

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
Criminal Division – Felony Branch

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UNITED STATES	:	
	:	Crim. No. F-2347-03
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v.	:	J. Erik Christian
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	:	
SAMUEL DAVIS	:	
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Praeipce for Samuel Davis

Defendant Samuel Davis, by and through undersigned counsel, respectfully submits this praecipe to address two issues: (1) the legal bases for Mr. Davis’ Motion to Dismiss the charged drug offenses, and (2) the need for Mr. Davis’ trial attorney Frederick Iverson to withdraw as counsel for the purpose of that motion. On November 19, 2003, Mr. Davis filed a Motion to Dismiss the drug charges; in response to this motion, the government filed an Opposition in which it conceded facts which constitute a violation of Mr. Davis’ Sixth Amendment right to the assistance of counsel at all critical stages of the prosecution of the drug charges as well as a violation of Mr. Davis’ Fifth Amendment right to Due Process. Specifically, the government conceded that, in violation of an express directive by Mr. Davis’ counsel, it twice interviewed Mr. Davis in the absence of counsel about matters related to the drug charges and initiated plea bargain negotiations by offering Mr. Davis a quid pro quo – beneficial treatment on the drug charges in exchange for information on open homicide cases.

Although the full scope of the violation of Mr. Davis’ fundamental constitutional rights must be developed through discovery and at a hearing, the following praecipe will set forth for the Court the applicable law regarding Mr. Davis’ rights and the

government's obligations under the Fifth and Sixth Amendment, and explain why, even under the facts thus far admitted by the government, Mr. Davis' rights were violated and dismissal of the charges is both warranted and necessary.

This praecipe will also explain why Mr. Davis' trial attorney Frederick Iverson must withdraw as counsel for the purposes of Mr. Davis' Motion to Dismiss. On January 9, 2004, Mr. Iverson filed a Motion to Withdraw explaining that the government had notified him that he would be a potential witness in support of Mr. Davis' Motion to Dismiss because Mr. Iverson's recollection as to his conversations with the United States Attorney's Office (USAO) were contradicted by Assistant United States Attorney (AUSA) Brandon. The government has not filed a response to this motion, but it has communicated to undersigned counsel that it will oppose Mr. Iverson's Motion to Withdraw because, in the government's view, Mr. Iverson's testimony is not "relevant" to Mr. Davis' Motion to Dismiss. Mr. Davis' praecipe will explain why the government's initial assessment that Mr. Iverson is a potential witness was, in fact, correct; why Mr. Iverson's testimony is relevant to Mr. Davis' Motion to Dismiss; and why Mr. Iverson's obligations under the Sixth Amendment and the Rules of Professional Responsibility preclude him from simultaneously assuming the roles of witness and advocate during the litigation of Mr. Davis' Motion to Dismiss.

The Facts Relating to Mr. Davis' Arrest and  
His Multiple Unauthorized Interviews by the Police

As a preliminary matter, although the government has already admitted to taking actions that violated Mr. Davis' Fifth and Sixth Amendment rights, the full scope of the government's misconduct in Mr. Davis' case has yet to be revealed. The facts set forth below are based largely on the government's response to Mr. Iverson's initial request for

discovery under Superior Court Criminal Rule 16 and the government's Opposition to Mr. Davis' Motion to Dismiss. Acquisition of complete information concerning the government's misconduct awaits meaningful disclosure by the government in response to Mr. Davis' discovery requests<sup>1</sup> and a hearing at which Mr. Davis will call Mr. Iverson and other government witnesses to testify.

Mr. Davis was arrested by the police after an alleged drug sting operation on April 22, 2003. After his arrest, Mr. Davis was taken immediately to the Metropolitan Police Department's (MPD's) Seventh District Station. At the station, Mr. Davis was debriefed by a homicide Detective, Detective Oliver Garvey. Detective Garvey's objective was to use Mr. Davis' arrest as leverage to induce Mr. Davis to talk to Detective Garvey about open homicide cases.<sup>2</sup> Detective Garvey told Mr. Davis that Mr. Davis was being charged with distribution. Although the government asserts that

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<sup>1</sup> Counsel for Mr. Davis has now written the government three times in his effort to obtain discovery, but has yet to obtain any meaningful response to these requests, much less any of the documents or recordings that Mr. Davis believes exists in this case. Mr. Davis, through Mr. Iverson, sent the government two separate discovery requests on January 6 and 7, 2004, respectively. See Attachment 1 (Letters from Frederick D. Iverson to AUSA Margaret J. Chriss, dated January 6 and January 7, 2004). On Friday January 9, 2003, the government faxed a letter to Mr. Iverson in which it purported to respond to Mr. Iverson's requests. See Attachment 2 (Letter from AUSA Margaret J. Chriss to Frederick D. Iverson, dated January 9, 2004). In this response, the government provided counsel with very few facts and no documentation of Mr. Davis' three interviews by the police; the government also failed to meaningfully respond to Mr. Davis' discovery request by, among other things, entirely ignoring three of Mr. Davis' requests, and referring Mr. Davis generally to the government's Opposition to his Motion to Dismiss. See Attachment 3 (Letter from Frederick D. Iverson to AUSA Margaret Chriss, dated January 17, 2004) (explaining the deficiencies in the government's response to Mr. Davis' discovery requests).

<sup>2</sup> The government has stated explicitly that Mr. Davis was not (and is not now) believed to be a suspect in any homicide case. See Government's Opposition to Defendant's Motion to Dismiss for Violations of Defendant's Right to Counsel, n. 2 ("the police never had any reason to suspect that [Mr. Davis] would inculcate himself in the homicides that they were investigating").

Detective Garvey told Mr. Davis that he could not talk about Mr. Davis' drug case, the government admits that Detective Garvey told Mr. Davis that if Mr. Davis provided him with "useful information about homicides," he would tell the Assistant United States Attorney prosecuting Mr. Davis' drug case about Mr. Davis' cooperation. See Government's Opposition to Defendant's Motion to Dismiss for Violations of Defendant's Right to Counsel, ¶ 7.<sup>3</sup>

Mr. Davis responded to Detective Garvey's questions and gave Detective Garvey information that was apparently "useful" with respect to at least one open homicide case. Detective Garvey passed this information on to the Detective investigating that homicide, Detective Edward Truesdale. See Government's Opposition to Defendant's Motion to Dismiss for Violations of Defendant's Right to Counsel, ¶ 8.

The day after his arrest, Mr. Davis appeared in court. Attorney Frederick D. Iverson was appointed to represent Mr. Davis. Subsequent to his appointment as Mr. Davis' counsel, Mr. Iverson received a telephone call from Assistant United States Attorney [AUSA] Kathleen Brandon. AUSA Brandon was not the attorney responsible for prosecuting Mr. Davis' drug charge; AUSA Brandon was working on a homicide case (apparently Detective Truesdale's case) and wanted permission to debrief Mr. Davis about matters related to her case. Mr. Iverson denied AUSA Brandon permission to speak to his client. See Attachment 2 (government states that it will stipulate to this fact); Attachment 4 (same). AUSA Brandon then informed Mr. Iverson that she had

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<sup>3</sup> Counsel has reason to believe that, in this interview (and the following two interviews), the government also sought to elicit incriminating statements from Mr. Davis about his drug activity and the drug charges, and may have successfully obtained such statements. It is unclear whether any effort was made to read Mr. Davis his rights under Miranda v. Arizona 384 U.S. 436 (1966) after his arrest; the government's Opposition to Mr. Davis' Motion to Dismiss is silent as to this point.

already sought a “come-up” order for Mr. Davis. AUSA Brandon stated that she might not be able to cancel the order in time, but told Mr. Iverson that she understood that she did not have permission to speak to his client.

AUSA Brandon’s conversation with Mr. Iverson notwithstanding, Mr. Davis was subsequently transported from the D.C. Jail to the United States Attorney’s office.<sup>4</sup>

There, Mr. Davis was debriefed at length by Detective Truesdale about open homicide cases (including the homicide case that he was apparently working on with AUSA Brandon). During this debriefing, Mr. Davis was again informed that if Mr. Davis provided useful information to the police about any open homicide cases, the police would try to help him with his drug case by letting the prosecutor in that case know that Mr. Davis was acting as a cooperating witness.<sup>5</sup>

Some time after this interview, AUSA Brandon contacted Mr. Iverson and acknowledged that Mr. Davis had been debriefed in direct contravention of counsel’s express wishes. However, even though Mr. Davis had been brought to the United States Attorney’s office and even though he had discussed “in more detail what he knew” about open homicide cases, AUSA Brandon represented to counsel that she had not been

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<sup>4</sup> Mr. Davis was incarcerated by the Department of Corrections (DOC) pursuant to a probation violation charge. As such, he was officially in the custody of the Superior Court. See D.C. Code § 23-1322. It is as yet unclear how the USAO or the MPD were able to transfer Mr. Davis from the DOC to the USAO (or, subsequently, to MPD headquarters) to be interviewed without first seeking authorization from the Superior Court.

<sup>5</sup> Counsel also has reason to believe that, after Mr. Davis was appointed counsel, at least one government agent contacted members of Mr. Davis’ family in an effort to obtain Mr. Davis’ assistance as a cooperator. The government agent apparently directed one or more members of Mr. Davis’ family to encourage Mr. Davis’ to act as a cooperating witness. This government agent also apparently did not immediately reveal his identity as a law enforcement agent until he was explicitly asked if he was an attorney working on Mr. Davis’ behalf.

present for this interview and that she only learned about it after the fact. See Government's Opposition to Defendant's Motion to Dismiss for Violations of Defendant's Right to Counsel, ¶ 10. In response, counsel informed AUSA Brandon that he would file the appropriate motions to protest this unauthorized interview.

Although it was clear that any further contact with Mr. Davis was not authorized by his counsel, the police interviewed Mr. Davis about his knowledge of open homicide cases yet a third time on May 13, 2003. This time no attempt was made to obtain Mr. Iverson's permission to speak to Mr. Davis. Instead, without counsel's knowledge, Mr. Davis was brought from the D.C. Jail to MPD headquarters. There he was debriefed for at least two hours by two police officers, Detective Garvey and Sergeant Fred Johnson. Just as on the prior two occasions, the police reassured Mr. Davis that, if he gave the police information that was useful in its homicide investigations, they would try to help him in his pending drug case by telling the prosecutor that he was he was acting as a cooperating witness in their murder cases. See Government's Opposition to Defendant's Motion to Dismiss for Violations of Defendant's Right to Counsel, ¶ 11.

The government subsequently made Mr. Davis a plea offer, but this offer did not reflect any of the benefit promised to Mr. Davis by the police to induce him to act as a cooperating witness. The government offered Mr. Davis a plea to one count of distribution<sup>6</sup>, and offered to cap its allocution at two years of incarceration. See Attachment 5 (Letter from David Carey Woll, Jr. to Franz C. Jobson and Frederick D. Iverson, dated August 14, 2003). Mr. Davis rejected this plea offer.

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<sup>6</sup> Mr. Davis initially faced two charges of unlawful distribution of a controlled substance, and one possession with intent to distribute (PWID) charge, but the government subsequently dismissed the PWID charge on November 19, 2003.

THE LEGAL BASES FOR MR. DAVIS' MOTION TO  
DISMISS: THE SIXTH AMENDMENT RIGHT TO  
COUNSEL, THE FIFTH AMENDMENT RIGHT TO  
DUE PROCESS, AND THE COURT'S SUPERVISORY  
POWER.

Although additional facts may come to light that provide further evidence of the government's misconduct, even as presented in the skeletal fashion above, the government's actions in Mr. Davis' case present clear violations of Mr. Davis' rights to Due Process and the effective assistance of counsel guaranteed by the Fifth and Sixth Amendments. Mr. Davis had a Sixth Amendment right to the assistance of counsel at all critical stages of the prosecution of the drug charges that he faced; by cutting trial counsel out of the loop at debriefing sessions where government agents expressly offered Mr. Davis a quid pro quo – beneficial treatment on the drug charges in return for information on open homicide cases – this right was violated. Similarly, the government's complete disregard for Mr. Davis' right to counsel and principles of fundamental fairness violated Mr. Davis' Fifth Amendment right to Due Process.

No lesser remedy than dismissal of the distribution charges will vindicate Mr. Davis' fundamental constitutional rights and deprive the government of the fruits of its transgressions. Not even the most skilled counsel could recreate fair plea negotiations now that Mr. Davis has divulged everything likely to be of use to the government. Finally, this Court has the discretion to grant Mr. Davis the requested relief under its inherent supervisory power where, as here, the government's behavior was inconsistent with the fair administration of justice and very likely abrogated its obligations under federal law, the District of Columbia's Rules of Professional Responsibility, and the United States Attorney's Office's own rules of conduct.

**A. Dismissal of the charges is warranted because the government’s unauthorized debriefing sessions with Mr. Davis in the absence of counsel and in violation of counsel’s express directive violated Mr. Davis’ Sixth Amendment right to the effective assistance of counsel.**

1. The Scope of the Sixth Amendment Right to Counsel

The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel in his defense.” U. S. Const. amend. VI. This right to counsel “[e]mbod[ies] a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself.” Moulton v. Maine, 474 U.S. 159, 169 (1985). For this reason, it is “indispensable to the fair administration of our adversarial system of criminal justice.” Id. at 168.

The Sixth Amendment right to counsel “attaches” after the commencement of criminal proceedings. Fellers v. United States, \_\_\_ S.Ct. \_\_\_, 2004 WL 111410 (Jan. 26, 2004); Brewer v. Williams, 430 U.S. 387, 398 (1977) (“the right to counsel granted by the Sixth . . . Amendment[] means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’”) (quoting Kirby v. Illinois, 406 U.S. at 698). This right to counsel is “offense” or “prosecution” specific -- that is, the right pertains only to the criminal proceedings that the government has initiated, see Texas v. Cobb, 532 U.S. 162, 167-68, 172-73, n. 3 (2001). But within that prosecution, the right to the assistance of counsel is quite broad. It applies to all “critical” stages of the particular prosecution, Moulton, 474 U.S. at 173; United States v. Wade, 388 U.S. 218, 224 (1967), that is, “at every stage of a criminal

proceeding where substantial rights . . . may be affected.” Mempa v. Rhay, 389 U.S. 128, 134 (1967).

It is well-settled that these “critical” stages encompass events prior to trial. Indeed, the Supreme Court has repeatedly acknowledged that “the guiding hand of counsel,” is especially important “during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important.” Moulton, 474 U.S. at 169 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Massiah v. United States, 377 U.S. 201, 205 (1964); see also Moulton, 474 U.S. at 170 (“to deprive a person of counsel during a period prior to trial may be more damaging than denial of counsel during the trial itself”).

Moreover, the Supreme Court has recognized that a defendant has just as much (if not more) need of the assistance of his counsel pre-trial when he is confronted “by the procedural system, or by his expert adversary, or by both.” United States v. Ash, 413 U.S. 300, 310 (1973); see also Wade, 388 U.S. at 224 (noting that the Sixth Amendment right to counsel extends to pre-trial events because “today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pre trial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality”). Accordingly, the “Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a ‘medium’ between him and the State.” Michigan v. Jackson, 475 U.S. 625, 632 (1986) (quoting Moulton, 474 U.S. at 176); see also Brewer, 430 U.S. at 415 (“the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the

citizen”) (Stevens, J. conc.); Wade, 388 U.S. at 226 (“It is central to that principle that in addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.”)

Given the broad scope of the Sixth Amendment right to counsel within a particular prosecution, it is only logical that its protections apply with full force to plea negotiations and cooperation discussions between a defendant and the government. Such negotiations and discussions might well have an effect on a defendant’s “substantial rights,” Mempa, 389 U.S. at 134, or even “settle the accused’s fate,” Wade, 388 U.S. at 224. Thus, it is critical that counsel be present at and participate in such events in order to ensure that “the accused’s interests will be protected consistently with our adversary theory of criminal prosecution.” Id. at 227; see also United States v. Leonti, 326 F.3d 1111, 1117 (9<sup>th</sup> Cir. 2003) (“the essence of a critical stage is . . . the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel”).

Indeed, the Supreme Court has explicitly held that the Sixth Amendment right to the effective assistance of counsel applies to the plea process, see Hill v. Lockhart, 474 U.S. 52, 57 (1985), and numerous federal courts have reaffirmed that this right encompasses the right to the assistance of counsel in plea negotiations and reaching a plea agreement. See, e.g., Nunes v. Miller, 350 F.3d 1045, 1053 (9<sup>th</sup> Cir. 2003) (“During all critical stages of a prosecution, which must include the plea bargaining process, it is counsel’s ‘dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution’”)

(quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)); Boria v. Keane, 99 F.3d 492, 496-98 (2d Cir. 1996) (ineffective assistance of counsel during plea negotiations justified grant of habeas relief) *cf.* Moody, 206 F.3d 609, 613-16 (6<sup>th</sup> Cir. 2000) (counsel’s failure to pursue plea negotiations with the government on defendant’s behalf would have constituted ineffective assistance of counsel had the Sixth Amendment right to counsel attached).

Likewise, the case law of the Supreme Court and other federal courts, when read in conjunction, clearly establish that the Sixth Amendment right to counsel guarantee encompasses cooperation discussions. The Supreme Court’s decision in United States v. Morrison, 449 U.S. 361 (1981) – a case in which the Court was presented with a clear opportunity to reject the application of Sixth Amendment protections to post-indictment cooperation discussions, but refused to so limit the right to counsel – provides support for this interpretation of the Sixth Amendment. The Court in Morrison assumed without deciding that the defendant charged with distributing heroin had a Sixth Amendment right to the assistance of counsel at post-indictment debriefing sessions where government agents were seeking her cooperation in a related drug investigation. The Court held that the defendant was not entitled to any relief, however, where she had not suffered any prejudice because the government agents had not been successful in obtaining any information from her. 449 U.S. at 365-67. The Court concluded its decision by specifically noting that it did “not condone” the misconduct of the government agents and suggested that it might have issued a different decision had the defendant been able to demonstrate that she had been “adverse[ly] impact[ed]” by their “egregious behavior.” 449 U.S. at 367.

Other federal court decisions condemning efforts by government agents to communicate with defendants about the possibility of cooperation, post-indictment and in the absence of counsel, make clear that the Sixth Amendment right to counsel applies to cooperation discussions. See, e.g., United States v. Ming He, 94 F.3d 782, 790-91 (2d Cir. 1996) (holding as an exercise of its supervisory power that defendants are entitled to assistance of counsel at debriefing interviews but relying heavily on Sixth Amendment precedent); United States v. Chavez, 902 F.2d 259, 266 (4<sup>th</sup> Cir. 1990) (“admonish[ing] the United States Attorney’s Office and all federal investigative agencies, to avoid this type of intrusion into the attorney-client relationship” where FBI agent communicated with defendant ex parte about cooperating; defendant’s Sixth Amendment rights to counsel was not violated, however, because there was no showing of prejudice); United States v. Glover, 596 F.2d 857, 860, 864 (9<sup>th</sup> Cir. 1979) (government agent’s post-indictment, ex parte communication with defendant urging defendant to “talk to us” because “we’re the good guys” was “reprehensible”; defendant’s Sixth Amendment rights to counsel was not violated, however, because there was no showing of prejudice). Implicit in these decisions is the recognition that cooperation discussions may be “perilous” and hence that defendants are entitled to the protection of counsel. Ming He, 94 F.3d at 790; see also Leonti, 326 F.3d at 1120 (explaining that the assistance of counsel is required even though “the [cooperation] process is not strictly adversarial in nature, the government is not transformed into a neutral and impartial “arm of the court” simply because it is seeking information from the defendant. While seeking his assistance, the government continues to simultaneously seek the imposition of a sentence for his crime”).

Furthermore, there is a growing body of authority within the framework of ineffective assistance of counsel claims that any period of attempted cooperation is also “‘a critical stage’ of the criminal process” for which a defendant is entitled to counsel under the Sixth Amendment. Leonti, 326 F.3d at 1117 (attorney’s failure to assist with and attend cooperation sessions may constitute ineffective assistance of counsel); United States v. Fernandez, 2000 WL 534449, at \*2-4 (S.D.N.Y. 2000) (attorney’s failure to discuss a defendant’s opportunity to cooperate and the benefits of cooperation may constitute ineffective assistance of counsel); United States v. Robertson, 29 F. Supp.2d 567, 571 (D. Minn. 1998) (ineffective assistance of counsel where attorney failed to advise defendant about the benefits of cooperation offered as part of plea agreement); cf. United States v. Duran-Benitez, 110 F. Supp.2d 133 (E.D.N.Y. 2000) (ineffective assistance of counsel where attorney advised defendant not to cooperate with the government in order to protect another client). It would make no sense to recognize the Sixth Amendment right in the context of claims of ineffective assistance of counsel but to reject it in the context of claims of government misconduct.

Apart from this precedent, consideration of the important assistance counsel can provide in cooperation discussions and debriefing sessions compels the conclusion that a defendant is protected by the Sixth Amendment at such a “critical” stage. See Moulton, 474 U.S. at 170 (“the right to the assistance of counsel is shaped by the need for assistance of counsel”). In addition to the crucial task of negotiating the terms of the cooperation agreement up front, counsel (1) can assist her client at debriefing sessions by “explaining the government’s questions while also keeping her client calm”; (2) “can keep her client focused on the fact that while he is seeking the assistance and protection

of the government, that entity does not share the defendant's interests even after the execution of a cooperation agreement"; (3) "might help resolve potential disagreements between the government and the defendant and assist the defendant in clarifying his answers to ensure they are complete and accurate"; and (4) "can serve as a potential witness at sentencing to the fact that her client fully performed the promise he made to the government." Ming He, 94 F.3d at 789-90; see also Leonti, 326 F.3d at 1119 (the assistance of counsel in any period of attempted cooperation "includ[es] but [is] not limited to, facilitating communication between the defendant and the government, attending proffer sessions, ascertaining the government's expectations and whether the defendant is satisfying them, communicating the client's limitations to the government, and establishing a record of attempts to communicate.")

Finally, the government itself regularly acknowledges as part of its standard debriefing letter, that a defendant has the right to counsel at debriefing sessions. See Attachment 6 (Sample Cooperation Letter, ¶4) ("your client has the right to have defense counsel present during these [cooperation] interviews"). By sending this debriefing letter to counsel and by including a signature for counsel on the cooperation acceptance form, the government also appears to recognize that a defendant has the right to counsel in negotiating the terms of his cooperation. Id. p. 1 ("This letter confirms the agreement between your client . . . and the Office of the United States Attorney for the District of Columbia . . ."); Acceptance Form ("I have read each of the pages constituting this plea/cooperation agreement, reviewed them with my client, and discussed the provisions of the agreement with my client"). Given these party admissions, see Harris v. United States, 834 A.2d 106, 120-22 (D.C. 2003) (prior statements by the United States

Attorney's office may be treated as party admissions), the government's effort to contest Mr. Davis' entitlement to the protection of his Sixth Amendment right to counsel at his two interviews at the United States Attorney's Office and at MPD Headquarters, is less than convincing.

In sum, the scope of the right to counsel guaranteed by the Sixth Amendment extends broadly to all critical stages of the particular prosecution for which the right to counsel has attached. These critical stages encompass events pre-trial, and specifically include plea negotiations and cooperation discussions. Thus, absent a valid waiver, a defendant who has been appointed counsel on a particular charge has the right to the assistance of his attorney at any confrontation with government agents where the possibility of a plea or cooperation may arise. It is against this backdrop that Mr. Davis' Sixth Amendment claim must be analyzed.

## 2. The violation of Mr. Davis' Sixth Amendment right to Counsel

In order to establish a Sixth Amendment violation, Mr. Davis must show not only that his right to counsel had attached and that the time period during which he was deprived of counsel was a "critical stage" in the prosecution, see supra, but also that he was, in some way, adversely affected or prejudiced by this deprivation. See Briggs v. Goodwin, 698 F.2d 486, 494 (D.C. Cir.), vacated on other grounds, 712 F.2d 1444 (D.C. Cir. 1983); see also United States v. Kelly, 790 F.2d 130, 138, n.6 (D.C. Cir. 1986); United States v. Noriega, 764 F. Supp. 1480, 1490 n. 8 (S.D. Fla. 1991); but see Shillinger v. Haworth, 70 F.3d 1132 (10<sup>th</sup> Cir. 1996) (per se violation of Sixth Amendment when intrusion on attorney-client relationship is "purposeful"). Mr. Davis need not show that this prejudice was outcome-determinative. Id. Mr. Davis need only

show that the government’s disregard for his right to counsel “imposed . . . [an] additional effort or burden on the defense.” Briggs, 698 F.2d at 494 (holding that the “[m]ere possession by the prosecution of otherwise confidential knowledge of about the defendant’s strategy or position is sufficient in itself to establish detriment to the criminal defendant”). Moreover, as the court explicitly noted in Briggs, this additional burden may not necessarily concern the fairness of a trial but also may impact the “whole range of interests implicated by a criminal prosecution. These interests may extend beyond the wish for exoneration to include, for example, the possibilities of a lesser charge, a lighter sentence, or the alleviation of the practical burdens of a trial.” Briggs, 698 F.2d at 494 (emphasis added) (internal quotations and citations omitted).

More pertinent facts expanding the scope of the government’s intrusion into Mr. Davis’ right to counsel may come to light through discovery or at a hearing, but even under the facts thus far admitted, Mr. Davis’ Sixth Amendment right to counsel was clearly violated by the government’s misconduct in this case. Mr. Davis’ right to counsel attached, at the very latest, on the day after his arrest, when he was appointed counsel at his presentment. Given the scope of the Sixth Amendment right to counsel set forth above, it is clear that Mr. Davis’ two interviews, at the USAO and the MPD Headquarters respectively, constituted “critical stages” in the prosecution for which counsel should have been present. At these two interviews, government agents initiated plea negotiations<sup>7</sup> by offering Mr. Davis the possibility of a quid pro quo – beneficial

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<sup>7</sup> See I.N.S. v. St. Cyr, 533U.S. 289, 291 (2001) (“Plea agreements involve a quid pro quo between a criminal defendant and the government.”); Chambers v. Reno, 307 F.3d 284, 290 (4<sup>th</sup> Cir. 2002) (the “quid pro quo exchange characterizes a plea agreement”); United States v. Sandoval-Lopez, 122 F.3d 797, 800 (9<sup>th</sup> Cir. 1997) (“a negotiated guilty

treatment on his drug charges in return for information on open homicide cases – and thereby induced Mr. Davis to act as a cooperating witness.

Moreover, Mr. Davis can easily demonstrate that he was prejudiced by the government’s successful efforts to debrief him in the absence of his counsel. Clearly an additional burden was placed on the defense where Mr. Davis, in two lengthy interviews, gave the government “useful” information about multiple homicide cases (and possibly about a drug distribution network), but counsel was entirely cut out of the loop. At the very least, Mr. Davis acted as an off-the-books cooperating witness, but was entirely deprived of counsel’s advocacy to seek some benefit in return. Cf. Chavez, 902 F.2d at 267 (no Sixth Amendment violation where post-indictment ex parte communications between defendant and government agent concerned only the “possibility of cooperation”); Glover, 596 F.2d at 862 (no Sixth Amendment violation where post-indictment ex parte interview “was interrupted by Glover’s counsel shortly after it had begun . . . [and] Glover gave no information . . . and refused to cooperate”). Moreover, because counsel was excluded from these debriefing sessions, counsel was not present (1) to ensure that Mr. Davis understood the consequences of speaking to the government about his pending drug case and/or other cases, (2) to facilitate any cooperation on Mr. Davis’ part, or (3) to verify that Mr. Davis provided valuable information to the government.<sup>8</sup>

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plea is a bargained for quid pro quo”) (internal quotation and citations omitted); United States v. Asset, 990 F.2d 208, 215 (5<sup>th</sup> Cir. 1993) (same).

<sup>8</sup> At a hearing on Mr. Davis’ Motion to Dismiss, counsel intends to present evidence further illustrating how Mr. Davis was prejudiced by the violation of his Sixth Amendment right to counsel.

Thus, it is clear that Mr. Davis not only had a right under the Sixth Amendment to the assistance of counsel in his cooperation discussions and debriefing sessions with the government, but also that this right was violated when the government ignored counsel's directive not to speak to his client, and successfully induced Mr. Davis to provide "useful" information about open homicide cases by offering him beneficial treatment on his drug charges.

### 3. The Prosecution's Ineffectual Defenses

In its Opposition to Mr. Davis' Motion to Dismiss, the government asserted that there is no Sixth Amendment violation here, because, under the Supreme Court's decision in Texas v. Cobb, 532 U.S. 162, 164 (2001), the right to counsel is "offense specific." But it is the very "offense" or "prosecution" specific nature of the Sixth Amendment right that guaranteed Mr. Davis protection in his conversations with the government agents in this case. In those conversations, government agents explicitly linked the provision by Mr. Davis of information about open criminal cases to beneficial treatment on Mr. Davis' pending drug charges. Such conversations, which were in the nature of preliminary plea negotiations and/or cooperation discussions, are unquestionably "prosecution specific" within the meaning of Cobb.

Similarly, the prosecution's argument that Mr. Davis's Sixth Amendment right to counsel was not violated because he was not "question[ed] . . . about his pending case in which he was represented by counsel," and because "the government does not intend to use the defendant's statements to the police during the trial of his pending case" is both misguided and ineffectual. To begin with, counsel has reason to believe that Mr. Davis was questioned about matters related to his drug charges. But even if it is the case that no

information related to Mr. Davis' drug charges was elicited in these ex parte interviews, Mr. Davis' Sixth Amendment claim is not weakened. The scope of Sixth Amendment protections are far more broad than the scope of the Fifth Amendment protection against self-incrimination. Indeed, once the Sixth Amendment right to counsel attaches, it guarantees the effective assistance of counsel at all critical stages of the adversarial process to level the playing field between the all powerful government and the individual defendant. See Michigan v. Jackson, 475 U.S. at 632 n. 5 (“after the initiation of adversary judicial proceedings, the Sixth Amendment provides a right to counsel at a ‘critical stage’ even when there is no interrogation and no Fifth Amendment applicability”); United States v. Henry, 447 U.S. 264, 270, 273 (1980) (rejecting a government argument that “seeks to infuse Fifth Amendment concerns into the Sixth Amendment protection of the right to the assistance of counsel”); United States v. Wade, 388 U.S. at 223 (“[t]he fact that the lineup involved no violation of Wade’s privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel”). Clearly, engaging in discussions with Mr. Davis in which an express connection was made between beneficial treatment in his drug case and providing information to the government on open drug cases was just such a critical stage at which Mr. Davis was entitled to the assistance of his counsel.

Finally, the government’s argument that its sole objective in speaking to Mr. Davis ex parte was to obtain information about open homicide cases – cases where Mr. Davis was not a suspect and was not represented by counsel – is premised on a fundamental misunderstanding of the protections afforded by the Sixth Amendment right

to counsel. Even if it were true, it would make no difference for Sixth Amendment purposes that all the police were really interested in when they interviewed Mr. Davis ex parte and offered him a quid pro quo was the information Mr. Davis could provide about homicide cases. The Supreme Court held in Moulton that prosecutors and law enforcement could not justify interference with or circumvention of a defendant's Sixth Amendment right to counsel on the grounds that government agents had "alternative, legitimate reasons" for making contact with the defendant. See Moulton 474 U.S. at 180. While acknowledging that "dual purposes may exist whenever police have more than one reason to investigate someone," the Court nonetheless held that where these investigations relate to cases for which a defendant has representation, the government's "investigative powers are limited by the Sixth Amendment rights of the accused." Id. at 179-80. Thus, regardless of the government's stated objectives, Mr. Davis was constitutionally entitled to the assistance of counsel at interviews where the information he provided about open homicides was expressly linked to the disposition of Mr. Davis' drug cases.

4. Dismissal as the only appropriate Remedy for the Violation of Mr. Davis' Sixth Amendment Right to Counsel.

Having established that his fundamental constitutional right to the assistance of counsel was violated at a critical stage of the prosecution, Mr. Davis is entitled to relief. This relief should be "tailored to the injury suffered" by Mr. Davis and "neutralize the taint" of that injury. Morrison, 449 U.S. at 668 ("Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant effective assistance of counsel and a fair trial."). Under the circumstances presented, the only relief that will adequately address the violation of Mr. Davis' right to

counsel and deprive the government of the “fruits of its transgression[s],” *id.* at 669, is to dismiss with prejudice the pending drug charges against Mr. Davis.

In Morrison, the defendant seeking dismissal as a remedy for the government’s authorized ex parte contact, could not show a substantial threat of prejudice to justify such a remedy, because she never acceded to the government agents’ requests and never acted as a cooperating witness. By contrast, as the government admits, Mr. Davis did speak to the government agents, at length and on multiple occasions. As a result, the opportunity for the assistance of counsel at the critical stage of cooperation discussions/plea negotiations has been irretrievably lost. Counsel cannot now seek to facilitate Mr. Davis’ cooperation and advocate for some beneficial treatment on Mr. Davis’ drugs charges; the government has apparently already used Mr. Davis up and cast him aside. Nor can counsel vouch for Mr. Davis’ valuable assistance and advocate after the fact for Mr. Davis because counsel was not there. Meanwhile the government has what it wanted and has no reason to assist Mr. Davis. In this situation, Mr. Davis cannot be put back in the position he was in prior to the government’s violation of his rights. With the cat out of the bag, no other remedy short of dismissal will vindicate Mr. Davis’ rights. Cf. Morrison, 449 U.S. at 669 n.2 (rejecting dismissal as remedy where there was “no claim there was continuing prejudice which, because it could not be remedied by a new trial or suppression of evidence, called for more drastic treatment”).<sup>9</sup>

Moreover, the willfulness of the government’s violation militates in favor of dismissal in this case. This is not simply a case where the “constable blundered” by

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<sup>9</sup> Notably, such a disposition in this case would in no way prejudice, and could benefit, the prosecution in the homicide cases about which the government sought information from Mr. Davis. If Mr. Davis were to testify in any of the homicide cases, he could truthfully say that he had derived no benefit from his testimony.

failing to appreciate that Mr. Davis had a right to counsel, rather this is a case “where the constable planned an impermissible interference with the right to the assistance of counsel.” Henry, 447 U.S. at 275; see also Brewer, 430 U.S. at 399 (Sixth Amendment violated where police “deliberately and designedly” set out to interview defendant in the absence of counsel). The government knew that Mr. Davis had a right to counsel at these interviews. Contacting counsel and negotiating the terms of a defendant’s cooperation is standard operating procedure in the United States Attorney’s Office for the District of Columbia. And, in fact, AUSA Brandon did contact trial counsel, Mr. Iverson, in an effort to obtain his consent to these interviews. The problem is that when Mr. Iverson denied the government permission to speak to Mr. Davis, the government brushed aside his directive and, taking advantage of the fact that it had Mr. Davis in its custody,<sup>10</sup> went ahead and conducted its interviews anyway.<sup>11</sup> Such an abuse of power cannot be sanctioned, and dismissal of the charges in Mr. Davis case is necessary to send an unmistakable message to the government that the Sixth Amendment right to counsel must

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<sup>10</sup> The government not only took advantage of its physical control over Mr. Davis but also of the effect that Mr. Davis’ incarceration would have on his psychological state. See Henry, 447 U.S. at 274 (relevant that defendant was incarcerated at the time his Sixth Amendment right to counsel was violated because confinement is a “powerful psychological inducement[] to reach for aid”).

<sup>11</sup> Of course, it is no defense for the government to assert that the police were unaware that Mr. Iverson was Mr. Davis’ court-appointed counsel or that Mr. Iverson had denied AUSA Brandon permission to speak to Mr. Davis. “Sixth Amendment principles require that we impute the State’s knowledge from one state actor to another . . . One set of state actors (the police) may not claim ignorance of defendant’s unequivocal request for counsel to another state actor (the court).” Michigan v. Jackson, 475 U.S. at 634; cf. Fellers, \_\_ S.Ct. \_\_, 2004 WL 1114100 (Sixth Amendment violated where, “after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner’s Sixth Amendment rights,” police “deliberately elicited” information from petitioner related to offense for which he had counsel).

be respected. See Morrison, 449 U.S. at 366 n.2 (more extreme remedy for Sixth Amendment violation may be necessary to “deter future lawlessness”).

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“Once the [Sixth Amendment] right to counsel has attached . . . the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining counsel . . . . at the very least, the prosecutor and police has an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.” Moulton, 474 U.S. 170-71; see also Ming He, 94 F.3d at 791 (Not only does the government have an obligation not to “knowing[ly] exploit[] . . . an opportunity to confront the accused without counsel being present,” the government “acting consistently with the spirit and letter of the Sixth Amendment and with the fair administration of justice, should . . . actively facilitate[] that representation” ). The court may take its pick of descriptors, but it is apparent even on this slight record that the government in Mr. Davis’ case did not “respect,” “preserve” or “facilitate” Mr. Davis’ right to the assistance of his counsel on the pending drug cases when it linked the provision by Mr. Davis of information about open criminal cases to beneficial treatment on these drug charges. The government’s successful end run around counsel unquestionably prejudiced Mr. Davis, and dismissal of the charges is an appropriate remedy for such a violation of Mr. Davis’ rights.

**B. Dismissal of the charges is warranted because the government's unauthorized debriefing sessions with Mr. Davis in the absence of counsel and in violation of counsel's express directive also violated Mr. Davis' Fifth Amendment right to Due Process.**

In addition to violating Mr. Davis' Sixth Amendment right to the effective assistance of counsel, the government's misconduct also violated Mr. Davis' Fifth Amendment right to Due Process. The Fifth Amendment may provide a remedy where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v. Hsia, 81 F. Supp.2d 7, 18 (D.D.C. 2000) (citing United States v. Russell, 411 U.S. 423, 431-32 (1973)). Here, the government's repeated ex parte contact with Mr. Davis, made after counsel expressly denied the government permission to speak to Mr. Davis, demonstrates an obvious disregard not only for Mr. Davis' fundamental Sixth Amendment right to counsel and but also for the basic principles of fairness that are the bedrock of our criminal justice system. See United States v. Marshank, 777 F. Supp. 1507, 1523 (N.D. Cal. 1991) (Fifth Amendment guarantee of Due process may be violated "where government interference in the attorney-client relationship is so shocking to the universal sense of justice") (internal quotations and citation omitted); In re T.I.B., 762 A.2d 20, 29 (D.C. 2000) (recognizing that Fifth Amendment right to Due Process may be violated where there is "[a]rbitrary or unjustified interference" with a defendant's right to the assistance of counsel) (citing Powell v. Alabama, 287 U.S. 45, 69 (1932) (holding that a defendant is entitled to the "guiding hand of counsel at every step of the proceedings against him").

A three-factor test should be employed in order to determine whether the government's interference with Mr. Davis' right to counsel "was so outrageous as to

constitute a violation of due process and require dismissal of the indictment on Fifth Amendment grounds.” See Hsia, 81 F. Supp.2d at 18-19 (adopting the three-factor test developed by the Third Circuit in United States v. Voigt, 89 F.3d 1050 (3d Cir. 1996)).<sup>12</sup> Specifically, this Court should consider whether (1) the government was objectively aware of the attorney-client relationship; (2) the government deliberately intruded into or circumvented that relationship; and (3) there was actual and substantial prejudice to the defendant as a result of the government’s misconduct. Voigt, 89 F.3d at 1067; Hsia, 81 F. Supp.2d at 19. In Mr. Davis’ case, this test is easily satisfied.

First, there is no doubt that the government knew that Mr. Davis had counsel prior to his two interviews at the United States Attorney’s Office and MPD Headquarters. Indeed, the government reached out to Mr. Iverson immediately after he was appointed as Mr. Davis’ counsel; AUSA Brandon telephoned Mr. Iverson for the express purpose of seeking his permission to interview Mr. Davis.<sup>13</sup> Second, it is equally apparent that the government deliberately circumvented Mr. Davis’ right to counsel. Mr. Davis’ interview at the United States Attorney’s Office took place shortly after Mr. Iverson expressly denied the government permission to speak to Mr. Davis. Notwithstanding Mr. Iverson’s directive, government agents retrieved Mr. Davis from the Jail, transported him to the United States Attorney’s Office and interviewed him there at some length. In a subsequent conversation with AUSA Brandon, Mr. Iverson protested this unauthorized,

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<sup>12</sup> The three-factor test of Hsia and Voigt is a useful analytic tool, although those cases concerned claims that the government had improperly intruded into the defendant’s attorney-client relationship, whereas the government in this case entirely deprived Mr. Davis of the assistance of counsel at a critical stage of the prosecution.

<sup>13</sup> As noted above, see n. 11, it would be no defense to its misconduct for the government to assert or elicit evidence that the police did not know about AUSA Brandon’s telephone conversation with Mr. Iverson. AUSA Brandon was obligated to pass on to the police Mr. Iverson’s directive that Mr. Davis’ should not be interviewed.

ex parte contact, but, notwithstanding counsel's objections, the government then interviewed Mr. Davis in the absence of counsel a second time. Cf. Morrison, 449 U.S. at 366 n.2 (noting that the record "does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter future lawlessness").<sup>14</sup> Third, as explained above, Mr. Davis has suffered actual and substantial prejudice from the government's misconduct. Mr. Davis was deprived of the assistance that counsel could have provided in setting the terms of cooperation and negotiating a plea agreement. Mr. Davis was also deprived of counsel's assistance at the time he provided information to the government. Mr. Davis has now given the government whatever useful information had, but has received nothing in return.

In sum, the government's repeated ex parte communications with Mr. Davis, made after counsel expressly denied the government access to Mr. Davis, constitutes outrageous behavior that not only violated Mr. Davis' Sixth Amendment right to counsel but also violated the basic principles of fundamental fairness protected by the Due Process Clause of the Fifth Amendment. Like the violation of Mr. Davis' Sixth Amendment rights, this Fifth Amendment violation warrants dismissal of the charges against Mr. Davis.

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<sup>14</sup> Mr. Davis expects that the record of the government's improper conduct will only expand at a hearing. For example, Mr. Davis also has reason to believe that, after Mr. Davis was appointed counsel, at least one government agent contacted members of Mr. Davis' family, concealed the fact that he was a law enforcement officer, and directed Mr. Davis' family members to encourage Mr. Davis' to act as a cooperating witness. See n. 5 supra.

**C. Dismissal of the charges is warranted based on the government's unauthorized debriefing sessions with Mr. Davis in the absence of counsel and in violation of counsel's express directive pursuant to this Court's supervisory power.**

Alternatively, this Court may avoid ruling on the violations of Mr. Davis' constitutional rights altogether, and grant Mr. Davis relief from the government's misconduct in an exercise of its inherent supervisory authority. See, e.g., *Ming He*, 94 F.3d at 792 (avoiding Sixth Amendment issue by invoking general supervisory power over members of the bar to grant defendant relief from ex parte, unauthorized contact by United States Attorney's Office); *United States v. Lopez*, 4 F.3d 1455, 1463 (9<sup>th</sup> Cir. 1993) (acknowledging "that exercise of supervisory powers is an appropriate means of policing ethical misconduct by prosecutors"). A trial court unquestionably has the authority to supervise the conduct of prosecutors who practice before it and to ensure that they comply with clearly established standards of conduct regarding ex parte contact with represented parties. See *United States v. Williams*, 504 U.S. 36, 46-47 (1992) (supervisory authority may be exercised to "enforc[e] or vindicat[e] legally compelled standards of prosecutorial conduct"); *Lopez*, 4 F.3d at 1463 (within the discretion of the trial court to "act in an appropriate manner to discipline" prosecutor "if he subverted . . . the attorney-client relationship"). The applicable standards of conduct in Mr. Davis' case are the federal statute requiring federal government lawyers (including Assistant United States Attorneys) to abide by local ethical rules, the District of Columbia's ethical rule prohibiting unauthorized contact with represented parties, and the USAO's own internal rule proscribing such contact. The government appears to have violated all three.

The obligation of government attorneys to comply with local ethical rules is mandated by federal law. With the passage of the McDade-Murtha Amendment, 28

U.S.C § 530B (“Ethical standards for attorneys for the government”), in 1998, Congress put to rest any question that government attorneys could disregard local ethics rules and firmly rejected the federal government’s previously asserted position that federal government attorneys could regulate themselves. See New York State Bar Ass’n v. F.T.C., 276 F. Supp.2d 110, 131-33 (D.D.C. 2003) (recounting history of Department of Justice efforts to exempt its attorneys from local ethical rules and noting that McDade-Murtha “reflects the respect Congress has for the right of the states to regulate the ethical conduct of lawyers who practice law in their jurisdictions”). Pursuant to McDade-Murtha, all federal government attorneys are required to comply with the local ethical rules and laws that govern the conduct of attorneys in the jurisdictions in which the government attorneys practice. 28 U.S.C § 530B(a). Although an effort was made to include a provision in the USA Patriot Act repealing McDade-Murtha, see Senate Bill 1437 (proposing the “Professional Standards for Government Attorneys Act of 2001”); see also Statements Introduced on Bills and Joint Resolutions (Senate, September 19, 2001), this effort failed. See USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. Thus, McDade-Murtha is the law, and all government attorneys, including all AUSAs, must abide by it.

Because of McDade-Murtha, all of the attorneys in the United States Attorney’s Office for the District of Columbia, must comply with the Rules of Professional Responsibility for the District of Columbia.<sup>15</sup> Specifically, these prosecutors must

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<sup>15</sup> The text of the statute refers to “State laws and rules,” but has been interpreted to encompass the rules of non-states. See Mendoza Toro v. Gil, 110 F. Supp.2d 28, 37 n.3 (D. P.R. 2000).

comply with Rule 4.2 of the District of Columbia Rules of Professional Responsibility which states:

During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2 of the District of Columbia Rules of Professional Responsibility (emphasis added). The purpose of this “no contact” rule is to “protect represented persons against overreaching by adverse counsel, safeguard the attorney-client relationship from interference, and reduce the likelihood that clients will disclose privileged or other information harmful to their interests.” See ABA Formal Ethics Opinion 95-396 (1995) Notably, an almost identical prohibition is found in section 9-13.240 of the United States Attorneys’ Manual (USAM) which provides that:

Except as provided in USAM 9-13.241 or as otherwise authorized by law, an attorney for the government should not overtly communicate or cause another to communicate overtly, with a represented person who the attorney for the government knows is the target of a federal criminal or civil enforcement investigation and who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such person.

USAM § 9-13.240.

Both Rule 4.2 and Section 9-13.240 of the USAM expressly prohibit an attorney from using a non-lawyer to evade the no-contact rule. Consequently, Rule 4.2 may be violated where an attorney’s agent makes ex parte contact with a represented party, unless the attorney can demonstrate that the attorney did not “knowingly participate in the efforts” to make ex parte contact. See Cobell v. Norton, 213 F.R.D. 33, 39 (D.D.C.

2003).<sup>16</sup> As noted previously, full development of the facts in Mr. Davis' case awaits discovery and a hearing, but on the record as it stands, it appears that Mr. Davis' two ex parte interviews with the police, first at the United States Attorney's Office and then MPD Headquarters, were conducted in violation of Rule 4.2. Specifically, it appears that the United States Attorney's Office did "knowingly participate in the efforts" to conduct these two interviews which clearly concerned a matter for which Mr. Davis had representation. Cobell, 213 F.R.D. at 39.

To begin with, AUSA Brandon was clearly in direct contact with the police. Her telephone call to Mr. Iverson followed Mr. Davis' initial interview with the police at the Seventh District immediately after his arrest, and, presumably, the only reason she made the call to Mr. Iverson was because the police told her that Mr. Davis might have useful information. Moreover, as she herself admitted to Mr. Iverson, AUSA Brandon was responsible for the first come up order to transport Mr. Davis to the USAO. Tellingly, she ordered Mr. Davis' transport from the Jail to the USAO before even asking Mr. Iverson whether he would authorize the government to speak to Mr. Davis. After learning that Mr. Iverson would not consent to a debriefing session, AUSA Brandon failed to take adequate steps to stop the interview she had put in motion, and even though

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<sup>16</sup> Rule 4.2 and Section 9-13.240 of the USAM appear to impose broader no-contact restrictions than Rule 4.2 of the ABA Model rules and the implementing regulations of the McDade-Murtha Amendment, 28 C.F.R. § 77.4. Model Rule 4.2 makes no mention of "caus[ing] another to make contact," and 28 C.F.R. § 77.4(f) states only that "[a] Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under the circumstances that would violate the attorney's obligations under Section 530B." Of course, to the extent the District of Columbia imposes a more restrictive rule on the conduct of government attorneys, it is controlling. See United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (8<sup>th</sup> Cir. 1998) (attorney general has no authority to issue implementing regulations that exempt government attorneys from full scope of local no-contact rule).

Mr. Davis's interview took place in her office building, AUSA Brandon did not make any effort to curtail the police's interview with Mr. Davis. Furthermore, it cannot be denied that the police, by virtue of linking Mr. Davis' cooperation in open homicide cases to beneficial treatment in his drug cases, communicated with Mr. Davis in both this interview at the USAO as well as the following interview at MPD Headquarters about a subject for which Mr. Davis had representation. Finally, although the government has yet to provide Mr. Davis with any information about the second come-up order ordering Mr. Davis' transport from the Jail to MPD Headquarters, at the very least the record demonstrates that AUSA Brandon failed once again to take adequate steps to communicate to the police officers that Mr. Iverson was continuing to deny the government permission to interview Mr. Davis.

Based on this misconduct by the government, dismissal of the charges against Mr. Davis is authorized and warranted. The USAO and its agents have broken a law expressly directing its attorneys to comply with local ethical rules.<sup>17</sup> See 28 U.S.C § 530B. As the Supreme Court noted in Williams, "the supervisory power can be used to dismiss an indictment because of [prosecutorial] misconduct . . . at least where that misconduct amounts to a violation of one of those 'few clear rules which were carefully approved by this Court and by Congress.'" 504 U.S. at 46. Moreover, such a remedy is justified when it "prevents parties from reaping benefit or incurring harm" as a result of

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<sup>17</sup> Any effort by the government to invoke the "authorized by law" exception to the no-contact rule to defend against this law violation must fail. Indeed, although the government is generally authorized to investigate crime, this does not give it specific legal authority to contact represented parties ex parte in the course of such investigations. See Lopez, 4 F.3d at 1461 (general statutory authority to investigate crimes does not satisfy the "authorized by law" exception to the "no-contact" rule); In the Matter of John Doe, Esq., 801 F. Supp. 478, 486 (D.N.M. 1992) ("As an exception to the general rule, however, 'authorized by law' must be narrowly construed").

statutory and ethical violations. Id. As discussed above, Mr. Davis was seriously prejudiced by the government's misconduct, whereas the government was substantially benefited; the only way to provide Mr. Davis with relief and deny the government the fruits of its illegal and unethical conduct is to dismiss his pending drug charges. Cf. Lopez, 4 F.3d at 1464 (dismissal under supervisory authority not warranted absent sufficient showing of prejudice).

The integrity of our criminal justice system is threatened when the government lawyers flout the bright line rules and laws that regulate their conduct. In the Matter of John Doe, Esq., 801 F. Supp. at 479 ("ethical standards are not merely a guide for the lawyer's conduct, but are an integral part of the administration of justice"). In Mr. Davis case, the government ran afoul of Rule 4.2 of the District of Columbia Code of Professional Responsibility, and violated 28 U.S.C. § 530B when it engaged in multiple ex parte discussions with Mr. Davis about a matter for which he had representation. In order to preserve the orderly administration of justice and enforce local ethical rules, this Court should exercise its supervisory authority and dismiss the charges against Mr. Davis.

THE NEED FOR MR. DAVIS' TRIAL ATTORNEY  
FREDERICK IVERSON TO WITHDRAW AS  
COUNSEL ON MR. DAVIS' MOTION TO DISMISS

Mr. Davis has requested a hearing on his Motion to Dismiss. At this hearing, Mr. Davis intends to trial counsel Frederick Iverson to testify. In anticipation of being called as a witness, Mr. Iverson filed a motion with this Court seeking permission to withdraw as counsel on Mr. Davis' Motion to Dismiss. In that Motion, Mr. Iverson informed the Court that the Public Defender Service had agreed to represent Mr. Davis for the purpose

of his motion to dismiss. The government has not yet filed a formal response to Mr. Iverson's Motion to Withdraw; however, AUSA Chriss informed Ms. Easterly that the government would oppose Mr. Iverson's Motion to Withdraw because Mr. Iverson's testimony would not be "relevant" to Mr. Davis' Motion to Dismiss. The government's position notwithstanding, Mr. Iverson's testimony is critically relevant to Mr. Davis' Motion. Moreover, Mr. Iverson cannot fulfill either his constitutional obligations under the Sixth Amendment or his ethical obligations under Rule 3.7 if he is forced to assume both the role of witness and the role of advocate during the litigation of Mr. Davis' motion. Finally, no delay will ensue and the government will not be prejudiced in any way if Mr. Iverson is permitted to withdraw.

Mr. Iverson is clearly an important source of relevant information with respect to Mr. Davis' Motion to Dismiss, which concerns unauthorized ex parte contact with Mr. Davis by government agents about matters concerning his pending drug cases. To begin with, Mr. Iverson, and only Mr. Iverson, can testify about his conversation with AUSA Brandon in which he refused to give her permission to speak to Mr. Davis. This denial of consent is a critical element of Mr. Davis' argument that his Fifth and Sixth Amendment rights were violated and that an exercise of the Court's supervisory authority is warranted. Moreover, Mr. Iverson's testimony about his conversation with AUSA Brandon will also provide relevant circumstantial evidence of USAO's involvement in Mr. Davis' debriefing sessions and relevant circumstantial evidence of the linkage the police drew between Mr. Davis' cooperation and beneficial treatment in his pending drug cases.

Mr. Davis cannot simply call AUSA Brandon to testify about this conversation, because the government has already informed Mr. Davis that AUSA Brandon's recollection of the this conversation will conflict with Mr. Iverson's recollection.<sup>18</sup> See Attachment 4. Indeed, it was in the course of making such a representation, that the government itself asserted that Mr. Iverson would be a potential witness at a hearing on Mr. Davis' motion. Id. The government was correct in this initial assessment, and there is no legitimate reason, now that Mr. Iverson has moved to withdraw, for the government to contradict itself.

As an important source of relevant information, Mr. Iverson must testify at a hearing on Mr. Davis' motion. But Mr. Iverson may not simultaneously assume the mantle of advocate and witness. Rule 3.7 of the District of Columbia Rules of Professional Responsibility generally prohibits an attorney from "act[ing] as advocate" at a proceeding "in which the lawyer is likely to be a necessary witness."<sup>19</sup> As the Court of Appeals explained in Wolf v. District of Columbia Board of Zoning Adjustment, "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another while that of a witness is to state facts objectively." 397 A.2d 936, 946 n.5 (D.C. 1979) (quoting Ethical Consideration 5-9, ABA Code of Professional Responsibility (1972)). As a result, an advocate-witness cannot function effectively in either role – as an advocate, the attorney cannot effectively argue his own

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<sup>18</sup> Additionally, Mr. Davis anticipates that the government will oppose any effort by Mr. Davis to call AUSA Brandon to the stand as it is the government's curious position that AUSA Brandon's testimony is also not relevant to Mr. Davis' Motion to Dismiss. See Attachment 4.

<sup>19</sup> The rule specifically prohibits an advocate from acting as a witness "at a trial," but logically it applies to any proceeding in which counsel testifies about a disputed, material issue of fact.

credibility, and as a witness, the attorney becomes “more easily impeachable for interest.” Id.

There are times, however, where, as here, the unforeseen situation will arise when counsel must act as a witness. In such a situation, the “manifestly appropriate” course of action is for counsel to do precisely what Mr. Iverson has done in this case – move to withdraw as counsel and seek substitute counsel. United States v. Vereen, 429 F.2d 713, 715 (D.C. Cir. 1970) (reversible error where trial court refused to allow defense counsel to personally withdraw, substitute associate as counsel, and then take the stand to testify on defendant’s behalf where there was no other available source for the testimony); In Matter of Gorfkle, 444 A.2d 934, 940 n.6 (D.C. 1982) (“DR 5-102 [predecessor of Rule 3.7] . . . requires that counsel withdraw from representing a litigant when he ‘learns or it is obvious that he . . . ought to be called as a witness on behalf of his client’”); cf. United States v. Porter, 429 F.2d 203, 204 (1970) (no error to preclude counsel from testifying on defendant’s behalf where counsel did not arrange for substitute counsel and counsel’s testimony was not of “critical significance”). This solution serves everyone’s interests: Mr. Davis’ fundamental constitutional right to call witnesses in his defense and right to the effective assistance of counsel, see U.S. Const. amend. VI, is preserved; Mr. Iverson’s obligations under the Sixth Amendment and the Rules of Professional Responsibility are honored; id.; Rule 3.7 of the Rules of Professional Responsibility; the government’s interest in unfettered cross-examination is protected; and the Court’s interest in judicial economy is respected.

Thus, for all the reasons presented, Mr. Iverson's Motion to Withdraw as counsel on Mr. Davis' Motion to Dismiss should be granted, and PDS counsel should be permitted to continue its representation of Mr. Davis on this limited issue.

Date: January 28, 2004

Respectfully Submitted,

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