-waivable conflict, and thus, a *Curcio* hearing would not impact disqualification.

The government's Second Motion to Disqualify constitutes its fifth lengthy submission, within the record, seeking to disqualify Mr. Soehnlein in this case. The government does not identify a new, previously unknown conflict. It merely attempts to reorganize and supplement prior arguments that have already been addressed, at length.

In this submission, the government now employs some particularly outrageous arguments, including the suggestion that "Mr. Soehnlein's conduct *may* come under the scrutiny of the New York State Bar Association." Dkt. #919 at 17 (emphasis added). The government goes on to state: "it is unknown whether anyone, including Judge Sinatra, has or will make any ethics referrals related to these events." *Id*. Such an ethical inquiry would be baseless, particularly in light of this Court's Decision and Order.

In response to the submission, the defense filed a motion related to scheduling issues and the request for a clarification of the legal standard to use in response to the government's motion.

> 36. If the defense is responding to a motion for reconsideration, then it does so mindful that the government is seeking reconsideration of a previous order, which "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" *In re Health Management Systems, Inc. Sec. Lit*., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)(*quoting Wendy's Int'l, Inc. v. Nu-Cape Construction, Inc.*, 169 F.R.D. 680, 685 (M.D.Fla. 1996)).
>
> 37. If, on the other hand, this is not to be treated as a motion for reconsideration, then the Law of the Case Doctrine would appear to be fully dispositive.
>
> 38. "[T]he law of the case doctrine forecloses reconsideration of issues that were decided — or that could have been decided — during prior proceedings." *United States v. Williams*, 475 F. 3d 468, 471 (2d Cir. 2007).
>
> Dkt. # 922-1 at 9.

This Court issued a Text Order addressing the defense's motion:

> Based on the government's representation that it is not requesting reconsideration of this Court's prior decision and order, this Court will consider Docket Item 919 as a new motion. See Docket Item 925 at 2 ("The governments filing, see [Docket Item] 919, is not a motion for reconsideration because it was requested or invited by the Court and analyzes the conflicts attendant in this case through the actual and potential conflict rubric."). The Court agrees with Gerace, however, that he is entitled to additional time to respond in light of the government's again seeking disqualification of

> Attorney Soehnlein&#8212rather than merely outlining a proposed *Curcio* inquiry as this Court and Gerace had anticipated. See Docket Item 919 at 1 ("The totality of conflicts inherent in Mr. Soehnlein's representation of defendant Gerace should compel the Court to decline to accept any waiver of conflicts by defendant Gerace, and Mr. Soehnlein should be disqualified.").
>
> Dkt. # 934.

Based on this Court's observations contained in the above Text Order, the defense has prepared a Response to the government's Second Motion to Disqualify Mr. Soehnlein, and it submits these motions, seeking dispositive relief, in cross filings necessitated by the government's newest efforts to disqualify counsel.

III. LEGAL ANALYSIS

A. THE SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE

All of the government's efforts to disqualify counsel have implications for Mr. Gerace's the Sixth Amendment, particularly his right to counsel of his choosing.

The Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

The Sixth Amendment right to assistance of counsel includes "the right of a defendant who does not require appointed counsel to choose who will represent him."

See United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (*citing Wheat v. United States*, 486 U.S. 153, 159 (1988)).

Indeed, "the right of an accused who retains an attorney to be represented by that attorney is a right of constitutional dimension." *United States v. Perez*, 325 F.3d 115, 124 (2d Cir. 2003)(*citing United States v. Wisniewski*, 478 F.2d 274, 285 (2d Cir.1973)).

The requirements of the "[t]he Sixth Amendment right to counsel of choice… command[], not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *US v. Gonzalez-Lopez*, 548 US 140, 146 (2006)

Also encompassed in the right to counsel is the "right to representation that is free from conflicts of interest." *United States v. Williams*, 372 F.3d 96, 102 (2d Cir. 2004) (*quoting Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

However, the defendant "may waive his Sixth Amendment rights to effective assistance of counsel and to confrontation of witnesses, just as he may knowingly and intelligently waive any constitutional right." *United States v. Armedo-Sarmiento*, 524 F. 2d 591, 592 (2d Cir. 1975).

"Where the right to counsel of choice conflicts with the right to an attorney of undivided loyalty, *the choice as to which right is to take precedence must generally be left to the defendant and not be dictated by the government*." *US v. Perez*, 325 F. 3d 115 (2d Cir. 2003)(emphasis added).

Thus, while each attempt by the government to disqualify counsel may have had strategic benefits to the government's case, they fundamentally encroach on Mr. Gerace's constitutional protections and he has paid a high price to defend them, including the expending of resources and the extended delay of his pretrial detention.

B. THE ROLE OF THE GOVERNMENT IN CRIMINAL CASES

1. The Prosecutor's Obligation to Ensure Fair Process

A prosecutor's obligation "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).[26]

In other words, "[t]he prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

Prosecutors wield enormous power. They have the ability to initiate an investigation that by its mere existence has the capability to completely derail someone's professional and personal life. They have the ability to file charges on mere probable cause that will instill crushing pretrial anxiety and drain an individual's personal resources. They have the ability to pursue the deprivation of individual liberty, even

[26] During oral argument on the first motion to disqualify Mr. Soehnlein, the government led its arguments with this quote and noted that it hangs on a picture frame in the US Attorney's Office. Certainly, it is an appropriate reminder of the government's responsibility, but given the manner in which this case has proceeded, this Court pointed out that it was "not so sure that… everybody in [the US Attorney's] office reads that quote the same way." Dkt. # 825 at 5.

during pretrial proceedings, when a defendant has demonstrated compliance with the conditions of his release.

But the power that prosecutors yield is not merely provided by statutory authority to conduct investigations, file charges, and prosecute cases. It is also provided by the public trust given to prosecutors based on the expectation that they will act within the role of impartiality that is required of them. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999) ("Within the federal system, for example, we have said that the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.") (internal citation and quotation marks omitted).

The American Bar Association (ABA) Criminal Justice Standards for Prosecution Function[27] notes "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." ABA Standards for Criminal Justice § 3-1.2. ABA also address the prosecutor's heightened duty of candor, "[i]n light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations." ABA Standards for Criminal Justice § 3-1.4(a). Furthermore, "[t]he prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true,

[27] These Standards are intended to provide guidance for the professional conduct and performance of prosecutors. They are available at https://tinyurl.com/ProsecutionFunction/

to a court, lawyer, witness, or third party… [and] should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary … to avoid misleading a judge or factfinder." ABA Standards for Criminal Justice § 3-1.4(b).

2. The Impact of Bad Faith Maneuvering by the Government

When the government fails to maintain its obligations discussed above, and when it engages in bad faith though intentional or reckless strategy that encroaches on fundamental constitutional rights, review of the government's conduct is instrumental for determining appropriate relief for a defendant or sanctions against the government to ensure the fair administration of justice.

While there are various areas where government prosecutors can engage in misconduct, in many instances where relief is warranted, it relates to a prosecutor's obligation for candor to the Court and the defendant.

For example, in the context of candor required of a prosecutor in fulfilling his or her *Brady* obligations, dismissal of the indictment and/or reversal of conviction is often warranted if bad faith is apparent. *See e.g. Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979) (reversing where detective concealed existence of favorable witness); *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) (upholding dismissal of indictment when government acted in bad faith by destroying the defendants' chemical laboratory equipment despite repeated suggestions of its potential exculpatory nature); *Brown v.*

Borg, 951 F.2d 1011 (9th Cir. 1991) (dismissing where prosecutor argued robbery was motive for murder while withholding information that the alleged stolen items were in fact turned over to the decedent's family by hospital personnel); *United States v. Chen*, 605 F.2d 433, 435 (9th Cir. 1979) (noting that federal agents' intentional destruction of currency form was "unjustified and inexcusable.").

Similarly, substantial relief may be imposed based on bad faith violations of the Jencks Act. *See e.g. United States v. Kasouris*, 474 F.2d 689, 692 (5th Cir. 1973) (declaring mistrial when prosecutor represented to court that he possessed no Jencks Act material for witness when he had a signed statement in his file); *United States v. Lonardo*, 350 F.2d 523, 529 (6th Cir. 1965) (reversing convictions when stenographic transcript of witness's interview was deliberately destroyed the day before trial); *United States v. Rivera Pedin*, 861 F.2d 1522, 1528 (11th Cir. 1988) (reversing conviction when prosecutor failed to provide defense with witness's diary that constituted Jencks Act material); *United States v. Mannarino*, 850 F. Supp. 57, 66, 73 (D. Mass. 1994) (ordering new trial when agent's misconduct resulted in the witness destroying Jencks Act material and permitting defendants to depose witness and agent to attempt to reconstruct the statement the agent had destroyed); *see also United States v. Ramirez*, 174 F.3d 584, 588 (5th Cir. 1999) (finding tape recordings made and taped over by Bureau of Prisons were in "possession of the United States" under Jencks Act and should have been disclosed, and remanding for

hearing on whether tapes were erased in bad faith, which would require dismissal of the case).

Providing relief to a defendant is even more crucial in circumstances where the government knows that it presents false evidence.

The Supreme Court has historically held, for example that "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Under these circumstances, courts do not employ a strict materiality test or a harmless error analysis. *See United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975) (holding that prosecutor's culpability in covering up a witness's lies "will mandate a virtual automatic reversal of a criminal conviction"); *see also Alcorta v. Texas*, 355 U.S. 28 (1957) (reversing conviction and death sentence where sole eyewitness lied about his romantic involvement with the victim -- lies the government condoned and covered up).

The presentation of false evidence in a courtroom is intolerable because it undermines the "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

C. THE COURT'S SUPERVISORY ROLE

This Court maintains supervisory authority to formulate rules and impose sanctions when necessary to appropriately oversee the administration of justice,

including the protection of rights afforded to the accused and the fairness of the adversarial process.[28]

In the present case, repeated motions attempting to disqualify counsel clearly intrude on Mr. Gerace's constitutional protections, but even when government misconduct does not rise to the level of a constitutional violation, a federal court, in the exercise of its supervisory authority "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *Bank of Nova Scotia v. United States*, 487 US 250, 254 (1988)(*quoting United States v. Hasting*, 461 U. S. 499, 505 (1983); *see also United States v. Williams*, 504 U.S. 36, 45 (1992).

The supervisory power of the judiciary is based on the overarching principle that "judges exercise substantial discretion over what happens inside the courtroom." *United States v. Simpson*, 927 F.2d 1088, 1090-91 (9th Cir. 1991). The exercise of a court's supervisory power is intended "to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules governing matters apart from the trial itself." *United States v. Williams*, 504 U.S. at 46.

[28] In some instances, the courts' supervisory role is demonstrated through the imposition of regulations and/or sanctions with various legal implications. *See, e.g. Thomas v. Arn*, 474 U.S. 140, 142, 146-47 (1985) (circuit courts have inherent power to establish a rule that "the failure to file objections to the magistrate's report waives the right to appeal the district court's judgments"); *United States v. W.R. Grace*, 526 F.3d 499, 511 n.9 (9th Cir. 2008) (en banc) (district court had authority to issue pretrial order requiring government to disclose finalized list of witnesses more than a year in advance of trial).

These judge-made rules are designed "to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and finally, as a remedy designed to deter illegal conduct." *United States v. Tucker*, 8 F.3d 673, 674-76 (9th Cir. 1993).

In its supervisory role, courts are permitted to consider relief, including dismissal of an indictment in an exercise of its supervisory powers if the misconduct is sufficiently egregious. *See e.g. Simpson*, 927 F.2d at 1090.

The request for dismissal and/or other sanctions are discussed below.

IV. DISCUSSION

The Background section of this memorandum addresses the historical intrusions on Mr. Gerace's Sixth Amendment Right to Counsel of Choice, including an extensive look at the circumstances under which Mr. Daniels' representation of Mr. Gerace came to an end based on false allegation made by a notoriously unreliable witness.

In this section of the memorandum, the defense primarily focuses on a more extended review and discussion of events that have transpired since November 2023, including the grand jury subpoena of Mr. Gerace's defense investigator and the multiple attempts to disqualify Mr. Soehnlein.

The discussion then addresses the request for dismissal and other requests for relief/sanctions that are appropriate based on the circumstances of this case.

A. THE DEFENSE INVESTIGATOR WAS ORDERED TO COMPLY WITH A GRAND JURY SUBPOENA BASED ON AN INTENTIONAL OR RECKLESS PRESENTATION OF FALSE INFORMATION TO THE COURT

It is well settled that "[t]he Sixth Amendment's assistance of counsel guarantee can be meaningfully implemented only if a criminal defendant knows his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceedings." *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1997).

The attorney-client privilege is "one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The purpose of the privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Id*. (internal citation and quotation marks omitted).

A separate, but related privilege is the attorney work product privilege.[29] Federal Rules of Criminal Procedure (Fed. R. Crim. P.) 16 codifies work-product protection for

[29] 39. The work product doctrine is suffused with policy considerations relating to the appropriate role of the attorney and the relationship between client and attorney. *United States v. Nobles*, 422 U.S. 225, 236-40, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975); *Upjohn Co. v. United States*, 449 U.S. 383, 398, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981). *Doe v. United States (In re Grand Jury Subpoena Dated October 22, 2001)*, 282 F.3d 156, 160 (2d Cir. 2002).

documents and materials prepared in connection with the investigation or defense of the case in criminal proceedings.

Although Rule 16 refers to proceedings in which there is a named defendant, the work-product protection rule has also been applied to grand jury proceedings. *See, e.g., In re Grand Jury Subpoena*, 482 F.2d 72 (2d Cir. 1973).

Work-product protection applies to materials obtained or prepared with an eye toward litigation. The work-product doctrine protects work product of the lawyer or an agent of the lawyer by prohibiting 'unwarranted inquiries into the files and the mental impressions of an attorney in criminal litigation.' *In re Grand Jury Proceedings*, 2001 U.S. Dist. LEXIS 15646 (N.D.N.Y. October 3, 2001). It can encompass facts as well as opinion. The work product privilege applies to preparation not only by lawyers but also by other types of party representatives including, for example, investigators like Mr. Lawrence, seeking factual information. *Doe v. United States (In re Grand Jury Subpoena Dated October 22, 2001)*, 282 F.3d 156, 157 (2d Cir. 2002).

Here, Mr. Gerace had a protected privilege both in his communications with attorney and his attorney's agents, and in his attorney's work-product, which would include those hired to work as part of the defense team, as an agent of his attorney.

Throughout these proceedings, Mr. Gerace has attorneys who have employed professional services as part of the defense against these charges, including, obviously, the utilization of private investigators.

Although, along with changes in counsel, there have been other changes to the composition of the defense team, including investigators and paralegals.

During the course of Mr. Cohen's representation and continuing for a couple of months after he was relieved, Mr. Lawrence acted as an investigator for the defense team, including taking direction from Mr. Cohen to complete tasks related to the defense of this case.

Mr. Gerace communicated with Mr. Lawrence with the appropriate understanding that his communication would be privileged, and Mr. Lawrence created material during the course of the investigative steps he took at Mr. Cohen's direction.

With that in mind, the fact that Mr. Lawrence would be subpoenaed to the grand, particularly with less than two months before trial, was unforeseeable. It immediately invoked enormous concerns for Mr. Gerace's Sixth Amendment Right to Counsel, based on a clear effort to pierce the veil of privileged communication and material.

The concerns that any attorney would have regarding the issuance of a subpoena for a defense investigator are reflected in the Department of Justice Manual.

> Authorization of the Criminal Division. Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. Such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General or a Deputy Assistant Attorney General for the

> Criminal Division before they may issue, unless the circumstances warrant application of [a specific exemption].
>
> …
>
> This policy extends to proposed subpoenas to paralegals, investigators, or other employees or agents of attorneys, if the information sought relates to the attorney's representation of a client, including information that the employee or the agent of the attorney, rather than the attorney personally, acquired.
>
> Justice Manual (JM) § 9-13.410 (Revised in 2018) available at https://tinyurl.com/913410 (emphasis added)

When defense counsel contacted chambers for this Court on November 6, 2023, to address the subpoenaing of Mr. Lawrence, the defense stated:

> Last week the defense investigator in US v Gerace was served with a subpoena to appear before a Federal grand jury this Wednesday (11/8) at 1:00 p.m. to testify and produce materials. *There was no attempt to contact Eric or me prior to the service.*
>
> The investigator engaged legal counsel, Thomas J. Eoannou, who I have cc'd on this email. I understand that Tom has communicated with the Government. He asked for an adjournment, which the Government has refused.
>
> Eric and I have also communicated with Tom, and we have advised him that *there is no waiver of privilege by Mr. Gerace or defense counsel that would permit the investigator to testify regarding his involvement in this matter. That is just one of the concerns that immediately comes to mind in response to the Government's attempt to pull a defense investigator into the grand jury*.
>
> Exhibit B-2 (emphasis added).

When AUSA Tripi claimed he had not bothered to contact defense counsel, because he had relied on an affidavit from Mr. Cohen, which appeared to imply that Mr. Lawrence was hired by a third party and worked independently of the defense team, the defense took him at his word.

However, even if that explained why the US Attorney's Office had initially failed to contact the defense or followed proper DOJ protocols before issuing the subpoena to a defense investigator, the US Attorney's Office was now being provided an affirmative clarification that Mr. Lawrence was indeed part of the defense team. That assertion should have triggered appropriate measures by the US Attorney's Office, in line with DOJ protocol, to treat Mr. Lawrence as a member of the defense team.

It appears that the US Attorney's Office seeks to claim that it generally believed, at that point in its investigation, that the implication by Mr. Cohen in his affidavit that [redacted]

However, unbelievable that position might be, if the US Attorney's Office had been acting in good faith, it would have made efforts to request evidence confirming Mr. Lawrence's status one way or another.

Not only did the US Attorney's Office avoid making those efforts, it attempted to prevent the defense from having time to furnish proof to confirm its assertion that Mr. Lawrence was a defense investigator. The defense only requested that the US Attorney's

Office delay enforcement for a few days in order to provide proof. The US Attorney's Office refused.

The US Attorney's Office provided no reason as to why it could not accommodate a few days. As we now know, the return of an indictment was not imminent. A new indictment would not be filed until January 5, 2024. *See* case no. 23-cr-00099-LJV-JJM, Dkt. # 24.[30]

The clear implication of the US Attorney's Office's refusal to permit a few days of delay, is that it anticipated that doing so would further compromise its attempt to maintain willful ignorance of the fact that Mr. Lawrence was acting at Mr. Cohen's direction as part of the defense team.

When the defense filed the motion to quash, it provided [redacted]

The US Attorney's Office presented [redacted]

[30] The new indictment was filed just days before Mr. Gerace would have (and should have) had his trial commence had the government not filed the motion to disqualify Mr. Soehnlein.

[redacted]

If the US Attorney's Office had been acting in good faith or attempting to ascertain the truth regarding whether there were constitutional protections at play, it could have

[redacted]

[redacted]

The US Attorney's Office did not return the recording that it had obtained, nor did it secure the recording and await a decision by the court regarding whether a crime-fraud order would be issued before reviewing its contents.

Instead, it appears to the defense, based on the available record, that the US Attorney's Office reviewed the recording while knowing that it was obtained by false arguments.

The US Attorney's Office then selectively interpreted the recording and used it to initiate an investigation and bring the motion to disqualify Mr. Soehnlein without any deference to the consequences of doing so.

B. THE MOTION TO DISQUALIFY ERIC SOEHNLEIN WAS BROUGHT IN BAD FAITH

1. The Prosecutors Responsible for the Motion to Disqualify

Other than the members of the trial team, it is not clear if anyone from the US Attorney's Office was involved in the decision to subpoena Mr. Lawrence, [redacted], and the decision to review the recording without a crime fraud order.

However, once the recording was reviewed and discussions turned to whether to investigate Mr. Soehnlein and/or move for his disqualification, it is apparent that many other prosecutors had become involved in this process.

Unlike the grand jury investigation underlying case no. 23-cr-00099 (*Gogolack et al*), this case involves a trial team comprised of prosecutors from both the US Attorney's Office and the Public Integrity Section of the Department of Justice Criminal Division, and presumably there was some supervision involved in the decision-making from each office.

As discussed above, there have also been multiple instances in which the trial team indicated that the investigation related to Mr. Soehnlein was being conducted by other prosecutors, which upon information and belief, are prosecutors primarily located with the Rochester office of the US Attorney's Office.

Furthermore, the investigation of Mr. Soehnlein, an attorney of record in this case, would presumably trigger DOJ protocols requiring authorization and communication from an Assistant Attorney General or a Deputy Assistant Attorney General or another individual with authority to weigh in.

Thus, although the trial team may have been responsible for the primary drafting of the initial motion, the superseding and revised motion, its supplement, the reply brief, and the unsolicited letter brief, as well as solely responsible for handling oral argument

related to the submissions, it appears that there were many cooks in the kitchen, and the actual decision-making as to how to proceed may have fell elsewhere.

During oral argument, there were comments made by the trial team reflective of that point. AUSA Cooper summarized the circumstances as "[t]he government came into possession of information, decisions were made by the Department of Justice as to how that was going to be pursued, and that put the attorneys on this trial team in a position to file the motion that we filed." Dkt. # 824 at 5. AUSA Tripi stated "all I'm saying is it merited an investigation which is being conducted by separate attorneys… And so that's where we stand. And… so we're basically, pardon my French, us as the trial team, we're left with a shit sandwich." Dkt. # 824 at 29-30.

In its Decision and Order, this Court accepted the premise "that the decisions of others in the United States Attorney's Office to investigate the so-called orchestrated recusal obligated the trial team to bring these issues to the Court's attention." Dkt. # 889 at 25, FN 15.

However, regardless of whoever within the US Attorney's Office was involved in the decision making, the government is still responsible for the impact it had on this case, including substantial delay, extended pretrial detention, and the expense of financial resources that were earmarked for trial defense, not to mention the collateral impact that it has had one of Mr. Gerace's lawyers, Mr. Soehnlein, who has also had to weather the

storm from the underlying investigation and the ongoing motion practice regarding disqualification.

And even if there had been a valid basis to initiate an investigation, this Court would still be left with legitimate issues regarding the manner in which the motion was brought and the content contained therein.

2. The Motion to Disqualify

As noted in the Background section of this memorandum, although one of the government's trial team members identified herself during oral argument as the principal author of the motion to disqualify Mr. Soehnlein, there were multiple signatories to the motion, and presumably other prosecutors, referenced in the preceding section, were involved in deciding the manner in which to bring the motion and its content.

In regard to the manner in which the motion was brought, a decision was made by the government to bring this motion, *ex parte*. Mindful of Mr. Gerace's Sixth Amendment protections at issue, as well as the irreparable damage it would do to the defense to lose Mr. Soehnlein as one of the lead attorneys, the defense immediately sought disclosure of the motion.

This Court considered the defense's arguments for disclosure, but it provided the government with an opportunity to revise and supersede its motion in a manner which would allow the government control over what information is shared within the motion

and the defense could receive the revised copy so it could respond and subject the motion to the adversarial process.

Although the government agreed to this process, it also continued to articulate its objection, [redacted]

Now, upon reflection, it is impossible to overstate how important it was to have the government's motion tested by the adversarial process.

First of all, *Fulton* and its progeny require a conflict issue, with its implications for a defendant's Sixth Amendment protections, be subject to factual review.

Secondly, the government's selective interpretation of Mr. Lawrence's recording warranted responsive arguments, including the identification of several comments made by Mr. Lawrence that established he did not have any real insight into the creation of the witness list and was engaged in bloviation.

Thirdly, and most importantly, had the defense not been permitted to review and respond to the allegations, the Court would have had to decide the issue, as presented by the government, with gaping legal and factual omissions.

The initial motion, the revised motion, and the supplement all completely omit any reference to the safe harbor provision which is necessarily anchored to a proper legal

analysis based on the underlying allegations involving the filing of the defense witness list.

As noted in this Court's Decision and Order, it "has serious concerns about the fact that in a brief accusing a well-respected member of the bar of a crime, no supervisor at the United States Attorney's Office noticed the omission of a legal provision that could absolve him." Dkt. # 889 at 26, FN 16.

Furthermore, the revised motion and the supplement, and presumably the initial motion, all omit any reference to the May 17, 2023, conference.

The first time the conference is mentioned is in [redacted]

This completely negates any possibility that the witness list was filed with an intention of recusing the judge. Defense counsel had no reason to expect that the witness list would cause recusal based on [redacted], in the presence of one of the members of the government's trial team.

The government has seemingly continued to steer away from offering any comment regarding the May 17, 2023, conference. The defense also suspects, upon information and belief, that the transcript from May 17, 2023, was not provided by the

trial team to the prosecutors responsible for conducting an investigation, even though it is clearly relevant to the investigation of a charge that requires evidence of corrupt intent.

There is no way around it. The government's submission to this court omitted material facts and any reference to the safe harbor provision, and it sought to do so in an *ex parte* submission. Regardless of who was involved in the decision-making process and who supervised the product that it produced, the record is replete with reason to find that the government acted intentionally or recklessly in a manner that supports a finding that this motion practice was engaged in bad faith.

C. THE RENEWED EFFORTS TO DISQUALIFY ERIC SOEHNLEIN ARE BEYOND THE PALE

As addressed in the Background information, the government first effort to disqualify Mr. Soehnlein started in November 2023, and the issue took over five months to resolve. During that time, in addition to oral argument, the government filed *four* separate submissions presenting its arguments for disqualification.

The government now tried to argue for the same relief without any regard for consequence, including the obvious delay that it causes.

Although the government claims the Court "requested or invited" this submission (Dkt. # 925 at 2), no reasonable interpretation of the Court's Decision and Order or the discussion on May 1, 2024, would suggest that the Court requested a new motion for disqualification.

Moreover, there is no possibility that the Court invited the government to present the arguments that it now employs, such as the suggestion that "Mr. Soehnlein's conduct *may* come under the scrutiny of the New York State Bar Association." Dkt. #919 at 17 (emphasis added).

Such an ethical inquiry would be baseless, particularly in light of this Court's Decision and Order. Even if such an inquiry existed, which as far as the defense knows, it does not, it would not likely not be the basis for a conflict, and if it was, it would certainly be waivable. The inclusion of these comments serves no real purpose than to improperly denigrate Mr. Soehnlein, a well-respected local attorney, who has already been unfairly targeted by the US Attorney's Office.

The defense has filed its Response to the Government's motion. Dkt. 973. It addresses why the government's latest motion should be completely disposed of.

The arguments contained therein support the conclusion that the government's ongoing efforts to disqualify Mr. Soehnlein are intentionally or recklessly causing delay in this matter and continuing a sustained attack against Mr. Gerace's Sixth Amendment right to counsel of his choice.

D. IN ORDER TO PROPERLY ADDRESS THE GOVERNMENT'S MISCONDUCT, THE COURT SHOULD DISMISS THE INDICTMENT AND/OR IMPOSE OTHER SIGNIFICANT SANCTIONS

Mr. Gerace has been repeatedly prejudiced by the government's encroachment on his Sixth Amendment rights.

Although courts have "emphasized the importance of prejudice as a trigger to the exercise of supervisory power" (*U.S. v. Tucker*, 8 F.3d 673, 675 (9th Cir. 1993)), there is no doubt that prejudice exists in this case.

Mr. Gerace ultimately lost his first counsel of choice based on false allegations of one of the government's key witnesses. [redacted] He has had his case delayed by more than half a year just to litigate against multiple attempts to disqualify another one of his attorneys.

The Court should consider the totality of the record as it pertains to the interference with Mr. Gerace's Sixth Amendment rights to counsel of his choice. In instances of prosecutorial misconduct, each instance "must not be considered in isolation." *Hodge v. Hurley*, 426 F.3d 368, 384 (6th Cir. 2005).

Upon a finding of bad faith, the Court is permitted additional latitude in finding a commensurate sanction. While dismissal is one potential remedy, there are others,

discussed below, including disqualification of prosecutor, attorney fees, vacating speedy trial exclusion.

1. Dismissal

When government misconduct does not rise to the level of a constitutional violation, a federal court is nonetheless permitted to dismiss the indictment in an exercise of its supervisory powers if the misconduct is sufficiently egregious. *See United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)

The Supreme Court has emphasized, however, that courts should proceed "with some caution" and with an eye toward "balancing the interests involved" before using the supervisory power to put an end to a criminal prosecution. *United States v. Hasting*, 461 U.S. 499, 506-07 (1983) (*quoting United States v. Payner*, 447 U.S. 727, 734-36 (1980)).

Although dismissal of an indictment on the grounds of prosecutorial misconduct is an "extreme and drastic sanction," (*United States v. Rubio*, 709 F.2d 146, 152 (2d Cir. 1983)), dismissal is warranted where it is impossible to restore a criminal defendant to the position that he would have occupied but for the misconduct. *United States v. Artuso*, 618 F.2d 192, 196-97 (2d Cir. 1980); *Carmichael v. United States*, 216 F.3d 224, 227 (2d Cir. 2000).

The circumstances of this case are uniquely suited for an Order of dismissal. The amount of prejudice sustained over time, including but not limited to, custodial delay, expenditure of resources, loss of counsel of choice, is unquantifiable. Mr. Gerace cannot

be restored to the position he was in at the beginning of this case prior to the multiple encroachments on his Sixth Amendment protections. Accordingly, it is requested that this Court consider dismissing this case and allow Mr. Gerace to focus his attention on defending any remaining cases pending in this District.

2. Disqualification of the US Attorney's Office

Notably, there is no apparent statutory mechanism for disqualification of the US Attorney's office, but the Court, in its Supervisory capacity, may view this option as appropriate relief that is less severe than dismissal of the indictment.

Additionally, the government's current motion to disqualify identifies Mr. Soehnlein as a potential witness in *Gogolack et al*. As addressed in Mr. Gerace's Response to the government's motion, it does not appear that Mr. Soehnlein would be a witness to any events that are already public record and his communications with Mr. Gerace are privileged and not open to inquiry by the US Attorney's Office.

The one possible exception may be the details of the May 17, 2023 conference, but if anything, that would make him a witness for Mr. Gerace, as that conference completely rebuts any possible theory that the filing of the defense witness list was an overt act to a conspiracy.

This is relevant, because AUSA Cooper, was present for that conference as well, and he becomes a witness, potentially for the defense, against an overt act listed in the indictment that he signed. Case no. 23-cr-00099, Dkt. # 24 at 58.

Thus, to the extent the government continues to focus on disqualification, the more appropriate question may be how can this trial team, and possibly this office, prosecute this case?

This adds to the point that there were already multiple witnesses in this case previously or currently employed by the US Attorney's Office, and the totality of the circumstance may support disqualification.

3. Attorney's Fees

District courts have inherent power to punish bad faith conduct by awarding attorneys' fees to the other side. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991).

This type of relief is available to defendants in criminal cases.

In 1997, Congress enacted the Hyde Amendment which authorized federal courts to "award to a prevailing party [in a criminal case], other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes); *see United States v. Gilbert*, 198 F.3d 1293, 1299-1303 (11th Cir. 1999) (discussing the Hyde Amendment's legislative history).

In enacting the Hyde Amendment, Congress intended to sanction and deter prosecutorial misconduct. *Gilbert*, 198 F.3d at 1298.

In light of the government's latest attempt to disqualify Mr. Soehnlein, the award of attorney fees for the last six months of litigation would appropriately sanction and deter ongoing efforts aimed at Mr. Gerace's Sixth Amendment protections.

The request for attorney fees exists independently from the other requests for sanctions, including dismissal, though admittedly, the need to compensate the loss of resources associated with attorney fees diminishes significantly if this case comes to a conclusion at its current posture.

4. Other Relief

Finally, Mr. Gerace defers to the Court for any other relief that is just and appropriate.

E. OTHER CONSTITUTIONAL PROTECTIONS AFFORDED TO MR. GERACE, INCLUDING HIS RIGHT TO A SPEEDY TRIAL, HAVE BEEN VIOLATED

Once this Court issued its Decision and Order denying the government's motion to disqualify Mr. Soehnlein, the defense was able to briefly start functioning properly for the first time since November 2023.

Mr. Gerace was able to communicate with Mr. Soehnlein for the first time in over five months. Resources and energy could finally be diverted back to substantive issues in this case and not the ongoing defense of Mr. Gerace's Sixth Amendment right to counsel of his choice.

Mr. Gerace had every intention of moving forward towards a dismissal of the indictment or trial.[31]

This trial would have proceeded in January 2024, and assuming a unanimous verdict was reached one way or another, Mr. Gerace and his counsel could have moved on and focused their attention on the remaining charges brought by the government, particularly those in Case no. 23-cr-00099-LJV-JJM (*Gogolack et al.*), where a substantial production of discovery is in the process of being disclosed.[32]

Now, with the latest motion to disqualify Mr. Soehnlein, the government has once again directed these proceedings into a posture where the case can not effectively move forward. The decision to file this motion follows a stern warning from this court during the oral argument for the first motion to disqualify Mr. Soehnlein regarding the delay that has been accumulating.

> Is the government prepared to tell me why the case shouldn't be dismissed on speedy trial grounds, speedy trial due-process grounds, were I to grant this motion? Mr. Gerace is in jail, and it seems to me that there's a pretty strong defense argument that if I grant this motion, that his right to a speedy trial, especially given what I see to be, as Mr. Personius said

[31] The defense had hoped that motion practice surrounding speedy trial and other issues could be addressed while completing final trial preparation.

[32] In that case, on February 23, 2024, the Magistrate granted the government's request for 90 days for the production of discovery and "direct[ed] the government to provide discovery on a rolling basis, to extent possible." Case no. 23-cr-00099-LJV-JJM, Dkt. # 73. To date, no discovery has been provided, but two days ago, the government sent a letter indicating it would provide the material upon each defendant's production of a 3-terabyte hard drive and sufficient time to copy the material.

> better than I could, a very flimsy case against Mr. Soehnlein. Given that flimsy case, isn't there a pretty strong defense argument for at least constitutional speedy trial violations for Mr. Gerace who's presently incarcerated?
>
> Dkt. # at 825 at 33.

The government's response was that "where the government *in good faith* brings potential, actual, or per se conflicts to the Court's attention, and the appropriate inquiry is conducted… the 2nd Circuit has concluded that that time does not count against the government for the purposes of speedy trial." Dkt. # at 825 at 34 (emphasis added).

The Court ultimately denied the motion to disqualify Mr. Soehnlein, but the message to the government was that the delay accumulating from the government's motion practice, while Mr. Gerace remained incarcerated, was of a real concern to the Court, and if the court's decision did not place Mr. Gerace in a posture where he could prepare for and proceed to trial, then a dismissal may be required.

The government's comments during oral argument suggest that it is unconcerned about the delay, so long as the motion practice is accepted as good faith litigation by the government.

Absent a finding otherwise, the government felt secure enough in its position to bring a new motion to disqualify Mr. Soehnlein, and effectively ensuring that Mr. Gerace will not be able to go to trial by July 2024, which is when Mr. Bongiovanni will proceed

with his *second* trial, if Mr. Bongiovanni's case is not dismissed in the interim based on pending motions.

Mr. Gerace is entitled to dismissal for the reasons addressed in this motion. The Government has violated his Sixth Amendment right to counsel in such a way that this case should be dismissed, and Mr. Gerace's ultimate fate can be decided by case no. 23-cr-00099-LJV-JJM (*Gogolack et al.*).

However, if the Court does not find a sufficient basis to dismiss this case related to the encroachment on Mr. Gearce's Sixth Amendment right to counsel of choice, the defense still requests a finding regarding the legitimacy of the motion practice to disqualify Mr. Soehnlein. Even by the government's own comments during oral argument, if the investigation regarding Mr. Soehnlein and the related motion practice to disqualify him are not found to constitute good faith litigation, it will impart responsibility for this delay on the government and point to an appropriate conclusion on a speedy trial motion.

V. CONCLUSION

For the reasons stated above, it is respectfully requested that this Court issue an Order finding that Mr. Gerace's Sixth Amendment Right to Counsel was violated based on the circumstances leading to the disqualification of Joel Daniels; the subpoena issued to procure evidence from Mr. Gerace's defense investigator; and the repeated efforts to

disqualify Mr. Soehnlein; and it is further requested that this Court issue an Order of dismissing this case and any other relief or sanction that is just and appropriate based on the circumstances of this case.

Dated: May 22, 2024

s/ Mark A. Foti, Esq.
Mark A. Foti, Esq.

s/ Eric M. Soehnlein, Esq.
Eric M. Soehnlein, Esq.