HIGHLIGHTED PORTIONS WERE CENSORED BY FBI FOR 4 YEARS 7 MONTHS
(CURRENT REDACTIONS BY LETTER WRITER FOR PRIVACY REASONS)

Michael S. Zummer
[redacted]

August 15, 2016

The Honorable Kurt D. Engelhardt
United States District Court
for the Eastern District of Louisiana
C-367 Hale Boggs Federal Building
United States Courthouse
500 Poydras Street
New Orleans, LA 70130

Re: *United States v. Harry J. Morel, Jr.*, Criminal No. 16-050

Dear Judge Engelhardt:

Although I am the Federal Bureau of Investigation (hereinafter "FBI") case agent on the current investigation into Harry Morel (hereinafter "Morel"), I am writing this Court in my capacity as a private citizen under the First Amendment. I do not represent the FBI or U.S. Government in any way. The views in this letter are mine alone. The purpose of my letter is to report misconduct by the United States Attorney's Office for the Eastern District of Louisiana (hereinafter "USAO") which has affected the prosecution of Morel. I believe that the USAO's misconduct has resulted in a plea agreement with Morel based more on its own interest in covering up its misconduct than in advocating for a just result. I believe these matters are of public concern and deserve First Amendment protections.

I am not alleging misconduct by every Assistant U.S. Attorney (hereinafter "AUSA") who has participated in the case. Some have performed admirably and ethically, including AUSA James Baehr.

With the exception of Ralph Capitelli's statements to the media about now-deceased witness Danelle Keim and me, which are not the subject of this letter, I am not alleging any misconduct on the part of Morel's attorneys.

When I asked to report the misconduct to this Court in my official capacity, I was barred from doing so. I was informed that the FBI does not communicate directly with the courts without permission from the Justice Department. At the FBI's direction, I submitted the letter to Justice Department entities to ask for permission to send the letter. The Justice Department entities determined that they were not in the position to grant me permission. The FBI then notified me that I could not submit the letter in my official capacity.

When I asked to disclose this letter to this Court as a private citizen under the First Amendment, I was notified that the FBI would not review this letter for prepublication review which FBI policy requires prior to any release. Even though I wrote in the letter that I was writing in my capacity as a private citizen under the First Amendment, the FBI determined that the disclosure to this Court was in the performance of my official duties and could not be reviewed. The FBI's position essentially asserts that I have no First Amendment right to disclose prosecutorial misconduct on a case to the presiding judge. Although the FBI's administrative appeals process has not been completed, I gave the FBI until the close of business on August 15, 2016 to make a final decision citing the August 17, 2016 sentencing hearing in this case. The FBI did not make a final decision. The FBI's refusal to authorize the release of this letter under its prepublication review policy violates my First Amendment rights which will be irreparably harmed if I do not take action before the August 17, 2016 sentencing hearing. I must treat their position on August 15, 2016 as a final decision.

Because this matter involves a dispute over Constitutional rights, it can only be resolved in the Federal courts. In the course of litigation, the disclosure would be submitted to a court anyway for a decision. Because the disclosures in dispute are letters to a court and part of my reason for disclosure under the First Amendment is to notify this Court of prosecutorial misconduct which is relevant to a hearing on August 17, 2016, I am submitting the full misconduct letter to this Court for a judicial determination on whether this disclosure is deserving of First Amendment protections. To that end, I am notifying the FBI of the submission to allow the FBI the opportunity to dispute the issue. If the FBI maintains the position it has taken, that this disclosure is within the performance of my official duties and not protected under the First Amendment, the FBI, after seeking permission from the Justice Department, can argue that issue before this Court and ask to have the letter returned or sealed. Although, by asserting that this letter is not within my First Amendment rights I believe the FBI has forfeited its opportunity to raise matters involving its prepublication review, the FBI will have an opportunity to raise those issues before this Court. If the FBI does not assert itself before this Court, or this Court determines that the FBI's legal position is incorrect, I request that this Court place the letter in the public record. I will not submit this letter to the media, unless this Court puts it in the public record. Therefore, any public release of this letter will be a judicial decision after the FBI has had the opportunity to communicate with this Court, if it chooses to do so.

Although this is not the normal procedure to handle this sort of legal issue, the FBI's conduct has left me no choice. I have consistently told FBI officials of Morel's sentencing hearing on August 17, 2016, which is when my disclosure is most important to this Court, although the larger public concerns will remain. Submitting the letter in this manner is the only way to allow a judicial determination over the legal question posed by the FBI's decision to deny me my First Amendment rights in time for my speech to get to the public entity immediately affected by it.

1. Background and Experience

I was first employed as an FBI special agent in 1999 after serving as a Marine Corps infantry officer. I was assigned to investigate white collar crime in New Orleans. My investigations resulted in twenty-one convictions. In 2003, I left the FBI to attend Stanford Law School. After my first year of law school, I interned at the Ministry of the Interior for the Republic of Georgia where I provided advice on combating corruption. I then volunteered to serve a tour in Al Anbar Province, Iraq as a Marine reservist where I was responsible for the development of the Iraqi Security Forces. During my tour, I also investigated corruption by Iraqi officials.

After graduating from Stanford Law School in 2007, I clerked for Judge Edith Brown Clement of the U.S. Court of Appeals for the Fifth Circuit from 2007 to 2008. I returned to the FBI as a special agent in 2008 and was assigned to investigate public corruption. My investigations have, so far, resulted in nine convictions, not including Morel's. I have also taught classes on public corruption investigations overseas to investigators, prosecutors, judges, and other public officials from thirteen countries. During the course of this instruction, I have been exposed to corruption problems in those countries.

In 2015, I was reassigned to the International Terrorism squad in New Orleans after making public comments critical of the USAO, but I continued to teach about corruption overseas and continued as the lead case agent on two corruption investigations, including the Morel case. Recently, I was reassigned to the Law Enforcement Corruption squad in New Orleans.

I have been continuously assigned as the lead case agent on the Morel investigation since the current case was opened in 2009.

2. Legal Issues

A. First Amendment

The Supreme Court has "identified two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (internal citations omitted). "When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of

scrutiny." *Id.* at 423. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421.

My situation is substantially different from the facts in *Garcetti*, where a prosecutor, Ceballos, alleged retaliation after conveying his opinion and recommendation to his supervisor regarding a search warrant affidavit that he believed contained serious misrepresentations. *Id.* at 420. The Court determined that the Ceballos "did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee." *Id.* at 422.

My disclosure to this Court is not part of my official duties. I have made specific assertions that I am writing this letter as a private citizen under the First Amendment, which Ceballos never did. This assertion by a government employee is important, because it tells the reader that the disclosure is not the official government position. Also, it is a decision by the employee about which form of legal protection the employee seeks, the First Amendment or whistleblower protections. Although I reported this prosecutorial misconduct to the appropriate authorities for whistleblowers, I am not claiming that protection in this disclosure to this Court.

Most importantly, the FBI has told me that I cannot make this disclosure in my official capacity without permission from the Justice Department and the Justice Department has not given me that permission. Therefore, according to the FBI, I do not have the authority to make this disclosure to this Court in my official capacity as an FBI agent. However, the FBI has also apparently decided that, despite my assertions to the contrary, any disclosure that I make to this Court about this case is within my official duties. The FBI is taking contradictory positions which prevent me from making this disclosure. Because I am reporting misconduct by the Justice Department, of which, the FBI is a part, the FBI has every reason to take such a position to prevent this letter from being disclosed to this Court and, ultimately, the public. The FBI's position essentially gives the Justice Department unbridled power over whether its employees can report misconduct by Justice Department prosecutors to a court affected by the misconduct.

If the FBI argues that I lost my First Amendment rights when I attempted to report this misconduct in my official capacity by following the process it outlined to me, I only followed that process because I was directed to do so. I have followed the FBI's procedures and orders, but the FBI has refused to follow its own policy and refused to review this letter even though I asserted my First Amendment rights. The vast majority of time writing this disclosure, even when I was attempting to make it in my official capacity, has been spent outside of working hours. The vast majority of time and resources spent at work on this matter have been expended

to follow the FBI's procedures to make this disclosure, whether in my official or private capacity.

My situation is close to the one in *Lane v. Franks*, 134 S.Ct 2369, 2378 (2014), where the Court held that, "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment." Although *Lane* involved sworn testimony under a subpoena, I am providing information to a court regarding a matter before it. Like the testimony in *Lane*, I believe this disclosure provides information relevant to this Court's upcoming decision and public policy matters far beyond it. (The only reason I am not providing this letter to the media at this time is because the FBI has refused to review this letter for prepublication review and I am attempting to give the FBI the opportunity to address this Court before it is placed in the public record.) "[P]ublic employees are uniquely qualified to comment on matters concerning government policies that are of interest to the public at large." *Id.* at 2380 (internal citations and quotations omitted). To quote *Lane*, "[t]he importance of public employee speech is especially evident in the context of this case: a public corruption scandal."

The purpose of my disclosure to this Court is not to address the facts of the Morel case but to notify this Court of corruption in the Justice Department over the handling of the case and the FBI in trying to prevent disclosure of the misconduct. This is not a personal grievance. I am not asking for any relief from this Court except to make it aware of what happened and to allow the public to see that. This Court should know the pattern of misconduct that led to the plea agreement before it. The prosecutorial misconduct in this case also concerns the victims and witnesses who have been attacked in public statements by defense counsel. It concerns the Saint Charles Parish Sheriff's Office which put itself at great risk to assist the investigation. The victims, witnesses, and investigative team should know, and they deserve to have the public know, why this plea agreement was made. In public statements, U.S. Attorney Kenneth Polite has blamed the victims in part for the decision to make the plea agreement. If the U.S. Attorney can publicly blame the victims, the victims deserve to have the prosecutorial misconduct by U.S. Attorney Polite and his office which led to the plea agreement aired in the public sphere. Finally, the public should know when there is corruption in the criminal justice system and attempts by the FBI to conceal that misconduct from public scrutiny.

I cannot forecast what the FBI will do to me. So, it is difficult to answer the Court's second question from *Garcetti* of "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti* at 418. However, after the FBI determined that I had no First Amendment right to make this disclosure, I took the only reasonably available route to make a limited disclosure to the entity which needed the information in a timely manner while giving the FBI the opportunity to assert itself to this Court. The FBI created this problem and this Court would have been

prejudiced if I did not make this disclosure. This Court should be involved in the decision-making and see the information at issue before the hearing on August 17, 2016.

I do not believe the FBI can have any justification, let alone an adequate one, if it takes administrative action against me for making this limited disclosure to this Court. I have shown far more respect for the FBI's policies and procedures than the FBI is showing for my assertion of my First Amendment rights. On August 15, 2016, another FBI agent informed me that an FBI manager allowed him to write a letter to a court in similar circumstances to my own without going through the procedures I was forced to follow. The FBI appears to pick and choose which disclosures it scrutinizes.

B. Grand Jury Material

As a general matter, I believe it is well-established that many Federal investigations include Grand Jury material which cannot be disclosed under Federal Rule of Criminal Procedure 6(e). The factual basis filed with this Court discloses that a Grand Jury subpoena was issued in the Morel case. To the best of my knowledge and understanding of Rule 6(e), I am not including anything in this letter that would violate my obligation as someone to whom there have been disclosures made under Rule 6(e)(3)(A)(ii).

The Supreme Court has "noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979).

The Fifth Circuit has described the Rule 6(e) secrecy requirement as applying "not only to information drawn from transcripts of grand jury proceedings, but also to anything which may tend to reveal what transpired before the grand jury." *In re Grand Jury Investigation*, 610 F.2d 202, 216 (5th Cir. 1980) (internal citations and quotations omitted). The court also "construe[d] the secrecy provisions of Rule 6(e) to apply not only to disclosures of events which have already occurred before the grand jury, such as a witness's testimony, but also to disclosures of matters which will occur, such as statements which reveal the identity of persons who will be called to testify or which report when the grand jury will return an indictment." *Id.* at 216-17.

However, the Fifth Circuit noted that "the disclosure of information obtained from a source independent of the grand jury proceedings, such as a prior government investigation, does not violate Rule 6(e). A discussion of actions taken by government attorneys or officials E.g., a

recommendation by the Justice Department attorneys to department officials that an indictment be sought against an individual does not reveal any information about matters occurring before the grand jury. Nor does a statement of opinion as to an individual's potential criminal liability violate the dictates of Rule 6(e). This is so even though the opinion might be based on knowledge of the grand jury proceedings, provided, of course, the statement does not reveal the grand jury information on which it is based." *Id.* at 217 (internal citations omitted).

Although FBI agents often receive disclosures under Rule 6(e)(3)(A)(ii), we also testify as fact witnesses. "Rule 6(e) does not prevent disclosures by a witness who testifies before the grand jury." *Id.* at 217 (internal citations omitted).

The D.C. Circuit has stated "internal deliberations of prosecutors that do not directly reveal grand jury proceedings are not Rule 6(e) material." *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1003 (D.C. Cir. 1999). "It may be thought that when such deliberations include a discussion of whether an indictment should be sought, or whether a particular individual is potentially criminally liable, the deliberations have crossed into the realm of Rule 6(e) material. This ignores, however, the requirement that the matter occur before the grand jury. Where the reported deliberations do not reveal that an indictment *has been* sought or *will be* sought, ordinarily they will not reveal anything definite enough to come within the scope of Rule 6(e)." *Id.* at 1003 (emphasis in original).

This letter will not disclose any witnesses, whether or not they testified before a Grand Jury, and Morel has been charged and pleaded guilty, although to a lesser offense. My knowledge of his conduct comes from the FBI investigation. This letter will disclose potential charges discussed and approved by Justice Department attorneys, but none of the discussions or approvals I mention will be definite enough to come within the scope of Rule 6(e).

C. Privacy Act

Because I am now submitting this letter through the FBI's prepublication review process, I will briefly address the potential Privacy Act issues. Simply stated, I am not disclosing anything in this letter that was retrieved from a system of records using personal identifiers. Most of what is in this letter has not even been entered into any system of records of which I am aware. I was a firsthand witness to anything in this letter that was placed into any system of records before a record was created or submitted.

This letter is primarily a description of the prosecutorial actions that I observed or of which I was told. I have attempted to remove factual issues about the case, but some issues have to be described to give context to the prosecutors' actions. The only possible witness named in this letter, Danelle Keim, aka Danelle McGovern (hereinafter "Keim"), is now deceased and has already been named publicly by the FBI and others as a witness. The details of her activity as a witness are part of the factual basis filed in the public record of this Court. Furthermore, several

public officials have made public statements about the results of the investigation into Morel's conduct.

D. U.S. Attorney's Manual on Recusal

Although I do not believe that the Justice Department's rules for its attorneys are enforceable by the courts, they are instructive in showing when prosecutors have failed to follow the appropriate standards.

"When United States Attorneys, or their offices, become aware of an issue that could require a recusal in a criminal or civil matter or case as a result of a personal interest or professional relationship with parties involved in the matter, they must contact General Counsel's Office (GCO), EOUSA. The requirement of recusal does not arise in every instance, but only where a conflict of interest exists or there is an appearance of a conflict of interest or loss of impartiality." *United States Attorneys' Manual*, 3-2.170 – Recusals, Feb. 2004. "The same circumstances which require that a United States Attorney recuse himself/herself (see USAM 3-2.170) apply to an Assistant United States Attorney. Ordinarily, the fact that an Assistant United States Attorney recuses will not require that the United States Attorney or the office recuse itself and the case or matter may be reassigned to another Assistant." *United States Attorneys' Manual*, 3-2.220 – Recusals, Feb. 2004.

3. Conduct of Prosecution

A. Case Declination

The current investigation into Morel was initiated in June 2009. On November 29, 2012, AUSA Brian Klebba told me he was assigned to the case. Previous AUSAs removed themselves from the case after a disagreement over how to conduct the investigation covertly.

A few days after another agent and I attempted to interview Morel on December 10, 2012, which was the end of the covert phase of the investigation, Ralph Capitelli (hereinafter "Capitelli") called and said that he was representing Morel. I advised AUSA Klebba of Capitelli's representation of Morel. At the time, I was working on a search warrant affidavit to search for evidence in Morel's office, specifically a camera memory card. On November 30, 2012, Keim, while cooperating with the FBI, recorded a conversation with Morel during which she gave a memory card to him in his office. I submitted a draft affidavit to AUSA Klebba. AUSA Klebba later told me that his chain of command had reviewed the affidavit and all had said there was no probable cause to search Morel's office. (Unlike state officials, FBI agents, at least in the Eastern District of Louisiana, must obtain approval for a search warrant from the USAO before submitting an application to a judicial official.)

Because the USAO blogging scandal had recently caused the departure of U.S. Attorney (hereinafter "USA") James Letten and First Assistant U.S. Attorney (hereinafter "First AUSA")

Jan Mann, AUSA Klebba's chain of command had become AUSA Matt Coman (Deputy Chief of Criminal), AUSA Duane Evans (Chief of Criminal), First AUSA Fred Harper, and Interim USA Dana Boente. When I asked AUSA Klebba what the specific issue was with the search warrant affidavit, he said that he had talked to First AUSA Harper and Interim USA Boente about it, but they had not provided specifics. AUSA Klebba then provided other assistance to the investigation.

On January 11, 2013, even though the USAO had denied the FBI a search warrant for Morel's office, Louisiana 29th Judicial District Attorney Joel Chaisson consented to a search of Morel's office. As described in the factual basis, Morel was served with a Grand Jury subpoena to turn over the memory card. Through his attorney he claimed that agents had taken the card during their search. Agents had not found the card during the search. Morel was supposed to turn over the memory card by January 17, 2013. (Although the due date of the subpoena is not disclosed in the factual basis, I do not believe this additional information---a due date that was never followed---is sufficiently specific to disclose a matter likely to occur before a Grand Jury.)

During the week of February 4, 2013, AUSA Klebba informed me that he had spoken with Capitelli who denied that Morel had the memory card. AUSA Klebba said that he told Capitelli that the government had a copy of the memory card anyway. (I had given Keim a copy of the original memory card to give to Morel. The FBI maintained custody of the original.)

On February 9, 2013, I was informed by Saint Charles Parish Sheriff Greg Champagne that Keim had been found dead that morning. There was no evidence to connect Morel to her death. She died immediately after a news report about the investigation. The report did not name Keim but provided sufficient information to identify her to Morel.

I notified AUSA Klebba of Keim's death. In order to mitigate the loss of her potential testimony, I arranged to interview a potential witness (hereinafter "Witness 1") who was in custody. The morning of February 13, 2013, the prison called to tell me that Witness 1 had been transported to Saint Charles Parish. Sheriff Champagne informed me that then-Louisiana 29th Judicial District Court Judge Michele Morel (Morel's daughter) had issued a writ to have Witness 1 brought to court. An assistant district attorney (hereinafter "ADA") who had previously been employed by Morel was going to meet with Witness 1. Although I had no information indicating misconduct on the part of then-Judge Morel or the ADA, I was concerned about the potential for abuse. I called AUSA Klebba and left a voicemail describing my concerns. I then contacted District Attorney Chaisson about the meeting. He immediately recused his office from any cases involving Witness 1. AUSA Klebba never addressed the issue regarding Witness 1.

On February 15, 2013, AUSA Klebba called me and told me that he had spoken to First AUSA Harper and Interim USA Boente. He said that after Keim's death the case against Morel which was difficult before was now impossible. I told him that I disagreed because we still had

solid evidence. I informed him that in the case against Congressman William Jefferson recordings were still admissible even though the source did not testify.

On February 18, 2013, I ran into AUSA Klebba in downtown New Orleans. I told him that we should still meet with Capitelli about the evidence that we had. AUSA Klebba said that he did not want to "bluff" Capitelli as he would have to work with Capitelli for the next "twenty years." I disagreed that we would be bluffing in any way and said that we still had a potential mail fraud against Morel for providing falsified community service letters to a court. AUSA Klebba said that only my supervisor and I believed that was fraud. I told AUSA Klebba that we had more evidence on Morel than we had on another official (hereinafter "Official A") whom I had investigated and AUSA Klebba had prosecuted. AUSA Klebba said that Morel had not come in and lied to us like Official A had. I said that Official A had not told a witness to destroy evidence on tape like Morel had. AUSA Klebba said that he did not think there was any underlying Federal offense for Morel to obstruct. I said that Use of an Interstate Facility in Aid of Racketeering (ITAR) (Title 18 U.S.C. Sec. 1952) was the underlying offense. AUSA Klebba made a gesture which I interpreted as dismissive of my suggested offense. (ITAR---specifically, using the telephone in aid of soliciting sexual bribes---had already been approved by FBI Headquarters and attorneys from the Justice Department as the basis of the investigation during the covert phase before AUSA Klebba was assigned to the case.) AUSA Klebba told me that he would be busy the following week on a sentencing and out of town the week after. He told me to get something "good" to bring his chain of command by the time he got back.

I did not understand why there was any time constraint and began doing research on various issues, including Fifth Circuit case law holding that labor was a property right within the meaning of the Hobbs Act which supported my mail/wire fraud argument. I prepared a Powerpoint presentation of audio and video clips to attempt to have a meeting with the USAO's management about the case. My supervisor, Supervisory Special Agent (hereinafter "SSA") Daniel Evans (no relation to AUSA Evans), and I discussed it and we were both concerned about First AUSA Harper because of his relationship with Capitelli. After speaking to other agents who were aware of the relationship, I checked public records in Gulf Shores, Alabama (Baldwin County) and found that Capitelli and First AUSA Harper were partners in a condominium which had a mortgage.

Upon learning this, I was informed by FBI management that Harper had previously been investigated for his relationship with Capitelli and that he had been told by USAO management, while Letten was USA, not to take part in cases involving Capitelli.

SSA Evans later told me that he had informed FBI Special Agent in Charge (hereinafter "SAC") Michael Anderson of the concern about Harper's relationship with Capitelli. SAC Anderson was going to address the condominium issue with Interim USA Boente.

On March 7, 2013, after Keim died and Capitelli was advised that the government had a copy of the memory card anyway (actually the original), AUSA Klebba told me that Capitelli had advised him that Morel had found the memory card.

Early in the week of March 25, 2013, I delivered a Powerpoint presentation regarding the Morel case to the USAO for AUSA Klebba. On March 28, 2013, AUSA Klebba called me and told me that he and others had reviewed the presentation. He said he had spoken to AUSA Evans and First AUSA Harper and that AUSA Evans and First AUSA Harper had spoken to Interim USA Boente about the case. AUSA Klebba had been told to decline the case because of Keim's death.

I did not understand why the case had been declined. I had not asked that it be prosecuted. I wanted to obtain records to identify potential victims for interviews. At the time, we were aware of three women, including Keim, and believed that there could be more victims. The sudden declination appeared to be designed to stop the overt investigation before it had the opportunity to start.

SSA Evans set up a meeting with AUSA Evans but ultimately met with First AUSA Harper, AUSA Evans, and AUSA Coman. SSA Evans told me that SAC Anderson would set up a meeting with Interim USA Boente. SSA Evans also said that he had made the USAO aware that the FBI would want another meeting regarding the Morel investigation.

Before an April 17, 2013 meeting, I received a declination letter from the USAO. From speaking to another AUSA, I became aware that AUSAs were clearing their cases in anticipation of the arrival of a new USA.

On April 17, 2013, SAC Anderson, SSA Evans, and I met with Interim USA Boente, First AUSA Harper, AUSA Eileen Gleason (who came at my request), AUSA Klebba, AUSA Evans, and AUSA Coman. Various issues regarding the Morel case were discussed as follows:

- Regarding the falsified community service papers, First AUSA Harper made the point that Morel had been falsifying those papers for five years and concluded that the length of time that Morel had been providing false papers made the case against him weaker. (I did not understand how the frequency of falsifying records made those falsifications less illegal.)

- First AUSA Harper expressed his concern that Morel had been doing favors for lots of people without asking for sex, and, therefore, the case was weak. (First AUSA Harper did not reconcile this point with government officials who did political favors or other official acts for people without asking for bribes, but later asked for bribes in connection with other acts and were convicted for it. I am not aware of any requirement that a public official has to always or regularly ask for bribes in order to be convicted of doing it once.)

- First AUSA Harper said that he had reviewed the video clips of Morel's July 23, 2012 visit to Keim's apartment and said that Morel would not have had sex with Keim if she had agreed to have sex with him that day. (He did not explain how he could arrive at that conclusion with Morel arriving at her apartment with two bottles of wine, asking Keim to kiss him, repeatedly, and grabbing her breast and buttocks.)

- First AUSA Harper said that juries in the Eastern District of Louisiana did not like cases on sex or gambling.

- Interim USA Boente said that he had reviewed a printout of the Powerpoint presentation which he described as thorough. I told him that he needed to review the recordings. Interim USA Boente said that he would not do that. He would read transcripts though. Interim USA Boente said that in his opinion Morel was that guy in college who "could not close the deal."

- First AUSA Harper said that with Morel turning in the camera memory card the obstruction charge was like someone threatening to kill the president. The threat was chargeable, but they would not charge something like that. I said that Morel's return of the memory card after being told that the government had a copy and the witness dying was like a bank robber bringing the stolen money back after learning he has been caught.

- Interim USA Boente said that the return of the memory card hurt the obstruction case. During the course of the discussion, Interim USA Boente realized that the memory card that Keim had given Morel was a copy of the original memory card which was in evidence. (That fact had been in the Powerpoint presentation he reviewed.) Interim USA Boente theorized that providing a copy of an item already in evidence might mean there was no obstruction charge at all. (I later did research finding that the Supreme Court held that the language of the obstruction statutes covered such attempts at obstruction.)

- When I pointed out that Witness 1 could mitigate the loss of Keim's testimony, First AUSA Harper pointed out that Witness 1 was a drug dealer. I denied that he was. First AUSA Harper said that Keim was doing drugs with Witness 1 just like she was doing drugs with her boyfriend when she died. I said that I did not know whether Keim had done drugs with Witness 1 because Witness 1 was in prison for burglary, not a drug-related offense.

- No one from the USAO discussed the separate obstruction of justice violation Morel committed by telling Keim to lie to investigators.

- First AUSA Harper said that the women were playing the system anyway. He did not reconcile this position with cases where government contractors "played the system" by paying monetary bribes to public officials to get contracts, yet public officials were prosecuted for it. He did not address the power disparity between Morel, an elected chief prosecutor, and women facing prosecution, whose loved ones faced prosecution, or who needed court-ordered child support.

At the conclusion of the meeting, the USAO agreed to review any new information gathered by the FBI regarding Morel's past conduct. The FBI would continue to investigate. However, the case was closed at the USAO. Although First AUSA Harper offered to provide investigative assistance if it was requested, I did not believe his offer was sincere.

Immediately after the meeting, SSA Evans and SAC Anderson expressed their disbelief at the meeting. SSA Evans described it as the "most irrational meeting" he had ever attended. I found most perplexing that the case had been declined before the overt phase of the investigation had been started. Without investigative assistance from the USAO, such as obtaining court orders and search warrants, it would be substantially more difficult to obtain records needed to identify more victims/witnesses.

B. OIG Complaint

During May 2013, I met with the Department of Justice Office of Inspector General (OIG). I agreed to file a complaint against First AUSA Harper for failing to recuse himself from matters involving Capitelli.

During June 2013, I provided an affidavit to the OIG. I also agreed to have my identity revealed, because I was told it would assist the course of the investigation. The OIG asked for other examples of Harper favoring Capitelli. I provided two.

First, I had heard from another FBI agent about AUSA Matthew Chester. Chester had told the agent and USAO financial analyst to withhold higher financial loss amounts from a U.S. Probation Officer during a presentence investigation. Chester cited his need to maintain a relationship with Capitelli as the reason for withholding the information from the court.

Second, I had heard from another agent about a case where two related defendants were investigated for fraud. The defendant represented by Capitelli was not prosecuted and the other defendant pleaded guilty. In that plea agreement, the government agreed not to prosecute Capitelli's client. After the guilty plea, the AUSA wanted to give U.S. Probation the correct dollar amount for guidelines calculations, but an upper manager at the USAO, whom the AUSA would not identify to the agent, was pressuring the AUSA to reduce the dollar amount. Capitelli was reportedly still involved in the case.

I had limited contact with the OIG. After filing my complaint, an OIG agent told me that Harper had exchanged his ownership in the condominium he owned with Capitelli. I checked Baldwin County, Alabama probate records again and found an act of exchange between Harper and a woman whom I was told was his live-in girlfriend. Harper exchanged his portion of the condominium with Capitelli for other properties. The date of the exchange was March 21, 2013. That date was significant to me because it was a few days after I had been told that SAC Anderson was going to tell Interim USA Boente about the condominium.

C. Continued Investigation and Reaction to OIG Complaint

Despite the declination of the Morel case, FBI management and I discussed how to get the case reopened by prosecutors. SAC Anderson said he trusted that when Kenneth Polite became the USA, Polite would be willing to have the USAO reopen this case. (Polite had been named but not confirmed as USA.) Based upon SAC Anderson's faith in Polite, the FBI did not approach other divisions of the Justice Department, such as the Civil Rights Division. Even if the FBI had approached those other divisions, the USAO could still prevent a prosecution by them.

During August 2013, I received a telephone call from AUSA Chester who was assigned to prosecute another investigation of mine. AUSA Chester began asking questions about actions the subject public official (hereinafter "Official B") had taken after receiving items of value from an individual seeking business with Official B's office (hereinafter "Individual B"). AUSA Chester expressed doubt that Official B had done enough in return for the payments from Individual B for Individual B to be charged with bribery. He insisted that I have interviews completed the following week to bolster that aspect of the case. When I reported the conversation to SSA Evans, he told me that the OIG had recently begun conducting interviews at the USAO in connection with my complaint. I suspected that AUSA Chester's sudden antipathy towards the case against Individual B was motivated, at least in part, by my reporting him to the OIG.

On August 29, 2013, the *Saint Charles Herald Guide* quoted Capitelli as saying that the case against Morel had been declined. Based upon my conversations with SSA Evans, I believed Capitelli was notified of the declination by the OIG when he was interviewed.

During October 2013, shortly after Polite took over as USA, I was advised by FBI management that I would be briefing the Morel case to USA Polite. When I asked who would be present at the brief, I was told that First AUSA Harper and other AUSAs previously involved in the case would be present. I refused to brief USA Polite with First AUSA Harper present. First, I believed First AUSA Harper had a conflict of interest with any case involving Capitelli. Second, I believed First AUSA Harper had a conflict of interest with any case involving me. Third, I believed that I would be tacitly endorsing First AUSA Harper's behavior if I agreed to brief him. Fourth, although I had no evidence First AUSA Harper had leaked anything to

Capitelli in the past, I suspected that he would. I did not want to take the chance of victims' identities being passed to Capitelli. Fifth, I feared that all of the AUSAs previously associated with the case now had a personal motive to see that their previous decision was not reversed, especially since the declination was now public knowledge. FBI management told USA Polite about the concerns and the brief was rescheduled. I was told by FBI officials that USA Polite avoided notifying his staff of my refusal by claiming the brief was rescheduled because he had decided to buy breakfast for his office that day.

I briefed USA Polite on the case on November 7, 2013. He was the only person from the USAO present. The brief was at the FBI office. After the brief, USA Polite commented, "This is disturbing."

On November 22, 2013, I was advised by another FBI agent that AUSA Richard Pickens had asked him when I was transferring. When told that I was not transferring, AUSA Pickens said that no one would work with me at the USAO. I was also told that AUSA Pickens commented about whether he had to worry about FBI agents filing OIG complaints against him. The agent asked him if he was doing anything that would necessitate an OIG complaint. (Before this, AUSA Pickens had used me as a witness in the case against former New Orleans Mayor C. Ray Nagin (hereinafter "Nagin"). I had also been told that, before my OIG complaint, the Nagin prosecution team, including AUSA Pickens wanted to use me at trial. I was not used as a witness in Nagin's trial.) Later, an FBI agent also quoted AUSA Pickens to me as asking the question, "Who is going to prosecute a prosecutor?"

Despite the brief to USA Polite, the USAO took no action on the Morel matter. On January 16, 2014, SAC Anderson asked me to request assistance from the USAO in the case. The purpose of the request was to spur a decision by the USAO. The request was not fulfilled, despite First AUSA Harper's offer of assistance on April 17, 2013.

Around this time, Richard Westling was hired to become the First AUSA. I believe that AUSA Harper became a senior litigation counsel at the USAO. During February 2014, I briefed First AUSA Westling and USA Polite on the Morel case at the FBI office. They took no immediate action on the matter.

Meanwhile, on or about February 25, 2014, having conducted several interviews documenting actions Official B took to further Individual B's interests, I met with AUSAs Chester and Jordan Ginsberg about the case against Individual B. Chester took the legal position that an individual could not be prosecuted for paying a bribe to a public official unless the public official did something in return and what the public official did in return for the payment was "nefarious." I reported the meeting to SSA Evans who set up a follow-up meeting with the AUSAs and AUSA Tracey Knight who had become head of the USAO's public integrity section.

On March 10, 2014, SSA Evans and I met with AUSAs Knight, Chester, and Ginsberg. During the meeting, AUSA Chester pointed to a stack of legal research which he claimed

supported his legal positions. I asked him to e-mail me his research, which he did a few days later. Checking AUSA Chester's cited case law, I found numerous errors and wrote an eighteen page response on the legal issues. The most egregious misquoted legal opinion was a Second Circuit case. Chester cited *United States v. Ganim*, 256 Fed. Appx. 399, 2007 WL 4233388 at *1 (2d Cir. Dec. 4, 2007)(unpublished) as "holding that government was required to prove official acts that the public official did in exchange for the benefits he received." Checking the citation, I found that Chester had removed the word "not" from the quoted holding. (The actual language from *Ganim* is "we…hold that the government was **not** required to prove a direct link between a benefit Ganim received and a specific act he performed, so long as the government proved that Ganim received benefits in exchange for his **agreement** to perform specific official acts or to do so as the opportunities arose." *Id.* at 401 (emphasis added).)

Based upon the number of errors, I suspected that AUSA Chester was intentionally misrepresenting case law in order to keep the case from being prosecuted. After sending my memorandum in response to AUSA Chester's research, I was told by SSA Evans that AUSA Chester had complained to USAO management that I was disrespectful to AUSA Chester in the memorandum. When SSA Evans asked if the USAO manager had read the memorandum, he admitted that he had not. Later, the USAO manager conceded to SSA Evans that I had not been disrespectful to AUSA Chester in the memorandum.

On March 14, 2014, AUSA Mark Miller was assigned to look into whether the case against Morel should be re-opened at the USAO. AUSA Miller was an experienced prosecutor who had been in Afghanistan when the case had been declined. SSA Evans vouched for AUSA Miller.

Around this time period, FBI management offered to send me to the USAO as a Special Assistant U.S. Attorney (hereinafter "SAUSA") to prosecute FBI cases. I was later told that USAO management had refused to accept me as a SAUSA. USAO management had told FBI officials that my assignment there as a SAUSA would be "too much too soon" for the USAO. I understood that comment to mean that I was too controversial of a figure because of my OIG complaint.

During July 2014, a final meeting was held with AUSA Chester about the case against Individual B. His response to my memorandum was that, although it might "technically" be a violation, it was not a case that would be prosecuted in the Eastern District of Louisiana, as though there were a higher burden to prosecute corruption cases in the district. During August 2014, I was advised by FBI management that USAO management said that the case against Individual B would not be prosecuted. A high-level USAO manager was quoted by FBI management as saying that he did not have enough "political capital" within the USAO to get the case prosecuted.

I never received notification from the OIG about the results of their investigation. FBI management told me the OIG reported the results to the Justice Department Public Integrity Section and later the Executive Office of United States Attorneys.

D. USAO Reopens Its File on Morel

Despite the controversy, AUSA Miller had the Morel case reopened at the USAO. Investigators began to obtain admissions from victims about sexual contact with, and sexual solicitations from Morel. Other than humorous remarks about fearing that another AUSA might take a sniper shot at him for taking the case, AUSA Miller provided all necessary support to the investigation. When we began finding large numbers of witnesses with pertinent information that was several years old, AUSA Miller thought of charging Morel under the Racketeer Influenced Corrupt Organizations Act ("RICO"), Title 18 U.S.C. Sec. 1962.

However, AUSA Miller appeared to be alone in his support of the case. On at least one occasion, AUSA Miller commented to me that no other AUSA would assist him in the case. He said, "It's just you and me, kid." I began looking for another AUSA to assist him and asked AUSA James Baehr, who had recently joined the USAO, if he was interested. He was. I recommended him to AUSA Miller. However, AUSA Miller did not bring AUSA Baehr on the case at first.

Unfortunately, during 2015, AUSA Miller was reassigned to other duties and, along with other cases that he had in the Eastern District of Louisiana, he had little time to spend on the Morel case. By April 2015, the investigators had exhausted all logical leads. We had found more than twenty witnesses with whom Morel had oral sex, other sexual contact, or from whom Morel had asked for sex in connection with his position as district attorney or assistant district attorney between 1986 and 2012.

During May 2015, I was advised by SSA Evans, who had been promoted to Assistant Special Agent in Charge (hereinafter "ASAC"), that USAO management told him that Morel had not had an "opportunity" to plead guilty. They intended to make a plea offer. Previously, AUSA Miller had told me that he intended to indict Morel on RICO and other charges and allow me to arrest him. (Although the FBI has statutory authority to arrest individuals who violate Federal crimes, FBI policy only allows agents to make arrests with the concurrence of Federal prosecutors. Thus, unlike the state criminal justice system, the public never knows when the FBI disagrees with Federal prosecutors.)

On July 23, 2015, I met with AUSA Miller, ASAC Evans, and SSA [redacted], the new public corruption supervisor. AUSA Miller said that he was making a plea offer to Morel which would include two counts of mail fraud, two counts of obstruction of justice, and two misdemeanor civil rights violations. I objected to the plea offer and said the victims deserved justice in the form of an indictment. Among other reasons, AUSA Miller commented that this was how "[his] office want[ed] [him] to handle it." When I asked about assigning AUSA Baehr

to the case, AUSA Miller said that he was concerned about putting a new AUSA in that position considering, as AUSA Miller put it, "how this case has been handled" at the USAO. He then said, "You know what I'm talking about." I knew that he was referring to the case's declination and subsequent OIG complaint. After the meeting, AUSA Miller commented to me that half of him did not want Morel to take the deal.

Shortly after the July 23, 2015 meeting, despite AUSA Miller's previously stated concerns, AUSA Baehr was assigned to the case to assist AUSA Miller since he was spending the majority of his time away from Louisiana on another assignment.

Early in the week of August 17, 2015, USA Polite met with Saint Charles Parish Sheriff Champagne at the sheriff's request. (The Saint Charles Parish Sheriff's Office had been instrumental to the investigation, and Sheriff Champagne had taken great personal risk in bringing the case to the FBI in the first place.) During the meeting, USA Polite admitted that a plea offer was being made to Morel. USA Polite told the sheriff that if Morel did not take the offer, he would be indicted "by the end of the month." (Based upon subsequent events, I do not believe USA Polite's statement described a matter occurring or likely to occur before a Grand Jury.)

On August 21, 2015, I attended a meeting with AUSAs Miller and Baehr, and Capitelli, Brian Capitelli (hereinafter "Brian Capitelli", while Ralph Capitelli will continue to be referred to as "Capitelli"), and Steve London. Capitelli had previously told AUSA Baehr that he did not want me present at the meeting. AUSA Baehr had me attend anyway. I had prepared a brief Powerpoint presentation for the meeting showing a minimal amount of evidence against their client. During the discussions after the presentation, Capitelli claimed that I had made false accusations against him. I corrected him by saying that I had not made any accusations against him, that I had made an accusation against a First AUSA. Capitelli explained this was why he did not want me in the meeting. Later, he mentioned Morel taking a plea but asked about limiting the information that was given to U.S. Probation in the presentence report. When Capitelli expressed concern to the AUSAs about "the agent backdoor[ing]" them to probation, I smiled at him. Capitelli pointed at me and said that I would go to U.S. Probation. Capitelli asked if I would make a commitment that I would not provide information to probation. I said, "I'm not committing to anything." Capitelli objected. I then said, "I'm not withholding anything from probation." When the AUSAs then discussed indicting Morel, Capitelli claimed that there had been a number of improprieties with the investigation that he could bring out. I responded, "Let's have the whole truth come out about this case."

After the meeting, the AUSAs and I discussed the issue of my OIG complaint becoming public knowledge if the case were prosecuted. There was discussion about how the complaint would make the USAO look if it did. AUSAs Miller and Baehr were not concerned, because they had not been at the office when the case was declined. AUSA Baehr also said that nothing would be withheld from U.S. Probation. (In response to the USAO practice of withholding

relevant conduct from U.S. Probation, ASAC Evans has ordered agents to provide all relevant evidence to U.S. Probation. However, since then, I have heard of two other examples of AUSAs attempting to reduce relevant conduct information to make plea deals that are essentially Federal Rule of Criminal Procedure 11(c)(1)(C) agreements, except they are not disclosed to the court.)

Despite USA Polite's statement to the sheriff about indicting Morel "by the end of the month," Morel was not indicted.

AUSA Baehr told me about another meeting between First AUSA Westling, AUSA Baehr, and the Capitellis. He said the Capitellis had made various accusations about the investigation. They also wanted the names of victims, but I objected to the USAO giving them their names for fear of the victims' being harassed. (During the course of the investigation, private investigators had approached various women and had even lied to a witness by telling her that Keim was dead because the FBI had relentlessly pursued her. In reality, the FBI provided Keim with a great deal of support over an eighteen-month period.)

E. Preparation of RICO Charge

I was not advised of any further plea negotiations and AUSA Baehr and I worked together to prepare a RICO memorandum to obtain approval from the Justice Department's Organized Crime and Gang Section (OCGS) to charge Morel with RICO. (Department of Justice policy requires all RICO charges to be approved by OCGS and a memorandum providing specific information must be submitted.) The RICO charge was based on Morel's use of the Louisiana 29th Judicial District Attorney's Office for racketeering activity, specifically bribery and obstruction of justice. (Because approval of a RICO charge by OCGS is not a final decision to seek an indictment, I do not believe it is a matter occurring or likely to occur before a Grand Jury.)

On November 25, 2015, AUSA Baehr advised me that the RICO memo and accompanying draft charges were provided to OCGS for review. Within a couple of weeks, AUSA Baehr provided me with questions from an OCGS attorney. During December 2015, AUSA Baehr told me that OCGS tentatively approved the RICO charge pending the submission of final drafts from the USAO.

Around this time period, I learned that Morel's behavior was described by at least one AUSA as "just an old guy having fun." Having interviewed each victim, I found that characterization to be far from accurate.

During January 2016, SSA [redacted] advised me that she had spoken to First AUSA Evans. (First AUSA Westling had left the USAO and AUSA Duane Evans had taken over as First AUSA.) He told her that the final draft was at OCGS for approval. He also told her that an attorney from OCGS was interested in assisting in the prosecution of the case. Despite this reported interest, an OCGS attorney was never assigned to the case.

Around late January 2016, SSA [redacted] advised me that she had spoken to First AUSA Evans. He told her that the USAO had held a review committee on the Morel case and the following resulted from the committee meeting:

- USA Polite had removed himself from the review committee, because he was in favor of prosecuting the case and did not want to prejudice the committee.

- AUSA Harper participated in the review committee despite the previous declination and OIG complaint.

- First AUSA Evans, who had participated in the previous declination, also participated in the review committee.

- The committee decided to resume negotiations for a plea agreement with Morel.

- The committee selected an AUSA manager (hereinafter "AUSA Manager 1") to lead the negotiations.

- First AUSA Evans indicated his disapproval for the case to SSA [redacted] by saying that the FBI had to go find the victims with the exception of Keim. They had not come forward on their own. (In my interviews of witnesses, I found that they were humiliated by what had happened with Morel and feared that he was still a powerful man. Most interviewees believed that Morel had killed Keim, even though there was no evidence to connect him to her death.)

- First AUSA Evans said that USA Polite had held the review committee to "appease" his office.

- First AUSA Evans said the committee approved moving forward because USA Polite was in favor of the case.

When I was notified of this committee, I became aware that an AUSA with political connections which might favor Morel was taking part in consideration of the case. In my opinion, AUSAs with close connections to political figures raise the appearance of impartiality in any public corruption case.

I found AUSA Manager 1's involvement in the case unusual. I never spoke with AUSA Manager 1 about the case other than a few words on March 30, 2016. To my knowledge, AUSA Manager 1 did not have any direct contact with anyone from the FBI about the Morel investigation. Throughout my career in the FBI, an AUSA has never led plea negotiations

without consulting with me about what offers were being made to the defense and what the defense was saying.

I am not aware of any personal relationship between AUSA Manager 1 and AUSA Harper, except that they have both been at the USAO since I arrived in New Orleans in 1999 and both served in USAO management for the last few years. When the Morel case was declined and AUSA Harper was First AUSA, AUSA Harper was superior to AUSA Manager 1 in the USAO chain of command. Also, AUSA Harper participated in the review committee which chose AUSA Manager 1 to lead plea negotiations.

On February 10, 2016, AUSA Baehr advised me that OCGS approved charging Morel with RICO. He did not tell me which racketeering acts had been approved, but I believe it included more than thirty acts of soliciting sexual bribes and obstruction of justice.

F. Plea Negotiations

After receiving authority to charge Morel with RICO, the USAO began plea negotiations in earnest. On February 14, 2016, AUSA Baehr advised me that Morel was being offered a new plea under Federal Rule of Criminal Procedure 11(c)(1)(C) limiting his sentence to twenty-five months. I alerted FBI management to the negotiations.

On February 19, 2016, I briefed FBI SAC Jeffrey Sallet, who had taken over from SAC Anderson. Shortly after the brief, he called USA Polite and reported back that USA Polite had told him there would be no Rule 11(c)(1)(C), the offer would be the same as AUSA Miller's with an additional civil rights violation (a total maximum sentence of eighty-three years), and that Morel's conduct would be publicly exposed instead of hidden in a reduced charge. SAC Sallet told me that the offer had been made on February 17, 2016 with a one-week deadline. SAC Sallet told me that USA Polite had said the case would be charged by the "end of the month" if Morel did not take the deal. USA Polite also claimed that the case would not have been re-opened it were not for him. (I took this statement as an indication that USA Polite was aware that members of the USAO were opposed to prosecuting the case because of the past declination and OIG complaint.)

When telling me and others what USA Polite had said, SAC Sallet somewhat rhetorically asked why the case had not been prosecuted. I answered, "Corruption."

On February 22, 2016, I spoke with AUSA Baehr about the plea offer, because I was concerned that USAO middle management was not following what USA Polite had told SAC Sallet. AUSA Baehr told me that the USAO had spoken with the Capitellis on February 17, 2016, but they were still negotiating. The USAO was supposed to hear from them that week. The USAO was considering reducing the two obstruction counts in the plea offer which each carried maximum sentences of twenty years to an obstruction of justice charge with a three-year maximum sentence, Title 18 U.S.C. Sec. 1512(d).

On February 24, 2016, the deadline reported by USA Polite to SAC Sallet passed without any word from the USAO.

On February 25, 2016, AUSA Baehr told me that the Rule 11(c)(1)(C) had been removed from the plea offer because of concerns about the judge rejecting the sentence. (Recently, Judge Milazzo had rejected the government's Rule 11(c)(1)(C) plea agreement with Darren Sharper.) AUSA Baehr told me that I was not going to like what the USAO had decided, Morel was going to get three to five years with a charge of violating 18 U.S.C. Sec. 1512(d).

On February 26, 2016, ASAC Evans contacted First AUSA Evans who confirmed that Morel was being offered a three-year maximum sentence.

On February 27, 2016, Sheriff Champagne contacted me after meeting with USA Polite. He confirmed that USA Polite approved of changing the obstruction charges from a maximum sentence of twenty years to a maximum sentence of three years. USA Polite was vague about the number of counts though, which left open the possibility that the offer had been made with multiple counts. USA Polite told Sheriff Champagne that the deadline was Wednesday, March 2, 2016 at 5:00 p.m.

Shortly after 5:00 p.m. on Wednesday, March 2, 2016, Sheriff Champagne advised me that USA Polite had told him he had not heard about Morel's response.

On March 3, 2016, I was advised by FBI management that First AUSA Evans had not heard a response to the latest offer. He confirmed that the plea offer had been for Morel to plead to one count with a maximum sentence of three years.

On March 4, 2016, SSA [redacted] advised me that she had heard from First AUSA Evans that there had been no deadline, because the USAO had not sent Morel a draft factual basis to sign. The USAO was meeting with the Capitellis that afternoon. Before the meeting, I asked AUSA Baehr for a copy of the proposed factual basis which he sent. (In the past, I never had to request a copy of a factual basis. This was normally something prosecutors asked me to review to assist them.) I was told that USA Polite was reportedly insisting that Morel's full conduct be included in the factual basis. During the conversation, AUSA Baehr said that he wanted to get a copy of the motion the Capitellis intended to file against me, suggesting that the Capitellis had made accusations against me. I was provided with no specific allegations.

After the meeting with the Capitellis on March 4, 2016, AUSA Baehr called and asked for the recordings of conversations between Keim and Morel to play for the Capitellis. The USAO had agreed to give them some form of pre-indictment discovery. After consultation with FBI management, I agreed to give them to him.

On March 5, 2016, an FBI agent told me that AUSA Knight had been present for an interview in another investigation, separate from the Morel case, which has the potential to

embarrass the USAO. AUSA Knight expressed concerns after the interview that the investigation could be more embarrassing to the USAO than the blogging scandal.

On March 7, 2016, I ran into SAC Sallet in the FBI office. He told me that USA Polite had called him on Saturday (March 5, 2016) and told him that he had ordered his people to indict Morel. USA Polite also said the Capitellis threatened that they had "bombshells" about the FBI. Once again, I was not advised of any specific allegations.

Later that day, I gave AUSA Baehr copies of the Keim recordings. He told me that the Capitellis were threatening to create substantial problems for the USAO if Morel were indicted. AUSA Baehr provided no specific details.

I believe the Capitellis were testing the government's case by alleging wrongdoing. I was not concerned about their threats. However, my OIG complaint was likely to be disclosed if I took the witness stand. I intended to disclose Harper's and Capitelli's relationship at the first opportunity I had.

On March 8, 2016, AUSA Baehr asked for an agent to play the recordings to Morel and the Capitellis on March 11, 2016, but they refused to meet with me. I offered my co-case agent, Special Agent [redacted] On March 9, 2016, when I advised SSA [redacted] of AUSA Baehr's request, she refused the USAO's demand that an agent other than me meet with the Capitellis and Morel. I advised AUSA Baehr via e-mail that the FBI insisted that I play the recordings since I was the case agent and that I was available the morning of March 11, 2016. That afternoon, SSA [redacted] received a call from First AUSA Evans. AUSA Manager 1 had accused the FBI of refusing to send anyone to play the recordings. SSA [redacted] explained that I was available as I was the case agent. Ultimately, Morel was not available on March 11, 2016, and AUSA Baehr played the recordings for them on or about March 15, 2016.

From March 19 through 26, 2016, I was in Budapest, Hungary teaching a course on public corruption investigations. While overseas, Sheriff Champagne let me know that he had heard from USA Polite that there would be no deal with Morel.

On March 28, 2016, AUSA Baehr asked to meet with me on March 30, 2016 to prepare for testimony. On March 29, 2016, AUSAs Baehr and William McSherry called to tell me that plea negotiations were on-going, but they would meet with me on March 30, 2016 at 1:00 p.m. to prepare me to testify. They warned me that the factual basis was being changed to limit the scope of Morel's conduct involving women other than Keim to between 2007 and 2009. Previously, the full scope of Morel's conduct, at least twenty-two women between 1986 and 2012 had been included.

On March 30, 2016, I met with AUSAs Baehr and McSherry. AUSA Nicholas Moses also joined the meeting after expressing an interest in the case. All three worked diligently to

prepare me to testify. During the preparation, I learned that if Morel were charged with RICO that the charge could not be dismissed without the approval of OCGS.

During the course of the meeting, I was told that Morel wanted a week to consider the deal. Later in the afternoon, I was told that Morel was contacting his family about the deal which we interpreted as a sign that he was going to accept it. Sometime between 5:00 p.m and 6:00 p.m., AUSA Manager 1 brought in documents, which I learned were the final factual basis to which Morel had agreed. AUSA Manager 1 told AUSA Baehr to sign the documents. AUSA Baehr expressed concern about signing the documents without reading them. I do not recall exactly what AUSA Manager 1 said after that, but AUSA Manager 1 stayed while AUSA Baehr signed the documents without reading them. AUSAs McSherry and Moses were also present. AUSA Manager 1 made a statement about the Capitellis possibly waiving a presentence investigation for the case. AUSA Manager 1 also made a comment about having the re-arraignment and sentencing on the same day, but he expressed doubt about that happening.

When I left the USAO that evening, I reviewed the portion of the factual basis involving Morel's conduct with women other than Keim. Based upon the previous conversation about this change from the proposed factual basis, I was not surprised to see this change. I did not read the rest of the factual basis until March 31, 2016. When I did, I saw that there were substantial changes to the portions of the factual basis involving Keim. Transcripts of portions of recorded conversations and other evidence were removed from the factual basis. The changes substantially minimized Morel's conduct, including evidence of crimes Morel committed other than the charged offense. I contacted AUSA Baehr and expressed a concern about the factual basis. He told me that he had not drafted the document because he had been working on charging Morel. (He had been preparing me to testify through the whole afternoon of March 30, 2016.) I then did a more detailed comparison between the proposed factual basis and final factual basis and wrote a rough description of the pertinent differences between the documents. (Because one document was in Microsoft Word and the other an Adobe PDF, I could not do an electronic comparison.) I contacted AUSA Baehr again later in the day and advised him to do a redline comparison of the documents to review. I told him that I would not want my name on that factual basis. Based upon AUSA Baehr's position in the office and how the negotiations had been handled by AUSA Manager 1 instead of AUSA Baehr, I do not believe that AUSA Baehr was in a position to make any changes to the document or deal. I do not believe that AUSA Baehr was aware of the changes that were made. I do not believe that AUSA Baehr intended in any way to withhold anything from this Court. I believe he was simply following the orders of his superiors.

On April 1, 2016 around 2:56 p.m., I told ASAC Evans that I intended to write a letter to this Court describing the USAO's misconduct unless FBI management gave me a reason why I could not do so. Around 3:35 p.m., ASAC Evans told me he had relayed our concerns about Morel's sentencing occurring without a presentence investigation to First AUSA Evans. First AUSA Evans said the USAO would oppose any attempt to avoid a presentence investigation. At

8:44 p.m. AUSA Baehr called and told me that he had been tasked with writing a sentencing memorandum. At 10:27 p.m., ASAC Evans called me. He told me that if I wrote a letter to this Court disclosing the USAO's misconduct, the USAO could dismiss the charge against Morel entirely. I told him I would not send the letter then.

I decided to avoid dismissal by the USAO by notifying this Court after Morel pleaded guilty.

At the press conference after Morel's plea on April 20, 2016, SAC Sallet called Morel a "sexual predator" and officials disclosed that there were more than twenty witnesses against Morel. (Based upon what I observed, besides Keim, Morel had oral sex with five women, made some sexual physical contact with at least eight women, and solicited sexual activity from at least nine others between 1986 and 2012. All of these actions were in connection with his position as district attorney.) The press logically asked why Morel received the plea agreement he did, if his conduct was as significant as described. When USA Polite was asked by one reporter how he told victims the plea agreement was "justice", the USA responded, "In many of these circumstances, we are dealing with very significant evidentiary concerns. We are dealing with vulnerable victims that if exposed to the scrutiny of the media or the scrutiny of the courtroom would prove to be very difficult witnesses and may ultimately lead to no justice for this defendant." USA Polite did not disclose the ethical problems at his own office at the press conference. Nor did USA Polite disclose that OCGS had approved a RICO charge against Morel which would have made a conviction much easier, as the jury could rely on only Keim's tapes or a handful of the witnesses.

I did the legal research associated with the "evidentiary concerns" and found no serious concerns with getting the evidence admitted. Neither did OCGS since it approved the RICO charge. (To my knowledge, I am the only person to do any substantial legal research, on the Morel case before the RICO memo was submitted to OCGS.) To my knowledge, USA Polite never met any of the witnesses, and, other than AUSA Miller, no AUSA met more than one witness. I met every witness and conducted almost all of the interviews. USA Polite's characterization of the witnesses is inaccurate and unfair. Several of the witnesses were prepared to testify and several did not have any "baggage" of any concern. Finally, sexual predators do not prey on the strong. Like his First AUSA, USA Polite blamed the victims and witnesses instead of admitting to his and his office's own failures in the case.

After Morel pleaded guilty on April 20, 2016, I notified FBI management again of my intention to write the misconduct letter to this Court. I was ordered to submit the misconduct letter to the FBI New Orleans Division's Chief Division Counsel. I submitted the misconduct letter for review on May 3, 2016. Although the Chief Division Counsel finished reviewing the misconduct letter that same day, I was not given an official response from the FBI's Office of General Counsel (hereinafter "OGC") for four weeks. I was instructed by OGC to send the misconduct letter to Justice Department entities that accepted complaints from whistleblowers,

such as the OIG or Office of Professional Responsibility (hereinafter "OPR"), and request permission to send the misconduct letter. On June 2, 2016, I expressed my desire to send the misconduct letter concurrently through prepublication review for disclosure as a private citizen under the First Amendment, but an FBI manager advised me against doing so. I submitted the misconduct letter to the OIG on June 2, 2016, approximately two days after receiving instructions from OGC. The OIG quickly acknowledged receipt of the letter and shortly thereafter advised me that the matter was transferred to OPR. (Throughout the past three years, the OIG has acted professionally and has been supportive of efforts to reform the Justice Department.) On August 11, 2016, OPR advised that it would be inappropriate for it to comment on whether I should send the letter to this Court and, consequently, the FBI advised me that I could not send the letter in my official capacity.

Because of the delay in a response from OPR, I began a concurrent process to disclose the misconduct letter to this Court under the First Amendment on August 8, 2016 by submitting two letters to the FBI's prepublication review program. One letter, a shorter notification letter, was submitted for review which was intended to notify this Court of the existence of the misconduct letter in case it could not be reviewed in time for the hearing on August 17, 2016. Both letters included the wording that I intended to make disclosures to this Court and the media as a private citizen under the First Amendment. In my e-mail submitting the letters for prepublication review, I wrote "I previously attempted to disclose this misconduct in my official capacity. I assumed the process outlined to me by management and OGC [FBI Office of General Counsel] would have worked. The process has not worked. I have received no word from DOJ, so I have chosen to do this in my personal capacity." I also wrote in the e-mail, "[s]ince I am being forced to send this in my personal capacity under the First Amendment, I intend to submit the letters to members of the media as well as the court." FBI agents are not authorized to make disclosures to the media as part of their official duties.

On August 12, 2016, I was notified that the FBI would not review either of the two letters that I submitted for prepublication review because the FBI took the position that the disclosures would be made in the performance of my official duties and were outside the scope of the prepublication policy guide. I immediately asked what basis was used to make that determination considering I specifically asserted my First Amendment rights. I also asked if it was the FBI's position that an FBI employee has no right under the First Amendment to report prosecutorial misconduct to a Federal judge because that employee witnesses the misconduct in his official duties. I also requested an appeal of the decision as the agency's final determination on the matter. I asked for an answer by close of business on August 15, 2016 and cited the August 17, 2016 sentencing hearing as a reason for the short deadline. On August 15, 2016, I was notified that the FBI's August 12, 2016 decision only pertained to my request to disclose letters to this Court and that my request to disclose the letters to the media were under review. I replied that, because of the August 17, 2016 sentencing hearing, although the administrative

appeals process was not complete, I had to treat the FBI's position on August 15, 2016 as its final decision.

Conclusion

Based upon the above, with respect to the Morel case, I believe the following:

1. AUSA Harper's involvement in the Morel case in 2013 caused at least an appearance of impartiality because of his property ownership with Capitelli.

2. After the unusual declination of the case in 2013, the members of the USAO at the time of the declination had at least an appearance of impartiality regarding the case. They had a personal interest to avoid seeing their previous decision publicly reversed.

3. After my OIG complaint against AUSA Harper, consideration of the case by members of the USAO caused at least an appearance of impartiality. They had a personal interest in avoiding another scandal about the USAO becoming public.

4. Although USA Polite reopened the USAO's file in 2014 under pressure from investigative agencies, he failed to keep members of his office who lacked impartiality away from consideration of the matter, e.g. AUSA Harper. Furthermore, it appears as though he invited their consideration of it.

5. The plea agreement between Morel and the USAO on March 30, 2016 is tainted by the USAO's lack of impartiality in the matter. The USAO has failed to represent the interests of the victims and the United States as a whole in this case.

6. This prosecutorial misconduct is relevant to this Court's consideration of the case, but the Justice Department and FBI has failed to notify this Court even though I requested to do so in my official capacity. Furthermore, the FBI managers have violated my First Amendment rights by refusing even to review my request to disclose this letter to this Court in my capacity as a private citizen.

Because I am writing this letter as a private citizen, I will make additional observations and recommendations that go beyond the scope of the case. The mishandling of the Morel matter is not an isolated incident. I have experienced firsthand, or heard from other agents, numerous examples of prosecutors mishandling cases especially, but not only, in corruption cases. Based upon what I have seen and heard, I believe that there is systemic corruption in the Justice Department. The FBI uncovers corruption, and the Justice Department covers it back up again. FBI managers advocate for prosecution of cases, but stifle attempts by agents to make the public aware of this systemic corruption in the Federal criminal justice system.

The law, in the form of Rule 6(e) and the Privacy Act, allows prosecutors to obscure their inaction on prosecutable cases. For example, one of the purposes of Rule 6(e) is to protect those

determined to be innocent by the Grand Jury, but the supposed independence of the Federal Grand Jury is a myth. Prosecutors decide what the Grand Jury hears and whom it considers as a target. If prosecutors do not put a case before the Grand Jury, the material collected in its name remains secret unless those same prosecutors seek authorization for its release. In reality, Rule 6(e) has the perverse effect of allowing one or a handful of Federal prosecutors to bury evidence of criminal behavior without even giving the Grand Jury the opportunity to determine a target's guilt or innocence. I have seen this several times---evidence of criminal conduct by public officials and contractors sealed from the public by Federal prosecutors using Rule 6(e). None of the evidence of which I write would identify or jeopardize a single witness, another important purpose of Rule 6(e).

Justice Department and FBI policies regarding whistleblowing and disclosing facts of investigations to the public also protect prosecutors. From my own experience, I can only describe the procedures as Byzantine and a concerted effort to conceal government misconduct. My most recent attempt to disclose prosecutorial misconduct to the judge presiding over the case was met with a bureaucratic runaround that had the effect of reducing my time to pursue my option to report under the First Amendment. That option was never presented to me by FBI OGC, although I never had direct contact with them. Ultimately, when I asserted my First Amendment rights, the FBI made contradictory assumptions that I could not disclose the misconduct as part of my official duties but any disclosure, even when made as a private citizen, was a part of my official duties. I believe this decision was an intentional effort by the FBI to keep these severe problems in the Federal criminal justice system from being disclosed.

The subtle punishment for speaking out and the antipathy against those who dare to try is daunting, even to someone with a law degree and experience as a Federal judge's clerk. Many of the best agents are disillusioned, angry, and demoralized, because of how prosecutors mishandle cases. Just a few days ago, I had a conversation with senior agents who suggested that the USAO should recuse itself from all FBI cases. Despite widespread abuse by prosecutors, agents must remain silent for fear that their next case will not be prosecuted. Their fear is justified. Since I filed my OIG complaint, I have had two cases subtly suffocated by prosecutors, and only one, Morel, prosecuted. I believe Morel was prosecuted because USA Polite feared public scrutiny if Sheriff Champagne arrested Morel on state charges, which he certainly would have with ardent FBI support. The USAO has no reason to fear the FBI alone, because the FBI cannot make arrests without its permission and the FBI will never speak out publicly against the Justice Department.

While these laws and policies have a valid purpose, they have become a refuge for scoundrels who are more interested in collecting a paycheck they have not earned than in zealously advocating for the United States. To borrow a phrase from Lord Acton, which was correctly applied to the FBI in the Whitey Bulger fiasco, "Every thing secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity." This decision-making shrouded in darkness has created a department which, at best,

is not working at optimal efficiency, or, as in the case of the USAO in the Eastern District of Louisiana, is one of the most corrupt government entities in its judicial district. I base that statement on having conducted or participated in corruption investigations in all thirteen parishes in the district, and using a broader definition of corruption to mean serving one's own interest over that of the public's, as opposed to outright bribery.

An effective USAO is desperately needed here. In the past few days alone, I have spoken with people from three parishes who have suffered at the hands of public officials abusing their power. There are some fantastic AUSAs at the USAO who can make a difference. I can think of several who bravely withstand withering fire in court to seek justice for the people of this district. Many of these talented dedicated AUSAs have been hired by USA Polite. However, the USAO cannot function properly if the USA does not have the courage to stand up to middle managers with conflicts of interest in cases, if the USA and First AUSA harbor a blame-the-victim mentality, and if other middle managers are more concerned about the office's reputation than seeking justice for victims.

The root cause of this systemic corruption is human nature. Human beings would rather not have their actions and decisions scrutinized. If prosecutors move forward with a case, they will be scrutinized, oftentimes unfairly, by defense attorneys, judges, and the media, especially if they dare to prosecute a powerful public official or other individual with connections. If Federal prosecutors do not take a case, there is little scrutiny and none of it is public. The secrecy of Federal prosecutorial decision-making lets Federal prosecutors take the easy way out if they choose. In the state system, on the other hand, where the police arrest and the district attorneys prosecute, the public can see what cases are and are not being prosecuted. There is public accountability for state prosecutors.

The lack of accountability for Federal prosecutors exacerbates the disparities in the Federal criminal justice system. Because Federal prosecutors can ignore the tougher cases without consequence, the less-committed prosecutors focus on the easier cases with less formidable defendants or more easily proven cases against the more formidable ones. I am convinced that if a police officer had done what Morel did, he would have been in prison a long time ago for much longer than the maximum three year sentence that the former district attorney faces, even with the exact same "evidentiary concerns" and "vulnerable victims" cited by USA Polite. Morel's conduct was far more odious than former District Attorney Walter Reed, but the USAO pounced on the fraud case which was already reported in the media. (I took no official part in the Reed case and base my comparison solely on what has been reported in the media.)

In the Marine Corps, I was taught to provide solutions when identifying a problem. I have three recommendations:

First, and most importantly, when Justice Department prosecutors decline a case which an investigative agency determines is prosecutable, the agency should be required by law to

provide a report to the public outlining the evidence against the subject. The report should be written in a manner which protects witnesses, sources, and methods. The American people should know when prosecutors and investigators disagree, so they can make their own decision about the effectiveness of both. In public corruption investigations, this recommendation would also shed light on the behavior of public officials believed by investigators to have committed a crime. Let the people see what their public "servants" are doing.

From my experience, management at investigative agencies will likely pressure case agents to agree with prosecutorial decisions in order to maintain peaceful working relationships with prosecutors. Therefore, case agents should have the legal duty to provide the report to a judge to decide whether it can be released, just like police officers who go directly to judges for warrants. Also, there should be serious consequences for managers who put undue pressure on agents to go along with prosecutors. A case agent who goes to a judge should receive whistleblower protections. He or she should not be sent on a fool's errand obtain permission from the Justice Department.

Second, U.S Attorneys should not have any influence on public corruption or civil rights cases. Political partisans with ambitions to become a mayor, congressman, or other official are the last people who should be making these decisions. Certainly, there are honest U.S. Attorneys, but the current system allows some foxes, or at least bravery-challenged watchdogs, to guard the henhouse.

Third, the Justice Department should hire prosecutors nationally instead of locally and force prosecutors to start out away from home. Also, it should rotate its managers within the local U.S. Attorney's Offices. This practice patterns the FBI and other Federal agencies. The FBI is far from perfect, but managers with fresh eyes and experience elsewhere in the nation can help turn around a rotting institutional culture. If the Justice Department is going to have career prosecutors, then it needs to take the same steps to combat their corruption as the investigative agencies have taken.

This letter will anger many powerful people, prosecutors, former prosecutors, defense attorneys, politicians, and FBI management. I have made more mistakes than I can count, and I am certain all of them, and some I have not made, will be used to discredit me. In reality, I mean nothing in all of this. I am just a messenger. If I am wrong, then I urge the Justice Department to prove it. Open up the files and let the American people see for themselves. I have a few cases in mind already which can be disclosed without violating Rule 6(e) or the Privacy Act.

I love fighting corruption in Louisiana. This is where I belong, but this letter most likely means my time is over here and possibly in the FBI. I am tired of having to accept corruption in order to fight corruption. I am tired of FBI managers pressuring me to accept corruption and cover up corruption by Federal prosecutors. More importantly, when I was in the Marine Corps, I learned the simple leadership lesson that I could not ask my Marines to do something that I

would not do myself. I see witnesses like I saw my Marines. I cannot ask others to expose corruption if I am not willing to do it myself. Danelle Keim faced far greater risks when she called 911 on April 16, 2010. I will never forget listening to her over a transmitter in her apartment while she waited for Morel to arrive on July 23, 2012. She was on the verge of breaking down from stress. She told me she was having flashbacks from Morel's sexual battery which prompted the emergency call more than two years earlier. She pulled herself together though and was a true hero. Danelle Keim was brave as anyone I have ever known. I will never forget the abuses the other women described to me. Nor will I forget their courage in disclosing them. One woman's description of what Morel did to her will haunt me for the rest of my life. The victims, the witnesses, the ones who told the truth in this case, deserve nothing less than the same from me. They certainly deserved better from the U.S. Department of Justice and the FBI.

Michael S. Zummer

Michael S. Zummer
[redacted]

September 6, 2016

The Honorable Kurt D. Engelhardt
United States District Court
for the Eastern District of Louisiana
C-367 Hale Boggs Federal Building
United States Courthouse
500 Poydras Street
New Orleans, LA 70130

Re: *United States v. Harry J. Morel, Jr.*, Criminal No. 16-050

Dear Judge Engelhardt:

In order to aid this Court in its decision regarding the release or return of my letter dated August 15, 2016 (hereinafter "August 15th Letter"), I am submitting additional material to address legal privileges not covered in the August 15th Letter which I anticipate the Government will assert. I assume that the Government will assert the Deliberative Process Privilege, Attorney-Client Privilege, Work Product Doctrine, and Law Enforcement Privilege. As there was no classified material or issues affecting national security in the August 15th Letter, the State Secrets Privilege does not apply.

I request this Court treat this letter as an addendum to the August 15th Letter and only release it to the public after making a legal determination on the question of my First Amendment rights and the privileges asserted by the Government. There is no additional factual material is this letter.

1. The Privileges Asserted by the Government Do Not Apply to First Amendment Speech.

"Since the beginnings of our nation, executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government." *In re Sealed Case No. 96-3124*, 116 F.3d 550, 557 (D.C. Cir. 1997). "The most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege; it allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." *Id.* (internal citations and quotations omitted).

"The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice

or services." *In re Lindsey*, 148 F.3d 1100, 1103 (D.C. Cir. 1998) (internal citations omitted). The attorney-client privilege may apply to Government attorneys "when the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors…." *Id.* at 1105 (internal citations and quotations omitted). Related to the attorney-client privilege is the Work Product Doctrine which applies to "written materials obtained or prepared by an adversary's counsel with an eye toward litigation…." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

"Federal common law recognizes a qualified privilege protecting investigative files in an ongoing criminal investigation or information which would reveal the identity of confidential informants, although if all information indicating the identity of an informant can be eliminated by excision, the document is discoverable." *Coughlin v. Lee*, 946 F.2d 1152, 1159-60 (5th Cir. 1991) (internal citations omitted).

These privileges are generally asserted by the Government in Grand Jury investigations of public officials and civil litigation. In the Freedom of Information Act (hereinafter "FOIA") context, Exemption 5 of FOIA states that an agency is not obligated to disclose "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Title 5 U.S.C. Sec. 552(b)(5). "Congress enacted this exemption largely to ensure that agencies not lose the protection traditionally afforded through the evidentiary privileges simply because of the passage of FOIA." *Army Times Pub. Co. v. Department of Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993) (internal citations and quotations omitted). FOIA codifies the Law Enforcement Privilege as Exemption 7 at Title 5 U.S.C. Sec. 552(b)(7).

Without any statutory authority to do so, the Federal Bureau of Investigation (hereinafter "FBI") cites the discretionary privileges in FOIA as a means to prohibit disclosures by employees under the First Amendment. *See* Federal Bureau of Investigation, *Prepublication Review Policy Guide*, June 4, 2015, at p. 11, *available at* https://vault.fbi.gov/2015-prepublication-review-policy-guide. (Despite the admonition on p. ii that if the guide or its contents "are provided to an outside agency, it and its contents are not to be distributed outside of that agency without [] written permission…," it is posted on an FBI website.)

At least one circuit has disagreed with this application of FOIA exemptions to Federal employees' First Amendment speech. When deciding whether the Central Intelligence Agency (hereinafter "CIA") could censor classified material from a former employee, the D.C. Circuit noted that the CIA employee's secrecy agreement "does not extend to unclassified materials or to information obtained from public sources. The government may not censor such material, contractually or otherwise. The government has no legitimate interest in censoring unclassified materials." *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) (internal citations and quotations omitted). The D.C. Circuit determined, "First, restrictions on the speech of

government employees must protect a substantial government interest unrelated to the suppression of free speech. Second, the restriction must be narrowly drawn to restrict speech no more than is necessary to protect the substantial government interest." *Id.* at 1142-43 (internal citations and quotations omitted).

The D.C. Circuit went on to distinguish the Government's response to a release under FOIA from censorship of employee speech. "In a FOIA case, an individual seeks to compel release of documents in the government's possession. Here, by contrast, McGehee wishes publicly to disclose information that he already possesses, and the government has ruled that his secrecy agreement forbids disclosure." *Id.* at 1147. "This difference between seeking to obtain information and seeking to disclose information already obtained raises McGehee's constitutional interests in this case above the constitutional interests held by a FOIA claimant. As a general rule, citizens have no first amendment right of access to traditionally nonpublic government information." *Id.* (internal citations omitted). "A litigant seeking release of government information under FOIA, therefore, relies upon a statutory entitlement---as narrowed by statutory exceptions---and not upon his constitutional right to free expression." *Id.* "In this case, however, McGehee wishes to publish information he possesses, and the CIA wishes to silence him. Although neither the CIA's administrative determination nor any court order in this case constitutes a prior restraint in the traditional sense upon McGehee or any other party, the entire scheme of prepublication review is designed for the purpose of preventing publication of classified information. McGehee therefore has a strong first amendment interest in ensuring that CIA censorship of his article results from a *proper* classification of the censored portions." *Id.* at 1147-48 (internal citations omitted) (emphasis in original). The court further reasoned that "[b]ecause the present case implicates first amendment rights, however, we feel compelled to go beyond the FOIA standard of review for cases reviewing CIA censorship pursuant to secrecy agreements….[C]ourts should require that CIA explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification." *Id.* at 1148.

In a case similar to my disclosure of the August 15th Letter to this Court, the U.S. District Court for the District of Columbia cited D.C. Circuit precedent and held that "censorship is prohibited even if the material falls within a FOIA Exemption, where the Government fails to show with reasonable specificity that its interest in censorship of Government employees, in order to promote the efficiency of public services, outweighs the interest of prospective speakers in free dissemination of those speakers' views. While FOIA provides a useful analytical tool for assessing the strength of the Government's interest under the *Pickering/NTEU* balancing test, it cannot negate or override the First Amendment inquiry." *Wright v. Federal Bureau of Investigation*, 613 F. Supp. 2d 13, 24-25 (D.D.C. 2009) (*referring to Pickering v. Board of Education*, 391 U.S. 563 (1968) and *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995)).

The difference between the case in *Wright* and my experience is that the August 15th Letter was denied any review at all for the purposes of submitting it to this Court. The D.C. District Court described the *Wright* case as "a sad and discouraging tale about the determined efforts of the FBI to censor various portions of a 500-page manuscript, written by a former long-time FBI agent, severely criticizing the FBI's conduct of [an investigation]…." *Wright* at 15. The court also wrote "[i]n its efforts to suppress this information, the FBI repeatedly changed its position, presented formalistic objections to release of various portions of the documents in question, admitted finally that much of the material it sought to suppress was in fact in the public domain and had been all along, and now concedes that several of the reasons it originally offered for censorship no longer have any validity." *Id.*

According to the Supreme Court, the "limited exemptions [to FOIA] do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act; consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Department of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 7-8 (2001) (internal citations and quotations omitted). Using the exemptions in FOIA to prohibit disclosures, as the FBI does, appears to pervert Congress's purpose of the Act. Therefore, this Court should apply the First Amendment balancing test described in Section 2.A. of the August 15th Letter to any Government requests for redaction.

2. Even If Applied to First Amendment Speech, the Privileges Do Not Apply to the Information in the August 15th Letter.

A. The Deliberative Process Privilege Does Not Apply to the August 15th Letter or the Material Within It.

"An inter- or intra-agency document may be withheld pursuant to the deliberative process privilege if it is: (1) predecisional, *i.e.*, prepared in order to assist an agency decisionmaker in arriving at his decision, and (2) deliberative, *i.e.*, actually related to the process by which policies are formulated." *National Council of La Raza v. Department of Justice*, 411 F.3d 350, 356 (2d Cir. 2005) (internal citations and quotations omitted). "The 'deliberative process' privilege is central among the privileges protected by Exemption 5. However, as with all exemptions under FOIA, the deliberative process privilege must be construed as narrowly as is consistent with efficient government operation." *Army Times* at 1069 (internal citations omitted).

Since the "deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news," *Klamath* at 8-9, there is no reason to prevent the author of the material from waiving the privilege. Without acknowledging the privilege applies, I waive the Deliberative Process Privilege for the August 15th Letter, the notification letter which I submitted for prepublication review, and any document I prepared which is included or referred to within the August 15th Letter, including the draft search warrant affidavit, my Department of Justice Office

of Inspector General complaint, my first draft of the Racketeer Influenced Corrupt Organizations Act (hereinafter "RICO") memorandum which was submitted to Assistant U.S. Attorney (hereinafter "AUSA") Baehr, my memorandum regarding AUSA Chester's research, my analysis of the difference between the draft and final factual bases, my e-mail regarding playing recordings, and any communications I wrote regarding my request to send letters to this Court.

The August 15th Letter includes a description of the content of the following inter- or intra-agency documents written by others to which I had access: AUSA Chester's e-mail to me regarding his legal research, the Morel plea agreement, a draft factual basis, a final factual basis, and communications to me regarding my request to send letters to this Court. (I was never given access to any written plea offers to Morel.) AUSA Chester's e-mail and communications to me about my request to send letters to this Court were written to me. I am not an agency decision-maker; therefore, those e-mails cannot be predecisional. The draft factual basis was not given to an agency decision-maker, but to Morel and his attorneys as part of a plea agreement. (It may not even apply as an inter- or intra-agency document.) The plea agreement and final factual basis are in the public record.

The August 15th Letter refers to other inter- or intra-agency documents prepared by others without disclosing their content, including: the declination letter, revisions to my original RICO memorandum and other draft charges against Morel. The disclosure of the existence of documents would be part of a privilege log in a litigation context anyway. *See Colo. Wild Horse and Burro Coalition, Inc. v. Kempthorne*, 571 F. Supp. 2d 71 (D.D.C. 2008). Therefore, holding that the disclosure of a short description of documents can be withheld under the Deliberative Process Privilege would be an unprecedented expansion of it. The privilege should not be applied to a mere description of documents. (Also, the declination of the case was publicly disclosed by Morel's attorney, Ralph Capitelli, during August 2013 anyway.)

The remainder of the communications I describe in the August 15th Letter were oral. Some courts have recognized that the Deliberative Process Privilege may be considered to prevent testimony of government officials. S*ee Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 938-39 (10th Cir. 2005). However, I could find no precedent to show that it could be applied to oral comments between government officials. Also, the oral communication that I had about my case work was not communicated to me in order to assist an agency decision-maker in arriving at a decision. Most importantly, FOIA Exemption 5 applies to "memorandums or letters." 5 U.S.C. Sec. 552(b)(5). Although the FBI is already expanding FOIA beyond its wording and intended purpose by using it to censor employees' First Amendment speech, the FBI should be limited in this illegal action to the scope stated in the Act.

None of the material in the August 15th Letter is related to the process by which policies are formulated. The material is related to individual case decisions. Thus, the second requirement for the Deliberative Process Privilege is not met.

Also, in the litigation context, courts have required an agency head, or a delegated representative, to determine whether to invoke the Deliberative Process Privilege. *See Marriott International Resorts, L.P. v. United States*, 437 F.3d 1302, 1306-08 (Fed. Cir. 2006). This requirement has not been applied in the FOIA context though. By applying FOIA exemptions to Government employee First Amendment speech without any statutory authority to do so, the Executive Branch has been able to strip its employees of a procedural protection when asserting their Constitutional rights that has been provided to litigants against the Government.

Finally, "when the decision-making process itself is the subject of the litigation, the overwhelming consensus and body of law within the Second Circuit is that the privilege cannot bar discovery, and it evaporates." *State v. Salazar*, 701 F. Supp. 2d 224, 237 (N.D.N.Y. 2010) (internal citations and quotations omitted). The subject of the August 15th Letter is the corrupt process by which the charging decision was made in the Morel case. Therefore, this Court should consider applying this persuasive authority from the Second Circuit.

The Deliberative Process Privilege does not apply.

B. Attorney-Client Privilege and Work Product Doctrine Does Not Apply to Federal Prosecutors' Decisions in Criminal Cases Outside of Litigation.

Federal prosecutors in criminal cases do not represent individual private clients. They represent the United States. Therefore, they should be accountable to it. "With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure." *Lindsey* at 1108.

This Attorney-Client Privilege and Work Product Doctrine are least applicable when the Government attorneys and officials have breached their duties to their client. The Fifth Circuit has held that "[t]he [attorney-client] privilege is not an inviolable seal upon the attorney's lips. It may be waived by the client; and where, as here, the client alleges a breach of duty to him by the attorney, we have not the slightest scruple about deciding that he thereby waives the privilege as to all communications relevant to that issue." *Laughner v. United States*, 373 F.2d 326, 327 (5th Cir. 1967).

Although I am not the Justice Department's client, the United States is, and my August 15th Letter alleges, at the very least, a breach of duty by members of the Justice Department to the United States. Assertions of Attorney-Client Privilege and related Work Product Doctrine in this case are an attempt by Federal prosecutors and other officials to shield themselves from any accountability to their client.

The purpose of the Work Product Doctrine is to shield an attorney's mental impressions from an adversary's counsel in litigation. *See Hickman* at 511-12. During the course of

litigation, the Government would be at an unfair advantage if prosecutors' work product were available to the defense. However, after litigation is over, there is no reason to keep prosecutors' work product secret from their client.

Finally, although I am a licensed attorney in Louisiana, I am not employed as such by the Government. I am not authorized to represent the United States in court, nor do I act as counsel for the FBI. Therefore, none of my communications are subject to the Attorney-Client Privilege or Work Product Doctrine.

Any assertion of the Attorney-Client Privilege or Work Product Doctrine to my August 15th Letter only proves my point that many Federal prosecutors have forgotten whom they serve.

C. An Analysis of the Law Enforcement Privilege Shows that Nothing from the August 15th Letter Should be Redacted, Because None of the Material in it Compromises a Source, Witness, or Law Enforcement Technique Beyond What Has Been Publicly Exposed by Government Officials.

"To determine whether this qualified [Law Enforcement] privilege bars discovery of given documents, the trial court should consider the ten factors articulated in *Frankenhauser v. Risso* (sic) in balancing the government's interest in confidentiality against the litigant's need for the documents." *Coughlin* at 1160 (internal citations omitted).

The factors from *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D.Pa. Mar.13, 1973) (unpublished) were described by the Fifth Circuit as follows: "(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the information sought to the plaintiff's case." *In re U.S. Department of Homeland Security*, 459 F.3d 565, 570 (5th Cir. 2006).

I recognize the importance of protecting sources and methods. However, the only additional facts regarding the Morel investigation in my August 15th Letter, other than what has already been disclosed in court filings and a press conference, is the breakdown of the manner in which Morel sexually abused or solicited women, his private investigators' activity, the consent given to search his office, and my communication with Danelle Keim on July 23, 2012. Morel was already aware of those facts except the July 23, 2012 conversation. Keim had already been

named as a witness by the media and Government officials. Other than Keim, I did not name any witnesses or provide any identifying information about them. Furthermore, the August 15th Letter is an attempt to provide some vindication or justice to the victims and witnesses by letting them know that the plea agreement was not a reflection of their quality as witnesses, but a result of improper influence over the U.S. Attorney's Office for the Eastern District of Louisiana. Hopefully, this disclosure will chill future prosecutorial misconduct. The August 15th Letter does not include any information which will affect any ongoing investigation or litigation. No sophisticated investigative techniques are disclosed. The criminal investigation into Morel has been completed. References to other investigations were made in a manner so as not to identify subjects or witnesses. Those references cannot jeopardize any investigation or litigation. The information in the August 15th Letter is not available from any other source and it is an important disclosure of Government misconduct. As to using the names of law enforcement officials and prosecutors in the August 15th Letter, no one's safety will be jeopardized by the use of their names. Criminal investigators are regularly exposed to public scrutiny during the course of investigations and prosecutions. The United States will benefit from additional scrutiny of its attorneys' decision-making, and courts should be notified of prosecutorial misconduct.

Therefore, I believe an analysis of the *Frankenhauser* factors shows that there is nothing in the August 15th Letter which should be redacted under the Law Enforcement Privilege.

3. The Government Has Waived Any Privileges.

A. U.S. Attorney Kenneth Polite Waived Any Privileges by Publicly Discussing His Office's Rationale for the Plea Agreement with Morel.

On April 20, 2016, U.S. Attorney Kenneth Polite held a press conference after Morel's guilty plea. During that press conference, Polite made representations to the media about why the plea agreement with Morel was made. (The full video of the press conference is available at https://vimeo.com/163586549.) (As the attorney for the United States, Polite's ability to comment publicly on a criminal case begs the question of how there can be any Attorney-Client Privilege or Work Product Doctrine regarding a criminal case once it is concluded.)

"[V]oluntary disclosure of privileged material subject to the attorney-client privilege to unnecessary third parties in the attorney-client privilege context waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter." *Sealed Case No. 96-3124* at 562 (internal citations and quotations omitted). Polite's remarks at the press conference serve as a waiver to any privileges his office can claim now. Polite represented to the public that the decision to make the plea agreement was based on evidentiary issues and concerns about witnesses. However, Polite did not disclose misconduct that occurred within his office which also contributed to the decision to make the plea agreement with Morel.

Although "this all-or-nothing approach [to waiver of privilege in the Attorney-Client context] has not been adopted with regard to executive privileges generally, or to the deliberative process privilege in particular," *id.*, in this case, Polite discussed his office's process as a whole. For that reason, the Deliberative Process Privilege should be waived for all of the material in the August 15th Letter. A public official should not be able to make an incomplete representation to the media about the discussions his office had when making a decision and then hide behind privileges when a government employee exposes the full story behind the decision.

B. The Government Waived Any Privileges by Violating My First Amendment Rights.

If this Court holds that I had a First Amendment right to send the August 15th Letter to this Court, I argue that the FBI violated that right by refusing to review the letter for privileges. Not only did the FBI refuse to review the long August 15th Letter, but also a much shorter letter seeking to notify this Court of the existence of the August 15th Letter. The Government should not be able to argue that one of its agencies can refuse to review an employee's free speech for privilege and then later claim privileges over that speech.

4. Whether Analyzed under a First Amendment Balancing Test or Qualified Privilege Analysis, the Benefit of Disclosing the August 15th Letter Outweighs the Benefit of Secrecy.

A. Any Recognition of a Privilege Asserted by the Government is Qualified.

"[F]ederal courts do not recognize evidentiary privileges unless doing so promotes sufficiently important interests to outweigh the need for probative evidence." *Lindsey* at 1104 (internal citations and quotations omitted). "The Supreme Court has not articulated a precise test to apply to the recognition of a privilege, but it has placed considerable weight upon federal and state precedent and on the existence of a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth. That public good should be shown with a high degree of clarity and certainty." *Id.* (internal citations and quotations omitted). Thus, the "deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is to be made flexibly on a case-by-case, ad hoc basis." *Sealed Case No. 96-3124* at 558 (internal citations omitted). Although the government attorney-client privilege exists, it can be overcome. *See Lindsey* at 1110. Also, "the attorney work product doctrine, like the law enforcement investigatory privilege, is a qualified immunity. It is designed to balance the needs of the adversary system to promote an attorney's preparation against society's general interest in revealing all facts relevant to the resolution of a dispute." *In re Sealed Case No. 87-5290*, 856 F.2d 268, 273 (D.C. Cir. 1988) (internal citations omitted).

B. In This Context, the Deliberative Process Privilege, Attorney-Client Privilege, and Work Product Doctrine Do Not Encourage Frank and Candid Discussion. They Encourage Dishonesty and Corruption.

The purpose behind the Deliberative Process Privilege, Attorney-Client Privilege, and Work Product Doctrine is to promote frank and candid discussions in making decisions. *See Klamath* at 8-9 (regarding Deliberative Process Privilege), *Lindsey* at 1105 (regarding Attorney-Client Privilege), and *Hickman* at 510-11 (regarding Work Product Doctrine). However, I believe my August 15th Letter shows that privileges do not promote candid communications in the context of Federal criminal investigations. They shield Federal prosecutors from accountability which allows them to make any legal determination they want. Instead of promoting efficient government operation, they promote inefficiency and misconduct. Therefore, there is no positive effect to asserting these privileges over communications about criminal cases after the case has been litigated or at least a plea agreement has been reached.

C. Any Conceivable Purpose of the Privileges is Outweighed by the Need to Expose Government Misconduct.

"[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *Sealed Case No. 96-3124* at 558. The August 15th Letter exposes Government misconduct. The importance of holding public officials, particularly prosecutors and FBI managers, accountable is paramount, because of the power they possess. They have vast power over not only defendants and investigation subjects, but also crime victims, witnesses, and criminal investigators. The importance of exposing the misconduct described in the August 15th Letter outweighs any benefit.

5. Conclusion

Privileges designed to give the Government a fair chance in litigation are used as excuses to deny employees' First Amendment rights when litigation is not at issue. These assertions of privilege force an employee who wants to speak out on a matter of public concern, including Government misconduct, to challenge his or her agency in the courts which is costly and jeopardizes that employee's career. This regime chills employee speech, insulates public officials from accountability, and fosters corruption.

I request that this Court protect Government employees' First Amendment rights to disclose misconduct, deny the Government's assertions of privilege, and release the August 15th Letter and this letter to the public.

I thank this Court for its time and effort.

Michael S. Zummer