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                       UNITED STATES DISTRICT COURT
                      CENTRAL DISTRICT OF CALIFORNIA
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                             SOUTHERN DIVISION
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    UNITED STATES OF AMERICA,
                                    ) Case No. SA CR 08-180-DOC
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               Plaintiff,
                                    ) EX PARTE APPLICATION FOR
                                    ) ORDER PERMITTING RELEASE OF
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                  v.
                                    ) GRAND JURY TESTIMONY;
                                    ) MEMORANDUM OF POINTS AND
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    MOSES ONCIU, BEATA GIZELLA
                                    ) AUTHORITIES AND DECLARATION OF
    PRIORE, and IRENE PEMKOVA,
                                    ) LAWRENCE E. KOLE IN SUPPORT
16
                                    ) THEREOF [F.R.Crim.P. 6(e)]
               Defendants.
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         Plaintiff, United States of America, by and through its
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   counsel of record, the United States Attorney for the Central
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   District of California, hereby applies ex parte for an order
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   pursuant to Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal
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   Procedure, authorizing the government to provide defendants'
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The government makes this application because of defendants' need to prepare for trial and the disclosure requirements of the Jencks Act, 18 U.S.C. § 3500. This application is based on the

counsel of record with a copy of the grand jury testimony of a

witness whom the government may call at trial.

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attached Memorandum of Points and Authorities and Declaration of Assistant United States Attorney Lawrence E. Kole, the files and records of this case, and such further evidence and argument as may be presented at any hearing on this application. Dated: September 25, 2012. ANDRÉ BIROTTE JR. United States Attorney DENNISE D. WILLETT Assistant United States Attorney Chief, Santa Ana Branch Office /s/ LAWRENCE E. KOLE Assistant United States Attorney Attorneys for Plaintiff United States of America

MEMORANDUM OF POINTS AND AUTHORITIES

Federal Rule of Criminal Procedure 6(e)(2)(B) provides in relevant part: "Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: . . . (vi) an attorney for the government"

Fed. R. Crim. Prod. 6(e)(2)(B). Rule 6(e)(3)(E) provides in relevant part: "The court may authorize disclosure -- at a time, in a manner, and subject to any other conditions that it directs -- of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding" Fed. R. Crim. Proc. 6(e)(3)(E).

A trial court has "substantial discretion to order or deny release" of a grand jury transcript. <u>United States v. Evans & Associates Construction Co.</u>, 839 F.2d 656, 658 (9th Cir. 1988). The starting point for the Court's analysis is the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." <u>Id.</u> (citation omitted). The Supreme Court has established five policy reasons for maintaining the secrecy of grand jury proceedings:

(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons

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who have information with respect to the commission of crimes; [and] (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. <u>United States v. Procter & Gamble Co.</u>, 356 U.S. 677, 681, n.6 (1958) (internal quotations omitted); see also United States v. <u>Dynavac</u>, <u>Inc.</u>, 6 F.3d 1407, 1411 (9th Cir. 1993) (<u>citing Procter</u> & Gamble, and Douglas Oil Co. of Calif. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979), for the same proposition). In <u>United States Industries</u>, <u>Inc. v. United States District</u> Court, the Ninth Circuit reasoned that a determination of whether disclosure of grand jury material should be made under Rule 6(e) depends on the need of the party seeking disclosure and on the "policy considerations for grand jury secrecy as they apply to the request for disclosure under consideration." 345 F.2d 18, 21 (9th Cir. 1965). The court held: "[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking the disclosures should not be required to demonstrate a large compelling need." Id. In this instance, the policy considerations requiring secrecy are inapplicable with respect to any witness who will

secrecy are inapplicable with respect to any witness who will testify at trial because the case has been indicted. See

Dynavac, 6 F.3d at 1412 ("When the grand jury investigation is already terminated and an indictment has been issued, only 'institutional' concerns are implicated by the documentary disclosure.") (citation omitted). Moreover, disclosure of the

grand jury testimony to defense counsel, who has requested such disclosure, would be in the interest of justice and allow defense counsel material in advance of trial that is necessary to the defense and is required to be disclosed by the Jencks Act, 18 U.S.C. § 3500.

For the foregoing reasons, the government respectfully requests that this Court issue an order authorizing the government to provide defense counsel with a copy of the grand jury testimony of a witness the government may call at trial.

The government also requests that defense counsel be ordered not to disclose such grand jury testimony to any other person or persons, except as necessary in preparation of the defense, without prior authorization from this Court, and that the copy of the testimony provided to defense counsel (and any reproductions or copies made of the produced copy) shall be returned to the government at the conclusion of the proceedings in this case.

DECLARATION OF LAWRENCE E. KOLE IN SUPPORT OF EX PARTE APPLICATION TO DISCLOSE GRAND JURY MATERIAL

- I, Lawrence E. Kole, declare and state as follows:
- 1. I am an Assistant United States Attorney for the Central District of California and am assigned to the prosecution of <u>United States v. Moses Onciu</u>, SA CR 08-180-DOC. I make this declaration in support of the government's ex parte application for an order permitting disclosure of a grand jury transcript.
- 2. I expect that the Government may call at trial a witness who testified before the grand jury during the investigation of this case. Such testimony constitutes a statement under the Jencks Act, 18 U.S.C. § 3500, which the government is required to provide to defendants if the witness testifies at trial.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Santa Ana, California.

DATED: September 25, 2012.

AUSA Lawrence E. Kole

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   Assistant United States Attorney
    Chief, Santa Ana Branch
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                        UNITED STATES DISTRICT COURT
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                       CENTRAL DISTRICT OF CALIFORNIA
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                              SOUTHERN DIVISION
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    UNITED STATES OF AMERICA,
                                     ) Case No. SA CR 08-180-DOC
13
               Plaintiff,
                                       [PROPOSED] ORDER ALLOWING
                                     ) DISCLOSURE OF GRAND JURY
14
                   v.
                                       TESTIMONY
15
    MOSES ONCIU, BEATA GIZELLA
    PRIORE, and IRENE PEMKOVA,
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               Defendants.
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For good cause shown, IT IS HEREBY ORDERED that plaintiff, United States of America, may supply defense counsel of record with a copy of the grand jury testimony of any witness whom the government may call at trial. The purpose of this order is to enable defendant to prepare his defense and to permit compliance with the disclosure provisions of the Jencks Act, 18 U.S.C. § 3500.

IT IS FURTHER ORDERED that defense counsel shall not disclose such grand jury testimony to any other person or persons, except as necessary in preparation of the defense, without prior authorization from this Court, and that the copy of

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1	the testimony provided to defense counsel (and any reproductions
2	or copies made of the produced copy) shall be returned to the
3	government at the conclusion of the proceedings in this case.
4	IT IS SO ORDERED.
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6	Dated:
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9	Honorable David O. Carter United States District Judge
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