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JAMIE HARMON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JAMIE HARMON et al., Defendants.	No. CR 08 00938 JW/PVT NOTICE OF MOTION AND MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES

TO THE CLERK IN THE ABOVE-ENTITLED COURT AND TO THE UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:

Please take notice that on a date to be set by the Court, this matter may be heard before the Honorable James Ware, United States District Judge. At that time, defendant will move this Court for an order granting a judgment of acquittal or, in the alternative, for a new trial.

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This motion will be based on the accompanying Memorandum of Points and Authorities, the complete file and trial record in this matter and such further evidence and arguments as allowed at the hearing of this matter.

Dated: October 13, 2010

Respectfully submitted,

/s/ SHARI L. WHITE
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JAMIE HARMON

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendant HARMON was indicted in six counts with conspiracy to launder monetary instruments (Count Two) as well as substantive counts in connection therewith (Counts Three through Seven) in violation of 18 U.S.C. §§ 1956(h) and 1956(A)(i)(b)(i), respectively.

On July 20, a jury was unable to reach a verdict on the conspiracy count, but convicted Defendant of the five substantive counts.

Under the Federal Rules of Criminal Procedure, Rule 29(c) permits a post-verdict motion for judgment of acquittal, and Rule 33 provides that: "[t]he court on motion of a defendant may grant a new trial to the defendant if required *in the interest of justice*." (emphasis added)

II. PRE-INDICTMENT DELAY VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND MANDATES A JUDGMENT OF ACQUITTAL DUE TO THE RESULTING PREJUDICE.

"The Fifth Amendment guarantees that defendants will not be denied due process as a result of pre-indictment delay." *United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007) *quoting United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989).

Rule 48(b) of the Federal Rules of Criminal Procedure, as adopted by Congress, authorizes a district court to "dismiss an indictment... if unnecessary delay occurs in: (1) presenting a charge to a grand jury ..."

The defense filed a pre-trial motion to dismiss the indictment in this case on those grounds. The court denied the motion, ruling that the Defendant had failed to show the requisite prejudice.

A defendant asserting the denial of due process resulting from pre-indictment delay must show "actual, non-speculative prejudice from the delay and that the delay, when weighed against the government's reasons for it, offends those fundamental conceptions of justice which lie at the

base of our civil and political institutions." *United States v. Gilbert*, 266 F.3d 1180, 1187 (9th Cir. 2001) (internal quotation marks and citation omitted)

While the assertions of the defense may have been speculative in some measure before trial, Defendant contends the United States Attorney's delay in prosecuting this matter resulted in demonstrable prejudice at trial. The defense therefore respectfully moves this Court to reconsider its pretrial decision on this issue.

The indictment in this case was brought a week prior to the expiration of the applicable statute of limitation. Although the United States Attorney is certain to maintain that any filing within that period is acceptable, this argument flaunts the United States Supreme Court holding in *United States v. Lovasco*, 431 U.S. 783 (1977). [Citation omitted]

The holding in *Lovasco* "acknowledge[d] that the statute of limitations does not fully define [a defendant's] rights with respect to the events occurring prior to indictment and that the Due Process Clause has a limited role to play in protecting against oppressive delay." *Lovasco* (*supra)* at 789.

In some circumstances the Due Process Clause requires dismissal of an indictment even when brought within the limitations period. *United States v. Marion*, 404 U.S. 307 (1971).

Generally, dismissal is proper under Rule 48(b) when delay is purposeful or oppressive. *United States v. Sears, Roebuck and Co.*, 877 F.2d 734, 739 (9th Cir. 1989). The defense contends that delay of this sort inheres in the prosecution's conduct in this case.

As noted in *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998):

> "Generally, the statute of limitations for a particular crime limits the government's delay in bringing an information and protects the defendant from the effects of excessive delay. However, delay violating a defendant's Fifth Amendment due process rights requires dismissal of the charges even if the statute of limitations has not expired. … [Accordingly] a defendant must show the delay, when balanced against the prosecution's reasons for it, offends those fundamental conceptions of justice which lie at the base of our civil and political institutions."(Internal quotation marks and citation omitted.)

This concept is stated simply elsewhere:

"... [A] delay between the offense and indictment, if prejudicial, can constitute a denial of due process. In determining the prejudicial effect of a pre-indictment delay, the governing standard is whether the delay has impaired the defendant's ability to defend himself." *United States v. Golden*, 436 F.2d 941, 943 (8th Cir.), *cert. denied,* 404 U.S. 910 (1971); *See also United States v. Pallan*, 571 F.2d 497, 500 (9th Cir. 1978); *United States v. Deloney*, 389 F.2d 324, 325 (7th Cir. 1963) (unreasonable delay coupled with prejudice requires "that relief under the Fifth Amendment should be afforded.")

A reference from the California state court is instructive: "[p]rejudice ... may be shown by ... [a] fading memory caused by lapse of time." *People v. Archerd*, 3 Cal. 3d 615, 640 (1970). "If the government... impairs a defendant's right to a fair trial, an inordinate pre-indictment delay may be shown to be prejudicial." *Id*.

Here, as a direct result of inordinate pre-indictment delay, "fading memory caused by a lapse of time" "impair[ed] defendant's right to a fair trial." The Ninth Circuit agrees that where delay has led to "dimmed memories," and "[w]here impairment is shown, it may be argued that such element is a factor to be considered as contributing to the actual prejudice to the defendant." *United States v. Mays*, 549 F.2d 670, 680 (9th Cir. 1977).

As the United States Supreme Court observed, prejudice is demonstrated when "defense witnesses are unable to recall accurately events of the distant past." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). In *Barker*, the Court remarked that "[l]oss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Id.*

Throughout the trial, and as referenced herein, virtually every witness acknowledged and evinced significant memory loss. Only those witnesses with memories practiced by repetition

before the grand jury could readily "recall" events and then only when questioned by the government.

Witnesses could not remember the critical dates of telephone calls, meetings, letters, and with whom those communications took place. The government made much of the faded memories of defense witnesses, inferring concealment where a reasonable observer might conclude only that time was the culprit, and despite the fact that prosecution witnesses suffered comparable lapses.

Exhibit A, attached, contains an exhaustive list, in chronological order, of the details of witness' failed memory during critical testimony.

A fundamental element of the prosecution's case against the defendant was that she had knowledge of Christian Pantages' criminal conduct on previous occasions, and should have been on notice that funds given to her by the client were the proceeds of illicit activity. The timing of this notice was critical, since the prosecution claimed the defendant knew Christian Pantages was dealing in stolen property from the start of their relationship. When the defendant received documents, or had access to them in the state court file was a recurring theme throughout the prosecution's case.

By way of examples, the first prosecution witness, Steven Kendig, a Mountain View Police Officer assigned to the REACT task force and responsible for the investigation of this matter, testified more than a dozen times that he could not remember vital components of the case he had developed. Purportedly, the defendant was provided with a copy of an affidavit Kendig had written in support of the state prosecutor's opposition to Pantages' release on bail. This document, in evidence, makes reference to Pantages' previous criminal conduct; Kendig could not remember when or if it was filed or how it was delivered to the court.

Kendig's faded recollection impaired Ms. Harmon's ability to defend herself, as this information would not only have been useful for impeachment of this witness, but also would have

provided valuable evidence to corroborate whether and on what dates the defendant had been provided with the information of her client's alleged criminal past.

David MacPherson, an attorney and prosecution witness, did not remember what actions he took with respect to the two particular checks at issue; checks which formed the foundation for his involvement in the present case. MacPherson was unable to remember whether his client endorsed a $45,000.00 check to him at the county jail; MacPherson's convenient failure to recall this last detail is unsurprising, since his receipt of the funds is a critical factor in whether or not he could be found criminally liable for money laundering on the basis of the statutory definitions used to prosecute the defendant in this case.

Santa Clara County Deputy District Attorney James Sibley could not remember whether he provided the defendant with important documents, and if so, on what dates that might have occurred. The deterioration of Mr. Sibley's memory was further evidenced by his failure to recall significant events in the state criminal cases. Perhaps most notably, Sibley had no recollection of seeing correspondence he purported to have faxed to the defendant, warning her of her possible criminal liability for accepting checks from Christian Pantages.

Sibley, who brought the fortuitously-discovered letter to court in the middle of trial where it was first disclosed to the defense, was unable to recall whether he received any confirmation that the defendant received the letter, which he claimed to have faxed to her on February 11, 2004.

Given that the government insisted that the defendant acquired knowledge of Pantages' criminal conduct through information she was ostensibly provided by the state prosecutor, Sibley's conveniently poor memory was significantly prejudicial to the defense.

Ingrid Cortopassi, Christian Pantages' former wife, and against whom investigators failed to persuade the United States Attorney to bring an indictment, when called as a prosecution witness, stated in response to more than twenty questions that she could not recall pivotal conversations and

events relating to the defendant's representation of Chris Pantages. She could not recall the precise details of her interactions with the defendant which could have shown either the absence of a conspiracy or some information about the defendant's intent when she accepted Pantages' checks.

Christian Pantages was unable to accurately recall the specific nature, extent, and timing of essential conversations with the defendant relating to SVR. Pantages forgot innumerable details of the various statements he has made to law enforcement officials. He could not recall statements he made to officials at the California Bar Association concerning their investigation into his moral character.

Pantages could not remember details regarding his involvement in the civil case, including the contents of his declaration, or who told him that Ebyam asked the defendant to deposit an $80,000 SVR check into her client trust account.

Pantages did not remember whether he disclosed the nature of SVR's business dealings to James Roberts (his attorney in the civil case). He could not recall the particulars of the SVR timeline he provided to Roberts in preparation for the civil suit, nor who prepared it; in fact for most of the pre-trial period in this case, Pantages persisted in misinforming the government that he had prepared the timeline for the defendant. This claim was exposed as fraudulent when it was discovered that Roberts was the only attorney with the timeline in his file and the only one who could provide it.

Pantages' lapses of memory materially impaired the defendant's ability to defend herself, since this evidence would have been exceedingly valuable for impeachment purposes, as well as to determine the extent of the defendant's knowledge of SVR's business dealings.

Yan Ebyam, called as a hostile defense witness, was, as during his testimony before the grand jury, unable to recall the conditions of his 2004 plea agreement with federal prosecutors. Mr.

Ebyam's failure of memory was also evidenced by his inability to recall specific portions of his testimony before the grand jury.

Mr. Ebyam's memory of particular events leading to the filing of the civil suit was equally feeble. Of consequence, Mr. Ebyam could not remember the details of his conversations Chris and Ingrid Pantages regarding the SVR checks or particulars of his negotiations with Chris Pantages concerning the division of SVR's assets.

Finally, the defendant herself could not remember the timing and substance of significant conversations and events relating to Christian Pantages and SVR, including what he told her about SVR and Ebyam when she met with him in jail on December 22, 2003 and at her office the following day. Critically, the defendant could not recall the precise dates and times she received documents or whether she received them at all.

Documentary evidence was likewise compromised by the corrosive effects of time. A striking example of this occurred in connection with the condition of the state prosecutor's files, offered through Deputy District Attorney James Sibley, which were incomplete, in disarray and established an abject failure of continuity. Sibley explained these defects by testifying that the District Attorney's office computers had been through several incarnations, and that their data storage protocol had changed over the years.

In *Ross v. United States*, 349 F.2d 210, 215 (D.C. Cir. 1965), a mere seven-month delay in a narcotics indictment resulted in "a trial in which the case against appellant consist[ed] of the recollection of one witness refreshed by a notebook."

Such a situation caused the court to conclude that "[w]ithout attempting to define the precise reach of the Fifth Amendment in this context, a due regard for our supervisory responsibility for criminal proceedings…requires, in our view, the reversal of this conviction." *Id.* at 216.

Following the *Ross* rationale, this court is similarly obliged to consider its supervisory responsibility in criminal cases, and order a reversal of this conviction based on the prejudice inherent to the defendant from the obvious deterioration of witness' memories, in addition to significant discontinuities in the documentary evidence.

Timing was a critical aspect in the proof of the defendant's knowledge of her client's criminal proclivities and his relationship to the funds she received from him. When she acquired various documents from the state prosecutor and his investigators was crucial to her understanding of the events which led to her client's acquisition of the funds in question. In a case where a difference of a few hours in the delivery of a check or of a document is the sole line of division between innocent and criminal knowledge, it is manifestly prejudicial to the defense to bring prosecution after such a span of time.

Absent the clear memory of witnesses at trial, and without a reliable, established continuum for the receipt of the documents proffered there, any intelligent attempt to discern when, or even if the defendant was aware of the illicit source of the funds she received, was nothing more than a long, tiresome guessing game for the jury. Certainly, in the face of the thousands of pages of information provided to the jury from the state prosecution's many files, that the defendant lost this game is not surprising.

This case is readily distinguished from cases such as *United States v. Sherlock, supra*, 962 F.2d 1349, in which a thirty-six month pre-indictment delay was held to be insufficiently prejudicial to warrant reversal (although Sherlock's conviction was reversed on other grounds).

In *Sherlock* the defendants asserted that the delay caused the victims in the case to repeatedly testify that they could not recall certain events surrounding the case. Here, nearly every witness displayed patently damaged recall. Unlike *Sherlock,* in which only government witnesses'

memories failed, a point arguably in the defendant's favor, in this case the lack of recall was epidemic.

In *Sherlock,* the indictment was brought slightly more than halfway through the five-year limitation period. Here, by contrast, the indictment was brought a mere six days before the statutory period expired.

Turning to the second element suggested by *Doe, supra*, 149 F.3d at 948, the delay must be "balanced against the prosecution's reasons for it."

Even in cases like *Sherlock*, where the Court described the evidence of prejudice as being "slim," the government's rationale was still weighed. *Sherlock*, 962 F.2d at 1355. Here, the government provided no explanation for the delay: their reasons for it are presently either a well-guarded secret, or will ultimately prove to be nonexistent.

The government presented evidence at one grand jury session after another without bringing an indictment against this defendant although government witnesses acknowledged that the defendant was being investigated as far back as early 2004.

This constitutes delay for no reason other than government convenience. There was meager evidence introduced at trial that the government did not already have in its possession at the beginning of the period of statute of limitations. Every act charged in the indictment in this case was complete by February, 2004, and all supporting documentation was complete and available, and largely in the government's possession at that time.

Unlike *Sherlock,* in which an investigation was ongoing and evidence was being developed during the period of delay, evidence that the government introduced at the trial of this case languished in government files, unused for half a decade. Such a feeble rationalization for doing violence to the due process clause should be rejected by this court.

Based upon evidence that the government empaneled two separate grand juries, and engaged in at least three sessions of evidence-taking before these panels, the Defendant suggests that delay in bringing the indictment was an intentional strategy on the part of the government. In the absence of an explanation, this Court may infer that the government intended to make presenting a defense more difficult, knowing that facts would be obscured by the march of time.

A defendant, however, need not demonstrate that government delay was the product of an intentional stratagem; that suggestion was expressly rejected by the Ninth Circuit. *Mays*, 549 F.2d at 677. In lieu of intentional delay, "negligent conduct can also be considered, since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." *Id.*, 549 F.2d at 678, *citing United States v. Barket,* 530 F.2d 189, 195 (8th Cir. 1976).

Once a defendant makes a showing of prejudice "due to an unusually lengthy government-caused pre-indictment delay, it then becomes incumbent upon the government to provide the court with its reason for the delay." *Mays*, 549 F.2d at 678. The government must now provide this Court with not only a justification for their delay but with a justification that trumps the due process rights of the defendant. In the absence of any such explanation, this Court must reject the government's case as improperly and untimely brought in abrogation of the defendant's rights.

The combined application of Rules 12(b)(3)(B) and 48(b), the Due Process Clause and this court's inherent supervisory powers, strongly suggest that the indictment in this case should be dismissed for the unexplained, unconscionable, and unjustifiable delay of nearly five years.

III. A JUDGMENT OF ACQUITTAL OR NEW TRIAL IS REQUIRED SINCE THE DEFINITION OF MONEY LAUNDERING IN THIS CASE IS CONSTITUTIONALLY VAGUE.

A statute may be challenged as either facially vague *or* vague-as-applied to the defendant. *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984).

The defendant asserts that 18 U.S.C. § 1956 is vague as applied only to her and those similarly situated. She was accused of conspiring with and assisting a former criminal defense client with obscuring the origins of two checks that she allegedly knew to the fruits of illegal activity. To accomplish this purportedly criminal scheme, the defendant deposited two checks into her attorney-client trust account, and then distributed the balance of the funds, minus her attorney fees, to the client in a series of checks.

Such facts suggest that the money laundering statute as applied to the Defendant is void for vagueness, since attorneys are *required* by California law to perform such tasks. It is unreasonable to suggest that any California attorney would understand this conduct to be prohibited under Federal law when it is mandated by state law. *See e.g. In the Matter of Sampson,* 3 Cal. State Bar Ct. Rptr. 119 (1994) (Holding that failure to account for trust funds violates Business and Professions Code §§ 6068(m), 6106, and California Rules of Professional Conduct, Rule 4-100.)

The defense does not dispute that there is case law that holds that the definition of money laundering in 18 U.S.C. § 1956 is not constitutionally void for vagueness on its face. *See United States v. Estacio*, 64 F.3d 477, 480 (9th Cir. 1995) *citing United States v. Ortiz*, 738 F. Supp. 1394, 1400 (S.D. Fla. 1990); *United States v. Gleave*, 786 F. Supp. 258, 270 (W.D.N.Y. 1992), *rev'd on other grounds sub nom United States v. Knoll*, 16 F.3d 1313 (2d Cir.), *cert. denied*, 115 S. Ct. 574 (1994).

However, the doctrine of void-for-vagueness is anchored in basic guarantees of due process. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The doctrine mandates that penal statutes be sufficiently definite so that ordinary people can understand what they may and may not do. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

A statute is also void for vagueness if it encourages arbitrary or discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). "To pass the vagueness test,

statutes and regulations must be sufficiently clear so that ordinary people can understand what conduct is being prohibited and written in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Ninety-Five Firearms*, 28 F.3d 940 (9th Cir. 1994).

Whether a statute is unconstitutionally vague is a question of law. *Id.*, 28 F.3d at 941. When a statute asserted as vague implicates a constitutional right, like the Sixth Amendment right to counsel at issue here, "a more stringent vagueness test should apply." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499 (1982).

The challenge to a statute under the doctrine of void-for-vagueness concerns itself with two things: whether the defendant may bring such a challenge, and whether she will succeed. If the conduct of the defendant as charged "clearly come[s] within the statute, [s]he cannot make a void for vagueness challenge." *U.S. v. Jae Gab Kim*, 449 F.3d 933, 942 (9th Cir. 2006). This is a "threshold inquiry, weeding out those defendants who cannot make an as-applied vagueness challenge at all. If . . . the defendant's conduct does not fall squarely and obviously within the statute, he can make an as-applied vagueness challenge." *Id*.

It is entirely unclear that the Defendant's conduct fell within the scope of the money laundering statute. Certainly, the government seeks to pin unsuspecting attorneys between the federal government and the State Bar of California. Specifically, Rule 4-100 (B)(4) of the Rules of Professional Conduct states, without exception, that a member of the State bar shall: "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

The "Handbook of Client Trust Accounting for California Attorneys," published by the California State Bar, explains at page 19 that "[t]his means that if your client asks you to return money you are holding in trust for that client, you must deliver that money promptly." Furthermore, the same handbook directs that a California attorney "should always pay out money from your

client trust bank account by using a check, a wire transfer or another instrument that specifies who is getting the money and who is paying it out."

The Bar absolutely requires that a California attorney will *always* do precisely what the Defendant in this case did because a California attorney *must*: when a client has a positive trust balance and asks for their money, they are to "promptly" receive "a check, a wire transfer or another instrument" returning their funds.

The California rule governing attorney conduct does not mention nor suggest that any basis exists upon which an attorney may refuse to return funds. There is no clause which permits an attorney to investigate the reasons for which the client wishes to retrieve their funds. Neither does the rule contains a requirement that the return of funds be in one, a dozen or a hundred disbursements.

According to the government, conduct mandated by the State Bar constitutes money laundering in violation of federal law as set forth in § 1956 when the attorney has been told by the government that the client is a suspected criminal, or when the client divulges information which might lead to a conclusion that they are possibly guilty of at least some of the charges against them. Including this conduct in the definition of the statute, and thereby denying an as-applied challenge generates both disturbing policy and legal implications.

The second step to any vagueness challenge is a consideration of the substantive merits of the vagueness challenge; a court must determine whether the statute's application was unconstitutionally vague because it did not put the defendant on notice that the charged conduct was prohibited. *Id.*; *see also U.S. v. Purdy*, 264 F.3d 809, 811 (9th Cir. 2001).

The statute will meet the level of "certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common

understanding and practices." *Panther v. Hames*, 991 F.2d 576, 578 (9th Cir. 1993) (internal quotation marks and citations omitted)

Put another way, "[a] defendant is deemed to have fair notice of an offense if a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question." *U.S. v. Fitzgerald*, 882 F.2d 397, 398 (9th Cir. 1989).

The inclusion of scienter as an element of the offense "'may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.'" *Jae Gab Kim*, 449 F.3d at 943 *quoting Village of Hoffman Estates,* 455 U.S. at 499. For example, such a requirement allows a person of ordinary intelligence to "base his behavior on his factual knowledge of the situation at hand and thereby avoid violating the law." *Id.*

Notice to the defendant that the federal government would seek to prosecute her for her conduct was anything but adequate.

When asked by this Court what a similarly-situated attorney should do after depositing client funds in her trust account and then learning the funds may be tainted, attorneys for the government had no ready answer. One suggestion was that the attorney might "lodge the funds with the court." The ethical dilemma presented by such a suggestion, and the means by which an attorney might avoid violating attorney-client privilege or the client's Fifth Amendment right against self-incrimination, was apparently not a consideration for the government.

Arguably, the rules of professional conduct might be legislatively amended to allow an attorney to refuse the return or use of funds until their legality has been established to the satisfaction of the government. However, no such rule governed the conduct of the defendant or any other California lawyer.

With no answer to the question of how to conform behavior to the demands of the government in this situation, the potential defendant is left to rely upon the "*noblesse oblige*" of the

government and, as the United States Supreme Court wrote in *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010), the courts will "not uphold an unconstitutional statute merely because the Government promised to use it responsibly."

As previously noted, the jury convicted Defendant of Counts 3-7, which each alleged that she violated 18 U.S.C. § 1956(A)(i)(b)(i) in that she:

> Did knowingly and willfully conduct and attempt to conduct a financial transaction affecting interstate commerce as described below which involved the proceeds of a specified unlawful activity, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, and that while conducting and attempting to conduct such a transaction, knew that the property involved in the financial transactions, that is, funds and monetary instruments, represented the proceeds of some form of unlawful activity.

The closely related statute at 18 U.S.C. § 1957, titled "engaging in monetary transactions in property derived from specified unlawful activity" is a companion statute to § 1956. Although defendant was not charged under § 1957, subsection (f) thereof provides that "[a]s used in this section:"

> (f) The term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution.

The exemption under § 1957(f)(1) was inserted by the drafters to "prevent the broad reach of the statute from criminalizing a defendant's bona fide payment to her attorney." *United States v. Rutgard,* 116 F.3d 1270, 1291 (9th Cir. 1997).

As noted, 18 U.S.C. § 1957(f)(1) provides that "monetary transactions" prohibited by the statute generally do not include "any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution." This language exempts

"monetary transactions" in the form of particular criminal defense fee payments as necessary to secure assistance of counsel in a criminal prosecution.

The right to representation as guaranteed by the Sixth Amendment referred to in the exemption, is the right to "assistance of counsel" in a "criminal prosecution;"[1] The "monetary transaction" generally "necessary" to exercise this right is a fee payment to counsel. Indeed, it is hard to imagine what "monetary transactions" Congress was referring to when it enacted this language into law, if not fee payments to criminal defense counsel.

The Constitutionally-compelling reason Congress created the exemption was because "[t]he exception for attorney's fees assures that an individual, who necessarily must reveal the details of his criminal activity to his attorneys, is able to obtain legal assistance."[2]

The defendant, an attorney, has been charged with criminal knowledge based upon what she was told by state prosecutors and police in their filings, in addition to what Christian Pantages claimed to have revealed to her about his business.

As the late Senator Edward Kennedy (who participated in the discussions with the House leading to the final language of the bill) explained, the absence of the attorney fee exemption would:

> …discourage[ ] attorneys… from taking on clients [and] from communicating with them [because] an attorney's fear of being prosecuted and imprisoned places an intolerable burden on the constitutional right to counsel.[3]

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[1] The exact text of the Sixth Amendment right to counsel is as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[2] 134 Cong. Rec. S32692, S32695 Section-by-Section Analysis of Judiciary Committee Issues in H.R. 5210 (Oct. 21, 1988).

[3] Report on 134 Cong. Rec. S32692.

The legislative intent underlying this language is equally applicable to a charge made under § 1956.

The issue is one of grave importance to our legal system. A considerable portion of both federal and state crimes are offenses that generate "proceeds." Most of those offenses are covered by the prohibitions in § 1957. Defendants with the "proceeds" of crime potentially in hand are the very people criminal defense lawyers deal with continually throughout their careers. Even when fees tendered by a client appear to be free of any criminal taint, some level of uncertainty invariably remains.

Other professionals can simply decline to do business with people accused of crimes; they are unlikely to even know someone's criminal status or have cause to inquire. Such transactions do not implicate a Constitutional right. Further, such persons are not required by the rules governing their profession to hold the property of the clients in trust.

The criminal defense bar does not have the luxury of turning every accused criminal away. Without some protection from prosecution, a criminal defense attorney who takes funds in trust is now at risk, based on the government's application of the law. The case before the Court exemplifies why Congress exempted transactions involving criminal defense fees from criminal prosecution under 18 U.S.C. § 1957.

In an attempt to at least ameliorate the vagueness inherent in the government's reading of the statute, the Defendant filed a pre-trial motion for a proposed jury instruction to read as follows:

> Ladies and gentlemen of the jury, you have heard testimony and received documents indicating that defendant, in her capacity as a criminal defense lawyer, represented Mr. Pantages in a state court criminal proceeding charging him with receiving stolen property. The term "financial transaction," as previously defined for you (pursuant to the MODEL INSTRUCTIONS) *does not* include any such transaction necessary to preserve a person's right to representation by a lawyer in an unrelated criminal case. Therefore, if you find the defendant falls within this exception, *i.e.* if you find that the financial transaction between Mr. Pantages and Ms. Harmon was all for potential attorney fees, then you must return a verdict of NOT GUILTY.

This court declined to provide such an instruction.

IV. A NEW TRIAL IS REQUIRED BECAUSE THE ADMISSION OF POLICE REPORTS WITHOUT REQUIRING THE REPORTING OFFICERS TO TESTIFY VIOLATED THE DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HER AND THE HOLDING OF *CRAWFORD V. WASHINGTON.*[4]

A new trial is warranted due to the prosecution being permitted, over defendant's objection, to admit into evidence a plethora of police reports written during the state's criminal investigation of Christian Pantages and a number of other defendants and suspects. Those reports detailed investigations which eventually led to multiple California convictions for a number of persons, including Pantages.

The Court gave a limiting instruction that documents were offered solely for the purpose of showing what information was provided to Defendant regarding Pantages' alleged criminal acts prior to releasing his funds from her client's trust account. Putting aside the fact, discussed previously, that there was scant evidence to demonstrate the means by which this information was provided to her, or whether it was provided at all, this instruction could not protect defendant's Constitutional right to confront the witnesses against her, since the officers who authored the reports were not called to testify.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."

Long ago, in *Pointer v. Texas*, 380 U.S. 400, 405 (1965), the Supreme Court emphatically stated:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of

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[4] *Crawford v. Washington,* 541 U.S. 36 (2004).

> confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

In *Maryland v. Craig*, 497 U.S. 836, 845 (1990), the Supreme Court explained that:

> "The essential concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word 'confront' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness."

Accordingly, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier-of-fact [has] a satisfactory basis for evaluating the truth of the [testimony]." *Dutton v. Evans*, 400 U.S. 74, 89 (1970). In other words, "[t]he right to cross-examine ... is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987).

More specifically, "the right guaranteed by the Confrontation Clause ...forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of the truth." (citation omitted) *Craig,* 497 U.S. at 845-846. Thus, the right of counsel for the accused to confront and cross-examine is cherished and remains "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

The defendant in the *Crawford* case stabbed the victim and was charged with assault and attempted murder. At trial, he claimed self-defense. In the course of their investigation, the police had conducted a recorded interview of defendant's wife, which tended to negate a claim of self-defense. Because of the state's marital privilege, the wife could not be called as a witness. Therefore, the prosecution sought to introduce the taped interrogation as evidence that the stabbing was not in self-defense. The defendant objected, asserting that his confrontation rights would be

violated. The trial court allowed the tape to be played for the jury, ruling that the Sixth Amendment does not bar admission of an unavailable witness's statement if it bears "adequate indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 66 (1980).

The defendant was found guilty. However, the United States Supreme Court ultimately reversed, explaining that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford,* 541 U.S. at 62.

Crawford effectively overruled *Roberts* stating:

> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. *Crawford,* 541 U.S. at 62.
>
> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability"... Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. (*Id.* at 61)

Here, the jury was given unfettered access to reports detailing what the police alleged to be true regarding the criminal activity of Christian Pantages a number of other criminal suspects and defendants.

The defense was denied the right to confront the report writers, and was thus deprived of an opportunity to ask questions which might have established or cast doubt upon the source and reliability of the claims made in the reports. When police reports were introduced to the jury after being approved by the court without being subjected to the rigorous test of cross-examination, they were acquired a false veneer of reliability. Jurors tellingly commented to the media that these

police reports indicated that the Defendant should have known that the funds she received were unlawfully acquired.

Allowing these police reports into evidence, even when accompanied by a limiting instruction, failed to overcome the mandate of the Confrontation Clause and the holding in *Crawford v. Washington*.

V. A JUDGMENT OF ACQUITTAL OR NEW TRIAL IS REQUIRED BECAUSE THE GOVERNMENT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS BY OBTAINING AN INDICTMENT THROUGH INTENTIONAL GOVERNMENT MALFEASANCE WHICH INCLUDED THE USE OF KNOWINGLY PERJURED TESTIMONY.

In Defendant's case, the conduct of the government in the presence of the grand jury was outrageous, resulting in the return of an indictment which rests upon the treacherous ground of perjured testimony.

This issue does not involve the failure to disclose evidence pursuant to either the Jencks Act or *Brady*, but the denial of due process which stems from the use of knowingly perjured testimony solicited from a key witness on the issue of his credibility, which ultimately resulted in the indictment of the Defendant.

Because government misconduct permeates the indictment, the Defendant's guarantee of due process under the law has been violated, and this Court should grant her a judgment of acquittal notwithstanding the findings of the jury.

An indictment based upon knowingly perjured testimony violates guarantees of due process. *Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008) *citing Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Supreme Court made clear that this prohibition against the use of false testimony applies when the testimony in question is relevant on the issue of the witness's credibility. Because each individual violation of the rule against allowing

perjured testimony further "undermines … confidence in the decision-making process," these violations cannot be viewed in isolation and are to be considered "collectively." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

The government's failure to disclose to the grand jury a promise made to a crucial government witness, even when the promise was made by someone other than the prosecutor who ultimately presents the false testimony, violates both *Napue* and *Brady*. *Giglio v. United States*, 405 U.S. 150 (1972).

Just prior to trial, and within several days of receiving transcripts from the government concerning the grand jury testimony of Yan Ebyam, defendant filed a "Motion to Dismiss Indictment for Prosecutorial Misconduct in Grand Jury Proceedings."

The motion was predicated on the fact that AUSA Cheng not only allowed the witness to commit perjury before the grand jury three times, when he denied that he was cooperating pursuant to a plea agreement with the United States, but solicited the perjured testimony on each occasion.

Because Ebyam's falsehoods were presented during confidential grand jury proceedings, defendant, as required by Rule 6 (e)(1), Fed. Rules of Crim. P., moved to seal her motion.

Without holding a hearing on the motion, this court made the following order:

> Defendant moves to dismiss the Indictment on the ground of prosecutorial misconduct in grand jury proceedings (footnote). Upon review of the Motion and supporting papers, the Court finds that the government has not violated the Jencks Act or Brady. Accordingly, the Court DENIES Defendant's Motion to Dismiss.

The above indicated footnote reads as follows:

> The Court GRANTS Defendant's Motion to file the Motion to Dismiss under seal. (Docket Item No. 109.) Since the Motion is filed under seal, the Court will not refer to its contents and addresses the Motion in a summary fashion only.

Ebyam testified at trial and was examined by defense counsel on his thrice-repeated misstatements to the grand jury. Those statements were used to impeach him and were presented in

open court. Since the trial has concluded, the contents of the grand jury proceedings are no longer under seal.

It should be noted that the court's finding that "the government has not violated the Jencks Act or *Brady*" was not the issue in Defendant's original motion. The Jencks Act[5] only concerns the production of witness statements in the government's possession. That obligation was satisfied, albeit at the last possible moment. *Brady* material (defined by *Brady v. Maryland,* 373 U.S. 83 (1963)) imposes a duty on the government to *disclose* either exculpatory or impeaching evidence. That obligation – disclosure – was finally made within only days of trial.

The flaw in the indictment is not one which can be cured by disclosure after the fact. The defense motion in its previous iteration concluded then, as now, that within the meaning of the Due Process Clause and this court's inherent supervisory powers, the indictment should be dismissed for unconscionable and outrageous conduct by the United States Attorney.

Yan Ebyam pleaded guilty to conspiring to launder monetary instruments (18 U.S.C. § 1956(h)) based upon a criminal enterprise that he conducted with the defendant's putative co-defendant in this case, Christian Pantages.

The plea agreement into which Ebyam entered was filed on September 29, 2004, and signed by AUSA Krotoski, Ebyam, and defense attorney James Blackman. AUSA Krotoski was employed in the same local United States Attorney's office as employs the prosecutors in this case.

The Defendant was indicted on December 31, 2008. In seeking the indictment, AUSA Cheng presented Ebyam to grand jurors. *See* Grand Jury Transcript of June 13, 2007 at GJ-000229; Grand Jury Transcript of July 18, 2007, at GJ-000155.

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[5] Rule 26.2, Fed. R. of Crim. P. and 18 U.S.C. § 3500.

The United States did not voluntarily divulge Ebyam's plea agreement to the Court or the defense. It is a fair inference that the government did not intend the defense to gain access to that plea agreement, although it contains information that appears to fall squarely into rules of disclosure under *Brady* and *Giglio*.

Specifically, Ebyam's plea agreement with the United States included the promise that the United States would recommend a downward departure from sentencing guidelines based entirely on his cooperation both "before and after" he was sentenced. *See* Ebyam plea agreement (hereinafter plea agreement) at page 5, 17-18. The transcript of Ebyam's sentencing hearing acquired by the defense after the trial in this case, confirms that the government did make such a recommendation, and that this court explicitly acknowledged consideration of the agreement in its sentencing decision.

Although this motion is grounded in the denial of due process and not the failure to provide discovery under *Brady*, it is worth noting that "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Ebyam was specifically required to be truthful with the United States (plea agreement at 5:19-20), with probation officers (plea agreement at 6:23-25), with the grand jury (plea agreement at 5:19-20, 22), and with this Court (plea agreement at 5:20, 22). He also promised to keep his agreement with the United States confidential absent express permission from United States Attorney to reveal it. *See* plea agreement at 6:1-2 ("I will not reveal my cooperation, or any information related to it, to anyone without prior consent of the government").

In order to effectuate the promise of his post-adjudication cooperation with the United States, Ebyam expressly waived his right to assert any statute of limitations defense in future

prosecutions if he failed or refused to meet his obligations under the agreement. *See* plea agreement at 7:7-9.

On each of the three separate occasions when Ebyam testified before the grand jury, he was subject to the terms of his plea agreement, and consequently subject to prosecution without regard to the statute of limitations, for any other crimes related to his criminal enterprise. *See* plea agreement at 7:17-18.

AUSA Cheng conducted the questioning of Ebyam during three discrete grand jury sessions. June 13, 2007 (GJ-000229)[6]; July 18, 2007, (GJ-000155); September 28, 2008 (GJ-00073).

This government witness, at each session of the grand jury, was questioned about whether or not he was testifying subject to a plea agreement, and whether any promises had been made in exchange for his testimony.

During the June 13, 2007 session of the grand jury, Ebyam was testifying about evaluating the risks of purchasing particular stolen computer equipment when a grand juror interrupted. Ebyam was asked to leave the grand jury chambers. GJ-000256:15-19. An unrecorded discussion ensued, in violation of Federal Rules of Criminal Procedure, Rule 6(e)(1). When Ebyam returned to the stand, the questioning proceeded in the following manner at GJ-000256:15-25:

> MR. CHENG: Ebyam, let me just start again regarding your testimony here.
> Q. First off, have any promises been given to you regarding or in exchange for your testimony here?
> A. No, I was charged in the beginning of 2004 or middle of 2004 officially. I was –
> Q. Let me stop you there for a second. When you say "charged," by who and where?
> A. Oh. I was charged – well, I was charged by the state initially. And then I was charged by the feds for conspiracy to launder money.

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[6] The serial numbering of the grand jury transcripts bears no relation to the chronological order of the sessions.

And I pled guilty, and served time, and was released. And that is the end of it.

I have no – I have nothing to gain. I have no – I am not under any contract to cooperate. I don't have any benefit. I don't have any pending litigation. I am not being charged for any other matters. I don't have any other things I am trying to facilitate, trying to disburse [sic], nothing like that.

Q. Okay. Now tell us then what is your motivation is to testify today?

A. Well, one thing I realize – again, when I started my company it was done, I didn't start it as an illegal enterprise. Originally, when I was going out to auctions and buying equipment, it wasn't – we were not – I wasn't running around trying to buy stolen property and do illegal stuff. That wasn't the premise of the company

And one of the things I realized was that, you know, if you are going to be part of society is, you know, if you see your neighbor's house being broken into, you are probably going to call the police. And that is not what we have, you know, policemen on every door or every streetside that watches over everything, you know.

You – we depend on the fact largely that we look out for one another. If my car got stolen and my neighbor reported it stolen or saw someone stealing it, I would be happy that he reported it stolen, he saw someone steal it.

And so, you know, it kind of came down to the principle that, you know, there was in this case there was obviously some stuff that was stolen, and some people did it, and I saw it. And if I want to be a part of society again, I want to be a member of society, then, you know, I have to fulfill my obligation to what everyone else would do. And that is kind of why I am here.

GJ-000256:15-25 – GJ-000258:1-15.

AUSA Cheng then asked Ebyam to describe the sentence he received, *with no mention* of the plea agreement or the promises exchanged between his office and Ebyam. During a discussion of his probation status, and the fact that Ebyam was on supervised release at the time of his testimony, the following exchange occurred at GJ-000261:21:

Q. Okay. Now, getting back to your sentence and the fact that you are on probation, supervised release, now was there any specific term or agreement on your part with either the state government or the federal government such that while you are on probation or parole or supervisory release that you had to testify before this body?

A. Oh, no, no. Once I was sentenced, and that was more than – from what I am told, they could appeal your sentence up to a year after you have been sentenced. But I have been sentenced way more than a year ago, so my sentence is set. And they no longer – they can't appeal; they can't change it. Part of my agreement was not – to testify in the future, there was no sort of arrangement. There was no sort – it wasn't even mentioned at the time.

Q. I'm sorry, did you say part of your agreement was not to testify?

A. No, no, it wasn't not to testify. There was – it was not in the agreement. There wasn't "you agree to testify to this, you agree to do that." There was nothing in the agreement related to that.

Once my sentence was handed down, that was it. That was the end of the cooperation. That was the end of the sentence. Once sentence condition [sic] has been served, that is it.

Q. Okay. Now, just so we are clear, in your mind, when you are answering questions regarding your involvement in the buying and selling of computer equipment, you have clearly in your mind that you are talking about things that you have already pled to and have been sentenced for and have done your time for; is that right?

A. Yes, yes. These are all things – this is exactly what I pled guilty to and what I was sentenced for.

GJ-000261:21 – GJ-000263:1-2.

Later, AUSA Cheng asked Ebyam the same basic question and received the same deceitful answer.

Q. Have you asked for or do you have any expectation at all that any part of the government, whether it be federal or state, would be providing you any incentive or any type of quid pro quo in return for your testimony today?

A. No, there is nothing I could ask for. My sentence has been completed. I mean, I can't exactly go back and ask to get time off for time I have already served. So, there is nothing I have – I couldn't ask for anything and there is nothing I stand to gain from it.

GJ-000263:3-12.

This colloquy, which occurred during the June 13, 2007 grand jury session, was the first time Ebyam was questioned regarding his motivations for testifying and whether he received anything in exchange for his testimony.

At a second grand jury session on July 18, 2007, AUSA Cheng asked Ebyam this same question without prompting from a juror. This exchange began at GJ-000158:17.

Q. I [sic] Ebyam, you have previously testified before this body; is that correct?

A. Yes.

Q. We won't rehash certain things that we've spoken about, but we want to make it very clear, are you here of your own accord?

A. Yes, I am.

Q. And are you here for – based on any promises that were made to you or any coercive remarks made to you regarding your testimony?

A. No.

GJ-000158:17 – GJ000159:1-2.

When Ebyam was called before the grand jury a third time, AUSA Cheng again asked him the question without prompting from a juror. This exchange began at GJ-000158:17.

> MR. CHENG: Let me ask –
> A GRAND JUROR: What are you doing now?
> A GRAND JUROR: Testifying.
> BY MR. CHENG:
> Q. Let me ask this question in lieu of that, Ebyam. Are you receiving any benefit from your cooperation with the government, either for your testimony today or any other type of testimony on this particular case?
> A. I – I do run a company right now. I have served my time. I – I made a mistake. I'll be honest. I'll admit it. I told you what happened. I was 24 years old, 25 years old at the time. I made a mistake. I did something really stupid and I paid a price for it.
> I went to jail. I'm not under indictment. I'm not getting any paychecks. I'm not – there's no secret benefit down the line. I served my time. My sentence is up. It ended two years ago. I've been out. I'm running a successful business again, and I'm keeping it legitimate.
> GJ-000151:19 – GJ-000152:1-13.

At no time during any of the three grand jury sessions did AUSA Cheng or Ebyam reveal the terms of the plea agreement to grand jurors. At no time did the prosecutor fulfill his absolute duty to step in and correct Ebyam's misstatements regarding the plea agreement and its terms. This repeated misconduct invites the collective prejudice analysis suggested by *Kyles v. Whitley*, 514 U.S. at 436.

AUSA Cheng not only permitted Ebyam's perjured testimony, he encouraged it.

On one occasion he asked Ebyam to elaborate on the reasons for his cooperation, after which Ebyam responded that he was testifying because he wanted to contribute to society. GJ-000261:21 – GJ-000263:1-2. AUSA Cheng did nothing to correct Ebyam or to indicate to grand jurors that Ebyam was, in fact, subject to prosecution if he failed to cooperate with the United States Attorney.

Grand jurors were left with the entirely false impression, endorsed by the United States Attorney that Ebyam testified freely and voluntarily, motivated solely by his newfound respect for an ordered society. This suppression of Ebyam's total lack of credibility before the grand jury

violates *Napue,* 360 U.S. at 269, and is outrageous government conduct sufficient to constitute a denial of due process.

Ebyam testified falsely on a number of occasions. AUSA Cheng solicited testimony from Ebyam that his civil attorney, David MacPherson, was fully aware that funds Ebyam sought to recover from defendants Pantages and Harmon were the proceeds of an illegal enterprise. GJ-000199:3-13, 21-25.

Later, AUSA Cheng called MacPherson to testify before the grand jury on April 30, 2008. GJ-000001. MacPherson did *not* testify that he knew the funds were the proceeds of a criminal enterprise; instead he claimed that he believed the funds were the legitimate subject of a business dispute (GJ-000033:21-25; GJ-000034:15-23). He testified that it was not until much later that he discovered Ebyam was involved in criminal activity (GJ-00054:3-20).

It is clear from MacPherson's testimony that he believed the solution was to divide disputed funds between Pantages and Ebyam, (GJ-000045:2-9), but not to turn over anything to the government as having been stolen. McPherson went so far as to assert at trial that it was not until much later that he learned of Ebyam's criminal acts; certainly this testimony is at odds with the testimony in which he described meeting with Ebyam in the Santa Clara County jail.

AUSA Cheng should have known that both witnesses could not be truthful on this issue. Their versions of what took place are plainly mutually exclusive. Either MacPherson filed a civil lawsuit to recover contraband funds and lied to the grand jury, or Ebyam did not inform his civil attorney of the unlawful nature of his business. In the latter, more likely event, Cheng was faced with yet another perjured statement by Ebyam.

Regardless of who spoke falsely, AUSA Cheng knew of the difference between the two versions no later than September 24, 2008. Not only was he responsible for soliciting the

conflicting testimony, but he failed to inform grand jurors, defense counsel and the court of the problem which the discrepancy created.

Not only does it defy logic to for the government to insist that AUSA Cheng was unaware that Ebyam was subject to a plea agreement, under *Giglio* it is *legally irrelevant*; "[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Giglio,* 405 U.S. at 154.

In *Giglio,* one AUSA made promises to a witness to secure his plea, while a second AUSA, purportedly ignorant of the promises, questioned that witness during a later proceeding. *Id*., 405 U.S. at 155. As here, the witness in *Giglio* denied testifying in exchange for any favorable treatment, and the District Court, considering a motion for new trial, held that disclosure of the promise would have made no difference to the verdict.

The United States Supreme Court did not concern itself with "the differing versions of the events," and based its reversal entirely on the prosecutor's failure to advise jurors of the witness's perjury. The court found that without the perjured testimony, "there could have been no indictment and no evidence to carry the case to the jury." *Id.*, 405 U.S. at 154.

Without Ebyam's grand jury testimony, it is entirely reasonable to believe that no indictment could be returned against the Defendant and Pantages.

The United States may attempt to claim that AUSA Cheng was ignorant of the terms of the plea agreement with Ebyam. However, considering that his office obtained the plea agreement, under the rule of *Giglio* and *Brown*, the actual knowledge of the AUSA *does not matter*. The fact that the local office of the United States Attorney prosecuted Ebyam imputes the knowledge of his plea to all prosecutors in the office. *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995)

(the prosecutor is "deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant.") As the Ninth Circuit Court of Appeals wrote: "the constitutional prohibition on the "knowing" use of perjured testimony applies when *any* of the State's representatives would know the testimony was false." (emphasis in original.) *Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008).

Should the court find that the governmental subornation of Ebyam's perjured testimony, standing alone, is insufficient, the court may dismiss an indictment for prosecutorial misconduct either on constitutional grounds or by exercising its supervisory power. *United States v. Carrasco*, 786 F.2d 1452, 1455 (9th Cir. 1986).

"Errors in grand jury proceedings are discussed under two theories, the constitutional theory and the supervisory powers theory." *United States v. DeRosa*, 783 F.2d 1401, 1404 (9th Cir. 1986).

To apply the constitutional theory in considering government misconduct "[a] district court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation." [citation omitted.] *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991).

The issue of whether government conduct is outrageous and amounts to misconduct is a question of law to be decided by this Court (*United States v. Wylie*, 625 F.2d 1371, 1378 (9th Cir. 1980)).

To violate due process, governmental conduct must be "so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction." *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991) *quoting United States v. Russell*, 411 U.S. 423, 431 (1973).

The facts of this case readily demonstrate that the identified government conduct was "…so excessive, flagrant, scandalous, intolerable, and offensive as to violate due process." *United States*

v. Edmonds, 103 F.3d 822, 825 (9th Cir. 1996). *quoting United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993).

A due process violation occurs when the government proceeds on an indictment which it knows to be based partially on perjured testimony when the perjured testimony is material. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974); *Brown*, 513 F.3d at 1071; *Napue*, 360 U.S. at 269. The duty of the prosecutor in a grand jury is "not to permit a person to stand trial when he knows that perjury permeates the indictment." *Basurto*, 497 F.2d at 785.

The evidence that Ebyam offered perjured answers to grand jury questions is manifest; his testimony is impossible to reconcile with his plea agreement. In addition, aspects of the testimony of MacPherson and Ebyam are mutually exclusive. A United States Attorney who learns of perjured testimony on a material issue, such as credibility, is under a duty to inform the grand jury. *United States v. Flake*, 746 F.2d 535, 538 (9th Cir. 1984).

AUSA Cheng did not. AUSA Cheng was also "under a duty to immediately inform the court and opposing counsel" but did not do so when Ebyam later testified at trial. *Basurto*, 497 F.2d at 784. AUSA Cheng, under a duty imposed by case law to "correct the cancer of justice that had become apparent to him," *Id.*, did nothing.

Even if MacPherson did not implicate himself in misconduct when he claimed to believe in the legitimacy of Ebyam's business and took money from him for legal fees (GJ-000015:5-8), he has implicated his client in a fourth, discrete, act of perjury. The record before this Court supports a finding that the prosecutor knew of perjury or "cancer," (*Basurto*, 497 F.2d at 785), before the grand jury and that the prosecutor committed misconduct and "allowed the cancer to grow" by proceeding with the case. *Id.*

Should AUSA Cheng somehow makes the claim that he did not know of Ebyam's plea agreement, a fact which would require this Court to make the legal finding that *no one* in the local

office of the United States Attorney knew of the plea agreement, dismissal is *still* required if the misconduct has significantly infringed upon the grand jury's ability to exercise its independent judgment. *DeRosa*, 783 F.2d at 1405.

Grand jurors were very clearly concerned about Ebyam's motivations for cooperating. A grand juror, apparently acting on his own, asked AUSA Cheng to have Ebyam stop testifying and step out of the grand jury chambers. In violation of Federal Rules of Criminal Procedure, Rule 6(e)(1), the ensuing conversation was not recorded.

When Ebyam resumed the stand, AUSA Cheng did not continue the line of questioning preceding the interruption, but instead immediately questioned Ebyam about promises made to him in exchange for his cooperation. Ebyam then offered his perjured answer.

Since a perjured answer was provided in response to a question that a juror felt important enough to pause the proceedings to ask, it is a fair conclusion that the issue of Ebyam's credibility and motivation was an issue of vital importance to this grand jury. By providing a false answer to this central question, AUSA Cheng, through Ebyam, "significantly infringed upon the grand jury's ability to exercise its independent judgment" with respect to evaluating the testimony and whether or not to deem Ebyam sufficiently credible to warrant the issuance of an indictment.

Should the court find that the conduct on the part of the United States falls short of the requirement necessary to establish a due process violation, the Court may still dismiss the indictment under its supervisory powers. *United States v. Fernandez*, 388 F.3d 1199, 1239 (9th Cir. 2004), *quoting United States v. Ross*, 372 F.3d 1097, 1109 (9th Cir. 2004).

There are three valid bases for the exercise of this Court's supervisory power: first, to remedy a violation of a statutory or Constitutional right, second, to preserve judicial integrity; and third, to deter future illegal conduct. *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991);

Garza-Juarez, supra, 992 F.2d at 905. The defense suggests that all three bases are present in the record here.

Although this court may use its supervisory power only to dismiss an indictment in "flagrant" cases of prosecutorial misconduct, the defendant submits that this test has been met here.

When a government attorney permits a key witness to testify falsely three times, fails to inform the grand jury, and neither advises the court or defense counsel, the defense submits that such conduct is flagrant within the meaning of the law. *See e.g., Jacobs*, 855 F.2d at 655; *United States v. Rogers*, 751 F.2d 1074, 1076-77 (9th Cir. 1985).

If a court is to permit dismissal under a supervisory powers theory, the government's misconduct must also have prejudiced the defendant. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (requiring both a flagrant disregard for the limits of professional conduct and substantial prejudice to the defendant); *United States v. Kearns*, 5 F.3d 1251, 1254 (9th Cir. 1993). "The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless." *Bank of Nova Scotia*, 487 U.S. at 263-264.

The instant case may be distinguished from cases such as *United States v. Bracy*, 566 F.2d 649, 654 (9th Cir. 1977), in which perjured testimony placed before the grand jury was deemed harmless because the testimony was "so far removed from the truth" that it could not have contributed to the return of the indictment, and because the grand jury apparently ignored the testimony.

In the present case there is little doubt that Ebyam was an important witness for the United States at the grand jury. He described a complete criminal scheme of which he claimed the defendant had knowledge. Without his testimony, there is grave doubt as to whether the grand jury

could have indicted her. Certainly his testimony was so important to AUSA Cheng that he required Ebyam's testimony at three separate sessions of that tribunal.

Furthermore, it is patently obvious from the fact that grand jurors questioned Ebyam's motivations for testifying, that they were concerned about the veracity of his testimony.

Had Ebyam been a peripheral witness, unnecessary to in the grand jurors' decision-making, his motivations for testifying would not have been an issue at three different sessions.

VI. CONCLUSION

The conduct of the Defendant's trial was riddled with defects, mistakes and governmental malfeasance.

The United States Attorney waited an unconscionably long time to indict the defendant. The rationale behind this decision is opaque, since it is apparent that no new evidence was sought nor existing evidence developed during the five-year interval between the alleged events and the indictment. In fact, the delay served no function but to impose an improper burden on the Defendant, who was forced to rely upon the tattered remnants of old files and the bleached and faded memories of witnesses.

Also, it is evident that the government relied upon witnesses who had considerable incentive to develop amnesia; certainly Ingrid Cortopassi's testimony, and her nearly complete failure of memory concerning her close relationship to the people and events in question, is remarkable in view of the potential for a finding of her criminal liability under the very facts of this case. Permitting such witnesses five years to craft an opportune, indistinct recollection is a critical aspect of the prejudice which accrued to the defendant as a result of the passage of time.

The law requires that prejudice to the defendant must be balanced against the needs of the government in building its case. Here, the government's delay bears no rational relationship to the complexity of the case. The facts as they are alleged to have occurred took place over the course of

a very brief period. The transactions which form the basis of the prosecution arc are simple, consisting of nothing more than the deposit and disbursement of a straightforward sum of money, well-defined by the two checks which comprise their entirety.

The government has provided no rationale for the delay; no evidence exists to demonstrate an ongoing investigation. Careful examination of the reports in this case yields the conclusion that little action, if any, was undertaken in pursuit of an indictment between 2004 and 2007.

When compared with the dearth of government justification for its patent failure to act, the merest featherweight of prejudice tips the scales in the favor of the defense. Where the defense can show substantial prejudice, as it has here, the court should grant the Defendant a judgment of acquittal based upon the unnecessary and prejudicial delay.

A basic precept of the criminal justice system is that no one should be prosecuted for conduct that a reasonable person would not know was forbidden. The defendant is a criminal defense attorney. As such, she is hired to represent those accused of crimes. Implicit in this role is a judicious discernment of the underlying facts; the lawyer must assess the merits of the information supplied by the client, as well as that provided in discovery by the prosecution.

It is ludicrous to suggest that a defense attorney must reject the assertions of a client because the government insists he is guilty. The adversarial nature of the American system of criminal justice mandates the existence of defense attorneys precisely from the necessity to counterbalance the government's extraordinary power to make such claims. There is no more fundamental principle of criminal jurisprudence. Here, the government demands that defense attorneys pay wholesale obeisance to the statements of law enforcement,; and threatens the loss of liberty should they accept payment to defend a client. No guidance is provided as to how a reasonable person may avoid prosecution. This lack of definition renders such an interpretation of the law constitutionally infirm. The import of the government's position is undeniable; it seeks to

chill a defendant's Sixth Amendment right to counsel by making it impossible for attorneys to accept paying clients without some proof of the legitimacy of the funds used. The government only deepens this legal quagmire by prosecuting lawyers for the return of unused funds to the client; an act that attorneys are obligated to perform.

Because the government definition of money laundering in this matter is unconstitutionally vague as applied to the defendant, the court should grant a new trial or a judgment of acquittal.

Also, jurors were granted access to police reports that detailed criminal behavior of Pantages, Ebyam and many others, in which the Defendant is not alleged to have been involved.

Those police reports were admitted over the timely objections of the defense on the ground that admitting the reports, and permitting the jurors to access them during deliberations denied the Defendant the right to confront and cross-examine the authors of those reports.

Thus, the jurors were permitted to infer that the information contained in the police reports was fact; not simply the bare, often-unsupported allegations of investigators. This is a fallacy which closely corresponds with that implied by the government's seeming insistence that defense attorneys must unconditionally credit the statements of law enforcement, even in the face of a client's vehement and reasonable avowals to the contrary. An experienced attorney knows what the jurors did not: that police reports and the statements of prosecutors are often fraught with inaccuracies and speculation. It is such things, among others, which a defense attorney is hired to seek and exploit. By permitting the reports into evidence without benefit of testimony concerning their contents or the protection of confrontation through cross-examination, the Court conferred upon them the imprimatur of authenticity and accuracy. In short, with nothing to controvert them, the jurors could and likely did accept them as the truth.

Further, in view of the impaired memory of nearly every witness called at trial, it is not unreasonable to believe that the recollections of the persons who authored those reports would be

similarly compromised. Some reports admitted for juror examination were more than ten years old, further strengthening the assertion that their preparers' memories might be even more significantly diminished.

Because the credibility and accuracy of the police reports admitted into evidence was not tested on cross-examination, and because such confrontation is the right of the defendant, this Court should grant the motion for a new trial.

Finally, the conduct of the assistant United States' attorneys in this case has been outrageous, both within the meaning of the law, and in the broader context of human behavior.

If it were true that this misconduct consisted of only a single incident, it might be claimed, however questionably, that the false testimony of Yan Ebyam was merely a failure of memory or a mistake. It strains credulity to believe that Ebyam and AUSA Cheng could make the same mistake three times. The law imposes a duty on the prosecution to know the circumstances under which its witnesses testify. While it may be true, albeit implausible, that AUSA Cheng had no knowledge of Ebyam's plea agreement, his ignorance cannot be excused. The law is clear: the government is a monolith. The knowledge of one prosecutor is the knowledge of all prosecutors: this is a legal certainty which brooks no exception.

Common sense analysis of the facts dictates that the government had full knowledge that Ebyam testified subject to a plea agreement. It was the government who struck the bargain with the witness: he was a prosecutor in the same office as AUSA Cheng, on the same prosecution team.

The specious claims that the government's witness forgot the written legal promise which he executed in open court, and which reduced his sentence by more than half, or that he was a disinterested good Samaritan must be rejected. Weaker still is the claim that although the government's witness was technically subject to the plea agreement, he was testifying for other reasons and the government ignored the previous agreement.

These arguments should be disregarded. The law is plain. *None of these explanations matter*. The government was obligated to correct its wayward witness and did not. The statements made to the grand jury were false. The prosecution's conduct resulted in a denial of the guarantee of due process, and the court should grant the Defendant a judgment of acquittal notwithstanding the verdict of the jury.

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Respectfully submitted,

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