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10 BRENT R. WILKES

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

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|----|---|----------------------------|
| 13 |) | Case No.: 07CR0330-LAB |
| 14 |) | |
| 15 |) | MOTION FOR PRODUCTION OF |
| 16 |) | PSR DOCUMENTS AND FOR |
| 17 |) | PRODUCTION OF DOCUMENTS |
| 18 |) | PROVIDED TO PROBATION |
| 19 |) | SENTENCING IN ORDER TO |
| 20 |) | HAVE MINIMALLY SUFFICIENT |
| 21 |) | TIME TO INVESTIGATE PSR |
| 22 |) | ALLEGATIONS & PREPARE |
| 23 |) | OBJECTIONS |
| 24 |) | |
| 25 |) | Date: January 28, 2008 |
| 26 |) | Time: 9:30 a.m. |
| 27 |) | Judge: Hon. Larry A. Burns |

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19 The Defendant Brent Wilkes, through undersigned counsel, Mark Geragos, seeks a
20 continuance of his sentencing date as the untimely disclosure of the Pre-Sentence Report
21 ("PSR")¹ in violation of Federal Rule of Criminal Procedure 32(e)(2) as well as its
22 unexpected contents which includes a recommendation that this Court sentence Mr.
23 Wilkes to 720 months in prison, or "essentially a life sentence," *see* PSR at 21, resulting
24 from upward adjustments of 36-levels, *see id.* at 17-18, necessitates extensive
25 investigation, review of Mr. Wilkes' accounting records and preparation of substantial

26
27 ¹ Undersigned counsel assumes that the Court has received a copy of the PSR,
28 however, a copy will be hand-delivered to chambers in the event that the Court has not yet
seen the PSR.

1 objections. The PSR was received late in the day on January 14, 2008, thus, holding a
2 sentencing hearing on January 28, 2008 violates the plain language of Rule 32(e)(2)
3 (minimum notice required between disclosure of PSR and sentencing date is 35 days).
4 Responding to the serious and extraordinary upward adjustments contained in the PSR
5 will necessitate a minimum of 60 additional days.

6 As set forth in the attached Declaration of Mark J. Geragos, there is more than
7 good cause for the continuance. Undersigned counsel does not have sufficient time to
8 investigate and prepare objections. Mr. Wilkes received his presentence report on
9 January 14, 2008, (really on January 15, 2008), less than two weeks before the date of his
10 sentencing. Rule 32(e)(2) of the Federal Rules of Criminal Procedure requires the
11 probation officer to give the defendant and his counsel the presentence report “at least 35
12 days before sentencing unless the defendant waives this minimum period.” Fed. R. Crim.
13 P. 32(e)(2). Mr. Wilkes has not, nor will he waive the minimum required notice under
14 this section.

15 Furthermore, Criminal Rule 32.1 of the Local Rules of Practice for United States
16 District Court for the Southern District of California similarly requires the presentence
17 report to be mailed to the defendant or his counsel 35 days prior to the date fixed for the
18 sentencing hearing. Crim L R 32.1(a)(3). Defendant may file his objections, if any, 18
19 days prior to the date fixed for the sentencing hearing. CrimLR 32.1(a)(5). The Rule
20 specifically provides that “[i]f the presentence report is not timely filed – that is, 35 days
21 prior to the scheduled sentencing date – then the defendant and the government shall have
22 seventeen (17) days following the actual date on which the presentence report is filed
23 within which to file and serve.” *Id.* Here, Mr. Wilkes does not even have the minimum
24 seventeen (17) days within which to file his objections to the report before his sentencing
25 hearing on January 28, 2008.

26 Moreover, a cursory review of the presentence report (which is all that has been
27 accomplished presently) indicates that serious Fifth and Sixth Amendment issues are
28 implicated: the report recommends a twenty-level upward adjustment for the supposed

1 benefit received by Mr. Wilkes' corporation, ADCS, *see* PSR at 18, most of which was
2 uncharged, unproven at trial and not the subject of the jury's verdict, and significantly,
3 appears to be less than the loss amounts attributed to Randall Duke Cunningham.² The
4 PSR also recommends a four-level upward adjustment for being an "organizer or leader
5 of criminal activity," as well as a multitude of other upward adjustments, *see* PSR at 17-
6 18. These upward adjustments have quadrupled the otherwise applicable base offense
7 level, thus raising substantial issues relating to the applicable burden of proof, whether it
8 is beyond a reasonable doubt or clear and convincing evidence as well as substantive
9 issues related to their applicability in the first instance. These issues require legal
10 research and analysis as well as necessitate Mr. Wilkes consulting with his accountant
11 and undersigned counsel then meeting with the accountant.

12 Mr. Wilkes also must see the sentencing documents of his codefendants to
13 compare the benefit/loss amounts attributed to them by Probation and the government to
14 address any issues related to disparate treatment of codefendants. Additionally, the
15 cursory review of the PSR reveals that both the 20+ levels of upward adjustments as well
16 as the two-level upward adjustment for obstruction of justice are based upon records or
17 some type of documents provided by government agents to the probation office which the
18 defense has not seen and which do not appear to have been provided to the trial jury

21 ² The upward adjustment for the benefit amount attributable to Cunningham was
22 gleaned by obtaining the only sentencing filing available in that case. In order to properly
23 respond to these allegations, Mr. Wilkes needs to see the loss amounts attributed not only to
24 Mr. Cunningham by the probation office, but also to Mr. Mitchell Wade and to Mr. Thomas
25 Kontagiannas. The probation office and the government appear to be taking inconsistent
26 positions by attributing greater benefit amounts to Mr. Wilkes than to Mr. Cunningham. This
27 is the case notwithstanding that Cunningham should have been held responsible for greater
28 sums, in that he had the bribes received from Wade as well. Simultaneous with this motion
seeking a continuance, Mr. Wilkes is also moving for production of the portions of the
Cunningham, Wade and Kontagiannas' PSR so that an investigation into the upward
adjustments can be performed and if borne out, an argument regarding disparate treatment
of codefendants made.

1 either.³ Mr. Wilkes will be seeking production of these documents.

2 Mr. Wilkes has a Fifth Amendment as well as the aforementioned rule-based rights
3 to adequately respond to the various issues raised by the late-filed presentence report. *See*
4 *United States v. Garcia-Sanchez*, 189 F.3d 1143, 1148-1149 (9th Cir. 1999) (defendant
5 has due process rights to be sentenced based only upon reliable information). Based upon
6 the Fifth and Sixth Amendments as well as Federal Rule of Criminal Procedure 32, he
7 requests this Court continue the sentencing date for 60 days.

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9
10 Respectfully submitted,

11 DATED: January 15, 2008

GERAGOS & GERAGOS
A Professional Corporation

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13
14 /s/ Mark J. Geragos

By: _____
MARK J. GERAGOS
Attorneys for Defendant
BRENT R. WILKES

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28 ³ These same government agents who have given the probation office this “secret
evidence” may actually be the same agent(s) responsible for leaking information about the
grand jury proceedings to the media.

DECLARATION OF MARK J. GERAGOS

I, Mark J. Geragos, hereby declare and state:

1. I am the principal of the law firm of Geragos & Geragos, a professional corporation, attorneys of record for defendant Brent R. Wilkes in the above-captioned action. I am licensed to practice law before this Court. I was the trial lawyer primarily responsible for the defense of Mr. Wilkes in this action. Accordingly, I have personal knowledge of the matters set forth herein or am informed and believe them to be true. I make this declaration in support of the Motion to Continue the Sentencing Date.

2. Our office received Mr. Wilkes' presentence report late in the day on January 14, 2008.

3. Mr. Wilkes has not waived the minimum notice requirements under Rule 32 of the Federal Rules of Criminal Procedure and Local Rule 32.1 of the Local Rules of Practice for United States District Court for the Southern District of California.

4. Based on my firm's cursory review of the presentence report, I believe serious Sixth Amendment issues are implicated, as well as issues with what burden of proof should apply to the multiple excessive upward adjustments, substantive issues related to their applicability, and issues related to the disparate treatment received by codefendants. An investigation into the supposed profit obtained by Mr. Wilkes as a result of the contracts referenced in the PSR will require extensive consultation with both Mr. Wilkes and his accountant. I also need to obtain documents from the codefendants' sentencing hearings and perform a comparison of the benefit amounts attributed to them and the government's sentencing recommendations regarding these and other upward adjustments which I am unable to do presently.

5. If forced to go forward with a sentencing hearing on January 28, 2007, in a case where the PSR recommends "essentially a life sentence," and appears to be based upon undisclosed and uninvestigated information, I will be ineffective and Mr. Wilkes' Fifth Amendment rights will be violated. At a minimum, I require 60-days to properly respond to the PSR's recommendation of 720 months incarceration for Mr. Wilkes.

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I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct.

Executed this fifteenth day of January, 2008 at Los Angeles, California.

/s/ Mark J. Geragos
MARK J. GERAGOS