



U.S. Department of Justice

United States Attorney
Eastern District of New York

United States Attorney's Office

610 Federal Plaza
Central Islip, New York 11722-4454

October 26, 2007

VIA ECF

The Honorable Denis R. Hurley
United States District Judge
Eastern District of New York
934 Federal Plaza, Central Islip, N.Y.

Re: United States v. Rodney Morrison
Criminal Docket 06-699 (S-2) (DRH)

Dear Judge Hurley:

The government writes to summarize potential conflict of interest issues relating to the conduct of defense counsel Peter Smith, former FBI Special Agent Warren Flagg and other defense investigators. As discussed below, potential conflicts of interest exist because:

(i) Mr. Morrison could conceivably be a witness against Mr. Smith in any potential disciplinary action or criminal prosecution against Mr. Smith relating to Mr. Smith's conduct in this case;

(ii) Mr. Smith could conceivably be a witness against Mr. Morrison in connection with an investigation of obstruction of justice perpetrated by Mr. Morrison through his attorneys and private investigators, including Mr. Flagg;

(iii) Mr. Flagg could conceivably be a witness against Mr. Morrison in connection with an investigation of obstruction of justice by Mr. Morrison through his attorneys and private investigators, including Mr. Smith;

(iv) defense investigators, including Mr. Flagg may, because of their alleged conduct, decide to invoke their Fifth Amendment

privilege against self-incrimination at the trial thereby potentially depriving the defendant of the ability to introduce favorable evidence, and

(v) the conduct of Mr. Smith and the defense investigators could be revealed through the testimony of various witnesses and, thus, portray Mr. Morrison's defense team in a negative light and create certain inferences regarding consciousness of guilt of Morrison.

For the reasons discussed below, the government respectfully requests that the Court conduct the appropriate conflict of interest inquiry and the necessary waiver procedures.

Applicable Law

"A defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel." United States v. Blau, 159 F.3d 68, 74 (2d Cir. 1998); see also Wood v. Georgia, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.") Additionally, "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160 (1988).

When there is even the possibility of a conflict of interest, the trial court "must investigate the facts and details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all." United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994). An attorney has a potential conflict of interest "if the interests of the defendant may place the attorney under inconsistent duties at some time in the future." See United States v. Kliti, 156 F.3d 150, 153 n.3 (2d Cir. 1998) (citing Cuyler v. Sullivan, 446 U.S. 335, 356 n.3 (1980) (Marshall, J., concurring in part and dissenting in part)). By contrast, "[a]n attorney has an actual . . . conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." Winkler v. Keane, 7 F.3d 304, 307 (2d Cir. 1993) (internal quotation marks omitted). If the court's inquiry reveals a potential or actual conflict, the court has a subsequent

"disqualification/waiver" obligation. Levy, 25 F.3d at 153. "In most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice." United States v. Schwarz, 283 F.3d 76, 95 (2d Cir. 2002). See also United States v. Perez, 325 F.3d 115, 127 (2d Cir. 2003) ("lesser conflicts, such as an attorney's representation of two or more defendants or his prior representation of a trial witness, are generally waivable").

If the Court finds that a conflict exists, and that "the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation . . . the attorney must be disqualified, regardless of whether the defendant is willing to waive his right to conflict-free counsel." Schwarz, 283 F.3d at 95-96. However, if the conflicts are of a kind that a rational defendant could knowingly and intelligently desire the conflicted attorney's representation, the Court must obtain directly from the defendant a valid waiver in accordance with the procedures set forth in United States v. Curcio, 680 F.2d 881, 888-90 (2d Cir. 1982). See, e.g., United States v. Stantini, 85 F.3d 9, 13 (2d Cir. 1996); United States v. Malpiedi, 62 F.3d 465, 467 (2d Cir. 1995); Levy, 25 F.3d at 153; United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986). In obtaining such a waiver, the trial court is obliged to: (1) advise the defendant of his right to conflict-free representation; (2) instruct the defendant as to the dangers arising from the particular conflict; (3) permit the defendant to confer with his current counsel; (4) encourage the defendant to seek advice from independent counsel and provide independent counsel if necessary; (5) allow a reasonable time for the defendant to make his decision; and (6) determine, preferably by means of questions that are likely to be answered in narrative form, whether the defendant understands the risks and freely chooses to run them. Curcio, 680 F.2d at 888; see United States v. Massino, 303 F. Supp. 2d 258 (E.D.N.Y. 2003).

Conduct of Attorney Peter Smith

During the pendency of this matter, the government has become aware that attorney Peter Smith has allegedly engaged in conduct which involves:

- 1) Smith's repeated misuse of the subpoena process by, among other things, serving subpoenas seeking personal banking information of a government investigator and using trial subpoenas to investigate a third party, who has no contact with the criminal case, in connection with an unrelated

business dispute between that third party and Mr. Morrison;

2) Smith's alleged intimidation and harassment of witnesses and other conduct which may constitute obstruction of justice, which includes his use of threatening language and his involvement in the mistreatment of a juvenile son of one of the witnesses; and

3) Smith's receipt of significant fees for which there appears to be no legitimate source.

While Smith is not the target or subject of a criminal investigation, his conduct is of concern and, as the trial unfolds, it is conceivable that he may become the subject of a grievance committee disciplinary action or some other proceeding. In that regard, Mr. Morrison could conceivably be a witness against Mr. Smith in such actions. Moreover, any evidence adduced at trial of Smith's alleged improper conduct could potentially reflect poorly on Mr. Morrison, and the jury may view this conduct as consciousness of guilt on the part of Morrison. For all of these reasons, the government requests that the Court explore these issues with Morrison.

Conduct of Defense Investigators Including Warren Flagg

The government has received information that defense investigators, including potentially Mr. Flagg, have engaged in alleged intimidation and harassment of witnesses. For example, defense investigators have visited relatives of government witnesses at 3:00 a.m. carrying visible firearms and made contact with represented parties in violation of the disciplinary rules. Also, the government has recently been advised that investigators, including potentially Mr. Flagg, have misrepresented to witnesses their status as law enforcement agents and may have displayed false badges and credentials. The government is currently investigating these allegations.¹ Accordingly, it is conceivable that Mr. Morrison and his defense investigators, including Mr. Flagg, could become subjects or targets in an obstruction of justice investigation. Thus, Morrison and the investigators could conceivably be witnesses against each other. In addition, in this trial, the defense investigators, including Mr. Flagg, may be forced to assert their Fifth Amendment privileges at trial, resulting in Morrison being potentially deprived of the ability to

¹See Title 18, U.S.C. § 912.

introduce favorable evidence through his investigators. Also, the potentially illegal actions of the investigators could reflect poorly on Mr. Morrison, and the jury may view this conduct as consciousness of guilty on the part of Morrison. Therefore we ask that the Court discuss these issues with Morrison.

The Curcio Waiver

Should the Court determine that the conflicts of interest in this case can be waived, the government respectfully suggests that the Court conduct a Curcio hearing in which it advises and inquires of Mr. Morrison along the following lines:

(1) Do you understand that under the Sixth Amendment of the United States Constitution, you have the right to effective assistance of counsel?

(2) Do you understand that effective assistance of counsel means a counsel free of conflicts?

(3) Are you aware that your attorney Peter Smith and your private investigators, including Warren Flagg may have engaged in unethical or illegal conduct?

(4) Do you understand that you could be called as a witness in any disciplinary action against Mr. Smith to provide testimony that may be adverse to Mr. Smith's interests?

(5) Are you aware that the conduct of Warren Flagg and your other investigators has resulted in an investigation into whether you obstructed justice by directing them to allegedly intimidate and harass witnesses?

(6) Do you understand that Mr. Smith may be a witness in the obstruction of justice investigation regarding to whom Flagg and the other investigators were taking direction and to whom they reported.

(7) Do you understand what I have just explained to you? Do you have any questions? Please tell me in your own words what you understand the conflicts of interest to be in this case and how they may affect you?

(8) You have the right to be represented by an attorney who does not have any possible conflicts of interest in

representing you. If you keep Mr. Smith as counsel, do you understand that he will be operating under the potential conflicts of interest I have described for you, and you will be giving up that right?

(9) Are you aware that you could avoid this problem altogether by obtaining new counsel?

(10) Do you know that if you cannot afford new counsel, the Court will appoint new counsel for you?

(11) You may have the opportunity to discuss these matters with an independent counsel, do you wish to do so?

(12) Have you had enough time to think about these matters and consult with ?

(13) Do you understand what I have just explained? Do you have any questions? At this point, how do you wish to proceed?

Conclusion

As described above, the government respectfully requests that the Court conduct a conflict of interest inquiry in accordance with applicable law before the jury selection as these issues must be resolved prior trial.

Respectfully Submitted,

BENTON J. CAMPBELL
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EASTERN DISTRICT OF NEW YORK

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October 30, 2007

VIA ECF

Hon. Denis R. Hurley
United States District Court
Eastern District of New York
934 Federal Plaza, Central Islip, N.Y.

Re: United States v. Rodney Morrison
04-CR-699 (S-2) (DRH)

Dear Judge Hurley:

On the eve of trial the government asks the Court to conduct a *Curcio* hearing to address alleged conflicts created by alleged misconduct by attorney Peter Smith and one or more members of our investigative team, including former FBI Agent Warren Flagg. For the following reasons the government's request should be denied. In the alternative, should the Court believe the government's undifferentiated claims of misconduct and conflict might merit additional inquiry it should require the government first to provide, at a minimum, specificity sufficient both to permit the Court to determine whether, in fact, a hearing is required and also to avoid unfairly and unnecessarily creating tension between Mr. Morrison and his defense team. Such required specificity should include the identity of the person or persons who allegedly were harassed or misled by Mr. Smith or Mr. Flagg and the form such misconduct took.

The government makes the following allegations against Mr. Smith:

- 1) Smith's repeated misuse of the subpoena process by, among other things, serving subpoenas seeking personal banking information of a government investigator and using trial subpoenas to investigate a third party, who has no contact with the criminal case, in connection with an unrelated business dispute between that third party and Mr. Morrison;
- 2) Smith's alleged intimidation and harassment of witnesses and other conduct which may constitute obstruction of justice, which includes his use of threatening language and his involvement in the mistreatment of a juvenile son of one of the witnesses; and
- 3) Smith's receipt of significant fees for which there appears to be no legitimate source.

Gov. Let. at 3-4.

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The government makes the following allegations against the investigators:

For example, defense investigators have visited relatives of government witnesses at 3:00 a.m. carrying visible firearms and made contact with represented parties in violation of the disciplinary rules.

Also, the government has recently been advised that investigators, including potentially Mr. Flagg, have misrepresented to witnesses their status as law enforcement agents and may have displayed false badges and credentials.

Gov. Let. at 4-5.

When the government raises a claim of conflict of interest, the court's first job is to determine whether the conflict is actual, potential, or not a conflict at all. An actual conflict exists when the interests of attorney and client "diverge with respect to a material factual or legal issue or to a course of action." *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980). The existence of an actual conflict requires disqualification of counsel where the conflict "is so egregious that no rational defendant would knowingly and voluntarily desire the attorney's representation..." *United States v. Lussier*, 71 F.3d 456, 461 (2d Cir. 1995). Even where not required the court may nonetheless disqualify counsel based upon its "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). Where no actual conflict exists a potential conflict might nonetheless be present "if the interests of the defendant may place the attorney under inconsistent duties at some time in the future." *United States v. Kliti*, 156 F.3d 150, 153, n.3 (2d Cir. 1998). Both actual conflicts not otherwise requiring disqualification, as well as potential conflicts may be waived by an informed defendant. It appears the government here alleges various waivable conflicts.

A court need not, however, initiate a *Curcio* hearing every time the government asserts the defense is encumbered by an actual or potential conflict. The court is not duty-bound "to inquire whenever, as a result of creative speculation, one could imagine a situation in which a conflict may have arisen." *United States v. Velez*, 354 F.3d 190, 198 (2d Cir. 2004). Rather, the court should "initiate an inquiry when it knows or reasonably should know of the possibility of a conflict of interest." *Strouse v. Leonardo*, 928 F.2d 548, 555 (2d Cir. 1991).

A *Curcio* hearing is a serious matter since it has the potential to (1) chill vigorous defense advocacy by claiming members of the defense team are acting unlawfully and are under investigation, and (2) drive a wedge between the client and his defense team by suggesting there may be cause for the defendant to believe his attorneys and/or investigators have reason to not act vigorously in the defendant's interest. In this case we are confident the Court will be particularly sensitive to this latter concern, given the previous successful efforts by a member of the prosecutorial team to create just such conflict between Mr. Morrison and his previous counsel. Additionally, the government's proposed questions would communicate dire warnings

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to Mr. Morrison that attorney Smith and investigator Flagg may have engaged in unethical or criminal conduct that would compromise his defense in this very serious case.¹ Accordingly such a hearing should not be conducted upon the government's "creative speculation," *Stouse v. Leonardo, supra*, but only where the government has made sufficient allegations to raise bona fide grounds requiring a hearing. This the government has failed to do, as it in no instance identifies, for example, which witnesses allegedly were harassed or misled by Mr. Smith or Mr. Flagg, much less does it explicate the harassing conduct to which such witnesses allegedly were subjected.

The absence of such specificity forecloses any consideration of the government's request. We nonetheless address the government's allegations to the extent we understand them.

Allegations against attorney Smith. Mr. Smith's supposed "misuse" of the subpoena process by subpoenaing Detective Trotta's bank records presents no ground for a *Curcio* hearing as it suggests no conflict between Mr. Smith and Mr. Morrison. Moreover, these subpoenas were the subject of litigation months ago and the subpoenas were withdrawn by the defense; if the government in good faith believed the mere act of issuing these subpoenas required a *Curcio* hearing - and we cannot imagine how this would be so - the time for making an appropriate application was then, not now.

We cannot respond to the government's additional allegations against Mr. Smith - alleging he issued trial subpoenas regarding an unrelated business dispute between a third party and Mr. Morrison; that he intimidated and harassed witnesses; and that he received fees that supposedly lack a "legitimate source" - since the government provides no details sufficient for us to understand to what these allegations refer much less to meaningfully respond.

Allegations against Mr. Flagg and other investigators. Here again the government makes allegations to which we cannot respond because they lack specificity. Moreover, the government's claim that the investigators acted improperly by speaking with "represented parties in violation of the disciplinary rules" (Gov. letter at 4) is quizzical, since Mr. Morrison is the only "party" to this indictment. See *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995).

¹ See, e.g., Gov. Letter at 5, question 3: "Are you aware that your attorney Peter Smith and your private investigators, including Warren Flagg may have engaged in unethical or illegal conduct?"

The government seeks to insulate itself from a claim that it has targeted Mr. Smith as a tactic to chill his advocacy while at the same time it endeavors to do precisely that. Thus the government says, "Mr. Smith is *not* the target or subject of a criminal investigation" (Gov. Let. at 4), even as it makes allegations he engaged in conduct amounting to criminal obstruction of justice and adds ominously that "as the trial unfolds, it is conceivable that he may be the subject of a grievance committee disciplinary action or some other proceeding."

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For these reasons the Court should deny the government's application for a *Curcio* hearing. In the alternative it should require the government to provide specificity with respect to its allegations.

Respectfully submitted,

/s/

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November 1, 2007

VIA ECF

The Honorable Denis R. Hurley
United States District Judge
Eastern District of New York
934 Federal Plaza, Central Islip, N.Y.

Re: United States v. Rodney Morrison
Criminal Docket 04-699 (S-2) (DRH)

Dear Judge Hurley:

The government writes in response to defendant Morrison's letter dated October 30, 2007 wherein he requests that the Court deny the government's request to conduct a Curcio Hearing or in the alternative requests that the Court require the government to provide more specificity with regard to the alleged improper conduct of Peter Smith, Warren Flagg and other defense investigators. While the Court has not required the government to provide further information in that regard, and the government has provided information about many of these incidents to counsel during meetings and in the 3500 material, the government by this letter sets forth additional facts which should make it clear that a Curcio inquiry is required.

Mr. Smith's Misuse of Subpoenas

Mr. Smith's misuse of subpoena power, which prompted an earlier motion to quash by the government, must be considered against other aspects of counsel's conduct.¹

The Business Disputes

First, it has come to the government's attention that Mr. Smith has been utilizing subpoenas ostensibly issued in connection with this prosecution to obtain information about Harry Wallace,

¹The issue of the Trotta subpoenas was never fully litigated as the subpoenas were withdrawn.

the Chief of the Unkechaug Indian Tribe, an individual with whom the defendant has had several business disputes. For example, Wallace has advised that, among several alleged improper subpoenas, Smith issued a subpoena for Wallace's college application to see which race box Wallace checked in an attempt to discredit Wallace as a Native American. Wallace was not listed on either the government or the defendant's witness list, so there appears to be no reasonable explanation for the issuance of that subpoena.

The Suffolk County Police Department Subpoenas

The defense witness list provided on October 29, 2007, lists, among others, the names of the following individuals:

Anthony Capuano
Charles Caramenello
Joanne Carlucci
Gaetano Foti
William Nunziata

None of these individuals, so far as the government is aware, has any relevant testimony to provide in this case. However, the government is aware that each of these individuals was either a defendant or witness in a state narcotics investigation by the Suffolk County Police Department between 1994 and 1999 in which Detective Trotta had some involvement. The government is concerned that information about this investigation has been obtained through pre-trial subpoenas to Suffolk County law enforcement. Investigations that Detective Trotta may have been involved with over ten years ago can not possibly be relevant, thus any use of subpoenas to obtain this information was improper.

Coercion of Witnesses by Mr. Smith and Mr. Flagg

The Danielle Juip Incident

Although the defense claims that lack of specificity prevents an intelligent response to the government's allegations supporting the request for a Curcio hearing, the government reminds counsel that Mr. Smith's conduct as it relates to Danielle Juip, a government witness, was revealed, in as much detail as the government had, to Mr. Murphy approximately three weeks ago.

In addition, the coercive behavior of Mr. Smith towards Juip is summarized in the notes of FBI Special Agent Steven Troyd, which has been marked and disclosed with the 3500 material. In essence, Ms. Juip will testify that Mr. Smith and Rick Arden, a defense investigator, came to her home and insisted on interviewing

her. Juip reluctantly exited her home to speak with them as she did not want them in her house. During the interview, Ms. Juip's 8-year-old son came out of the house and began pulling his mother toward the house, asking that she come inside. The investigator approached the child and pushed him away from Ms. Juip in an effort to continue the interrogation. Ms. Juip will testify that she "yessed" Smith and the unknown investigator because she feared them, was concerned for her son's safety and hoped to end the interrogation as quickly as possible. It is nearly inevitable that this conduct will emerge during Ms. Juip's testimony. While we can only speculate about how a jury may view such testimony, it is conceivable that it may reflect poorly on the defendant and, in addition, it may be viewed as consciousness of guilt on the part of the defendant. Since Smith is the defendant's attorney he can not take the stand and explain his conduct, thus the jury could be left with a negative impression of Smith and, by extension, Morrison. If Morrison is advised of this potential issue and agrees to waive this conflict, then should it arise at trial, Morrison can not then claim prejudice.

The James Johnson Incident

Mr. Smith's conduct with respect to a defense witness, James Johnson, was also revealed in earlier discussions between the government and defense counsel. Specifically, in November 2006, Messrs. Smith and Flagg met with Suffolk County Police Department Detective Lawrence Gualtieri regarding a robbery that took place in the home of government witness, Wynette Randall, in February 2002. Smith advised Gualtieri that he represented Johnson who would implicate Tony Phillips, a government witness, in this robbery. In fact, Flagg and Smith told Gualtieri that Johnson was prepared to testify about admissions Phillips allegedly made to him about Phillips involvement in the robbery.

Ultimately Johnson was never interviewed as Mr. Flagg and Mr. Smith refused to make Johnson available for an interview in their absence. Additionally, a subsequent investigation revealed that Mr. Smith never represented Johnson² and Mr. Flagg never worked in any capacity for Johnson.

Additionally, no charges against Phillips were pursued after Phillips, through counsel Steven Wilutis, agreed to meet with the Suffolk County Police Department and provide a DNA sample to compare with evidence left at Randall's apartment by one of the

²In fact, during earlier proceedings in this investigation, Mr. Johnson was represented by Thomas Lavallo, Esq.

armed gunman. The DNA test results exculpated Phillips.

Regardless what Johnson may say if called by the defense, his cross-examination by the government will certainly reveal the improper tactics employed by Flagg and Smith. This line of inquiry may reflect poorly on the defendant, thus, he should be given an opportunity to consider this issues during a Curcio inquiry.

The David Cohn Incident

On November 29, 2007, while the Court was in the process of jury selection, Mr. Flagg approached government witness David Cohn. Cohn is a former employee of the defendant. Cohn will testify that he was ordered by Morrison to accompany Tony Phillips to Costa Rica after Phillips was badly burned during the arson of Thomassina Mack's car. Although there is no evidence that Cohn has any criminal exposure in connection with the arson, and although 3500 material disclosed to the defense makes plain that Phillips never suggested that Cohn was involved in the arson, Flagg told Cohn that the government was in possession of statements from Phillips implicating Cohn in the arson. It appears that Flagg made this misrepresentation in an attempt to influence Cohn not testify at the trial.

The Shawn Morrison Incidents

Shawn Morrison, a government witness, has advised that he has been repeatedly followed by Mr. Smith both in an around Long Island as well as in Florida where Morrison was vacationing with his family. In addition, Mr. Smith, armed with a camera has taken photographs of Morrison at work, Morrison's vehicles and Morrison's customers. Morrison conveyed that he feels harassed and alarmed by Mr. Smith's conduct.

Improper Conduct by Defense Investigators

Shinnecock Indian Nation Chief Lance Gumbs, a defense witness, advised the government earlier this week that several members of the Shinnecock tribe have been approached by unidentified males seeking information regarding Morrison and Unkechaug Chief Harry Wallace. According to information relayed to Gumbs, These men identified themselves as FBI agents. No FBI agents have conducted such interviews.

Several other individuals, family members and neighbors of witnesses Arturo Kerr and Thurmond Davis, have complained to the government that they have been visited by individuals at hours such as 3:00 a.m. who displayed weapons and badges and represented

themselves to be affiliated with the court. In one instance, the investigator identified himself as working "for the government" and "Pete Smith's office." Based upon descriptions and a business card left with one witness, it appears that Raymond Zuppa, a defense investigator and attorney, has engaged in such conduct.

Finally, Alex Pascale a government witness who had previously been cooperative, recently exhibited a notable change in his behavior. In fact, when served with a trial subpoena a few weeks ago, Pascale advised that he was newly represented by counsel. When asked who his attorney was he said "I don't know." Similarly, when asked who was paying for his attorney, Pascale replied, "I don't know."

Because of the revelation of the conduct described above during the course of the trial will create at least a potential conflict of interest, the government respectfully requests that the Court conduct a conflict of interest inquiry in accordance with applicable law.

Respectfully Submitted,

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EASTERN DISTRICT OF NEW YORK

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