



C.	There Was No Actual Obstruction of the Administration of Justice. . . . .	26
III.	Movants’ Allegations Will Be Addressed by the Department’s Office of Professional Responsibility. . . . .	28
	Conclusion . . . . .	30

**Introduction**

Latifi and Axion (Movants) have filed a motion asking this Court to impose criminal contempt sanctions against the former United States Attorney, the Assistant United States Attorneys who prosecuted the case against them, two federal law enforcement agents, and a witness who testified at their trial. They ask this Court to go forward with a criminal contempt trial based on little more than speculation.

Movants’ accusations are serious because the penalties for criminal contempt—fines, imprisonment, or both—are serious. But those penalties are not warranted just because Movants have requested them. Just as a grand jury must find probable cause to charge a person with a criminal offense, this Court should determine whether Movants’ accusations supply probable cause to believe that the named individuals are guilty of criminal contempt. The Government rejects Movants’ accusations, and, if the Court requires, the individuals will defend their actions at a trial. But the Court should stop a contempt proceeding before it starts, because the allegations in the motion, even if true, are not enough to establish the crime of contempt.

The Court should deny the motion for an order to show cause because there is no probable cause to support a criminal contempt charge based on alleged discovery violations or alleged subornation of perjury. Applying a probable-cause or comparable standard, the Court should deny Movants' request for an order to show cause because their allegations, even if true, fail to establish the necessary elements of criminal contempt under Section 401. The Supreme Court has cautioned that "the very amplitude of the [criminal contempt] power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 451 (1911). Here, it is neither necessary nor proper.

The United States Attorney's Office is committed to upholding the highest ethical standards in discovery and throughout trial. Movants have raised allegations of discovery violations with the Department of Justice's Office of Professional Responsibility (OPR). The OPR will investigate the complaints Movants raise, and the United States Attorney's Office will cooperate fully with their investigation.

### **Background**

The grand jury indicted Movants for conduct related to two government

contracts. *Docs. 1, 9*.<sup>1</sup> In October 2007, this Court entered a judgment of acquittal under Fed. R. Crim. P. 29. *Doc. 61*. This Court also dismissed a related civil forfeiture action against Movants. Movants then sought attorney's fees under the Hyde Amendment (in the criminal case) (*Doc. 62*) and under the Civil Asset Forfeiture Reform Act (CAFRA) (in the civil case). This Court stayed the Hyde Amendment claim (*Doc. 111*) but awarded over \$360,000 in attorney's fees—for work performed in both the criminal case and the civil case—under the CAFRA. *United States v. Certain Real Property*, 566 F. Supp. 2d 1252 (N.D. Ala. 2008). On appeal, the Eleventh Circuit recently vacated the fee award, holding that CAFRA did not authorize an award for work performed in the criminal case. *United States v. Certain Real Property*, \_\_\_ F.3d \_\_\_, 2009 WL 2516273 (11th Cir. Aug. 19, 2009). The Eleventh Circuit's mandate has not yet issued, and the Hyde Amendment claim remains pending.

Only a few weeks after the Eleventh Circuit issued its decision—which dramatically cut their attorney's fee award—Movants filed this motion for an order

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<sup>1</sup>Movants' current claims involve only one of the six counts in the indictment. Although they state that the indictment included a count asserting a violation of 18 U.S.C. § 1001 based upon the First Article Test Report submitted for the bifilar weight assembly (*Doc. 117 at 2, ¶ 2*), the applicable count—Count Two—charged Movants with fraud involving aircraft parts in violation of 18 U.S.C. § 38. *Doc. 1 at 2; Doc. 9 at 2*. Count Three—which charged a violation of 18 U.S.C. § 1001—involved another government contract. *Doc. 1 at 3; Doc. 9 at 3*.

to show cause under Fed. R. Crim. P. 42(a), which governs criminal contempt. The motion makes two charges of criminal contempt related to one count of the indictment. *First*, the motion alleges that former United States Attorney Alice H. Martin and Assistant United States Attorneys David H. Estes and Angela Redmond Debro committed criminal contempt by violating discovery obligations under *Brady v. Maryland* and Fed. R. Crim. P. 16. *Doc. 117 at 1, 8. Second*, the motion alleges that Martin, Estes, and Debro, as well as law enforcement agents David Balwinski and Marcus Mills and witness James Oglesby,<sup>2</sup> committed criminal contempt by suborning perjury at trial. *Id. at 1-2, 8.* Although the motion was brought under Rule 42 and seeks to punish the named individuals solely for past conduct, it seeks “substantial monetary penalties imposed for the expenses, anguish, and attorneys’ fees incurred” in the criminal case. *Id. at 8-9.*

### **Standards Governing Criminal Contempt**

#### **I. Criminal Contempt Generally**

Movants filed their motion under Fed. R. Crim. P. 42, “Criminal Contempt.” 18 U.S.C. § 401 authorizes a district court to impose sanctions for certain kinds of criminal contempt. But although this Court has authority to impose criminal contempt

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<sup>2</sup>Mr. Oglesby is not a government employee. The Government does not speak on his behalf.

sanctions where the statute allows, “the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper.” *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 451 (1911); *see also Harris v. United States*, 382 U.S. 162, 165 (1965) (“the limits to the power to punish for contempt are ‘the least possible power adequate to the end proposed’”).

The Supreme Court has held that “[c]riminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.” *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994) (quotations and citation omitted); *see United States v. City of Miami*, 195 F.3d 1292, 1298 (11th Cir. 1999) (“A punitive or criminal contempt sanction may only be fashioned after many of the due process safeguards afforded to defendants in criminal proceedings . . . are provided to an alleged contemnor”). Among other protections, an alleged contemnor enjoys a presumption of innocence that can be overcome only by proof beyond a reasonable doubt. *See Gompers*, 221 U.S. at 444; *Romero v. Drummond Co.*, 480 F.3d 1234, 1243 (11th Cir. 2007).

Given the seriousness of a criminal contempt charge and the fact that “[c]riminal contempt is a *sui generis* proceeding for the protection of the integrity of the Court,” such a proceeding is “within the control of the Court and the Court has the

power and authority to order [it] dismissed” at any time. *United States v. Barnett*, 346 F.2d 99, 100 (5th Cir. 1965) (*en banc*); *see also United States v. Kelsey-Hayes Co.*, 1971 WL 572, at \*5 (E.D. Mich. 1971) (“the Court has the exclusive power, discretion, and authority to institute or dismiss, at any stage thereof, a criminal contempt proceeding where its ‘dignity and authority’ have allegedly been impugned”). Given that authority, district courts have applied a probable-cause standard before proceeding with criminal contempt trials. *See, e.g., In re United Corp.*, 166 F. Supp. 343, 345-46 (D. Del. 1958) (denying an application to appoint a prosecutor for a criminal contempt proceeding where there was no “showing of probable cause” to support the contempt charge); *In re Resource Tech. Corp.*, No. 08 C 4040, 2008 WL 5411771, at \*4 (N.D. Ill. Dec. 23, 2008) (holding that “[d]espite the absence of a statute or rule requiring a probable cause determination, prudence, and due regard for the burdens that a criminal charge imposes upon an accused, suggest that a judge should assess whether probable cause exists before deciding whether to initiate a criminal contempt charge”); *Kelsey-Hayes*, 1971 WL 572, at \*5 (finding “probable cause of a ‘willful’ violation . . . clearly lacking”); *see also E.A. Renfroe & Co. v. Moran*, 508 F. Supp. 2d 986, 998 (N.D. Ala. 2007) (Acker, J.) (advising that “in the context of criminal contempt proceedings the undersigned has acted as the functional equivalent of a grand jury for finding probable cause.”)

## II. The Controlling Statutes

Congress limited the federal criminal contempt power in two statutes, 18 U.S.C. §§ 401 and 402.

### A. Section 401

Section 401 is the general criminal contempt statute, and it provides that

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, *and none other*, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(Emphasis added.) Section 401 does not contain a specific statute of limitations, so the limitations period is five years. *See* 18 U.S.C. § 3282(a) (providing a five-year statute of limitations for non-capital offenses).

By its plain terms, the statute limits a district court's criminal contempt power to three specific kinds of conduct:

1. Subsection (1) applies to misbehavior in or near a court in session. There are four necessary elements for contempt under Section 401(1): (1) misbehavior, (2) in or near the presence of the court, (3) with criminal intent, (4) resulting in an actual

obstruction of the administration of justice. *See United States v. Wright*, 854 F.2d 1263, 1264 (11th Cir. 1988) (*per curiam*); *accord United States v. McGainey*, 37 F.3d 682, 684 (D.C. Cir. 1994); *American Airlines, Inc. v. Allied Pilots Ass’n*, 968 F.2d 523, 531 (5th Cir. 1992). The words “so near thereto” are “geographical terms” that “connote[] that the misbehavior must be in the vicinity of the court. It is not sufficient that the misbehavior charged has some direct relation to the work of the court. ‘Near’ in this context, juxtaposed to ‘presence,’ suggests physical proximity not relevancy.” *United States v. Nye*, 313 U.S. 33, 48-49 (1941); *see In re Stewart*, 571 F.2d 958, 966 (5th Cir. 1978) (alleged misbehavior must occur “within the immediate vicinity of the courtroom, such as the adjoining hallway or the jury room”).<sup>3</sup> Not only must the alleged misbehavior occur in or near the courtroom, it also must cause an *actual* obstruction of the administration of justice. *See Wright*, 854 F.2d at 1263 (the misbehavior must have “prevent[ed] the Court from performing its judicial duty”).

2. Subsection (2) applies to misbehavior by “conventional court officers” such as clerks, marshals, and bailiffs. *Cammer v. United States*, 350 U.S. 399, 405, 407-08 (1956); *United States v. Time*, 21 F.3d 635, 641 (5th Cir. 1994). The Supreme Court has held that “a lawyer is not a court ‘officer’ within the meaning of [Section]

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<sup>3</sup>Decisions rendered by the former Fifth Circuit before October 1, 1981 are binding in this Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

401(2).” *Cammer*, 350 U.S. at 405; accord *In re Holloway*, 995 F.2d 1080, 1081-82 (D.C. Cir. 1993); *American Airlines*, 968 F.2d at 531. Because none of the individuals named in the Motion is a “conventional court officer,” Section 401(2) has no application here.

3. Subsection (3) applies to violations of court orders, rules, or commands. There are three necessary elements for contempt under Section 401(3): “the court entered a lawful order of reasonable specificity; (2) the order was violated; and (3) the violation was willful.” *United States v. Bernardine*, 237 F.3d 1279, 1282 (11th Cir. 2001) (quotations omitted). Although the typical case involves violation of a court order or injunction, the statute also covers violations of court rules. The former Fifth Circuit held that a person could be guilty of contempt under Section 401(3) for violating a criminal procedure rule. *See United States v. Howard*, 569 F.2d 1331, 1336 (5th Cir. 1978) (affirming a criminal contempt conviction based on violation of Rule 6(e)). In any event, the alleged violation must be “willful,” and a “willful” violation is one that is “deliberate or intended . . . rather than one that is accidental, inadvertent or negligent.” *Bernardine*, 237 F.3d at 1282 & n.2 (quotations omitted); *United States v. Baldwin*, 770 F.2d 1550, 1558 (11th Cir. 1985).

## **B. Section 402**

Section 402 is the second federal criminal contempt statute, and it provides that

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of the district court of the United States . . . by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by a fine or imprisonment, or both.

\* \* \*

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

By its plain terms, Section 402 covers any contempt under Section 401(3)—willful disobedience of a court order, rule, or command—that *also* constitutes a federal crime.

This provision does not cover contempts that occur in or near the presence of the court, nor contempts involving violations of orders entered in cases brought or prosecuted in the name of the United States. A criminal contempt charge under Section 402 carries a one-year statute of limitations. *See* 18 U.S.C. § 3285 (“No proceeding for criminal contempt within section 402 of this title shall be instituted against any person . . . unless begun within one year from the date of the act complained of”).

## Argument

### **I. There Is No Probable Cause for a Charge of Criminal Contempt Based on an Alleged Discovery Violation.**

Movants' charge that the prosecutors should be held in criminal contempt because of alleged discovery violations is governed by 18 U.S.C. § 401(3).<sup>4</sup> There are three necessary elements for contempt under Section 401(3): “the court entered a lawful order of reasonable specificity; (2) the order was violated; and (3) the violation was willful.” *United States v. Bernardine*, 237 F.3d 1279, 1282 (11th Cir. 2001) (quotations omitted). Here, Movants allege that the prosecutors violated their discovery obligations under *Brady* and Fed. R. Crim. P. 16. But there can be no criminal contempt because (a) there was no *Brady* violation and (b) there is no evidence suggesting that any violation was willful.

#### **A. Brady v. Maryland Claim**

Movants claim that Estes, Debro, and Martin<sup>5</sup> violated their discovery

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<sup>4</sup>The alleged discovery violations did not occur in or near the court's presence, so Section 401(1) does not apply. As explained above, Section 401(2) does not apply because the attorneys and agents involved here are not “officers” of the Court for purposes of the contempt statute. Section 402 does not apply because the alleged discovery violations would not constitute federal crimes; and, even if Section 402 did apply, the claim would be barred by the one-year statute of limitations, as the trial took place in October 2007.

<sup>5</sup>Movants do not allege that Mills and Balwinski were responsible for any discovery violation. With respect to Martin, Movants allege only that she

obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose certain work orders created by Allegheny Technologies. *Doc. 117 at 8*. Under well-settled law from the Supreme Court and the Eleventh Circuit, Movants’ allegations, even if true, are not sufficient to establish a *Brady* violation.

*Brady* is not a discovery rule. “There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In determining whether a *Brady* violation occurred, the court must ascertain whether the suppression of evidence by the government deprived the defendant of a fair trial. *Id.*

The Supreme Court held in *Brady* that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. “There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have

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supervised Estes, Debro, Mills, and Balwinski. *Doc. 117 at 4*. Movants later allege that Martin, along with Estes and Debro, withheld the work orders. *Id. at 8*. In recounting the facts between these two conclusions, Movants provide no basis for concluding that Martin had any role in the events alleged.

ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); accord *Gary v. Hall*, 558 F.3d 1229, 1255 (11th Cir. 2009) (“To establish a *Brady* violation, a petitioner must show that: (1) the prosecution possessed evidence favorable to the accused, because it was either exculpatory or impeaching, and did not disclose it to the defense; (2) the State suppressed the evidence such that the defense did not otherwise possess the evidence and could not reasonably have obtained it; and (3) the evidence was material, and its absence yielded prejudice”). Movants have alleged that the Government failed to disclose the work orders. Even assuming that is true, and further assuming the defense could not have obtained the work orders through the exercise of reasonable

diligence,<sup>6</sup> there was no *Brady* violation here because the work orders were not “material” as that term applies in this context.

Undisclosed evidence is “material” for *Brady* purposes only “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Strickler*, 527 U.S. at 280 (quotations omitted). And “a ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). Indeed, “there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious

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<sup>6</sup>Contrary to Movants’ assertions that they “recently” learned of the work orders, the time records they submitted in the civil forfeiture case demonstrate that their counsel talked with and met with Joseph Ferrante—the witness who advised that the work orders for the blanks would be the most accurate means of determining when the blanks were produced and delivered to Axion—numerous times before the October 2007 trial. *See Ex. A* (Attachment 6 to Doc. 73, in *United States v. Certain Real Property*, 2:06-CV-01102-IPJ). On August 7, 2007, counsel called Ferrante to arrange a witness interview. *Ex. A at 12*. On August 9, 2007, counsel interviewed Ferrante in Huntsville “regarding supply of blank for first article.” *Id.* On August 10, 2007, counsel spoke to Ferrante by telephone concerning his “availability for trial.” *Id.* On September 11, 2007, a paralegal “review[ed] additional information from Joe Ferrante.” *Id. at 14*. On September 20, 2007, the paralegal finalized trial subpoenas for witnesses including Ferrante. *Id. at 16*. On September 27, 2007, Ferrante called counsel “regarding Government CID request for interview.” *Id. at 17*. According to the email messages Movants have proffered in support of their motion, the meeting between Debro, Estes, Balwinski, and Ferrante took place on October 1, 2007. *Doc. 117 at 4, ¶ 6 & Ex. B*. The very next day, counsel had a telephone call with “fact witness Joe Ferrante regarding bifilar blanks and interview with CID.” *Ex. A at 17*. Finally, as discussed below, Oglesby testified concerning work orders at trial.

that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler*, 527 U.S. at 281. In determining whether undisclosed evidence was “material,” the question is “whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 290 (quotations omitted).

The work orders at issue here were not “material” because *Movants were acquitted without that evidence*. The Eleventh Circuit’s decision in *Flores v. Satz*, 137 F.3d 1275 (11th Cir. 1998) (*per curiam*), is controlling. Flores was charged in state court with capital sexual battery. *Id.* at 1276. After Flores requested disclosure of medical and psychological records of the complaining witness, the State nolle prossed the pending charges. *Id.* at 1277-78. Flores sued the prosecutors and others, alleging that (1) they failed to investigate properly the complaining witness’s credibility, resulting in a delay of Flores’s release from pretrial detention and (2) they failed to disclose discovery materials in violation of *Brady*. *Id.* at 1278. The Eleventh Circuit held that there was no *Brady* violation because “Plaintiff . . . was never convicted and, therefore, did not suffer the effects of an unfair trial. As such, the facts of this case do not implicate the protections of *Brady*.” *Id.*

*Flores* disposes of Movants' *Brady* claim.<sup>7</sup> Because Movants were acquitted—even without the allegedly favorable work orders—they cannot claim injury from the nondisclosure of those documents. And that means the documents were not “material” for purposes of *Brady*. See *Strickler*, 527 U.S. at 280; *Gary*, 558 F.3d at 1255. Accordingly, Movants' allegations, even if true, do not support a finding of a *Brady* violation or criminal contempt.

### **B. Criminal Rule 16 Claim**

In addition to alleging a *Brady* violation, Movants allege that prosecutors violated Fed. R. Crim. P. 16 by failing to disclose the work orders. *Doc. 117 at 1, 8*. Rule 16(a)(1)(E)(i) requires disclosure of documents in the Government's possession that are “material to preparing the defense.” And Rule 16(d)(2) authorizes the district court to sanction a failure to comply with the Rule. Although Rule 16 does not restrict this Court's contempt power, the Supreme Court's admonition “never to exert [that

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<sup>7</sup> The Eleventh Circuit's rule in *Flores* is consistent with decisions from other circuits. See, e.g., *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999) (“Regardless of any misconduct by government agents before or during trial, a defendant who is acquitted cannot be said to have been deprived of the right to a fair trial”); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988) (“Because the underlying criminal proceeding terminated in appellant's favor, he has not been injured by the act of wrongful suppression of exculpatory evidence”); cf. *Carvajal v. Dominguez*, 542 F.3d 561, 570 (7th Cir. 2008) (“we are doubtful . . . that an acquitted defendant can ever establish the requisite prejudice for a *Brady* violation”).

power] where it is not necessary or proper” counsels consideration of the standards governing Rule 16 sanctions. *Gompers*, 221 U.S. at 451. In light of those standards, a criminal contempt charge would not be an appropriate sanction for an alleged Rule 16 violation.

If the Court decides to impose *any* sanction for a Rule 16 violation, it must be “the least severe” sanction to vindicate the requirements of the Rule. *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312 (11th Cir. 1985). And in determining what “the least severe” sanction is, the Court must consider several factors, including “the extent of prejudice, if any, the defendant has suffered” because of the alleged violation. *Id.*; see *United States v. Christopher*, 923 F.2d 1545, 1554-55 (11th Cir. 1991).

Here, there was no prejudice at all. Although the Government did not disclose the Work Orders, it did not rely on those documents at trial. And Movants were *acquitted* on all counts of the indictment even without the benefit of those documents. Thus, pretrial disclosure of the Work Orders—which related to only one count out of six—would not have affected this case in any meaningful way. In other words, any Rule 16 violation was harmless. See *United States v. Bolton*, 997 F.2d 1196, 1200 (7th Cir. 1992) (where the jury acquitted the defendant on the relevant count, the district court’s failure to grant a continuance to remedy the government’s Rule 16

discovery violation was harmless). Under those circumstances, even demonstration of a Rule 16 violation would not justify the drastic sanction of a criminal contempt charge.

There is no probable cause for a charge of criminal contempt based on an alleged Rule 16 violation, and the Court should deny the motion for an order to show cause based on such an allegation.

## **II. There Is No Probable Cause for a Charge of Criminal Contempt Based on an Alleged Subornation of Perjury.**

Movants' charge that Martin,<sup>8</sup> Estes, Debro, Balwinski, and Mills<sup>9</sup> should be held in contempt based on an alleged subornation of perjury is governed by Section

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<sup>8</sup>Movants again include Martin in a conclusory manner, alleging that she supervised Estes, Debro, Mills, and Balwinski. *Doc. 117 at 4*. Movants later allege that Martin, along with the other named individuals, sought to present false testimony to the Court. *Id. at 8*. Again, in recounting the facts between these two conclusions, Movants provide no basis for concluding that Martin had any role in the events alleged.

<sup>9</sup>Movants mention Mills in describing the four members of the "conspiracy" to commit the allegedly contemptuous acts and then again in recounting their version of the factual events. Although they assert that, in "early 2004," Oglesby told Balwinski and Mills that Axion had not received blanks from Tungsten Products until January 9, 2004 (*Doc. 117 at 2-3*), they attach a document that mentions neither Balwinski nor Mills (*id. at Ex. A*). Candidly, Mills was the author of the 2004 memorandum. But, the conduct that Movants now complain of occurred more than three years later—in October 2007. *Id. at 4-6*. Thus, Movants provide no basis for concluding that Mills had any role in the events alleged.

401(1).<sup>10</sup> To prove contempt under Section 401(1), four elements must be established beyond a reasonable doubt: “(1) misbehavior, (2) in or near the presence of the court, (3) with criminal intent, (4) that resulted in an obstruction of the administration of justice.” *American Airlines*, 968 F.2d at 531; *see United States v. McGainey*, 37 F.3d 682, 684 (D.C. Cir. 1994) (citing cases). Assuming that the alleged misconduct occurred “in or near the presence of the court,” there could be no criminal contempt here because (a) there was no misbehavior, (b) there was no criminal intent, and (c) there was no actual obstruction of the administration of justice.

**A. There Was No Misbehavior.**

A person suborns perjury when he “procures another to commit any perjury.” 18 U.S.C. § 1622; *see United States v. Bradberry*, 466 F.3d 1249, 1254 (11th Cir. 2006) (*per curiam*) (quotations omitted) (“[s]ubornation of perjury consists in procuring or instigating another to commit the crime of perjury”). The Eleventh Circuit has explained that “[i]t is essential to subornation of perjury that the suborner should have known or believed or have had good reason to believe that the testimony given would be false; that he should have known or believed that the witness would

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<sup>10</sup>Section 401(2) does not apply because the attorneys were not “officers” of the Court for purposes of the contempt statute. Section 401(3) does not apply because the alleged misbehavior did not involve a violation of any court order or rule. Section 402 does not apply for the same reason; if Section 402 did apply, this claim would be barred by the one-year statute of limitations.

testify willfully and corruptly, and with knowledge of the falsity; and that he should have knowingly and willfully induced or procured the witness to give such false testimony.” *Id.* (quotations omitted). Thus, there can be no finding of subornation of perjury unless (1) a witness actually committed perjury and (2) the alleged suborner should have known or believed that the witness would commit perjury before presenting the witness’s testimony. Movants’ allegations, even if true, are insufficient to establish either of those essential elements.

**1. There Was No Perjury.**

Here, the trial transcript shows that there was no perjury.<sup>11</sup> Perjury is “false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). Movants have failed to identify *any* false testimony, much less willful, intentional false testimony.

Movants assert that Oglesby testified falsely when he “denied the existence of the Work Orders.” *Doc. 117 at 7*. The Work Orders are the documents included in Exhibit D to the Motion—work orders attached to an October 12, 2007 email from ATI attorney Lauren McAndrews. *Id. at Ex. D*. As the Court will note, those work

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<sup>11</sup>Exhibit B to this response includes the initial trial testimony of Gerald Henderson and the complete testimony of Oglesby. Exhibit B includes pages 166-228 from day one and pages 864-66 from day six, when Oglesby was recalled.

orders relate to the three bifilar blanks that were the subject of this count. But the alleged false testimony Movants rely on did not relate to those three blanks. In fact, Oglesby denied the existence of any documentation relating to products *other than* the three blanks described in the work orders.

Just prior to Oglesby's testimony, while cross-examining Axion employee Gerald Henderson, defense counsel suggested that Tungsten Products supplied Axion with at least one blank in December 2003. *Ex. B at 182-83*. To test that theory, after calling Oglesby, counsel for both the Government and the defense asked Oglesby whether he was personally aware of every shipment that went out from Tungsten Products. *Id. at 195, 217*. Oglesby said he was not, but he said there would be documentation—"work orders"—for every product that was shipped from Tungsten. *Id.*<sup>12</sup> Not surprisingly, Estes's redirect examination addressed the defense theory that there could have been some other shipment of blanks before the January 2004 shipment:

Estes: You stated that you may not personally know of every bifilar blank that leaves Tungsten Products; is that correct?

Oglesby: Correct.

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<sup>12</sup>Oglesby twice mentioned work orders. First, he stated, "every component that we produce has a work order with it." *Ex. B at 195*. Second, he stated, "I see the entire work order processed throughout the whole plant." *Id. at 216-17*.

Estes: But there would be documentation for every bifilar blank that leaves Tungsten Products?

Oglesby: Correct.

Estes: And was there any documentation, *other than those three blanks right there*, for Axion before you went into production?

Oglesby: No.

Estes: Thank you.

*Id. at 220* (emphasis added).

As that exchange makes clear, Oglesby testified—truthfully—that although he was not personally aware of every shipment that left Tungsten, there would be documentation for every shipment, and he was not aware of any documentation for any shipment to Axion “other than those three blanks” that were the subject of the count. He did not deny there were work orders for the three blanks delivered to Movants; he testified that there was no documentation of *other* blanks going to Movants during the time frame in question. In other words, according to Oglesby, no other blanks were delivered to Movants during this time because there was no documentation to show that. Thus, the trial transcript by itself defeats any claim that Oglesby “denied the existence of the Work Orders”; he was not asked about those Work Orders, and he did not talk about those Work Orders in the testimony at issue.

**2. The Prosecutors and Agents Did Not Induce or Procure Perjurious Testimony.**

Even if Oglesby’s testimony could somehow be interpreted as perjurious, nothing but Movants’ speculation suggests that the prosecutors or agents suborned perjury. The Eleventh Circuit has made clear that a person does not suborn perjury unless he or she knew or believed or should have known or believed that (1) “the testimony given would be false” and (2) the witness would testify “willfully and corruptly, and with knowledge of the falsity.” *Bradberry*, 466 F.3d at 1254. The person with that knowledge or belief must then “knowingly and willfully induce[] or procure[] the witness to give such false testimony.” *Id.* Even taken as true, the facts alleged in the Motion are insufficient to establish subornation of perjury.

Movants assert that the prosecutors and agents “deliberately presented false, incomplete, and misleading evidence” in violation of 18 U.S.C. § 1622, the subornation-of-perjury statute. *Doc. 117 at 1-2*. The basis for that assertion seems to be the simple fact that the prosecutors were aware of the Work Orders relating to the three bifilar blanks that were the subject of this count. But those work orders did not show the date of delivery to Movants, and the prosecutors believed, based on discussions with Oglesby and other evidence discussed below, that the earlier “shipped” date shown on one page of the work orders was not the date of delivery to Movants but the date that the blanks were shipped or transferred to another part of

Tungsten Product's facility. Thus, Oglesby gave the prosecutors a reasonable explanation for the dates on the work orders.

The fundamental problem with Movants' claim is that the Work Orders are not "plainly exculpatory" and do not "directly contradict Oglesby's testimony regarding ATI's January 9, 2004 delivery of the blanks to Axion." *Doc. 117 at 6*. Oglesby testified that "in January [Tungsten Products] supplied three blanks to Axion. In May we actually started shipping product to [Movants]." *Ex. B at 210*. Movants speculate but proffer no testimony indicating that a "shipped" stamp is equivalent to the date blanks were actually *supplied to and received by* Axion. Although Movants have submitted the statement of Joseph Ferrante, he states that he "could not remember the exact date that the first delivery of three blanks occurred." *Doc. 119 at 2, ¶5*.

Oglesby's trial testimony was consistent with what he told Agent Mills in April 2004—that the three blanks agents found when executing the search warrant at Axion were the three blanks provided by Tungsten Products and that they were still blanks—"untouched." *Compare Ex. B at 185-86, 220-21, 225-28, 865 with Doc. 117, Ex. A*. Prosecutors were presented with undisputed evidence that three blanks had been supplied and three were still there. They therefore concluded that a Tungsten Products blank had not been used to make the first article. This conclusion was further confirmed by a bill of lading showing receipt of three blanks on January 9,

2004, and testimony from Axion employee Gerald Henderson to the effect that, although, he was “[n]ot 100-percent sure,” his best recollection was that he helped unload the blanks from someone’s car trunk on January 9, 2004. *Ex. B at 174-75; Ex. D (trial exhibit 13)*. There is simply no evidence to support the charge that the prosecutors *knowingly and willfully* “sought to present false evidence to the Court” (*Doc. 117 at 8*) when they presented testimony from Oglesby.

**B. There Was No Criminal Intent.**

Not only was there no misbehavior, but there was no criminal intent. As explained above, there is no evidence—only Movants’ accusation—suggesting the prosecutors presented false testimony knowing it was false.

**C. There Was No Actual Obstruction of the Administration of Justice.**

In any event, there is no reason to believe the alleged subornation of perjury actually obstructed the administration of justice. The Eleventh Circuit has explained that the alleged misbehavior must have “prevent[ed] the Court from performing its judicial duty.” *United States v. Wright*, 854 F.2d 1263, 1263 (11th Cir. 1988) (*per curiam*). Other courts agree that there can be no finding of contempt under Section 401(1) absent proof (beyond a reasonable doubt) that the alleged misbehavior “actually obstructed the administration of justice—by delaying proceedings, making more work for the judge, inducing error, imposing costs on parties, or whatever.”

*United States v. Oberhellmann*, 946 F.2d 50, 52 (7th Cir. 1991); *see American Airlines*, 968 F.2d at 532; *In re Grogan*, 972 F. Supp. 992, 1001-03 (E.D. Va. 1997).

Here, the alleged misbehavior did not prevent the Court from performing its duty. Movants' allegation relates to a single question asked on redirect examination of a single witness. As explained above, that question sought to clarify an issue raised by defense counsel in his cross-examination, and the witness's answer was correct. Even if that were not so, the Court entered a judgment of acquittal under Fed. R. Crim. P. 29. The Court gave no indication in its ruling that the ruling was based on Oglesby's testimony. *Ex. C at 1127*.<sup>13</sup> Thus, Oglesby's "No" answer to the question about documentation for shipments "other than" the three blanks at issue did not delay the proceedings, make more work for the judge, or induce any error. The Court was fully able to "perform[] its judicial duty" notwithstanding the alleged misbehavior. *Wright*, 854 F.2d at 1263.

The entire subornation of perjury claim is based on a one-word answer to one question during re-direct examination. The Court must review Oglesby's testimony in context. *United States v. Ronda*, 455 F.3d 1273, 1294 (11th Cir. 2006) ("in perjury cases, district courts should view a witness's testimony as a whole and his statements

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<sup>13</sup>Exhibit C is the Court's ruling on the first Rule 29 motion, page 1127 of day seven of the trial transcript.

should not be taken out of context”); *Van Liew v. United States*, 321 F.2d 674, 678 (5th Cir. 1963) (“A charge of perjury may not be sustained by the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows”).

Giving Estes’s question its plain meaning, Oglesby’s “No” answer was literally true and not at all inconsistent with the existence of the Work Orders. Estes asked about documentation for shipments “other than” the three bifilar blanks at issue, and Oglesby said there was no documentation for any other shipments. At the very least, the context makes clear that Oglesby was denying the existence of documentation “other than” the Work Orders identified in the Motion.

Because there is no probable cause to believe that Oglesby committed perjury at trial, or that the prosecutors or agents suborned any perjury, this Court should deny the motion for an order to show cause.

### **III. Movants’ Allegations Will Be Addressed by the Department’s Office of Professional Responsibility.**

Movants advise that they have “cited the perjurious testimony . . . suborned by the prosecution” in the complaint they “lodged . . . with the Department of Justice[’s] Office of Professional Responsibility.” *Doc. 117 at 3*. The Office of Professional Responsibility is a proper forum for investigation of Movants’ allegations against Martin, Estes, and Debro. Governing regulations provide:

The Counsel [for the Office of Professional Responsibility] shall:

(1) Receive, review, investigate and refer for appropriate action allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when such allegations are related to allegations of attorney misconduct within the jurisdiction of DOJ–OPR;

\* \* \*

(3) Report to the responsible Department official the results of inquiries and investigations arising under paragraphs (a)(1) and (2) of this section, and, when appropriate, make recommendations for disciplinary and other corrective action. . . .

28 C.F.R. 0.39a.

The United States Attorney shares Attorney General Eric Holder’s commitment to “ensuring that our prosecutors are provided sufficient training to understand fully their discovery obligations, and that they receive the support and resources necessary to do their jobs in a manner consistent with the proud traditions of [the] Department [of Justice.]” Press Release, Department of Justice, “Attorney General Announces Increased Training, Review of Process for Providing Material to Defense in Criminal Cases” (Apr. 14, 2009), *available at* <http://www.usdoj.gov/opa/pr/2009/April/09-opa-338.html>. Movants have raised their complaints to the Department of Justice’s Office of Professional Responsibility, and the United States Attorney’s Office looks forward

to assisting that Office in its work. That is an appropriate forum to investigate Movants' accusations.<sup>14</sup>

**Conclusion**

This Court should deny or dismiss the Motion.

JOYCE WHITE VANCE  
United States Attorney

JENNY L. SMITH  
Assistant United States Attorney

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<sup>14</sup>Although OPR has an open investigation regarding the allegations of prosecutorial misconduct arising in this case, such investigations normally do not enter a proactive phase (i.e., the conduct of interviews) if evidentiary hearings or a judicial resolution of the allegations in the district court are anticipated. Thus, in the instant case, OPR will likely postpone the proactive phase of its investigation in this matter until after the district court has disposed of the attorneys' fees motions still before the court.

**Certificate of Service**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that a copy of the foregoing will be provided to Movants' attorneys of record, via the CM/ECF system, this the 28th day of September, 2009.

/s/ electronic signature

JENNY L. SMITH

Assistant United States Attorney