UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL NO. 07-103
VERSUS	SECTION "L" MAG. (5)
JAMES G. PERDIGAO	VIOLATION: 18 USC 1341, 1344, 2314, 1957 & 2, 26 USC 7201 & 7206 (1)

MOTION TO RECONSIDER THE COURT'S ORDER AND REASONS ENTERED JULY 9, 2008 AND RENEWED REQUEST FOR EVIDENTIARY HEARING

NOW INTO COURT, through undersigned counsel, comes defendant James Perdigao who hereby moves the court to reconsider the court's Order and Reasons entered July 9, 2008 denying the defendant's motion to recuse and request for evidentiary hearing. For the reasons more fully set forth in the attached memorandum in support of this motion, defendant respectfully requests that the court reconsider its order denying the defendant's motion to recuse, forthwith hold an evidentiary hearing, and issue more specific findings of fact and conclusions of law in order to properly comply with Fed.R.Crim.P. 12(d).

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CERTIFICATE OF SERVICE

I hereby certify that on **July 22, 2008** I electronically filed the Motion to Reconsider the Court's Order and Reasons Entered July 9, 2008 and Renewed Request for Evidentiary Hearing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 22nd day of July, 2008.

/s/ William F. Wessel
WILLIAM F. WESSEL (8551)

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MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER AND RENEWED
REQUEST FOR EVIDENTIARY HEARING

This memorandum is respectfully submitted by defendant James Perdigao, through undersigned counsel, in support of his Motion to Reconsider the Court's Order and Reasons entered July 9, 2008 and Renewed Request for Evidentiary Hearing. As more fully set forth herein, defendant respectfully requests that the court reconsider its order denying the defendant's motion to recuse, forthwith hold an evidentiary hearing, and issue more specific findings of fact and conclusions of law in order to properly comply with Fed.R.Crim.P. 12(d).

Procedural Background

At a status conference held on April 16, 2008, the court directed the defendant to file his motion to recuse as soon as possible, giving the government until May 9, 2008 to respond to the defendant's motion. The court advised the parties that it would set the motion for evidentiary hearing after the government responded to the defendant's motion. See Minute Entry dated April 16, 2008, R. Doc. 94.

The defendant's motion to recuse was filed on April 17, 2008. (R. Doc. 96). The government's opposition was filed on April 21, 2008. (R. Doc. 98). By Order entered May 6, 2008, the court set an evidentiary hearing on the motion to recuse for May 21, 2008 after the court received the government's opposition. The court granted leave to the government to file a supplement to its opposition no later than May 12, 2008 and leave to the defendant to file a response to the government's supplemental opposition no later than May 16, 2008. (R. Doc. 99).

By Order entered May 20, 2008, the court rescheduled the evidentiary hearing (originally scheduled for May 21, 2008) to begin on June 19, 2008. (R. Doc. 108). At a status conference held on May 21, 2008, the court instructed the defendant to file a supplemental brief by May 28, 2008 outlining whom he intends to call as witnesses at the evidentiary hearing, what they will testify to, and the nexus between such testimony and defendant's contention that he is being deprived of due process. The court instructed the government to respond within three days of the defendant's filing and set another status conference for June 6, 2008. See R. Doc. 110.

The parties complied with the court's filing instructions- the defendant's Preliminary Witness List was filed on May 28, 2008 (R. Doc. 111), and the government's

opposition was filed on June 2, 2008 (R. Doc. 113). At a status conference held on June 6, 2008, the court orally advised the parties that, after a review of the relevant case law and the parties' submissions, it would deny the defendant's request for an evidentiary hearing and will deny the defendant's motion to recuse the U.S. Attorney's office, indicating that it would issue a separate written order doing so. See R. Doc. 116. Undersigned counsel had no notice that the status conference scheduled for June 6, 2008 would be anything other than a status conference preparatory to the evidentiary hearing scheduled for June 19, 2008. Without any notice to defense counsel, the court turned the status conference into a formal court hearing wherein the court ruled on the motion to recuse and request for evidentiary hearing.

Subsequently, the court issued its Order and Reasons entered on July 9, 2008 denying the defendant's motion to recuse and request for evidentiary hearing (hereinafter the "Order and Reasons"). See R. Doc. 117. The defendant respectfully suggests that the Order and Reasons are inadequate and deficient in that Fed.R.Crim.P. 12(d) requires that the court state its essential findings on the record. As more fully set forth below, the court failed to review and summarize the evidence, identify and address the hotly contested factual issues, and resolve them on the record as required by law.

The Court's Order and Reasons

In its Order and Reasons, the court found basically two facts. First, the court found that Deputy Chief Harper has not and will not have any supervisory authority in the prosecution of the defendant. Second, the court found that defendant's allegation that he provided information to the U.S. Attorney's office which it never investigated or followed up on "prove" to be unfounded. See Order and Reasons, p. 5-6.

With regard to the first factual finding, the court apparently relied exclusively on the affidavit from U.S. Attorney Letten stating that Deputy Chief Harper has not and will not have any supervisory role in the prosecution of the defendant. Defendant's Preliminary Witness List indicates that the defendant would establish through testimony that Deputy Chief Harper was directly involved in the defendant's prosecution, both through actual participation in plea negotiations and based on his supervisory role as Deputy Chief of the Criminal Division, whereby the line prosecutors in the Criminal Division report to him and ultimately to the U.S. Attorney. This testimony would directly contradict U.S. Attorney Letten's affidavit.[1]

Instead of hearing the evidence, the court, after initially ruling that an evidentiary hearing would be held, cut off any presentation of evidence and simply accepted U.S. Attorney Letten's assertions. The court did so without the benefit of cross examination, even in the face of directly contradictory allegations from the defendant. If Deputy Chief Harper's job is in fact to supervise cases in the Criminal Division such as this one, and yet he has not performed that function in this case for almost four years, is that because someone in the U.S. Attorney's office had foreseen some problem with Deputy Chief Harper's conduct? Obviously someone in the U.S. Attorney's Office or at DOJ suggested belatedly that Deputy Chief Harper be cloistered. In fact the U.S. Attorney's Office for the Eastern District of Louisiana's Key Personnel Report on the DOJ website now completely removes Deputy Chief Harper from the Office's Organization Chart. See Key Personnel Report, attached hereto as Exhibit 1 and incorporated herein by

[1] Indeed the government claims that the "September 1, 2006 plea discussion did not occur." See Gov't's Second Supp. Oppos., R.Doc. 113, at p. 15. Defendant should have the opportunity to present testimony and documentary evidence (such as phone records) to establish this basic contested fact.

reference. There must be some reason for Deputy Chief Harper's conspicuous absence from the organizational chart.

However, instead of questioning the assertions of U.S. Attorney Letten's affidavit, the court sought to avoid the matter of Deputy Chief Harper's role by concluding that the allegations about Deputy Chief Harper "if true . . . do not rise to the level of authorizing the disqualification of the entire office." Here the court overlooks and simply ignores the numerous other instances of misconduct and conflicts of interest cited by the defendant not only by Deputy Chief Harper, but also by U.S. Attorney Letten himself and by the line prosecutors assigned to this case.

The defendant respectfully submits that what the court should have done – in order to comply with F.R.Crim.P. 12(d) and to preserve the defendant's due process rights – is to consider whether each of the allegations against Harper, "if true," in conjunction with each of the allegations of misconduct and conflicts of interest on the part of U.S. Attorney Letten and the line prosecutors "rise to the level of authorizing the disqualification of the entire office." The court did not do so, and defendant submits that the court cannot properly do so without an evidentiary hearing.

The court's second factual finding (that the defendant's allegation that he provided information to the U.S. Attorney's office which it never investigated or followed up on "prove to be unfounded") suffers from the same error. What the court refers to as proof that the defendant's allegations are unfounded is simply the court's acceptance of the government's assertions, without even hearing or considering the defendant's contrary evidence.

The alleged "proof" on which the court relies is U.S. Attorney Letten's statement that he referred the "provided information" to the Department of Justice Public Integrity Section in Washington, together with a brief letter from the DOJ Office of Professional Responsibility (not the DOJ Public Integrity Section) asserting that the U.S. Attorney's office was cleared of any wrongdoing. The Order and Reasons states that the court "has been informed that the Public Integrity Division has closed its investigation into this matter." See Order and Reasons, R. Doc. 117, at p. 6. Apparently the court has been provided with information by the Public Integrity Section on which the court bases its decision, but such information has not been provided to the defendant. It is fundamentally unfair for the court to consider such information and not provide it to the defendant and allow him to rebut whatever assertions are made therein. The court's reliance on some hidden hearsay information from the Public Integrity Section not provided to the defendant violates the defendant's basic constitutional rights to a fair trial and to confront his accusers.

By letter dated December 5, 2006 to undersigned counsel, Public Integrity Section Trial Attorney Natasha Tidwell acknowledged that the defendant herein was interested in speaking with the appropriate investigative agency regarding further allegations against law enforcement officials in the Eastern District of Louisiana. The letter further advises that Public Integrity Section Trial Attorney Natasha Tidwell requested that "someone contact you to discuss the matter in detail." See Letter dated December 5, 2006 attached hereto as Exhibit 2 and incorporated herein by reference. Despite repeated offers from defense counsel for defendant to be interviewed, DOJ never accepted defendant's offers. The defendant questions the legitimacy of any inquiry in which the person making the

allegations (i.e., the defendant herein) is not interviewed for any details or information concerning his allegations.

Furthermore, as a threshold matter, it strains credulity to assert that the defendant's allegations against Deputy Chief Harper, for example, are without merit. As noted in the Preliminary Witness List, defendant proposed to introduce testimony and certified copies of real estate documents regarding Deputy Chief Harper's acquisition (and continuing ownership) of expensive Gulf Shores, Alabama properties with Robert Guidry's defense counsel while the Edwards case was on appeal and the State of Louisiana's suit against Guidry (who sued the U.S. for indemnification, with the U.S. being represented by the local U.S. Attorney's office) was pending. Defendant would further show that these transactions violated specific DOJ ethics rules.

Defendant would further show that he was aware that Deputy Chief Harper failed to make proper disclosures on his Public Disclosure Forms (also to be introduced at an evidentiary hearing) regarding property acquired with Guidry's counsel. In addition, defendant would show that Deputy Chief Harper failed to report a large six-figure profit on another real estate transaction involving yet another expensive Gulf Shores property on his Public Disclosure Forms. These documents involve concrete proofs and leave little room for interpretation or explanation. False declarations on Public Disclosure Forms can result in civil and criminal liability.

Yet, this court would accept the alleged assertion from the DOJ Public Integrity Section (presumably filed under seal and not made available to the defendant) that DOJ Public Integrity Section had closed its investigation into this matter (and presumably found no merit in the allegations made by the defendant). Of course, if the Public

Integrity Section actually found no merit in the allegations made by the defendant, the reasonable conclusion based on the foregoing presentation of facts, which are virtually impossible for the government to dispute, is that DOJ's internal investigation of misconduct lacks objectivity or is flawed, rather than that the defendant's allegations lack merit. Defendant is left in the dark to speculate about what information the court relied on from the Public Integrity Section.

If the Public Integrity Section actually found no merit in the defendant's allegations, it seems strange indeed that the government would file the Office of Professional Responsibility's whitewash closing letter (finding no merit in the defendant's allegations) not under seal but would provide the Public Integrity Section's whitewash closing letter (finding no merit in the defendant's allegations) to the court under seal without providing a copy to the defendant. Because the defendant was not provided with a copy of the Public Integrity Section's closing letter, the defendant is unable to challenge the court's reliance on such hearsay. The court should forthwith unseal the Public Integrity Section's closing letter and allow defendant the opportunity to respond.

After noting that the Public Integrity Section had closed its investigation (information relied on by the court but not provided to the defendant), the court cites a letter from DOJ Office of Professional Responsibility dated April 25, 2007, which stated "that they investigated the defendant's accusations and determined that further investigation was not warranted and considered the matter closed." See Order and Reasons, R. Doc. 117, p. 6. In so holding, the court did not require any transparency regarding the nature and quality of the investigation alleged to have been done by the

Office of Professional Responsibility. The form letter from J. Michael Jarrett of the Office of Professional Responsibility (Exhibit 4 to R. Doc. 113) fails to provide any evidence that the alleged inquiry, if in fact conducted, actually pertained to the issues raised by the defendant inasmuch as the letter does not refer to or identify any of the defendant's claims. Therefore the form letter sheds no light on what issues were taken up in the purported "inquiry" and provides no evidence regarding not only the content but also the quality and thoroughness of the alleged inquiry. As such, the form letter is not relevant to what connections are to be drawn from the information and testimony referenced by the defendant in the Preliminary Witness List. Rather, the form letter is utterly indistinguishable from what could have been written if no investigation at all had been done by the Office of Professional Responsibility.

Indeed the record of this proceeding demonstrates just how far the Office of Professional Responsibility is willing to go to rubber-stamp U.S. Attorney conduct. The brief form letter dated April 6, 2007 from H. Michael Jarrett of the Office of Professional Responsibility (Exhibit 2 to R. Doc. 113) completely exonerates U.S. Attorney Letten of misconduct in *U.S. v. James Collins and Yank Barry*, No. H-98-18 (S.D.Tex 2005). Once again, there is no transparency regarding the nature and quality of the investigation alleged to have been done by the Office of Professional Responsibility. And once again, the form letter from H. Michael Jarrett is utterly indistinguishable from what could well have been written if no investigation at all had been done by the Office of Professional Responsibility. This is in stark contrast to the lengthy opinion containing specifics of U.S. Attorney Letten's misconduct from U.S.D.C. Judge Lynn N. Hughes in the Opinion on Acquittal, *U.S. v. James Collins and Yank Barry*, No. H-98-18 (U.S.D.C.-S.D. Tex.

September 8, 2005). See Exhibit 1 to R. Doc. 111. In this case, the constitutional concern that checks and balances be preserved is obvious – the utterly non-transparent rubber stamp investigation of the U.S. Attorney's office by the Department of Justice itself is anything except the check and balance necessary to ensure a fair trial in this case.

Law and Argument

I. The court failed to state its essential findings on the record as required by Fed.R.Crim.P. 12(d).

Fed.R.Crim.P. 12(d) provides that:

> Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

Fed.R.Crim.P. 12(d). See also, *U.S. v. Santiago*, 410 F.3d 193 (5th Cir. 2005), *cert. denied*, 547 U.S. 1022, 126 S.Ct. 1565, 164 L.Ed 2d 303 (2006) ("when a ruling on pretrial motion requires the district court to decide factual issues, the district court must state its essential findings supporting its ruling on the record"). The Rule confers on the litigants a "right" to have factual findings made. See *U.S. v. Caballero*, 936 F.2d 1292 (D.C.Cir. 1991), *cert. denied*, 502 U.S. 1061, 112 S.Ct. 943, 117 L.Ed 2d 113 (1992). Because the court never required the parties to submit documents or affidavits (but instead led defense counsel to believe that an evidentiary hearing would be held), nothing has occurred in this case that gives the court a basis to make factual findings.

In this case, the defendant's motion asserts that U.S. Attorney Letten and Deputy Chief Harper have prohibited conflicts of interest because they have personal and professional reasons to quash defendant's testimony about the corruption of Robert Guidry in the Edwards trial. Defendant worked closely with U.S. Attorney Letten and

Deputy Chief Harper when defendant testified as Robert Guidry's attorney during the Edwards prosecution, a high profile case led by Letten and Harper. Defendant provided information and documents about Guidry paying bribes to Congressman William Jefferson to influence U.S. Attorney Jordan, about Guidry engaging in a wide variety of suspect financial transactions including establishing multi-million dollar offshore trusts after his guilty plea and prior to his sentencing to hide his assets from the government, and about Guidry "loaning" $300,000 to Congressman Jefferson's brother, Mose Jefferson, while the U.S. Attorney's office was preparing its sentencing recommendation for Guidry.

The government challenges these allegations variously as "false and conclusory allegations," "hearsay malice," and "uncorroborated allegations of wrongdoing by others." Yet it attempts to rebut the allegations by, for example, submitting a perfunctory, self-serving affidavit from Robert Guidry in which he attests that he never gave or provided, directly or indirectly, anything of value including cash payments, to Congressman William Jefferson, or former U.S. Attorney Eddie J. Jordan, Jr. in connection with his plea negotiations and/or subsequent plea agreement of October 15, 1998. See Exhibit 3 to Government's Second Supplemental Opposition, R. Doc. 113. The court, however, makes no factual findings regarding these allegations and gives no indication in its legal reasoning why it did not do so.

The mandatory requirement of stating "essential findings on the record" serves several functions. It informs the parties and other interested persons of the grounds for the court's ruling, adds discipline to the process of judicial decision-making, and enables appellate courts to properly perform their reviewing functions. *U.S. v. Williams*, 951

F.2d 1287 (D.C.Cir. 1991) (holding that district court's ruling denying motion to suppress could not be reviewed on appeal due to the district court's failure to state its essential findings on the record or to indicate its legal reasoning; court of appeals remanded the case with directions to the district court to state its essential findings on the record). There are cases in which the facts are undisputed and the legal consequences are so apparent that little guesswork is needed to determine the grounds for the court's ruling. This is not such a case. See *Id*.

The defendant's motion also asserts that the U.S. Attorney's office has a prohibited conflict of interest because it is aware that the defendant has either direct knowledge or a reasonable basis to believe that they have been involved in unethical or illegal conduct. As noted above, defendant intended to adduce testimony that Deputy Chief Harper purchased (and currently owns) property with one of Guidry's principal defense lawyers while the second appeal of Edwin Edwards was pending and while the State of Louisiana v. Guidry case was pending (where that same attorney was Guidry's counsel of record). Defendant also intended to adduce testimony that Deputy Chief Harper made false declarations on his Public Disclosure Forms in failing to disclose ownership of property with Guidry's counsel and in failing to report a substantial six-figure profit on another expensive Gulf Shores condo. Moreover, defendant intended to adduce testimony that Guidry paid substantial sums of money to Harper. See defendant's Preliminary Witness List, R. Doc. 111. Although fact-finding is the province of the district court, the court failed to address all of these allegations in its Order and Reasons.

The requirement that essential factual findings be placed on the record to facilitate appellate review originated at the U.S. Supreme Court and is underscored by the Court's

statement in *Murray v. U.S.*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed 2d 472 (1988) that fact-finding is the province of the district court. See *U.S. v. Prieto-Villa*, 910 F.2d 601, 610 (9th Cir. 1990); see also, *U.S. v. Woods*, 885 F.2d 352, 353-354 (6th Cir. 1989) (compliance with Federal Rules of Civil Procedure 58 necessary for appellate review). When there is reason to doubt that the district court asked the correct legal questions or that the district court actually weighed the evidence bearing on facts needed to answer such questions, the court of appeals may remand a case back to the district court for the factual findings required by Rule 12 as well as a statement by the district court of the conclusions of law it has reached on those findings. See *U.S. v. Williams*, 951 F.2d 1287, 1291 (D.C.Cir 1991).

The court's Order and Reasons state that "the [d]efendant's allegations focus primarily on two individuals: U.S. Attorney Letten and Deputy Chief Fred Harper." See Order and Reasons, R. Doc. 117 at p. 5. However, the court's Order and Reasons ignores most of the defendant's allegations against Deputy Chief Harper and U.S. Attorney Letten, including allegations relating to the State of Louisiana's lawsuit against Guidry. The defendant alleges that he has direct knowledge of U.S. Attorney Letten's improper assistance to Guidry and misconduct in blocking the State of Louisiana's efforts to recover Guidry's ill-gotten riverboat profits. The government now claims that there was no agreement protecting Guidry from civil liability, even though Letten would not articulate that position under oath in a state court hearing, thereby giving Guidry a claim for indemnification against the United States. See Government's Second Supplemental Opposition, R. Doc. 113 at p. 8.

In his Third Party Petition against the United States of America through the U.S. Attorney for the Eastern District of Louisiana,[2] Guidry himself alleges that Third Party Plaintiff [Guidry] relied to his detriment on the representations made by Third Party Defendant [through U.S. Attorney Letten] that $3.5 million would be the maximum financial sanction imposed upon him by either the federal or state governments." Letten himself testified that Guidry's lawyers advised him that Guidry would not make a plea deal unless Guidry's criminal exposure *and exposure generally* to the state as well as the federal government was included and that his office approached East Baton Rouge District Attorney Doug Moreau to "resolve any liability" Guidry had with the state:

> "Well, what happened, Your Honor, is, recognizing that Mr. Guidry would likely have some criminal exposure or exposure generally to the state of Louisiana because this was a case involving public bribery, extortion and the riverboat gaming licensing industry, Mr. Capitelli and Mr. Lemann told us that before they could have a comfort level to enter into a plea agreement with the United States they would need to resolve any liability which their client, Mr. Guidry, might have on a state level, as well. We didn't balk at that because we knew it was true. It made all the sense in the world. So what I did was, I had already been in contact with Doug Moreau, the District Attorney for the 19th J.D.C., and we had communications back and forth about a number of things. I set up a meeting with Doug, and I'm not sure who attended, but I know some of my prosecutors did, and simply asked Mr. Moreau as the judicial officer for the 19th J.D.C., in order to allow us to confect this plea agreement with Bobby Guidry, if he, on behalf of the state, would agree to an immunity which would then, I think satisfy Mr. Guidry and his counsel that his exposure would be limited, as it were."[3]

The defendant has personal knowledge of these events, and his testimony, like the testimony of East Baton Rouge District Attorney Doug Moreau, directly contradicts U.S. Attorney Letten. The court made no factual findings whatsoever with regard to these issues.

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[2] Third Party Petition, at Par. 8, in State of Louisiana v. Robert J. Guidry, No. 465,349(N), 19th J.D.C. for the Parish of East Baton Rouge.

[3] Transcript of Hearing, June 26, 2003, pp. 7-8, in State of Louisiana v. Robert J. Guidry, No. 465,349(N), 19th J.D.C. for the Parish of East Baton Rouge.

When a trial court omits an essential finding of fact, it is incumbent on the defendant to object to the sufficiency of the district court's findings because the failure to object to that omission results in waiver. See, e.g., *U.S. v. Caballero*, 936 F.2d 1292, 1296 (D.C.Cir. 1991), *cert. denied*, 502 U.S. 1061, 112 S.Ct. 943, 117 L.Ed 2d 113 (1992). Therefore in order to avoid any waiver argument, defendant herein specifically objects to the sufficiency of the court's findings and specifically requests that the court amplify such findings to address all of the remaining hotly contested factual issues.

Yet another example of the insufficiency of the court's findings involves the defendant's allegations against the line prosecutors in this case. In his motion, the defendant alleges that a line prosecutor in charge of actually carrying out the prosecution in this case not only revealed confidential information regarding the defendant's debriefing and information regarding his defenses to his former law firm but also divulged the contents of defendant's tax returns at a meeting attended by the line prosecutors, representatives of the F.B.I. and I.R.S., and members of upper management of Adams and Reese, LLP.

Such unlawful disclosure was without any conceivable legitimate justification and as such, constitutes a violation of 26 USC §7431, 7231 and 6103. Section 6103 of the Internal Revenue Code provides that tax return information shall be confidential, and except as authorized by the Internal Revenue Code, no officer or employee of the U.S. shall disclose any return information obtained by him in any manner in connection with his service as such an officer or employee of the United States. Section 7213 of the Internal Revenue Code makes it a felony to willfully violate the confidentiality protections of Section 6103. Finally, Section 7431 of the Internal Revenue Code creates

a private cause of action for damages against the United States for improper disclosure of tax return information. The unlawful disclosure of defendant's tax return information is yet another reason for recusal, but the court does not even address these allegations of misconduct.

In addition, as noted above, the line prosecutors in this case report to Deputy Chief Harper and U.S. Attorney Letten. Because the line prosecutors are supervised, evaluated and promoted by Letten and Harper, defendant asserts that the office cannot be sanitized such to assume the line prosecutors who prosecute this case will not be influenced by the same considerations that bar Letten and Harper from participation in this case. See *People v. Lopez*, 155 Cal.App. 3d 813,827 (Cal. App. 1984).

Particularly in cases such as this one, where there are hotly contested factual issues and direct conflicts in proposed testimony, it is crucial that the court conduct an evidentiary hearing and then summarize the evidence, identify factual conflicts, and resolve them on the record. A statement of "essential findings on the record" would then enable the appellate court to pinpoint legal errors by differentiating between findings of fact and conclusions of law. See *Burks v. State*, 706 P.2d 1190, 1191 (Alaska App. 1985).

II. The court's Order and Reasons suffer from the same deficiency cited by the Tenth Circuit in U.S. v. Bolden.

The court cites *U.S. v. Bolden*, 353 F.3d 870 (10th Cir. 2003) as the seminal case on the issue of recusing an entire U.S. Attorney's office. Defendant acknowledges the holding in *Bolden* but notes that the Tenth Circuit reversed the order disqualifying the entire U.S. Attorney's office in part because "the district court wrote an extremely short disqualification order, containing a paucity of facts to indicate either misconduct in the

representation or any alleged conflicts of interest on the part of the entire U.S. Attorney's office." *U.S. v. Bolden*, 353 F.3d 870, 879 (10th Cir. 2003); see also, *U.S. v. Collins*, 920 F.2d 619, 628 (10th Cir. 1990) (requiring the district court to make substantial findings on the record to justify disqualification of defense counsel). The defendant asserts this same deficiency here – i.e., that the court's Order and Reasons in this instance contains a paucity of facts found regarding the allegations of misconduct and alleged conflicts of interest on the part of the U.S. Attorney's office. Rather than extensively analyzing each allegation of misconduct or conflicts of interest in the representation, the court refused to delve into the merits of the vast majority of the defendant's allegations.

Indeed the court's Order and Reasons do not deal with several probable bases for disqualifying supervisors Letten and Harper and the line prosecutors. Instead, the court simply recites that the defendant's allegations focus on individual members of the U.S. Attorney's office. Thus, rather than extensively analyzing each alleged misconduct in the representation or alleged conflicts of interest on the part of the U.S. Attorney's office, the court merely concludes that the defendant's allegations do not involve misconduct on the part of the entire office, overlooking the well-settled law cited by defendant that the taint of a supervisor taints the subordinate.

Defendant does not deny that office-wide recusal implicates separation of powers concerns. However, separation of powers is but one aspect of the checks and balances of the Constitution. When a defendant's due process rights are impacted by misconduct and conflicts of interest on the part of the prosecutors, such defendant has no recourse other than to the judiciary to seek redress of the violation of his constitutional due process rights. The defendant is not asking this court to dictate to the executive branch whom it

can appoint as prosecutors. The defendant's allegations support removal of the U.S. Attorney, the First Assistant who is also Chief of the Criminal Division, the Deputy Chief of the Criminal Division, and at least two of the line prosecutors. These allegations are more than sufficient to support recusal of the entire office, especially under the reasoning of *U.S. v. Dyess*, 231 F.Supp.2d 493 (S.D.W.Va. 2002) addressed below, in which the district court (with the implied approval of the Fourth Circuit) recused an entire U.S. Attorney's office in the complete absence of any evidence of actual impropriety but rather only on the appearance of impropriety.

The circuit court cases do not suggest that a court cannot under any circumstances disqualify an entire U.S. Attorney's office, but rather that, given separation of powers concerns, a court may only do so if presented with a clear basis in fact and in law. See *Matter of Grand Jury Subpoena of Rochon*, 873 F.2d 170, 174 (7th Cir. 1989). Undeniably there are circumstances in which the participation of a U.S. Attorney in a criminal trial as a prosecutor or supervisor would be absolutely improper. For example, it would not be proper for the U.S. Attorney to prosecute or supervise the prosecution of a former client relating to a matter in which the U.S. Attorney had obtained confidential information in the course of his former employment by such client. If one further assumes that such U.S. Attorney continued to supervise the investigation and prosecution of such former client for a number of years without being Chinese-walled from participation and without the consent of his former client, this would present a classic scenario in which the entire U.S. Attorney's office should be recused.

A categorical denial of a district court's authority to ever disqualify an entire U.S. Attorney's office, far from protecting the constitutional power of the executive branch,

would excise a significant aspect of the judiciary's traditional power to protect a criminal defendant's constitutional rights. Furthermore, defendant asserts that it is not a necessary prerequisite for a defendant to show a violation of a defendant's basic constitutional right in order for the court to recuse a prosecutor. In a trial process which is fundamentally judicial in nature, the power of the court under the separation of powers doctrine is necessarily not exhausted by the bare enforcement of constitutional guarantees of a fair trial. Indeed those constitutional protections would be better served when judges exercise their discretion to prevent the possibility or the appearance of their violation.

In *U.S. v. Dyess*, 231 F.Supp.2d 493 (S.D.W.Va. 2002), the district court enunciated this principle when it recused the entire U.S. Attorney's Office based on the appearance of impropriety. Here the government has already acknowledged the appearance of impropriety in that Letten and DOJ decided that Letten's office should no longer be involved in the investigation of defendant's allegations concerning the Edwin Edwards prosecution and that his office should be recused from further participation. See Redacted Recusal Memorandum dated September 13, 2006, attached as Exhibit 1 to the government's Opposition to the defendant's motion to recuse. See R. Doc. 98.

In *Dyess*, the defendants were convicted of drug trafficking, and they appealed. The Fourth Circuit remanded the case back to the district court for further consideration of claims that the government drug investigators shared proceeds of drug transactions with the wife of one defendant, and may have engaged in other improprieties, while the defendants' appeal was pending. On remand, the district court held that the possibility of at least one U.S. Attorney serving as a witness required disqualification of the entire U.S. Attorney's office and that disqualification of the entire office was required to remove the

appearance of impropriety. *U.S. v. Dyess*, 231 F.Supp.2d 493, 497-498 (S.D.W.Va. 2002).

The district court noted that the client of the U.S. Attorney's office is not the U.S. Attorney, but the United States of America and held that:

> The unique nature of the U.S. Attorney's representation highlights a second, and potentially greater problem this office faces in its continued prosecution of these Defendants. Unquestionably, testimony from the police officers, who are agents of the United States, and possible testimony from [AUSA] Schwartz and other AUSAs or office employees is potentially prejudicial both to the reputation of their office and that of the Government. In this regard, the interest of the U.S. Attorney's office and that of the sovereign government may not be aligned because revelation of wrongdoing, which may be required in the service of trust and justice to these defendants, cannot help but cause reputational injury to the office.

U.S. v. Dyess, 231 F.Supp.2d 493, 497 (S.D.W.Va. 2002). The court emphasized that there were no allegations of improprieties or misconduct by the U.S. Attorney's office, in general, or by [AUSA] Schwartz, in particular. The court's action was not predicated on such wrongdoing, or even the possibility of such wrongdoing:

> Not impropriety, but the *potential appearance of impropriety* motivates the decision. (emphasis added)

U.S. v. Dyess, 231 F.Supp.2d 493, 497 at n. 4 (S.D.W.Va. 2002).

The court then proceeded to conduct the very same analysis of Rule 1.7 governing conflicts of interest, as did the defendant herein in his original memorandum in support of the motion to recuse. The court noted that "the potential conflict between protecting the good name of the office and its agents while ensuring that the Government's interest in justice are fully and fairly represented is clear and unavoidable. Presumably this consideration underlies an earlier decision to recuse the office of the U.S. Attorney for the Southern District of West Virginia from investigation and potential criminal prosecution of the police officers involved. At the hearing on the instant motion, the

Government revealed this recusal and further, disclosed that the office for the Northern District of West Virginia has been appointed in its stead." *U.S. v. Dyess*, 231 F.Supp.2d 493, 498 (S.D.W.Va. 2002).

The court held that this conflict of interest highlighted the court's final and paramount concern, namely, the potential for the appearance of impropriety:

> The Court's ultimate concern must be public confidence in the administration of justice, that "justice must satisfy the appearance of justice." *United States v. Johnston*, 690 F.2d 638 (7th Cir. 1982); *General Motors Corp. v. City of New York*, 501 F.2d 639, 649 (2d Cir. 1974). As the Supreme Court stated, federal courts have an obligation to ensure "that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988).

U.S. v. Dyess, 231 F.Supp.2d 493, 498 (S.D.W.Va. 2002). The Dyess case, requiring only the potential for the appearance of impropriety to justify recusal of an entire U.S. Attorney's office, is a significant departure from the Tenth Circuit's holding in *U.S. v. Bolden*, 353 F.3d 870 (10th Cir. 2003).

On appeal, the Fourth Circuit did not directly address the merits of the district court's decision to disqualify the U.S. Attorney's office. However, the Fourth Circuit noted the application of the district court's reasoning on this issue with implied approval:

> Although the district court noted there were no allegations of improprieties or misconduct by the United States Attorney's Office in general or the lead prosecutor in particular, the district court disqualified the United States Attorney's Office to avoid the appearance of impropriety. *Dyess*, 231 F.Supp.2d 493, 497 n.4.

U.S. v. Bartram, 407 F.3d 307, 309-310 (4th Cir. 2005), *cert. denied*, 546 U.S. 1189, 126 S.Ct. 1374, 164 L.Ed.2d 82 (2006).

The Fourth Circuit's implied approval of a disqualification of an entire U.S. Attorney's office represents a more recent circuit court decision than the Tenth Circuit's holding in *U.S. v. Bolden*, 353 F.3d 870 (10th Cir. 2003) and impliedly authorizes

disqualification of an entire office without any allegations of improprieties or misconduct by the United States Attorney's office in general or the lead prosecutor in particular. The threshold required by the Fourth Circuit in this most recent circuit court case is therefore far lower than previous circuit court cases. The facts and circumstances in this case clearly meet and exceed the Fourth Circuit standard.

III. It is well settled that prosecutorial bias against the defendant constitutes grounds for disqualification.

In its Order and Reasons, the court overlooked any consideration as to whether the conflicts of interest in the U.S. Attorney's office bias that office against the defendant. A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law. U.S. Const., 5th and 14th Amendments; *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed 479 (1927); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 Led 942 (1955). It is the obligation of the prosecutor, as well as the court, to respect this mandate. *Berger v. U.S.*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Nor is the role of the prosecutor in this regard simply a specialized version of the duty of an attorney not to overstep the bounds of permissible advocacy. The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. In all of his activities, his duties are conditioned by the fact that he 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; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. U.S., supra*, 295

U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *U.S. v. Cox*, 342 F.2d 167, 193 (5th Cir. 1965) (Wisdom, J., concurring).

Thus, not only is a judicial requirement of prosecutorial impartiality reconcilable with executive discretion in criminal cases, it is precisely because the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof. One of the reasons cited for the institution of public prosecutions is that Americans believed that an officer in a position of public trust could make decisions more impartially than could the victims of crimes or other private complainants, persons who often brought prosecutions under the older English system of criminal justice. See 3 Holdsworth, A History of English Law (7th Ed 1956), p. 621.

This advantage of public prosecution is lost if those exercising the discretionary duties of the prosecutors are subject to conflicting personal interests which might tend to compromise their impartiality. The Fifth Circuit in *U.S. v. Cox*, 342 F.2d 167, 192 (5th Cir. 1965) held that the prosecutor "is the representative of the public in whom is lodged a discretion which is not to be controlled by the courts, or an interested individual . . .," this means that even those interests of the prosecutor which lie outside cases being brought by the prosecutor must have – and must appear to have – no bearing on the conduct of that prosecution.

Furthermore, while the Fifth Circuit in *Cox* correctly puts control of prosecutors beyond the courts, the Fifth Circuit's holding in no way diminishes the court's powers to ensure a fair trial. Just as the trial judge has the power to prevent actual prosecutorial

misconduct in the courtroom, that judge also has the power to prevent prosecutorial misconduct from reaching the courtroom at trial, and the bias of the U. S. Attorney's Office set forth here and in the prior filings regarding the defendant's Motion to Recuse is the equivalent of – and has the appearance of - just that sort of misconduct which is within the power of the trial court to prevent from affecting the prosecution so that a constitutionally guaranteed fair trial is ensured. Therefore, this court is well within its rights and duties to disqualify this U. S. Attorney's Office.

Conclusion

This court's Order and Reasons are inadequate and deficient under Fed.R.Crim.P. 12(d) because the court failed to review and summarize the evidence, failed to identify and address the contested factual issues in their entirety, and failed to resolve those contested factual issues on the record as required by law. The court disregarded – without resolving on the record the contested factual issues regarding - the *prima facie* supervisory role ordinarily expected of the Deputy Chief of the Criminal Division and simply accepted U. S. Attorney Letten's assertion that Deputy Chief Harper had not performed that supervisory function over a four year period despite the fact that defendant had with his witness list indicated that testimony would, in fact, indicate that Deputy Chief Harper did have an actual role and participation in the prosecution of defendant.

The court also disregarded – without resolving on the record the contested factual issues regarding – defendant's allegations of misconduct and conflicts of interest relating to Deputy Chief Harper. Instead of resolving on the record the contested factual issues pertaining to Deputy Chief Harper, the court simply asserted that even if those allegations

against Deputy Chief Harper were true, that misconduct and involvement was not sufficient for disqualifying the entire U. S. Attorney's Office. However, in order to comply with F.R.Crim.P. 12(d), the court should not only have resolved the contested factual issues on the record, but the court should also have considered the other allegations which pertain not only to Deputy Chief Harper but also to U. S. Attorney Letten and the line prosecutors.

The court disregarded – without resolving on the record the contested factual issues regarding – defendant's allegations of bias and misconduct on the part of U. S. Attorney Letten and the line prosecutors. Instead of resolving on the record the contested factual issues regarding defendant's allegations of bias and misconduct with regard to U. S. Attorney Letten, the court in part relied on hearsay information from the Public Integrity Section which was not provided to the defendant and a wholly opaque form letter from the Office of Professional Responsibility which failed to demonstrate that any investigation had actually been conducted.

Without resolving on the record the contested factual issues regarding defendant's allegations of bias and misconduct with regards to the line prosecutors, the court ignored the defendant's allegations. The court should have required some transparency with regards to the government's assertion that an investigation was in fact conducted, and the court should have addressed the claims made against the line prosecutors so that the court could have resolved on the record the contested factual issues regarding defendant's allegations of bias and misconduct with regard to the line prosecutors.

These cumulative failures on the part of the court necessarily entail that the court did not consider the context put forth by the defendant; these failures on the part of the

court also necessarily entail that the court failed to resolve on the record the matter of just how thoroughly the entire U. S. Attorney's Office is affected by the bias and misconduct alleged by the defendant. For all of the foregoing reasons, defendant respectfully requests that the court reconsider its order denying the defendant's motion to recuse, forthwith hold an evidentiary hearing, and issue more specific findings of fact and conclusions of law in order to properly comply with Fed.R.Crim.P. 12(d).

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ATTORNEYS FOR DEFENDANT JAMES PERDIGAO

CERTIFICATE OF SERVICE

I hereby certify that on **July 22, 2008** I electronically filed the Memorandum in Support of Motion to Reconsider and Renewed Request for Evidentiary Hearing by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 22nd day of July, 2008.

/s/ William F. Wessel
WILLIAM F. WESSEL (8551)

Key Personnel Report

Current as of: 16 July 2008

District: LOUISIANA, EASTERN

HEADQUARTER

Phone Numbers
Office: (504) 680-3000
Fax: (504) 589-3594

Address
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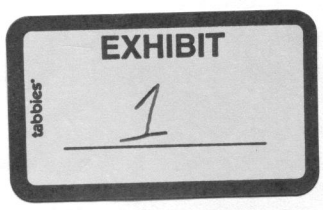
* Represents Presidentially Appointed United States Attorney

Official Position/Title	Name
*USA	*Jim Letten
Secretary to USA	Kathy English
First AUSA	Jan Maselli Mann
Criminal Chief	Jan Maselli Mann
Civil Chief	Thomas Watson
ATAC Coordinator	Michael Magner
Confidential Human Source Coordinator	Jan Maselli Mann
District Office Security Manager	Dianna C Beasley
Chief, Appellate	Stephen Higginson
Chief, Cybercrimes	James Mann
Crisis Management Coordinator	Michael Magner
Chief, General Crimes	Marvin Opotowsky
Chief, Narcotics	Maurice Landrieu
Chief, OCDETF	Tracey Knight
Chief, Strike Force	Salvador Perricone
Chief, Violent Crimes	Duane Evans
Admin Officer	Dianna C Beasley
Intelligence Specialist	Michael Magner
Systems Manager	Peter Bayer
VW Coordinator	Donna Duplantier
LECC Coordinator	John Sherlock
Senior Litigation Counsel	Bill McSherry
Senior Litigation Counsel	Salvador Perricone



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

December 5, 2006

Via Overnight Mail
Mr. Charles F. Griffin, Esq.
Law Office of Charles Griffin Attorney at Law
802 So. Carrolton Avenue
New Orleans, Louisiana 70118

Re: James Perdigao

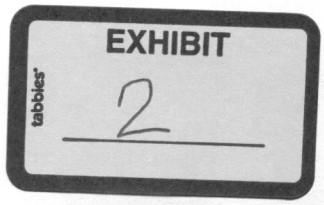
Dear Mr. Griffin:

As per our recent conversation, it is my understanding that your client, James Perdigao, is interested in speaking with the appropriate investigative agency regarding further allegations against law enforcement officials in the Eastern District of Louisiana. Mr. Perdigao's initial allegations, all supporting documentation, and your most recent letter have all been forwarded to that agency for its review. I have also requested that someone contact you to discuss the matter in detail. However, any information you have regarding threats to Mr. Perdigao's safety should be directed to the local authorities in your area.

Very truly yours,

Natashia Tidwell

Natashia Tidwell
Trial Attorney
Public Integrity Section
U.S. Department of Justice
Bond Building, 12th Floor
10th and Constitution
Washington, DC 20530



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL NO. 07-103
VERSUS	SECTION "L" MAG. (5)
JAMES G. PERDIGAO	VIOLATION: 18 USC 1341, 1344, 2314, 1957 & 2, 26 USC 7201 & 7206 (1)

NOTICE OF HEARING

PLEASE TAKE NOTICE that the Motion to Reconsider the Court's Order and Reasons Entered July 9, 2008 and Renewed Request for Evidentiary Hearing filed by defendant James Perdigao, through undersigned counsel, will be brought for hearing before the Honorable Eldon Fallon, United States District Judge, 500 Camp Street, New Orleans, Louisiana 70130 at 2:00 p.m. on Wednesday, August 13, 2008, or at such other date and time as may be set by the court.

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ATTORNEYS FOR
DEFENDANT
JAMES PERDIGAO

CERTIFICATE OF SERVICE

I hereby certify that on **July 22, 2008** I electronically filed the Notice of Hearing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 22nd day of July, 2008.

__/s/ William F. Wessel_____
WILLIAM F. WESSEL (8551)