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Applying the Rationale of *Twombly* to Provide Safeguards for the Accused in Federal Criminal Cases

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Applying the Rationale of *Twombly* to Provide Safeguards for the Accused in Federal Criminal Cases

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In 2013, we marked the sixth anniversary of the Supreme Court's 7-2 decision in the now-famous *Bell Atlantic Corp. v. Twombly* case.¹ This private treble damages civil action—where the court dismissed as factually insufficient a civil complaint pleading a conspiracy to violate a federal criminal statute, the Sherman Antitrust Act²—produced an unexpected bonanza of pleading safeguards protecting defendants in future civil cases of all types, and resulted in numerous dismissals of complaints.³

But the basic pleading rule of *Twombly*—that allegations setting forth “a legal conclusion” cannot substitute for required “factual allegations”—a pleading rule, which should in principle be equally applicable to pleadings in federal criminal litigation, has not been applied by the courts to dismiss criminal indictments or informations for failure to make sufficient “factual allegations.” This has been so, notwithstanding the reiteration and reinforcement of the *Twombly* rule by the even better known *Iqbal*⁴ case, which explained that, in *Twombly*:

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a ‘legal conclusion’ and, as such, was not entitled to the assumption of truth. *Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim*

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¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007).

² 15 U.S.C. §1 (2006).

³ For the most recent and comprehensive empirical study of the effects of the pleading standards set by *Twombly*, and the follow-on case of *Iqbal*, on the litigation of civil cases, see Jonah P. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012). This article also references numerous prior articles and studies concerning the impact of *Twombly* and *Iqbal* on civil cases, including reports by the Administrative Office of the U.S. Courts. The Gelbach article concludes that *Twombly* and *Iqbal* have resulted in substantially increasing the grants of motions to dismiss civil complaints, and also in deterring the filing of civil complaints because plaintiffs' counsel feared a dismissal under the heightened pleading standards.

⁴ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

*for relief and been entitled to proceed performe.*⁵

The *Iqbal* Court further explained:

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.* (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’)⁶

There have been vigorous responses to the challenges and obstacles which *Twombly*, and its follow-on case *Iqbal*, pose to the viability of complaints in civil actions that were instituted by civil rights groups and other public interest plaintiffs.⁷ Civil procedure expert Professor Arthur Miller authored the authoritative and encyclopedic critique: *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*.⁸ Miller’s article explains that “*Twombly* and *Iqbal* have destabilized both the pleading and the motion-to-dismiss practices as they have been known for over sixty years.”⁹ However, Professor Miller’s writings have eschewed any discussion of whether the *Twombly* and *Iqbal* pleading rule—that “conclusions of law” cannot substitute for required “factual allegations”—has application to challenging the sufficiency of indictments or informations pleaded by the government in federal criminal cases.

Moreover, Professor Miller’s greatest misgiving about *Twombly* and *Iqbal* was that those cases allow a trial judge to dismiss a civil complaint because the judge deems the well-pleaded allegations of the civil complaint to lack “plausibility.”¹⁰ This concern, however, has no application to dismissal of federal criminal indictments because the trial judge has no authority to dismiss the indictment of a grand jury on that ground.¹¹

⁵ *Id.* at 680 (citing *Twombly*, 550 U.S. at 555) (emphasis added).

⁶ *Id.* at 663, 687 (citing *Twombly*, 550 U.S. at 555) (emphasis added and internal quotations omitted).

⁷ See Joshua Civin & Debo P. Adegbile, *Restricting Access to Justice: The Impact of Iqbal and Twombly on Federal Civil Rights Litigation*, ACS Issue Brief, (Sept. 2010), later published in 5 ADVANCE 18-36 (Fall 2011). See also Suzette M. Malveaux, *Salvaging Civil Rights Claims: How Plausibility Discovery Can Help Restore Federal Court Access After Twombly and Iqbal*, ACS Issue Brief (Nov. 2010). Issues posed by *Twombly* and *Iqbal* were also addressed at the 2010 ACS Annual Convention by a panel moderated by Professor Arthur Miller, held on June 18, 2010, in Washington, D.C.

⁸ Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

⁹ *Id.* at 2.

¹⁰ Thus Professor Miller characterizes the pleading standard that has replaced traditional “notice pleading” as “plausibility pleading.” The traditional standard was set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), which was “retired” by the *Twombly* opinion. See *Twombly*, 550 U.S. at 563.

¹¹ See FED. R. CRIM. P. 12(b) (listing the possible grounds for motions to dismiss an indictment or information). The “plausibility” standard intended by the author of the *Twombly* decision, Justice Souter, was much more lenient to the pleader than the higher standard of “plausibility” later adopted by the 5-4 majority decision in *Iqbal*, in which Justice Souter dissented. Justice Souter’s opinion in *Iqbal* indicated that an allegation could be ruled not plausible only where it was obviously in conflict with reality; or “sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” See *Iqbal* 556 U.S. at 687

It is therefore appropriate at this time to consider the consequences of applying to criminal prosecutions the *Twombly* principle, as it was reinforced and reiterated in *Iqbal*, that in ruling on a motion to dismiss the plaintiff's initial pleading as insufficient, the trial court is "*not bound to accept as true a legal conclusion couched as a factual allegation.*"¹²

I. Application of *Twombly* to Federal Indictments

Just four months prior to the *Twombly* decision, in a leading case on the pleading standard for federal criminal indictments, the Supreme Court held in an 8-1 decision authored by Justice Stevens that, "an indictment *parroting the language of a federal criminal statute* is often sufficient. . . ." ¹³ Because most federal indictments are "parroting the language of a federal criminal statute," and such statutory language "contains all the elements of the crime," such indictments will either be "parroting" statutory language which does state "a conclusion of law," or alleging a "legal conclusion couched as a factual allegation."

For example, consider the application of *Twombly* to a very common form of indictment, one that alleges that the defendants "conspired and agreed" to violate a cited federal criminal statute (such as a statute proscribing the selling of a controlled substance). A model indictment for conspiracy is set forth in Harry Subin's *The Practice of Federal Criminal Law*.¹⁴

COUNT ONE

(Narcotics Conspiracy: Importation)

1. In or about and between May 2004 and January 2005, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant PAUL CHRISTOPHER, together with others, did knowingly and intentionally conspire to import into the United States from a place outside thereof five kilograms or more of a substance containing cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 952(a). (Title 21, United States Code, Sections 963, 960(a)(1) and 960(b)(1)(B(ii)); Title 18, United States Code, Sections 3551 et seq.).¹⁵

COUNT TWO

(Narcotics Conspiracy: Distribution and Possession with Intent to Distribute)

(dissent of Souter, J., joined by Stevens, Ginsburg and, Breyer, JJ.).

¹² *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹³ *United States v. Resendiz-Ponce*, 549 U.S. 102, 109 (2007) (emphasis added). The opinion in *Resendiz-Ponce* went on to note there are also "crimes that must be charged with greater specificity." As an example of such crimes, the opinion cited the Contempt of Congress statute, 2 U.S.C. §192, and the Court's holding in *Russell v. United States*, 369 U.S. 749 (1961), that to be valid the indictment "must go beyond the words of" that statute. "Both to provide fair notice to defendants and to assure that any conviction would arise out of the theory of guilt presented to the grand jury, we held that indictments under §192 must do more than restate the language of the statute." *Resendiz-Ponce*, 549 U.S. at 109 (emphasis added).

¹⁴ HARRY I. SUBIN ET. AL., *THE PRACTICE OF FEDERAL CRIMINAL LAW* 272 (2006).

¹⁵ *Id.*

2. In or about and between May 2004 and January 2005, both dates being approximate and inclusive, within the Eastern District of New York, the defendants PAUL CHRISTOPHER and WILLIAM VAN NESS, together with others, did knowingly and intentionally conspire to distribute and possess with intent to distribute five kilograms or more of a substance containing cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1). (Title 21, United States Code, Sections 846 and 841(b)(1)(A)(ii)(II); Title 18, United States Code, Sections 3551 et seq).

This model form of conspiracy indictment would no longer be considered sufficient if the *Twombly* standard of pleading applied to indictments, since the allegation that the defendant did “conspire” is not supported by underlying factual allegations, but is merely a “conclusion of law.”

In *Twombly*, the complaint charged that a number of telephone companies had “conspired” with each other and “agreed” with each other to engage in certain specified anti-competitive practices, such as refraining from entering into each other’s markets. Such conduct would not violate the antitrust law if each company’s decision to engage in it is reached independently, but would violate the Sherman Antitrust Act if this “parallel conduct” was entered into because the defendants had in fact “conspired” and “agreed” to do so. Under existing law, an indictment alleging that this “conspiracy” and “agreement” had brought about the anti-competitive practices would be held “sufficient” because it included statutory language containing all the essential elements of the charge and apprised the defendants of the charge they must be prepared to meet. Numerous Supreme Court cases have stated that the requirements of a sufficient indictment are that it “contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend.”¹⁶ For purposes of deciding a motion made by one of the defendants to dismiss the indictment for failure to charge that he committed an offense, the allegation that the defendants conspired and agreed together has been assumed by the court to be true.

In the *Twombly* civil case, the complaint of conspiracy to engage in the anti-competitive practices would likewise have withstood a motion to dismiss if the allegation that defendants “conspired” and “agreed” to perform the anti-competitive practices was assumed to be true for purposes of the motion to dismiss. But in *Twombly*, the Court held, by 7 to 2, that this allegation of “conspiracy” was alleging “a legal conclusion” (not a “factual allegation”), so that it would not be assumed to be true. Since the complaint did not allege specific facts that showed such an agreement had been entered into, *Twombly* held that dismissal of the complaint was required. As noted above, and in *Iqbal*, the opposite result would have followed “[h]ad the court simply credited the allegation of a conspiracy.”¹⁷ It should be unacceptable to uphold a challenged criminal indictment by assuming that an allegation that the defendant “conspired” is a true “allegation of fact,” while under *Twombly* a civil complaint would be dismissed because an allegation of “conspiracy” is deemed to be merely “a legal conclusion.”

¹⁶ See, e.g., *Hamling v. U.S.*, 418 U.S. 87, 117-18 (1974).

¹⁷ See *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (discussing the *Twombly* conspiracy allegation).

An accused in a criminal case should be at least as entitled as a defendant in a civil case to be advised by the charging document of the factual basis for the charge filed against him. Indeed, Rule 7(c) of the Federal Rules of Criminal Procedure requires that the “essential facts” be alleged in an indictment, whereas Rule 8(a) of the Federal Rules of Civil Procedure does not by its terms require such specificity. Indeed, as Justice Stevens pointed out in his *Twombly* dissent, the framers of the Federal Rules of Civil Procedure expressly rejected the old civil code rule that the complaint must allege “the facts constituting the cause of action”¹⁸—whereas the new Federal Criminal Rules have required that an indictment plead “the essential facts constituting the offense.”¹⁹ Moreover, Rule 7(c) of the Criminal Rules, unlike Rule 8(a) of the Civil Rules, has a constitutional foundation in the Sixth Amendment, which guarantees the right of the accused “to be informed of the nature and cause of the accusation” against him.

II. How Far Does *Twombly* Go in Changing the Law on Sufficiency of Indictments?

In *Resendiz-Ponce*,²⁰ the Supreme Court divided indictments into two categories: “[W]hile an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity.”²¹

Application of the *Twombly* pleading rule, that “conclusions of law” cannot substitute for the pleading of the underlying facts, would at least move many indictments that are now “often” held sufficient under the precedent of *United States v. Debrow*,²² into the second category, which covers “crimes which must be charged with greater specificity.”²³ The paradigm for the second category, as *Resendiz-Ponce* noted, is *Russell v. United States*.²⁴

But, going further, the *Debrow* case itself might be implicitly overruled by a decision applying to criminal cases the *Twombly* pleading rule that “conclusions of law” cannot substitute for “allegations of fact” in ruling on a motion to dismiss the initial pleading filed against the defendant. *Debrow* itself, on a close reading, really substituted a “conclusion of law” for an allegation as to the underlying facts, in holding that the indictment therein was sufficient. In *Debrow*—which was the first to construe Rule 7(c) after adoption in 1946 of the new Federal Rules of Criminal Procedure—the Supreme Court reversed the lower court decisions and ruled that perjury indictments were sufficient even though they did not allege the specific facts as to the identity of the official who had administered the oath and the source of that official’s authority to do so.²⁵ The Federal District Court in Mississippi, and the majority opinion of the Fifth Circuit affirming the District Court’s ruling, had dismissed a series of indictments for perjury allegedly committed before a U.S. Senate Subcommittee conducting a hearing in Mississippi. The Supreme Court held that “allegations as to those facts were supplied by the

¹⁸ See *Bell Atl. Corp. v. Twombly*, 550 U.S. at 574-75 (Stevens, dissenting).

¹⁹ FED. R. CRIM. P. 7(c).

²⁰ *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007).

²¹ *Id.* at 109.

²² *United States v. Debrow*, 346 U.S. 374 (1953).

²³ *Id.*

²⁴ *Supra* note 13.

²⁵ The perjury statute, 18 U.S.C. § 1621, provided that the oath had to be authorized by a law of the United States; therefore, as the Supreme Court noted, it would be necessary to prove the identity of the person who had administered the oath and that such person, by virtue of his official position, was authorized by statute to administer the oath.

allegations in the indictments that the defendants had ‘*duly taken* an oath’. ‘Duly taken’ means an oath taken according to a law which authorizes such oath.’²⁶

The Supreme Court was thus using a conclusion of law—that the oath was “duly taken”—without requiring (as *Twombly* would) that the facts underlying that “conclusion of law” be pleaded in the charging document. The Court reasoned that the identity of the person who administered the oath “goes only to the proof of whether the defendants were duly sworn.”²⁷ But the Court’s acknowledgment that proof of such person’s identity was required in order to prove two essential elements—that the oath was (1) authorized by a law of the United States and (2) taken before a competent tribunal, officer or person—shows that the Court was substituting the conclusion of law, “duly taken,” for the underlying facts. Those facts, omitted from the indictment in *Debrow*, should be considered “essential facts” within the meaning of the requirement of Rule 7(c), that the indictment state “the essential facts constituting the offense charged.” And the majority of the Fifth Circuit did hold that Rule 7(c) was violated by failure to allege those two “essential facts” in the indictment.²⁸

Thus the Supreme Court’s reasoning in *Twombly* should be held to implicitly overrule the Court’s reasoning in the leading case of *United States v. Debrow*. The precedents following *Debrow*²⁹ should likewise be deemed overruled by *Twombly*. The reaffirmation of *Debrow* in *Resendiz-Ponce* should no longer be held binding.

III. Policy Considerations

The policy considerations that would support applying *Twombly-Iqbal* pleading standards to safeguard the rights of the accused in criminal cases are no less compelling than the Supreme Court’s rationale for according the protection of those heightened standards to defendants in civil cases.

The policy justification given for the Supreme Court’s decisions in *Twombly* and *Iqbal*—which changed prior law so as to make it easier for defendants to terminate civil suits with a successful 12(b)(6) motion to dismiss the complaint as insufficient—was that a dismissal at this juncture of the case spares civil defendants from having to incur significant burdens of expense and time. In *Twombly*, for example, the dismissal saved the defendants the expense of having to engage in extensive discovery procedures, and the resulting risk that defendants may find it more economical to pay an unwarranted monetary settlement than to incur the substantial expense of discovery proceedings. In *Iqbal*, the dismissal spared high public officials from having to spend their time defending themselves in the litigation and being distracted from the performance of their duties.

²⁶ *Debrow*, 346 U.S. at 377 (emphasis added).

²⁷ *Id.*

²⁸ See *United States v. Debrow*, 203 F.2d 699 (5th Cir. 1952).

²⁹ See, e.g., *Hamling v. United States*, 418 U.S. 87, 117-19 (1974) (holding that an indictment for publishing “obscene” material was sufficient even though it did not allege the facts establishing the legal conclusion that the material was “obscene”). The *Hamling* opinion held the indictment was sufficient because it alleged the legal conclusion that the material was “obscene.” (The word “obscene,” as used in 18 U.S.C. § 1461, is not merely a generic descriptive term, but a *legal term of art*.) (emphasis added) See also *Resendiz-Ponce*, *supra* note 20, at 109 (citing *Hamling* with approval).

No less compelling are the justifications for raising pleading standards in order to protect the defendants in criminal cases. The burden spared a defendant by a successful motion to dismiss the case under Rule 12(b)(3),³⁰ is even more important to that defendant's welfare than is a dismissal under Rule 12(b)(6)³¹ to a civil defendant, because the criminal defendant's liberty, rather than the civil litigant's time or money, is at stake. Thus the argument for applying the *Twombly* rationale to the heightened standards for pleading civil complaints—once *Twombly* had been held by *Iqbal* to cover “all civil cases”—should also be applied to raising the standards for pleading indictments in criminal felony prosecutions. The criminal defendant whose motion to dismiss is denied, may well feel pressured into accepting a “settlement” in the form of a guilty plea to a less severe offense, to avoid the risk and strain of going to trial and receiving a heavier sentence if he loses. The concern in *Twombly*, that the civil defendant might be pressured into granting an improptuous monetary “settlement” in order to avoid the cost burdens of litigating its defense, seems less compelling than the concern one should have for a defendant facing loss of liberty if his motion to dismiss is erroneously denied, and he feels coerced into “settling” his case for a “plea bargain” that will send him to jail. The Supreme Court recently noted that approximately ninety-seven percent of federal felony convictions are secured through guilty pleas, because the accused will be sentenced more harshly if he is convicted after rejecting a plea bargain.³²

Moreover, the arguably unfair disadvantage that the *Twombly-Iqbal* rationale imposes on civil plaintiffs—because at the pleading stage they lack the knowledge of certain facts that those cases require the plaintiffs plead in order to avoid a dismissal³³—is inapplicable to the federal government “plaintiff” in criminal cases. There, the “plaintiff” United States government has the resources needed for compelling disclosure of the facts necessary to plead an indictment with the requisite factual specificity. The government's resources are far more extensive than those ordinarily available to the drafters of civil complaints. The prosecutor who will draw up the indictment's allegations can readily employ government-controlled grand jury proceedings, and the grand jury's sweeping subpoena powers, to discover the specific facts which would have to be pleaded in an indictment under an *Iqbal-Twombly* standard of sufficiency. The government also has available the investigative assistance of the FBI and other law enforcement agencies. The government can therefore readily discharge the burden of more careful and detailed pleading of facts that would be required to plead an offense in an indictment under the heightened *Iqbal-Twombly* standard for pleading “factual allegations,” not “legal conclusions.”

Additionally, the accused has far greater need than the civil defendant to secure detailed factual allegations from the plaintiff's initial pleading. The civil defendant can readily flush out the plaintiff's allegations by taking his or her deposition, or submitting written interrogatories, or taking depositions of third parties—none of which basic discovery devices are available to the defendants in federal prosecutions, or those in most states. And the civil defendant whose motion to dismiss for factual insufficiency is erroneously denied still has the opportunity to avoid the burdens of trial by securing a summary judgment in his favor if the plaintiff cannot show

³⁰ FED. R. CRIM. P. 12(b)(3).

³¹ FED. R. CIV. P. 12(b)(6).

³² *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

³³ Before *Twombly* and *Iqbal*, it was more difficult for defendants to foreclose plaintiffs from proceeding with discovery by a motion to dismiss the complaint under Rule 12(b)(6), because the motion would be adjudicated under the “notice pleading” standard as construed in the landmark case of *Conley v. Gibson*. See *supra* note 3.

essential facts at that juncture. But the federal criminal defendant whose motion to dismiss is erroneously denied must then stand trial or plead guilty; there is no equivalent of a motion for summary judgment in federal criminal cases.³⁴

IV. Courts' Use of *Twombly* in Criminal Proceedings

The application of *Twombly* need not be limited to civil cases, as shown by the courts' application of the *Twombly* test to adjudicate motions to dismiss claims against the government brought by criminal defendants or third parties in certain types of criminal proceedings.

In opposing collateral attacks on criminal convictions made by defendants moving to vacate their sentence under 28 U.S.C. § 2255 for alleged constitutional violations, the government often seeks to have defendants' applications for relief dismissed for failure to state a claim. For example, in *United States v. Luck*, Judge Norman K. Moon applied the *Twombly* standard to each of the movant's constitutional claims under § 2255, holding that one of the claims was sufficient to survive the government's motion to dismiss that claim, and granting dismissal of the remaining claims as insufficient to satisfy *Twombly* requirements.³⁵

Rule 12 of the *Rules Governing Section 2255 Proceedings for the United States District Courts* provides that "the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure . . . may be applied to a proceeding under these rules."³⁶ Additionally, *Advisory Committee Notes to Rule 12* recognize "the nature of a § 2255 motion [to vacate the defendant's sentence] as a continuing part of the criminal proceeding . . . as well as a remedy analogous to habeas corpus by state prisoners."³⁷ The *Advisory Committee Note to Rule 1* similarly states that "a motion under §2255 is a further step in the movant's criminal case and not a separate civil action."³⁸ Thus *Luck* clearly illustrates the applicability of *Twombly* to pleadings in criminal cases. This supports the application of *Twombly* to pleading requirements for indictments and informations as well.

Twombly is also utilized by the courts in litigation brought under Rule 32.2(c)(1)(A) of the Federal Rules of Criminal Procedure,³⁹ which governs petitions filed by third parties asserting an interest in property to be forfeited to the government following a defendant's criminal conviction. Government motions to dismiss such petitions for "failure to state a claim" are subject to the *Twombly/Iqbal* test of sufficiency. For example, in *United States v. Egan*,⁴⁰ numerous third parties filed petitions claiming a portion of the property that had been seized by the government from the criminal case defendant, Mr. Egan. The government moved to dismiss these petitions for failure to state a claim. As the Court's opinion notes, the government based its argument for dismissal of the petitions upon *Iqbal* and *Twombly*. But applying the standard of those cases, the Court held each petition sufficient and denied the government's motion to

³⁴ The jurisdiction of Vermont, notably, allows criminal defendants both to take discovery depositions and to move for summary judgment.

³⁵ See *United States v. Luck*, 2009 WL 159859 (W.D. Va. 2009).

³⁶ RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE U.S. DISTRICT COURTS, RULE 12 (2010).

³⁷ ADVISORY COMMITTEE NOTES TO RULE 12 (emphasis added).

³⁸ ADVISORY COMMITTEE NOTE TO RULE 1 (emphasis added).

³⁹ FED. R. CRIM. P. 32.2(c)(1)(A).

⁴⁰ See *United States v. Egan*, 2011 WL 3370392 (S.D.N.Y. 2011).

dismiss each of the petitions. As the case caption (*United States v. Egan*) indicates, these petitions were part of the criminal proceedings, and were authorized by provisions of the Federal Rules of Criminal Procedure.

V. Conclusion

Over the past six years since the *Twombly* decision, most federal district judges will likely have had occasion to consider the application of *Twombly* and *Iqbal* to motions in civil cases, filed on behalf of defendants invoking *Twombly* to support the dismissal of the plaintiffs' complaints. The familiarity of the federal bench with *Twombly* and *Iqbal* should therefore assist counsel for the accused in urging that courts entertain motions to apply *Twombly* and *Iqbal* to defense motions for dismissal of indictments and informations in federal criminal cases.

Just as *Twombly* "retired" the original *Conley v. Gibson* pleading standard that was applied for many years under the Federal Rules of Civil Procedure, so may *Twombly* also "retire" the *Debrow* pleading standard, applied for so many years under the Federal Rules of Criminal Procedure. Allegations that *Twombly* recognizes as mere conclusions of law when pleaded in a civil complaint, are not transmogrified into allegations of "essential facts" when those same words (e.g., "conspiracy") are pleaded in a criminal indictment. Even if the higher pleading standard is not constitutionally required by the Fifth Amendment grand jury clause, the pleading of "the essential facts constituting the offense" is mandated by the terms of Rule 7(c) of the Federal Rules of Criminal Procedure,⁴¹ and by *Twombly*.

⁴¹ FED. R. CRIM. P. 7(c).