

1 MARK J. REICHEL, State Bar #155034  
THE LAW OFFICES OF MARK J. REICHEL  
2 655 University Avenue, Suite 215  
Sacramento, California 95825  
3 Telephone: (916) 974-7033  
[mreichel@donaldhellerlaw.com](mailto:mreichel@donaldhellerlaw.com)

4  
5 Attorney for Defendant  
ERIC MCDAVID

6  
7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF CALIFORNIA  
9

10 UNITED STATES OF AMERICA, )  
11 Plaintiff, )

12 v. )

13 )  
14 ERIC MCDAVID, )  
15 Defendant. )

Case No. CR.S-06-0035-MCE

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO PROVIDE GRAND  
JURY TRANSCRIPTS INCLUDING  
THOSE OF CASE AGENTS AND  
AUSA; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
THEREOF; REQUEST FOR  
EVIDENTIARY HEARING.**

16  
17 Date: February 6, 2007  
Time: 8:30 A.m.  
18 Judge: Hon. Morrison C.  
England

19 **TO: MCGREGOR SCOTT, United States Attorney, and Assistant**  
20 **United States STEVEN R. LAPHAM:**

21 **PLEASE TAKE NOTICE THAT** at the above date and time, or  
22 as soon thereafter as the matter may be heard, defendant,  
23 through his attorney, will and hereby does move for an order  
24 requiring the government promptly to provide the following:  
25 grand jury transcripts containing **any statements made by**  
26 **Assistant United States Attorneys and by case agents**  
27 appearing before the grand jury, including but not limited to  
28 Mot.Disclose grand jury transcripts

1 comments regarding exculpatory evidence.

2 This motion is based on the United States Constitution,  
3 the Federal Rules of Criminal Procedure, the Points and  
4 Authorities submitted in support, and such argument and  
5 evidence of counsel at the hearing on the motion.

6 Respectfully submitted

7 DATED: December 19, 2006.

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MARK J. REICHEL  
ATTORNEY AT LAW  
Attorney for defendant

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/S/ Mark Reichel

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.  
3 SUPPORTING FACTS<sup>1</sup>

4 Defendant has presently pending before the district  
5 court numerous motions which establish that a large number of  
6 illegalities occurred by law enforcement and the government  
7 in the investigation and prosecution of this defendant. He  
8 was illegally targeted for his political views, he was  
9 contacted while represented by counsel, he was subject to  
10 illegal search and seizures on numerous occasions, and there  
11 were extensive prejudicial and inflammatory public comments  
12 made by the government.

13 He has a right to a grand jury deliberative process free  
14 from these extensive illegalities. He has the right in such  
15 an instance to inspect the grand jury proceedings to present  
16 to the court his request for a dismissal of the indictment.

17 Rule 6(e)(3)© of the Federal Rules of Criminal Procedure  
18 states that disclosure of grand jury records or materials,  
19 otherwise prohibited, may also be made: (1) when so directed  
20 by a court preliminarily to or in connection with a judicial  
21 proceeding; and (2) when permitted by a court at the request  
22 of the defendant, upon a showing that grounds may exist for a  
23 motion to dismiss the indictment because of matters occurring  
24 before the grand jury.

25 <sup>1</sup> Familiarity with the operative facts of this charge are  
26 assumed and reference is made to the Criminal Complaint which  
27 has a sufficient recitation of the government's version of  
28 the operative background facts. As with all of the  
defendant's pretrial motions, the factual background comes  
from the discovery provided by the government, defense  
investigation, and the anticipated testimony and evidence to  
be submitted at the hearing of the motion.

II.

APPLICABLE LAW REQUIRES THE DISCLOSURE.

**RULE 6(E) -STANDARDS GOVERNING REQUESTS FOR TRANSCRIPTS**

In United States v. Mechanik, 475 U.S. 66 (1986), the U.S. Supreme Court held that any grand jury abuse or prosecutorial misconduct concerning the grand jury is rendered harmless by a subsequent conviction of the defendant by the petit jury. Mechanik, 475 U.S. at 67. The Ninth Circuit has held that the Mechanik holding applies to virtually any claim of grand jury abuse. United States v. Dederich, 825 F.2d 1317 (9th Cir. 1987); United States v. Benjamin, 812 F.2d 548 (9th Cir. 1987). Thus, any matters concerning abuse of the grand jury process must be fully litigated pretrial.

Rule 6(e)(3)(C)(ii) of the Federal Rules of Criminal Procedure provides that a court may order disclosure of grand jury material "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury". Before the court orders disclosure, a defendant must show a "particularized need" for the materials. Douglas Oil Co. v. Petrol Stops, 441 U.S. 211, 291 (1979); Dennis v. United States, 384 U.S. 855 (1966). Defendant is not required to meet a certain quantum of proof. Defendant must demonstrate that (1) the material sought "is needed to avoid a possible injustice"; (2) "the need for disclosure is greater than the need for continued secrecy"; and (3) the request "is structured to cover only materials so needed". Douglas Oil, 441 U.S. at 222.

1 In applying this test, the court must balance two  
2 competing interests: the need for disclosure and the need  
3 for continued secrecy. Id. Several factors weigh heavily in  
4 the balancing test where, as here, the grand jury has long  
5 completed its work.

6 First, the interests in secrecy are measurably reduced  
7 after the grand jury completes its investigation. Douglas  
8 Oil, 441 U.S. at 222 ("as the considerations justifying  
9 secrecy become less relevant, a party asserting a need for  
10 grand jury transcripts will have a lesser burden in showing  
11 justification"), Dennis, 384 U.S. at 870.

12 Second, a possible abuse of the grand jury process  
13 weighs heavily toward disclosure. The risk that a  
14 defendant's Fifth Amendment right to indictment by grand jury  
15 has been undermined is a grave one. The grand jury serves  
16 "the dual function of determining if there is probable cause  
17 . . . and of protecting citizens against unfounded criminal  
18 prosecution". Branzberg v. Hayes, 408 U.S. 665, 686-87  
19 (1972). At issue here is not simply defendant McDavid's  
20 rights, but the integrity of the grand jury process.

21 The defense is also interested in statements by the  
22 prosecutor and by the government case agent concerning the  
23 existence or non-existence of exculpatory evidence. As such,  
24 that part is a very limited request.

1 III.

2 **DEFENDANT HAS A PARTICULARIZED NEED**  
3 **FOR DISCLOSURE**

4 **A. There Are No Other Means to Obtain This Information**

5 Unlike evidence presented by third party witnesses, the  
6 information that the defendant seeks in this motion is  
7 available only from the grand jurors themselves, the  
8 government attorney, or the case agent. Pursuant to Rule  
9 6(e) of the Federal Rules of Criminal Procedure, however,  
10 these individuals are not empowered to release the  
11 information sought absent an order from the court.

12 **B. There is a Strong Probability That Such Information**  
13 **Exists As It Relates To Exculpatory Statements**

14 In March, 1983, the Department of Justice issued a two  
15 volume set of materials entitled Federal Grand Jury Practice  
16 Manual. In volume II of that manual, form #81 lists the  
17 recommended script to use when presenting an indictment  
18 before the grand jury. Section C(2)(d) of that script reads  
19 as follows:

20 "Question by Assistant United States Attorney: 'Are  
21 you aware of any information which points directly to the  
22 innocence of this defendant?'

23 Answer: Example -- 'yes.'...

24 [Note to AUSA: It is good practice to tell the agent  
25 in advance that this question will be asked. If the agent  
26 has any doubt as to what is exculpatory, he and the AUSA can  
27 resolve those doubts beforehand.]"

28 What defendant wants to know by this motion is if this  
question or something similar was said before the grand jury,

1 and what the prosecutor or agent said in response. If it  
2 appears that this question was asked, and a false or  
3 misleading response was given, then this would be evidence to  
4 support a motion to dismiss the indictment. See discussion  
5 infra.

6 **C. False or Misleading Statements by the Prosecutor or**  
7 **Case Agent Would be Sufficient Grounds to Dismiss the**  
8 **Indictment.**<sup>2</sup>

9 The Ninth Circuit has repeatedly approved use of the  
10 District Court's supervisory power to dismiss an indictment  
11 for governmental misconduct. "[S]uch dismissal is used as a  
12 prophylactic tool for discouraging future deliberate  
13 governmental impropriety of a similar nature." See United  
14 States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978) and (cases  
15 cited).

16 Governmental "misbehavior, even if unintentional, can  
17 cause improper influence and usurpation of the grand jury's  
18 role". United States v. Samango, 607 F.2d 877, 882 (9th Cir.  
19 1979). This Court's inquiry focuses on whether the  
20 government's conduct was "a significant infringement on the  
21 grand jury's ability to exercise independent judgment." Bank  
22 of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct 2369,  
23 2376 (1988) Where dismissal is sought for non-constitutional  
24 error, such as governmental misconduct,

25 "dismissal of the indictment is appropriate only  
26 'if it is established that the violation  
substantially influenced the grand jury's decision

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27  
28 <sup>2</sup>If the prosecutor or the agent mentions exculpatory  
evidence before the grand jury, the explanation of this  
evidence must be truthful and non-misleading.

1 to indict,' or if there is 'grave doubt' that the  
2 decision to indict was free from the substantial  
influence of such violations." Id. at 2374.

3 This inquiry is consonant with the Court's traditional  
4 goal "to protect the integrity of the judicial process,  
5 particularly the functions of the grand jury, from unfair or  
6 improper misconduct". United States v. Chanen, 549 F.2d  
7 1306, 1309 (9th Cir.) cert. denied, 434 U.S. 823 (1977). The  
8 court directs its inquiry toward the effect of any  
9 misinformation given the grand jury, not the prosecutorial  
10 conduct. United States v. DeRosa, 783 F.2d 1401, 1405 (9th  
11 Cir.), cert. denied, 477 U.S. 908 (1986).

12 If the prosecution not only failed to present  
13 exculpatory evidence to the grand jury, but also mislead  
14 them into believing that no such evidence existed, then the  
15 prosecution has undermined the independence of the grand jury  
16 in making an informed determination of probable cause. See  
17 United States v. Sears, Roebuck & Co., Inc., 719 F.2d 1386,  
18 1392 (9th Cir. 1983).

19 There is no question that a prosecutor's knowing use of  
20 false testimony under oath before a grand jury is sufficient  
21 grounds for dismissal of an indictment. United States v.  
22 Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977); United States  
23 v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974). As one  
24 district court noted,

25 "[T]he Supreme Court and other federal courts,  
26 including those in the Ninth Circuit, have been  
27 concerned on occasion with possible usurpation of  
28 the function of the Grand Jury by the prosecution.  
The fear is that a Grand Jury sufficiently  
controlled by the Government thus becomes a kind of  
"rubber stamp" for the wishes of the prosecutor.  
The Fifth Amendment Due Process clause of the



1 constitution guarantees citizens who are to be  
2 charged with serious crimes in the federal courts  
3 the right to have their cases screened by a Grand  
4 Jury of their fellow citizens before being put on  
5 trial. If the presentation to the Grand Jury is  
6 done unfairly and essential information is withheld,  
7 the Grand Jury is thus unable to make a decision  
8 based on a fair assessment of the evidence. Then  
9 the indictment in fact becomes the decision of the  
10 prosecutor and not of the Grand Jury, thereby  
11 causing fundamental unfairness and a violation of a  
12 defendant's constitutional rights.

13 United States v. Isgro, 751 F.Supp. 846, 850 (C.D. Cal.  
14 1990).

15 What the defense seeks by this motion, among other  
16 things, is to see if in fact the prosecution, or a government  
17 agent, misled the grand jury by stating that certain evidence  
18 did not exist, when it in fact did exist. If this did occur,  
19 then the defense will prepare an appropriate motion to  
20 dismiss the indictment.

#### 21 **CONCLUSION**

22 The evidence available to the defendant and presented to  
23 the court at this time through the various motions to dismiss  
24 and suppress evidence indicates that the government quite  
25 probably improperly impeded the grand jury's role in this  
26 case. The transcripts of grand jury testimony regarding  
27 these subjects and also the subject of exculpatory evidence,  
28 therefore, should be produced for preparation of a motion to  
dismiss the indictment.

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Respectfully submitted

DATED: December 19, 2006.

MARK J. REICHEL  
ATTORNEY AT LAW  
Attorney for defendant

/S/ Mark Reichel