Five Ways to Write Like John Roberts

By Ross Guberman

hen Chief Justice John Roberts was a lawyer, he once wrote that determining the “best” available technology for

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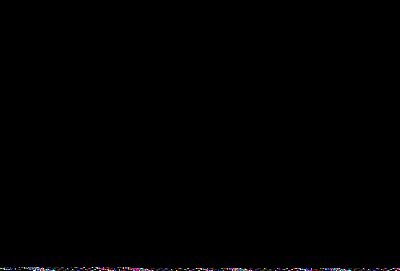
controlling air pollution is like asking people to pick the “best” car: “Mario Andretti may select a Ferrari; a col- lege student a Volkswagen beetle; a family of six a mini- van. The choices would turn on how the decisionmaker weighed competing priorities such as cost, mileage, safety, cargo space, speed, handling, and so on.”

Did Roberts feel the same way about “best” when Ruth Bader Ginsburg said that he was the “best” advocate to come before the Supreme Court? Or when Senator Chuck Schumer, who voted against his nomination, conceded that even Roberts’s opponents called him “one of the best advocates, if not the best advocate, in the nation”?

Unlike sports, advocacy writing may not evoke a hit list of heroes. Even so, no one questions Roberts’s rock-star status as a briefwriter. Nor was the car analogy plucked at random: According to two Supreme Court insiders, when Alaska hired the nation’s “best” brief writer to write about the “best” technology for an electric genera- tor, the result in *Alaska v. EPA* was also the “best” brief that the Justices had ever seen.1

So how did Roberts do it?

At least 30 tech- niques distinguish his writing from the norm. Here are five of the easiest ones to use in your own writing.



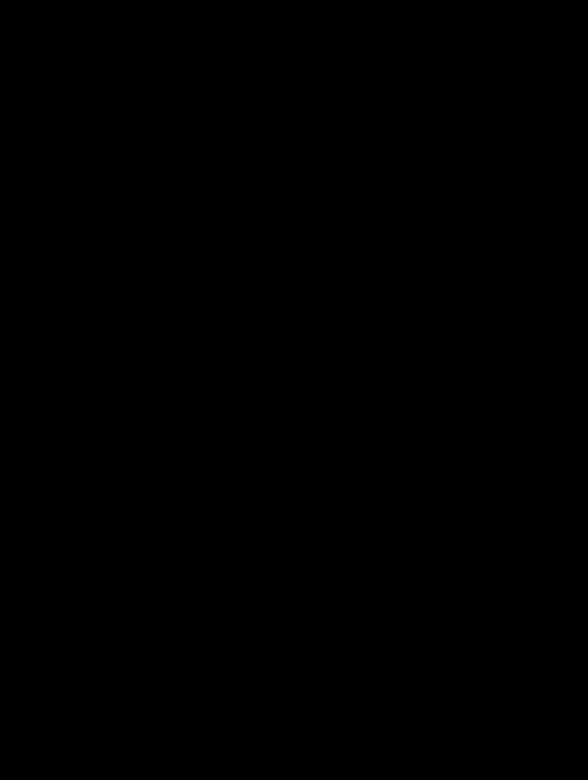
### Let your facts “show, not tell.”

The facts in a brief should read like narrative nonfic- tion, a bit like something you’d read in *The Atlantic* or *The New Yorker*.

1 Roberts’s brief: [www.legalwritingpro.com/briefs/alaska-epa.pdf](http://www.legalwritingpro.com/briefs/alaska-epa.pdf)

Or perhaps in *A River Runs Through It*. Watch how Roberts explains the way the Red Dog Mine, the ac- cused polluter in the case, got its name:

For generations, In- upiat Eskimos hunt- ing and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange- and red-stained creekbeds in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the



name of Bob Baker noticed striking discolorations in the hills and creekbeds of a wide valley in the western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey. Exploration of the area eventually led to the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations

became known, his faithful traveling companion— an Irish Setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted “Red Dog” Creek.

Now why would Roberts mention an Irish Setter? What does a shotgun-flying dog have to do with the Clean Air Act or administrative law? Is the passage just a flourish of elegant writing that ultimately wastes everyone’s time?

Not at all. Roberts is litigating a classic federalism fight between the states and the federal government. And who knows how a mine fits into the community better than the local and state officials close to the ground?

You’ll find the same technique elsewhere when Roberts “shows” you why the Red Dog Mine plays a vital economic role without “telling” you what to think by shoving that conclusion down your throat:

Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Arctic Borough, an area roughly the size of the State of Indiana with a population of about 7,000 Prior to the mine’s opening,

the average wage in the borough was well below the state average; a year after its opening, the borough’s average exceeded that of the State.

Finally, instead of just sticking these transitions at the beginning of your sentences, place them closer to the verbs, where they are often more effective and interesting:

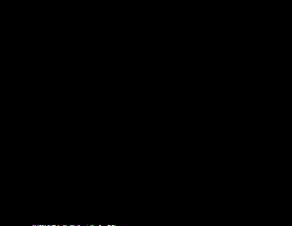
The EPA thus regards the state review process as the means by which [NOT *Therefore*, the

EPA]

### Add speed through short and varied transitions.

Do you want an easy way to jump-start your prose and streamline your logic? Start your sentences with short, punchy words.

Here Roberts does so three times in a row as he explains why the Alaska agency’s deci- sion about the Red Dog Mine’s technology should withstand EPA scrutiny:



But the EPA cannot claim that ADEC’s decision was “unreasoned.” Nor can the EPA assert that ADEC’s determination in any way results in emis- sions exceeding national standards or permitted increments. How to control emissions within those standards, without exceeding available in- crements, was for the State to decide.

You’ll see other speedy openers peppering the rest of the brief:

Yet instead of addressing the most pertinent leg- islative history . . . .

And the asserted reason for compromising the bright-line rule in the Act . . . .

Also vary the logical links you use. Most lawyers stick to eight or so of the tried-and-true—*moreover*, *accord- ingly*, *however*. A great advocate might use 50 or more “signposts” to help the judge track the brief’s internal logic. Roberts uses such varied signals as *at bottom*, *also*, *under that approach*, *in short*, *to this end*, *be- cause*, *then*, *for example*, *in each case*, *nowhere*, *in any event*, *of course*, *instead*, *to begin with*, *indeed*, and *thus*, just to name a few.

Congress also established a preconstruction review and permitting process . . . [NOT *Addi- tionally*, Congress established]

The court then went on to hold that the EPA had not acted arbitrarily or capriciously [NOT

*Subsequently*, the court went on to hold]

### Add elegance and clarity through parallel constructions.

Also on the style front, look for ways to use more paral- lelism in your writing. It’s not just a stylistic trick. It’s a way to streamline information and make your points stick.

Sometimes, you can create a streamlined parallel list:

The Red Dog Mine is the largest private employer in the Northwest Arctic Borough, where geogra- phy and the harsh environment pose unique employment challenges, offer few employment alternatives, and limit any concern about other industrial development . . . .

Other times, you can compare or contrast two concepts or parties by using a semicolon, as Roberts does here when he contrasts the federal government and the States:

In clean air areas, the federal government determines the maximum allowable increases of emissions for certain pollutants; the States decide how to allocate the available increments among competing sources for economic develop- ment and growth.

And here when he contrasts two ways of finding the “best” way to control pollution:

Deciding that a more stringent and more costly control is “best” for a particular source

may reflect a judgment that the economic benefits of that particular expansion are worth consuming only so much of the available increment; deciding that a less stringent and less costly control is “best” for a different source may reflect a different judgment about the value of that specific project.

### Add interest through short sentences, examples, and figures of speech.

Variety in the prose is another way to ensure a standout brief.

After all, nothing is more tedious than an endless series of medium-long sentences that follow predictable and repetitive patterns.

Here are three Roberts-esque ways to spice up your prose.

First, like most lawyers, you probably try to avoid long sentences. But how often do you include a short sentence—say twelve words or fewer:

The basic division of responsibilities carried through to the PSD program.

The EPA, however, had no authority to do so. Of course, that is just the point.

So too here.

Second, as in the earlier car analogy, an example is often a terrific way to bring an abstract legal point to life.

Consider this series of examples. This time, Roberts is claiming that what’s “best” for one state (such as Alaska) might not be best for another—another varia- tion on the Ferrari vs. Volkswagen theme:

For example, one State—experiencing little eco- nomic growth in the pertinent area and concerned about the impact of increased costs on a critically important employer—may select as BACT for that employer a less stringent and less costly technol- ogy that results in emissions consuming nearly all of (but not more than) the available increment for growth. Another State—experiencing vigorous

economic growth and faced with many competing permit applications—may select as BACT for those applications a more stringent and more costly technology that limits the impact of any particular new source on the increment available for development. A third State—in which ecotour- ism rather than more industrial development is the priority—may select as BACT an even more stringent and more costly technology, effectively blocking any industrial expansion.

Third, a well-chosen figure of speech can be price- less, as long as you’re explaining a complex legal point and not taking a pot shot at the other side:

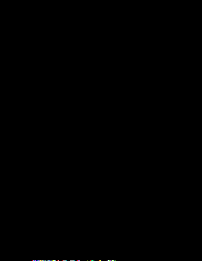
The awkwardness of considering whether the EPA was arbitrary or capricious in deciding that the State was arbitrary or capricious should be the canary in the mine shaft, signaling that some- thing is very much amiss.

### End with a bang.

As with any good novel or essay, the last sentence in your argument section should crystallize your message and offer the judges a parting thought:

When it came to BACT, however, Congress had a different idea, and left that determination—“on a case-by-case basis”—to the States.

Roberts’s “best” brief stands out for many other reasons as well, and not all of them can be reduced to a tech- nique. But as the preceding excerpts suggest, the mysti- cal world of high-level written advocacy may be closer than you think.



About the Author

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

No. 15 Cr. 00706 (VSB)

UNITED STATES OF AMERICA,

- v. -

NG LAP SENG,

Defendant.

##### MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS THE INDICTMENT OR IN THE ALTERNATIVE

**FOR A BILL OF PARTICULARS**

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##### PRELIMINARY STATEMENT

This case presents several remarkable issues novel to the American legal system. The government is invoking a bribery statute enacted to protect federal funds to prosecute a foreign national for allegedly making payments to a foreign diplomat assigned to the United Nations in connection with a construction project in China. It has done so in a case where no UN funds— let alone any federal funds—are at stake. It has done so even though the UN has no rules prohibiting the alleged payments. And it has done so even though much of the alleged conduct is routine, as a UN Task Force found.

The government has advanced aggressive interpretations of the corruption laws in the domestic context on several prior occasions, and the Supreme Court has decisively rejected those interpretations. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Skilling v. United States*, 561 U.S. 358 (2010); *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999); *McCormick v. United States*, 500 U.S. 257 (1991). These precedents apply directly here and clearly show that the indictment should be dismissed in its entirety. But they also illustrate a more persistent theme that has surfaced in this case as well. The scope of the corruption laws is quite limited, in part to avoid ensnaring routine conduct. These laws simply do not reach all activities that an American prosecutor might deem suspicious or ethically problematic. Given the risk that these statutes will criminalize routine conduct and impinge on constitutional liberties, the Supreme Court has repeatedly read them narrowly. This Court should do so again, in the unique context here. The government’s foray into policing the affairs of the UN was ill- advised and is unlawful.

dismiss “a portion of a count” even if it does not dismiss the whole count or indictment. *Id.* at 88-89.

##### ARGUMENT

##### COUNTS ONE AND TWO SHOULD BE DISMISSED FOR FAILURE TO ALLEGE ESSENTIAL ELEMENTS OF SECTION 666

The government’s unprecedented effort to apply a United States law to police the conduct of a foreign national and foreign diplomat concerning a project on foreign soil and implicating no federal funds is fatally flawed. Counts One and Two of the indictment are riddled with legal deficiencies that require dismissal of the charges: (1) Section 666 was intended to cover state and local officials and private organizations, not foreign quasi-sovereign entities like the UN, and well-settled canons of construction require “organization” to be narrowly construed and exclude the UN; (2) Ashe was not an “agent” of the UN at any time; (3) none of the official acts alleged in the indictment is legally sufficient to establish a criminal *quid pro quo* under the Supreme Court’s holding in *McDonnell*; (4) the allegation regarding official acts taken by Ashe “as opportunities arose” is patently deficient under Supreme Court precedent, as is the gratuity theory; (5) the alleged payments do not implicate the integrity of UN or federal funds; and (6) the purported payments were not in connection with any “business” of the UN within the meaning of § 666.

These deficiencies require the dismissal of Counts One and Two.

##### The United Nations Is Not An “Organization” Covered By § 666

In order to convict under § 666, the government must prove that the alleged conduct occurred in connection with an agent of an “organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program.” 18 U.S.C.

§ 666(b). The indictment alleges that the conduct relates to efforts to bribe an “agent” of the

“UN” and that the UN is an “organization” covered by § 666. (SI ¶¶ 11, 14). The § 666 counts against Ng should be dismissed, because the UN is not an organization covered by § 666.

Section 666(b) does not define “organization,” but under settled canons of construction the term should not extend to a quasi-sovereign intergovernmental entity like the UN without a clear statement by Congress that it intended to cover such entities. First, courts are to “construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.” *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *see also RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2107 n.9 (2016) (same); *McCulloch v.*

*Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) (National Labor Relations Act did not apply to foreign-flagged vessel because there was no “affirmative intention of the Congress clearly expressed” to do so). Second, absent a clear statement to the contrary, it is presumed that Congress does not intend to regulate foreign matters. *See, e.g.*, *Morrison v.*

*Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”); *In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, --- F.3d , 2016 WL 3770056, at \*9 (2d Cir.

July 14, 2016) (same); *see also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (the “affirmative intention of the Congress clearly expressed” is required in order for a statute “to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control” (internal quotation marks omitted)).

These canons stem from the principle that in service of international comity, federal law should not unduly interfere with the interests of another sovereign, unless it is clear that Congress intended to do so. Courts should “assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” *F. Hoffman-La Roche*, 542

U.S. at 164; *see also Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord” (internal quotation marks omitted)); *In re Microsoft*, 2016 WL 3770056, at \*9 (same).

Interpreting “organization” in § 666 to include the UN would create the very potential for international discord that these canons of construction seek to forestall. The UN is a quasi- sovereign entity. *See Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 544 (S.D.N.Y. 2013), *aff’d*, 768 F.3d 145 (2d Cir. 2014) (describing the UN as “united group of sovereign nations”). It is “functionally distinct from the natural territory of the United States,” *id.*, and its treaties with the United States have “effectively remove[d] control over the UN Headquarters and related areas from the jurisdiction of the United States,” *Klinghoffer v. S.N.C. Achille Lauro Ed Altri- Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 51 (2d Cir.

1991). Indeed, this Court has previously recognized that extending United States sovereignty over “the UN . . . and its inner-workings . . . risks the very sort of international discord that the rule against extraterritorial application aims to avoid.” *Republic of Iraq*, 920 F. Supp. 2d at 545.

Construing § 666(b) to reach the UN would be particularly problematic because it would invite an extraordinary level of interference with the UN’s internal governance. Section 666 regulates the conduct of agents of the organizations and governments it covers, and would impose United States standards of conduct on UN officials and foreign citizens who interact with the UN, including foreign diplomats such as Ashe.7 Moreover, because § 666(c) exempts

7 This application of United States laws to diplomats assigned to represent foreign countries before the UN in this country would also wreak havoc within the UN worldwide system and would subject United States diplomats to potential risks of prosecution in other countries where UN agencies are located for several reasons. First, since there are no regulations governing the

payments made “in the usual course of business,” prosecutions related to UN officials under

§ 666 would require courts to scrutinize internal UN practices—as is the case here, since the PGA is routinely funded by private contributions such as the payments alleged to have been made by Mr. Ng, as explained *supra* at pages 3-4.

This case well illustrates why § 666 should not be construed to cover the UN’s internal affairs. The government’s theory involves a Chinese citizen, whom it has suggested is akin to a Chinese government official (Dkt. No. 249 at 24), allegedly making payments to an Antiguan ambassador regarding a project in China related to a large group of UN member countries. As Mr. Ng’s Motion to Compel explains, this theory turns in large part on what the internal practices of the UN and the Office of the PGA were and may reflect another front in the larger geopolitical competition between the United States and China. (*Id.* at 15-16, 20-23). These are precisely the murky waters into which courts should presume Congress did not intend to wade absent a clear expression of intent. And there is nothing in § 666 indicating that Congress intended to do so— especially since no federal or UN funds were ever placed at risk in connection with the Macau

conduct of PGAs and candidates for PGA in soliciting contributions, application of § 666 here would subject UN-assigned foreign diplomats to federal law restrictions that do not apply in other countries. Second, if the UN were to promulgate regulations to control the solicitation of contributions in the future in response to this prosecution, those regulations would be subject to the interpretation of the United States courts in § 666 cases, and this could create conflicts that would result in different rules applying to UN personnel in the United States and UN personnel abroad. Partly to avoid the legal nightmare of subjecting UN personnel and foreign diplomats assigned to the UN to different legal regimes depending upon their geographic locations, disputes about the legal norms that govern the operations of the UN are resolved by the International Court of Justice, which can harmonize the legal rules within the UN system. *See* UN Headquarters Agreement, art. VIII, § 21(b), June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11 (providing that legal questions in disputes between the UN and United States may be referred to the ICJ). Most troubling, unilateral application by the United States of its laws to UN personnel, UN diplomats, and foreign nationals dealing with foreign diplomats assigned to the UN merely because the UN is physically located on United States territory opens the door for other countries where the UN has agencies to apply their laws against UN personnel and diplomats, including against American diplomats.

Conference Center (as explained further below), and the Macau Conference Center was a *pro bono* project of Mr. Ng. *Cf. United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1131 (N.D. Cal. 2015) (“Congress could not, in enacting Section 666, have envisioned that it could be applied extraterritorially to prosecute foreign crime in which the United States’s investment *was not harmed*.”).

Indeed, § 666 plainly excludes agents of foreign governments or foreign governmental agencies. It only covers agents of “State, local, or Indian tribal government[s], or any agency thereof.” 18 U.S.C. § 666(a)(2). There is no reason to believe that Congress intended to cover a quasi-sovereign entity like the UN, while expressly excluding other foreign sovereign entities like foreign nations and their personnel. If the UN were an “organization” within the meaning of

§ 666, the same would be true of the embassies and consulates within the United States of every foreign country that receives any form of aid from the United States—regardless of the laws or practices in the foreign country or diplomatic immunity (at least to the extent a prosecution was brought against the alleged recipient of the bribe). Plainly, the statute cannot sweep so broadly without at least a clear statement by Congress.

The legislative history also shows that Congress had no intention of covering foreign sovereigns like the UN. The Report of the Senate Committee on the Judiciary explains that

§ 666 was intended to protect “federal monies that are disbursed to *private organizations* or state and local governments pursuant to a federal program,” S. Rep. No. 98-225, at 369 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510 (emphasis added)—not public organizations like the UN or any foreign diplomatic mission to the United States. Moreover, the reason Congress enacted the statute was that some circuits had held that the existing “public official” bribery statute, 18 U.S.C. § 201, only covered federal officials. *Id.* Congress enacted § 666 to ensure

that agents of federally-funded private organizations or state or local governments that received federal money were subjected to federal criminal penalties for corruption. *See Sidorenko*, 102 F. Supp. 3d at 1130 (“Congress’s concern was bribes paid to domestic government organizations.”).

In *United States v. Bahel*, the Second Circuit affirmed the conviction of a UN employee who, while serving as a section chief for the UN’s Procurement Division, took bribes in exchange for assisting a supplier to obtain UN contracts. 662 F.3d 610, 617 (2d Cir. 2011).

Bahel argued that the United States’ treaty obligation to contribute to the UN is not a “federal program” and that the United States’ contributions to the UN are not federal “benefits” within the meaning of § 666. *Id.* at 626. The Court rejected those arguments. *Id*. at 627-30. However, the *Bahel* Court did not have occasion to consider the broader question of whether the UN is an “organization,” within the meaning of § 666. Thus, the Court did not address, much less decide, Mr. Ng’s argument.8

##### The Government Has Not Alleged That Ng Sought To Influence An “Agent” Of The United Nations

Section 666(a)(2) requires that the government prove the defendant gave or offered a payment intending to influence an “agent” of an “organization or of a State, local, or Indian tribal government” covered by the statute. The statute defines “agent” as “a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.” 18

8 Mr. Ng also preserves his right to challenge the validity of *Bahel*’s holding that the UN is a “federal program” and receives federal “benefits” before the Second Circuit en banc or in any petition for certiorari to the Supreme Court if necessary. Moreover, *Bahel* is distinguishable in a number of significant respects. There, the defendant was a UN employee responsible for procurement, and his alleged acts related directly to the expenditure of UN funds, and thus, at least indirectly to the United States’ financial contributions to the UN. Unlike in that case, there is no allegation that Mr. Ng’s alleged scheme involved the expenditure of UN funds. *See infra*, Part I.F.

U.S.C. §666(d)(1). The indictment alleges that Mr. Ng made a series of payments from 2011 to September 2015 intending to influence Ambassador Ashe as “an agent of . . . the UN.” (SI ¶¶ 10-11, 14). Because it is clear that Ashe could not be considered an agent of the UN at any time, the indictment fails to allege an essential element of a § 666(a)(2) offense, and Counts One and Two should be dismissed.

* 1. *Ashe was not an “agent” of the UN before or after he served as PGA*

The indictment alleges that “[f]or a number of years” until December 2014, Ashe “served in various positions at the Permanent Mission of Antigua and Barbuda” to the UN, including as “the Permanent Representative of Antigua to the UN, that is, Antigua’s ambassador to the UN.” (SI ¶ 1). The indictment acknowledges that in or around December 2014 Ashe “left the UN” entirely. (*Id.* ¶ 9). Ashe was PGA only between September 2013 and September 2014. (*Id.* ¶ 1).

In other words, from 2011 to September 2013, and from September 2014 until December 2014, the only position Ashe held was as a member of Antigua’s Permanent Mission or its “ambassador” to the UN. (*Id.*). As such, he was solely a representative of Antigua, not the UN, and plainly was neither “authorized to act on behalf” of the UN nor “a servant or employee, [or] a partner, director, officer, manager, [or] representative” of the UN. 18 U.S.C. § 666(d)(1). A nation’s Permanent Mission to the UN is a diplomatic entity of that nation, and, as the indictment itself acknowledges (SI ¶ 1), a nation’s Permanent Representative is its ambassador to the UN. As diplomatic representatives, members of a nation’s Permanent Mission are agents of the nation they represent, and not agents of the country (or intergovernmental entity) to which they are assigned. *See First Fid. Bank, N.A. v. Gov’t of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189, 192-93 (2d Cir. 1989) (Antigua’s ambassador to UN was an agent of Antigua); *Foxworth v. Permanent Mission of Republic of Uganda to United Nations*, 796 F. Supp. 761, 763

(S.D.N.Y. 1992) (noting that “the government of Uganda” was “represented by its permanent

mission to the United Nations”). Ashe was no more an agent of the UN than the Antiguan ambassador to the United States is an agent of the United States government.

Critically, several of the “official” acts alleged in the indictment occurred while Ashe was a member of Antigua’s Permanent Mission or Antigua’s ambassador. In particular, the indictment alleges that Ashe “submitted an official document at the UN . . . in support of the Macau Conference Center” on or about February 24, 2012, and that Ashe “submitted a formal revision to the UN Document” on or about June 5, 2013. (SI ¶ 12(b), (d)). These supposed acts occurred before Ashe became PGA, when he was an Antiguan diplomatic representative. Thus, even if they qualified as legally sufficient “official acts” under *McDonnell* (and they do not, as explained below), these allegations would have to be stricken because Ashe was not an agent of the UN when he undertook them.

Similarly, after December 2014, the indictment concedes that Ashe had no role in any capacity with the UN. (*Id.* ¶ 9 (alleging that Ashe “left the UN” in or around December 2014)). Clearly, at that point he could not be considered an agent of the UN. The government therefore may not rely on allegations regarding any conduct after December 2014.9

* 1. *Ashe was not an “agent” of the UN when he served as PGA*

The indictment alleges that the PGA “presides over the current UNGA session and represents the UNGA at various international forums” (SI ¶ 1), but that does not make the PGA an “agent” of the UN. The PGA “is not a UN employee and does not receive a UN salary.” (Shapiro Decl. Ex. C at 90; *id.* at 93 (“The PGA is not a UN staff member. His/her accreditation

9 The indictment also claims that Ng made payments to “one or more officials at the UN Development Programme.” (*Id.*). However, the government has not alleged any official acts taken by these unidentified individuals. *See infra* p.18 & n.12. Thus, even if these “officials” could hypothetically constitute agents of the UN, they cannot sustain the § 666 counts against Ng.

with the host country is the responsibility of the Permanent Mission of his/her home country.”)); *cf. Bahel*, 662 F.3d at 621 (affirming § 666 conviction of UN *employee*). The PGA possesses “very little formal power,” and merely serves as “the guardian of the [UN]GA Rules of Procedure but has no say in the actual decision-making of the [UN]GA.” (Shapiro Decl. Ex. C at 16). Furthermore, the UNGA is but one of several distinct organs within the UN, *see* UN Charter, art. 7, para. 1, such that the PGA’s documents are not even within the control of the UN’s Office of Legal Affairs. (*See* Dkt. 262-2 at 2 (noting that “the Office of Legal Affairs would be in a position to consider the provision of documents that are within the Secretariat’s control only,” and not the “General Assembly”)).

There is no indication in the indictment or in official UN documents describing the PGA’s duties that as PGA, Ashe had any authority “to act on behalf” of the UN as a whole; nor is there any hint that he was “a servant,” “employee,” “partner,” “director,” “officer,” “manager,” or “representative” of the UN itself. Accordingly, he cannot be considered an “agent” of the UN as defined by § 666(d)(1).10 Counts One and Two must be dismissed for this reason alone.

##### The Indictment Does Not Allege Valid “Official Acts”

Count Two charges Mr. Ng with violating 18 U.S.C. § 666, and Count One charges him with conspiring to do so. Both of these charges require the government to show that Mr. Ng sought “official acts” from Ambassador Ashe (or agreed to seek such acts, for the conspiracy charge). The indictment, however, does not identify any legally valid official acts. In other words, even if Mr. Ashe did or agreed to do the acts alleged in the indictment in exchange for

10 Furthermore, the indictment only alleges a single act taken by Ashe during his tenure as PGA: his alleged travel to China and meeting with Mr. Ng. (SI ¶ 12(f)). As discussed *infra*, this clearly was not an official act under *McDonnell*.

payment from Mr. Ng, the alleged conduct was not criminal under binding Supreme Court precedent. It was not criminal bribery, but rather innocent conduct. Counts One and Two therefore fail to state an offense and must be dismissed.

* + 1. *The “official act” requirement*

The federal anti-corruption laws, including 18 U.S.C. § 666, prohibit agreements to exchange “official acts” for payment. *United States v. Ganim*, 510 F.3d 134, 141-42 (2d Cir. 2007); *see also United States v. Skelos*, No. 15-CR-317 (KMW), 2015 WL 6159326, at \*2-3 (S.D.N.Y. Oct. 20, 2015). Until recently, the law in the Second Circuit was that “any act taken ‘under color of official authority’” qualified as an “official act.” *United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013) (quoting *Ganim*, 510 F.3d at 142 n.4). Thus, for example, a public official could be indicted for arranging and attending meetings in exchange for payment. *See Skelos*, 2015 WL 6159326, at \*3-4.

That is no longer true. In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Supreme Court sharply narrowed the scope of corruption prosecutions. Former Virginia Governor Robert McDonnell and his wife were convicted of federal bribery charges for accepting $175,000 in loans, gifts of luxury items, and other benefits from Virginia businessman Jonnie Williams, purportedly in exchange for taking “official acts” in support of a dietary supplement produced by Williams’s company. The “official acts” underlying McDonnell’s convictions included “arranging meetings for Williams with other Virginia officials” to discuss his company’s product, “hosting events” for the company at the Governor’s mansion, and “contacting other government officials” concerning research studies of the product. *Id.* at 2361 (internal quotation marks omitted). McDonnell argued that activities such as arranging meetings, hosting events, and contacting other officials did not qualify as “official acts”; the government,

on the other hand, argued that the term “official act” “encompasses nearly any activity by a public official,” including those activities. *Id.* at 2366-67. The Fourth Circuit affirmed McDonnell’s convictions. *See id.* at 2367.

The Supreme Court reversed. It rejected the government’s broad interpretation of “official act” and held that “setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an ‘official act.’” *Id.* at 2367-68. Instead, an official takes an “official act” only when he or she exercises governmental power, or advises or pressures another to exercise such power. *See id.* at 2371-72.

More specifically, the Supreme Court defined an “official act” as “a decision or action on a ‘question, matter, cause, suit, proceeding or controversy.’” *Id.* at 2371 (quoting 18 U.S.C.

§ 201(a)(3)). In order to prove an “official act,” the government must satisfy “two requirements.” *Id.* at 2368. First, it “must identify a ‘question, matter, cause, suit, proceeding or controversy’ that ‘may at any time be pending’ or ‘may by law be brought’ before a public official.” *Id.* (quoting § 201(a)(3)). This question must be “something specific and focused,” and it “must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.” *Id.* at 2372; *see also id.* at 2368-70.

Second, the government “must prove that the public official made a *decision* or took an *action* ‘on’ that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.” *Id.* at 2368 (emphases added). This could include “using his official position to exert pressure on another official to perform an ‘official act,’ or to advise another official, knowing or intending that such advice will form the basis for an ‘official act’ by another official.” *Id.* at 2372.

However, “[s]etting up a meeting, talking to another official, or organizing an event (or agreeing

to do so)—without more—does not fit that definition of ‘official act.’” *Id.* This is true even if the “event, meeting, or speech is related to a pending question or matter.” *Id.* at 2370.

Critically, the Court further held that the government’s “expansive interpretation of ‘official act’ would raise significant constitutional concerns.” *Id.* at 2372. First, public officials “arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time” as part of the “basic compact underlying representative government.” *Id.*

The Court discerned that the government’s overly expansive theory could chill public officials’ interactions with the people they serve and thus make it difficult for them to perform their duties. *Id.* Second, and relatedly, under the government’s interpretation, the term “official act” raises a “serious” due process concern, because its sweep would be indefinite and would risk “‘arbitrary and discriminatory enforcement.’” *Id.* at 2373 (quoting *Skilling v. United States*, 561 U.S. 358, 402-03 (2010)). The Court’s narrower construction was thus necessary to avoid a finding of unconstitutional vagueness. *Id.* Third, the government’s construction raised “significant federalism concerns,” which the Court’s narrowing construction avoided. *Id.*

That the Court’s narrow construction of “official act” was premised on the need to avoid serious constitutional problems is a crucial point. McDonnell was charged with bribery under the Hobbs Act and honest-services statute, not § 666. *See id.* at 2365. Both McDonnell and the government agreed that, to define “official action” for purposes of those statutes, they would use the definition of “official act” provided in 18 U.S.C. § 201(a)(3), the bribery statute that applies to federal officials (but not state officials like McDonnell). *See id.* As a result, the Supreme Court’s analysis of the “official act” requirement in *McDonnell* frequently refers to the text of that statute. *See id.* at 2367-72. It is clear, however, that the Supreme Court’s narrow construction of “official action” applies to *all* of the federal corruption laws, including § 666,

because that narrow construction was dictated by constitutional avoidance principles. Interpreting § 666 more broadly would implicate the very same constitutional problems the Court adopted the narrowing construction to avoid. If the corruption laws reached everything that an official customarily does in an official capacity, these concerns would arise regardless of which bribery statute the government chose to invoke in a particular prosecution. Thus, *McDonnell* squarely applies here.11

* + 1. *The government’s allegations*

The indictment does not specify which of Ashe’s activities the government alleges are “official acts” supporting the § 666 charges against Mr. Ng.12 The government appears to allege, however, that Ashe performed or agreed to perform the following purported “official acts” in exchange for payments:

1. “agreed, among other things, to use his position to build UN support for the Macau Conference Center” (SI ¶ 6);
2. “submitted an official UN document to the UN Secretary-General, which claimed that there was a purported need to build the Macau Conference Center to support the UN’s global development goals” (*id.*; *see also id.* ¶ 12(b));
3. “submitted a formal revision to the UN Document, which identified the Macau Real Estate Development Company as a partner in the Macau Conference Center project” (*id.* ¶ 12(d));

11 Indeed, in a recent brief unsuccessfully opposing bail pending appeal in another case raising *McDonnell* issues, the government did not dispute that *McDonnell*’s definition governs § 666 as well as the Hobbs Act and honest services fraud. *See* Mem. Of Law Of U.S. In Opp’n To Defs.’ Mot. For Bail Pending Appeal at 27, *United States v. Skelos*, No. 15-cr-317 (S.D.N.Y. July 25, 2016), ECF No. 218.

12 The indictment also does not attribute *any* acts to the UN Development Programme officials allegedly paid by Mr. Ng. (SI ¶ 9).

1. “traveled to China in his official capacity as UNGA President and met with Ng regarding the Macau Conference Center project” (*id.* ¶ 12(f));
2. sought additional payments after he “left the UN” in order to provide “further support for the Macau Conference Center” (*id.* ¶ 9); and
3. generally took “official action as opportunities arose to benefit Ng, including advancing Ng’s interest in developing the Macau Conference Center” (*id.* ¶¶ 11, 14).

None of these alleged actions satisfies the definition of “official act” established by the Supreme Court. As noted above, *McDonnell* sets forth “two requirements” for an official act. 136 S. Ct. at 2368. The acts alleged by the government do not satisfy either requirement.

* + 1. *The government does not allege any “question, matter, cause, suit, proceeding or controversy” that was pending or could have been brought before the UN*

To adequately allege an official act, the government first “must identify” the “question, matter, cause, suit, proceeding or controversy” that it relates to. *McDonnell*, 136 S. Ct. at 2368 (internal quotation marks omitted). For brevity, we will refer to this as a “matter.” The matter must be something that is “pending” or “may by law be brought” before a public official. *Id.* It is “something specific and focused” that “must involve a formal exercise of governmental power.” *Id.* at 2372; *see also id.* at 2369-70 (the matter must be “focused and concrete”— “the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete”). It must be “similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.” *Id.* at 2372. “[B]road policy objective[s]” such as “economic development,” “justice,” and “national security” do not count. *Id.* at 2369, 2374.

Nor do routine, administrative questions such as whether to arrange a “meeting, call, or event,”

since these are “not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee.” *Id.* at 2369.

The indictment fails to allege *any* “matter” that was pending or could have been brought before the UN. In several places, the indictment refers to the “Macau Conference Center,” but it leaves the relationship between this conference center and the UN entirely unexplained. The indictment does not allege that the UN was considering any question or controversy related to the Macau Conference Center. The indictment alleges that Mr. Ng paid Ashe in order to build UN “support” for the Macau Conference Center, but it does not describe the nature of this “support,” let alone allege that it was the “formal exercise of governmental power” that *McDonnell* requires. *Id.* at 2372.13 This is no better than the “nebulous” allegation that Governor McDonnell was paid to make decisions “related to Virginia business development.” *Id.* at 2361, 2374. Thus, the allegations do not state an offense, and Counts One and Two must be dismissed.

* + 1. *The indictment does not allege any “decision or action” on a matter that was pending or could have been brought before the UN*

Even if the question of whether to “support” the Macau Conference Center qualified as a “matter” before the UN, the government could not surmount the second hurdle of the *McDonnell* analysis. None of the acts described in the indictment (labeled “a” through “f” above) qualifies as an “official act” because none of them amounts to a “decision or action” on the pending matter.

1. The government cannot satisfy its burden by alleging that Ashe “agreed, among other things, to use his position to build UN support for the Macau Conference Center.” (SI ¶ 6).

13 We use the short-hand phrase “governmental power,” as *McDonnell* did, to refer to the authority of the entity of which the alleged recipient of the bribe is alleged to have been an agent.

Agreeing to use one’s official position to benefit another person, without more, is not an official act. Indeed, the Supreme Court in *McDonnell* flatly rejected the argument that it was a crime to use one’s official position to arrange and attend meetings for the benefit of a private party. *See* 136 S. Ct. at 2372. Even “hosting an event” aimed at building support for the private party’s objectives—or “expressing support” for those objectives in one’s official capacity—does not count as an official act. *Id.* at 2361, 2371; *see also id.* at 2365-66. Thus, the generic allegation that Ashe “agreed . . . to use his position to build UN support for the Macau Conference Center” does not state an offense. *See Pirro*, 212 F.3d at 93 (indictment insufficient where “the government’s allegation might or might not” describe a crime); *see also id.* at 95.14

The government cannot save this allegation by pointing out that Ashe allegedly agreed to do “other things” as well. (SI ¶ 6). To the extent the “among other things” language refers to other “official acts” the government intends to charge, it must be stricken. Otherwise, it would “impermissibly expand[] the charge” in violation of the Fifth Amendment by “‘permit[ting] the prosecution to go beyond the specific charge . . . made by the grand jury.’” *United States v.*

*Kassir*, No. S2 04-CR-356 (JFK), 2009 WL 995139, at \*3 (S.D.N.Y. Apr. 9, 2009) (quoting

*United States v. Pope,* 189 F. Supp. 12, 25 (S.D.N.Y. 1960)); *see also id.* at \*4 (granting motion to strike allegation containing the broadening phrase “among other things”).

1. The submission of “an official UN document to the UN Secretary-General” regarding the Macau Conference Center was not an official act either. (SI ¶¶ 6, 12(b)). This

14 The indictment does not specify which of Ashe’s purported “various positions” it is referring to. (SI ¶ 1; *see also id.* ¶ 6). As explained above, Ashe was not even arguably an “agent” of the UN while he was serving solely as Antigua’s ambassador to the UN. Any use of his “official position” during that period therefore could not support § 666 charges even if it would otherwise qualify as an “official act” under *McDonnell*.

“official UN document” is a letter from Ashe marked UN Document Number A/66748 and dated February 24, 2012. (Sealed Complaint, *United States v. Ashe*, 15 Mag. 3562, ¶ 36).15

Ashe sent the letter in his capacity as “the Permanent Representative of Antigua and Barbuda to the United Nations.” (Shapiro Decl. Ex. D at 2).16 In the introductory paragraph, Ashe writes that he has “the honour to transmit herewith the outcomes of recent high-level meetings and working sessions . . . which resulted in the launching of the Global Business Incubator.” (*Id.*). The main paragraph explains when these meetings occurred, describes their subject matter, and lists the participants. (*Id.*). And in conclusion, Ashe requests that the Secretary-General circulate the letter and its annex to the UN General Assembly. (*Id.*). The annex simply provides further details about the meetings and reports the participants’ decision to launch the Global Business Incubator. (*Id.* at 3-4). The letter does not say that the proposed incubator would be located in Macau, but the government alleges that this incubator was the Macau Conference Center.

The letter plainly falls outside *McDonnell*’s definition of “official action.” The letter does not exercise formal governmental power, nor does it advise or pressure any other official to exercise such power. *See McDonnell*, 136 S. Ct. at 2371-72. At most, it is an optimistic status report on the prospect of a global business incubator. It does not advise, request, or urge any further action on the part of the Secretary-General in support of the global business incubator.

15 The letter is attached as Exhibit D to the accompanying Shapiro Declaration. Since it is indisputable that the indictment refers to and relies on a specific, identifiable document, the Court should consider the contents of that document in ruling on Mr. Ng’s motion to dismiss. In the civil context, courts evaluating motions to dismiss regularly consider documents incorporated by reference in the complaint or integral to the claims alleged. *See, e.g.*, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991).

16 Accordingly, as explained above, he clearly was not an “agent” of the UN at the time.

The *only* thing the letter asks of the Secretary-General is to circulate the letter to the General Assembly. Asking someone to circulate a letter, however, is no more an “official act” than sending the letter in the first place. Neither is it a “decision or action *on* the pending question” of whether the UN should support the Macau Conference Center, even if the letter is somehow “related to” that question. *Id.* at 2370-71 (emphasis added).17

1. Nor did the letter transform into an official act once Ashe decided to “submit[] a formal revision” that “identified the Macau Real Estate Development Company as a partner in the Macau Conference Center project.” (SI ¶ 12(d)).18 The revised letter states that Ashe is “pleased to inform [the Secretary-General] that in response to the recommendation [for a global business incubator], Sun Kian Ip Group of China has welcomed the initiative and will serve as the representative for the implementation of the Permanent Expo and Meeting Centre for the countries of the South.” (Shapiro Decl. Ex. E at 1). Again, the revised letter is simply a report— it “informs” the Secretary-General of an additional fact but does not advise, request, or urge him to do anything with it. It therefore cannot form the basis for § 666 charges.
2. The indictment alleges only one purported “official act” that occurred after Ashe was elected PGA: Ashe “traveled to China in his official capacity as [PGA] and met with Ng regarding the Macau Conference Center project.” (SI ¶ 12(f)). *McDonnell* clearly held, however, that attending a meeting is not an official act, even if the meeting relates to a pending

17 The government cannot escape this conclusion by re-characterizing the “matter” before the UN as whether the Secretary-General should circulate Ashe’s letter. The question of whether to circulate a letter, like the question of whether to attend a meeting, is “not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee.” *Id.* at 2369. A decision on that routine administrative question therefore does not amount to an official act. *See id.*

18 The revised letter is attached as Exhibit E to the Shapiro Declaration.

matter. *See* 136 S. Ct. at 2370 (“meeting with other officials[] or speaking with interested parties” is insufficient). The government therefore may not rely on this allegation either.

1. The indictment alleges that Ashe sought additional payments from Mr. Ng after he “left the UN” in order to provide “further support for the Macau Conference Center.” (SI

¶ 9). But if Ashe left the UN, presumably he no longer had an “official position” at the UN and could no longer “formal[ly] exercise” the power of that organization. *McDonnell*, 136 S. Ct. at 2372. As a result, any actions he took after that date were not official acts for purposes of § 666.

1. Finally, the indictment contains the generic allegation that Mr. Ng paid Ashe for “official action as opportunities arose to benefit Ng, including advancing Ng’s interest in developing the Macau Conference Center.” (SI ¶¶ 11, 14). Although this allegation uses the term “official action,” that is not enough. In order “for an indictment to fulfill the functions of notifying the defendant of the charges against him and of assuring that he is tried on the matters considered by the grand jury, the indictment must state some fact specific enough to describe a particular criminal act, rather than a type of crime.” *Pirro*, 212 F.3d at 93. Where the definition of an offense “includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms”; instead, “it must descend to particulars.” *Id.* (quoting *Russell*, 369 U.S. at 765).

The allegation that Ashe took “official action” is about as informative as alleging that a criminal defendant sold “drugs,” made a “false statement,” or provided “material support” for terrorism. None of these allegations, however, is sufficient. *See United States v. Thomas*, 274 F.3d 655, 660 (2d Cir. 2001) (“[T]he type and quantity of drugs is an element of the offense that must be charged in the indictment ”); *United States v. Tonelli*, 577 F.2d 194, 196 (3d Cir.

1978) (indictment must “set forth the precise falsehood alleged and the factual basis of its falsity

with sufficient clarity to permit a jury to determine its verity and to allow meaningful judicial review of the materiality of those falsehoods” (quoting *United States v. Slawik*, 548 F.2d 75, 83 (3d Cir. 1977))); *Awan*, 459 F. Supp. 2d at 175 (dismissing indictment because it used the “generic expression ‘material support,’ . . . without specifying which of a variety of activities . . . the defendant must defend against or which the grand jury considered”). For all we know, the actions that Ashe allegedly took “as opportunities arose” are the very acts discussed above (such as the letter to the Secretary-General and the visit to Macau) that do not count as “official acts.” This generic allegation therefore cannot save the indictment. Counts One and Two must be dismissed.

##### The Allegation Regarding Official Acts Taken “As Opportunities Arose” Is Deficient For Several Additional Reasons

Even if the indictment alleges a valid “official act” (which it does not), the Court should strike the allegation that Mr. Ng paid Ashe (or agreed to do so) for official acts “as opportunities arose.” (SI ¶¶ 11, 14).

* + 1. *The allegation is impermissibly broad because it is not linked to specific matters before the UN*

The indictment alleges that Mr. Ng paid Ashe for “official action as opportunities arose to benefit Ng, *including* advancing Ng’s interest in developing the Macau Conference Center.” (SI ¶¶ 11, 14 (emphasis added)). This allegation is overbroad insofar as it suggests that Mr. Ng sought official action on subjects *other* than the Macau Conference Center, or that Ashe took such action.

The government must link Ashe’s “official acts” to a “specific and focused” matter that was pending or could have been brought before the UN. *McDonnell*, 136 S. Ct. at 2372; *see also id.* at 2369-70 (the matter must be “focused and concrete”). As explained in Part I.C *supra*, it

has not done so. But if the allegations in the indictment describe anything remotely resembling a matter pending before the UN, the Macau Conference Center is the only possible candidate. The other subjects on which Mr. Ng supposedly sought official action are left entirely unspecified, so there is no way to evaluate whether they satisfy the requirements outlined in *McDonnell*. To the extent the indictment alleges that Mr. Ng sought official action on these other, unspecified subjects, those allegations must be stricken.

* + 1. *The allegation does not satisfy the heightened standard applicable to bribes that take the form of political contributions*

The allegation that Mr. Ng paid Ashe to take official action “as opportunities arose” is deficient for an additional reason. Mr. Ng allegedly bribed Ashe by, *inter alia*, making monetary contributions to accounts that Ashe had established to support his UNGA Presidency. (SI ¶¶ 7-8, 12(g)).19 The UN fully expects that candidates for PGA whose countries are unable financially to supplement the admittedly insufficient funds made available to them by the UN, if elected PGA, will seek contributions from private parties to support their activities as PGA, and thus such contributions are routine and desirable within the UN. They are in the nature of political contributions within our domestic democratic system with one notable difference—there are no UN regulations governing such contributions.

Criminalizing contributions to a political cause or candidate raises constitutional concerns. As a result, a heightened standard applies to allegations that bribes took the form of otherwise permissible contributions. Under this standard, alleging that Mr. Ng made

19 The indictment alleges that the “purported” purpose of the accounts “was to raise money for [Ashe’s] UNGA Presidency” (SI ¶ 7), but it does not allege that these accounts served any other purpose, let alone that Mr. Ng knew of any other purpose.

contributions to Ashe’s PGA accounts for official action “as opportunities arose” does not state an offense.

In *McCormick v. United States*, 500 U.S. 257 (1991), the Supreme Court held that campaign contributions are bribes only when given “in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” *Id.* at 273. The Second Circuit has interpreted *McCormick* to mean that “proof of an *express* promise is necessary when [alleged bribe] payments are made in the form of campaign contributions.” *Ganim*, 510 F.3d at 142 (emphasis added). Moreover, “[n]o generalized expectation of some future favorable action will do.” *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011). Instead, “[t]he official must agree to take or forego some *specific* action in order for the doing of it to be criminal under § 666.” *Id.* (emphasis added); *accord Ganim*, 510 F.3d at 142 (there must be a promise “*to perform or not to perform an official act*” (quoting *McCormick*, 500 U.S. at 273)).

The *McCormick* rule applies not only to campaign contributions but also to other payments of a political or expressive nature. Convictions for such payments have the potential to “impact the First Amendment’s core values—protection of free political speech and the right to support issues of great public importance.” *Siegelman*, 640 F.3d at 1169; *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 327 (2010) (“First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech.” (internal quotation marks omitted)). For this reason, the *McCormick* rule has been applied to donations for a state ballot initiative, *see Siegelman*, 640 F.3d at 1169-70, as well as contributions to a politician’s legal defense fund, *see United States v. Menendez*, 132 F. Supp. 3d 635, 642-43 (D.N.J. 2015).

Like these payments, Mr. Ng’s alleged contributions to Ashe’s UNGA Presidency were, at the

very least, a “symbolic expression of support” protected by the First Amendment. *Id.* at 642.20 Thus, the “heightened pleading standard” of *McCormick* governs here. *Id.* at 644.

The allegation that Mr. Ng sought official action from Ashe “as opportunities arose to benefit Ng” fails to satisfy this standard, since the allegation is not linked to any *specific* official acts. The District of New Jersey recently dismissed several counts of an indictment against Senator Robert Menendez for this very reason. There, the indictment alleged that a donor gave contributions “in order to influence Menendez’s official acts, as opportunities arose,” and that Menendez accepted contributions in return for “being influenced in the performance of official acts, as opportunities arose.” *Id.* The court held that these allegations were “barred by *McCormick*” because they alleged “a generalized expectation of some future favorable action.” *Id.* (internal quotation marks omitted). For the same reason, the government cannot rely on virtually identical allegations in the indictment against Mr. Ng.

##### The Gratuity And Bribery Theories Are Deficient

The indictment charges Mr. Ng with (1) conspiring to pay “[b]ribes and [g]ratuities” and

1. paying “[b]ribes and [g]ratuities.” (SI at 1, 8). The Second Circuit has determined, contrary to several other circuits, that § 666 criminalizes gratuities in addition to bribes. *See Ganim*, 510 F.3d at 150. While bribery requires a *quid pro quo* exchange of payments for official action, an illegal gratuity is “a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.” *United States v. Sun- Diamond Growers of California*, 526 U.S. 398, 404-05 (1999); *see also Ganim*, 510 F.3d at 150

20 The allegations of the indictment, alone, establish that Mr. Ng’s payments to the PGA accounts to support Ashe’s “UNGA Presidency” fall within the *McCormick* rule. (SI ¶ 7). However, the nature and purpose of private contributions to a UNGA Presidency is explained in greater detail at pages 3-4 *supra*.

(“[A] payment made to ‘influence’ connotes bribery, whereas a payment made to ‘reward’ connotes an illegal gratuity.”).

* 1. *The gratuity theory should be dismissed entirely*

To the extent the indictment charges illegal gratuities in addition to bribes, the gratuity theory should be dismissed because the indictment does not allege a link between the purported gratuities and any specific official act.

An illegal gratuity charge requires “that some particular official act be identified and proved,” and that the gratuity payment be “linked to [this] identifiable act.” *Sun-Diamond*, 526

U.S. at 406; *see also id.* at 408 (violation must be “linked to a particular ‘official act’”); Gov’t’s Mem. Of Law In Opp’n To Defs.’ Pretrial Mot. at 27, *United States v. Skelos*, No. 15-cr-317 (S.D.N.Y. Sept. 25, 2015), ECF No. 27 (“[T]he Supreme Court held that an illegal *gratuity* must be linked to a specific official action.”). Linking the gratuity to a particular act is necessary to avoid the “peculiar result[]” of criminalizing routine political conduct, such as the giving of “token gifts” to officials “based on [their] official position.” *Sun-Diamond*, 526 U.S. at 406*.*

Here, however, the indictment simply lists a number of payments and purported official acts, without alleging that a particular payment was made to reward a particular act. (SI ¶ 12(a)- (g)). Without such an allegation, there is no assurance that the government is prosecuting actual *gratuities*, as opposed to gifts Ashe received simply because of his official position. It is no answer to point to the allegation that Mr. Ng paid Ashe “to reward the taking of official action as opportunities arose.” (SI ¶¶ 11, 14). The government cannot vaguely refer to unspecified “official action”; instead, it must link payments to an identifiable act. Moreover, to the extent the government sought to link a payment to any one of the alleged acts by Ashe, none of those

acts qualifies as a legally valid official act under *McDonnell* for the reasons explained above. The indictment therefore fails to adequately allege the payment of illegal gratuities.21

* 1. *The allegations regarding Mr. Ng’s contributions to the PGA accounts must be stricken*

As explained in Part I.D.2 *supra*, Mr. Ng’s alleged contributions to Ashe’s UNGA Presidency are analogous to campaign contributions, and the government must allege an “*express* promise” of official action when bribe payments are made in this form. *Ganim*, 510 F.3d at 142 (emphasis added). The indictment does not allege that Ashe made any “express” promise of official action to Mr. Ng. As a result, the government may not rely on contributions to the PGA account to charge a violation of § 666, and the allegations regarding those contributions should be stricken.

##### Section 666 Does Not Apply To The Alleged Payments To Ashe Because They Did Not Implicate The Integrity Of UN Funds, Much Less Federal Funds

Counts One and Two fail for the additional reason that they do not adequately allege any connection between Mr. Ng’s alleged payments and the UN’s funds or its financial interests.

Because the Macau Conference Center did not implicate, directly or indirectly, either federal funds or the financial interests of the UN, § 666 does not apply to the conduct alleged in the indictment.

21 Counts One and Two fail for the additional reason that § 666 does not criminalize the payment of gratuities. We recognize that the Second Circuit disagrees. *See Ganim*, 510 F.3d at 150. But the Second Circuit’s extension of § 666 to gratuities is inconsistent with the text and history of the statute, as is thoroughly explained in *United States v. Jennings*, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998), among other cases. Moreover, although the maximum punishment associated with the gratuity provision in § 201(c) is two years, the maximum punishment for § 666 is ten years. Thus, the Second Circuit’s extension of § 666 to gratuities has the perverse effect of “permit[ting] greater punishments to persons who give gratuities to state and local officials than to persons who give gratuities to federal officials.” *United States v. Crozier*, 987 F.2d 893, 900 (2d Cir. 1993). Congress surely cannot have intended this disparity to benefit federal officials.

Section 666(a)(2) prohibits payments made “in connection with any business, transaction, or series of transactions” of an entity receiving federal funds “involving anything of value of

$5,000 or more.” Although the government is not required to prove that federal funds were directly affected by the alleged bribery, *Salinas v. United States*, 522 U.S. 52, 60 (1997),22 the statute was never intended to reach “every federal contract or disbursement of funds.” S. Rep. No. 98-225, at 370, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511. The Supreme Court has cautioned that extending the statute to “turn almost every act of fraud or bribery into a federal offense” would “upset[] the proper federal balance” struck in the statute. *Fischer v. United States*, 529 U.S. 667, 681 (2000). The statute’s avowed purpose is to “protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.” *Sabri v. United States*, 541 U.S. 600, 606 (2004) (quoting S. Rep. No. 98-225, at 370, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511). “[I]n *each* case the exercise of federal power [must be] related to the federal interest in a federal program” or § 666 would improperly “criminalize routine acts of fraud or bribery.” *Fischer*, 529 U.S. at 689 n.3 (Thomas, J., dissenting).

The alleged bribery scheme involved payments to a foreign diplomat assigned to the UN, itself a separate, quasi-sovereign entity. The payments allegedly sought “UN support” for the Macau Conference Center (SI ¶¶ 5-6), but there is no allegation that this support would have been financial or that the Macau Conference Center itself would have implicated the UN’s financial interests in any way. There is no allegation that the UN would have expended any resources on the Macau Conference Center, that Mr. Ng would have been awarded any contract

22 The Supreme Court upheld this aspect of the statute against a facial constitutional challenge.

*Sabri v. United States*, 541 U.S. 600, 605 (2004).

with the UN, or that Mr. Ng would have reaped any financial benefit from the Macau Conference Center, a *pro bono* endeavor. By contrast, § 666 cases typically involve allegations that state or local government officials were bribed in return for an award of some government contract or benefit, or to avoid some government-imposed liability. *See, e.g.*, *Sabri*, 541 U.S. at 603 (real estate developer offered bribes to local official in exchange for economic development grants); *United States v. Brunshtein*, 344 F.3d 91, 94 (2d Cir. 2003) (bribes offered to expunge over

$500,000 in property taxes owed to city).

Section 666 was not intended to cover the sort of routine political conduct alleged here.

The UN is a separate quasi-sovereign entity; it is not part of any United States government agency, nor is it a private organization. As discussed *supra*, courts must avoid constructions of statutes that threaten to interfere with the interests and laws of other sovereigns in order to prevent international discord. At a minimum, then, absent a clear statement by Congress, the statute should not be construed to cover the inner-workings of the UN, its PGA, or representatives of diplomatic missions from other countries, unless there is some connection between the alleged bribery and either the use of federal funds or at least a risk to the financial interests of the UN, as the recipient of federal funds, itself. If § 666 applies to the UN, limiting its scope to cases implicating the financial interests of the UN ensures that the compelling interest in avoiding unintended clashes with foreign sovereigns is trumped only where the federal interest in safeguarding the integrity of federal funds from theft, fraud, or undue influence is meaningfully implicated. *See United States v. Bonito*, 57 F.3d 167, 173 (2d Cir. 1995) (doubting that § 666 could apply “if the corrupted business affected neither the financial interests of the protected organization nor . . . federal funds directly”); *see also United States v. McCormack*, 31

1. Supp. 2d 176, 186 (D. Mass. 1998) (§ 666 could not constitutionally apply where there was

“no connection whatsoever between the alleged conduct and either the federal funds that conferred jurisdiction, or the programs those funds authorized”).23

For example, in *United States v. Sidorenko*, the Northern District of California dismissed an indictment alleging the bribery of an agent of the International Civil Aviation Organization, a UN specialized agency which received millions in federal funds. 102 F. Supp. 3d at 1126 & n.3. Though the court based its ruling on the ground that the charge was an impermissible extraterritorial application of § 666, the court pointedly noted that “there [we]re no allegations here actually implicating the government’s interest in protect[ing] the integrity of the vast sums of money distributed through Federal programs” because the indictment contained “no allegation that even one dollar of the millions of dollars the United States presumably sent to ICAO was squandered.” *Id.* at 1130 (internal quotation marks omitted) (second alteration in original).

Accordingly, “Congress could not, in enacting Section 666, have envisioned that it could be applied extraterritorially to prosecute foreign crime in which the United States’s investment *was not harmed*.” *Id.* The same is true here. The gist of the allegations is that a foreign national bribed a foreign diplomat to the UN to gain his assistance in promoting the political objective of constructing a UN conference center in China, and there is no indication that even one dollar of

23 In *United States v. Santopietro*, the Second Circuit affirmed the convictions of defendants charged with a bribery scheme under § 666 despite the absence of an “obvious or direct financial loss” to the local government involved. 166 F.3d 88, 91 (2d Cir. 1999) (“*Santopietro II*”), *overruled by Sabri*, 541 U.S. 600. *Santopietro*, however, involved conduct that clearly implicated the financial interests of the local government and resulted in a substantial benefit to the defendants. *See United States v. Santopietro*, 996 F.2d 17, 18 (2d Cir. 1993) (“*Santopietro I*”) (bribery scheme involved disclosure of “confidential appraisal information for use in bidding on city-owned property” and “expedited treatment from city agencies”); *see also Santopietro II*, 166 F.3d at 91 (noting that “large amounts of money flowed to individuals through corrupt means”). It does not hold that § 666 applies where an organization or government’s financial interests are not implicated in any fashion by the alleged payments, let alone where the payments were made by someone who received no financial benefit, to an alleged agent of a foreign sovereign.

the UN’s funds, let alone any federal funds, would have been squandered by the UN’s “support” of the Macau Conference Center. Accordingly, the federal interest in safeguarding the integrity of federal funds is absent, and § 666 should not be construed to reach Mr. Ng’s alleged conduct.

##### The Alleged Payments Were Not In Connection With Any “Business” Of The UN

Counts One and Two should also be dismissed because the indictment fails to sufficiently allege that any payments from Mr. Ng to Ashe involved any “business” or “transaction” of the UN involving $5,000 or more.

In relevant part, § 666(a)(2) applies to payments made to an agent of “an organization . . . in connection with any business, transaction, or series of transactions of such organization . . . involving anything of value of $5,000 or more.” Thus, an essential element of a § 666(a)(2) offense is that the alleged bribery be connected to some business of the organization receiving federal funds. The statute does not define “business,” and the term is susceptible of several meanings, from a general “role” or “function” to “commercial or mercantile activity” or “dealings or transactions especially of an economic nature.” Merriam-Webster’s Collegiate Dictionary 167 (11th ed. 2014); *see also Bonito*, 57 F.3d at 172 (recognizing that a broad definition of the term “includes ‘work,’ ‘professional dealings,’ [and] ‘one’s proper concern’”); Black’s Law Dictionary 239 (10th ed. 2014) (defining “business” as “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain”). The Second Circuit has held only that “business” is “often broader” than a mere “transaction” and should be read “to include the dealings of a government official in connection with a discrete transaction.” *Bonito*, 57 F.3d at 173.

While “business” may be broader than “transaction,” it should nonetheless be read narrowly. Any “‘ambiguity concerning the ambit of criminal statutes should be resolved in favor

of lenity.’” *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Cleveland v. United States,* 531 U.S. 12, 25 (2000)). Thus, when there is a choice “‘between two readings of what conduct Congress has made a crime, it is appropriate, before [the court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite.’” *Aleynikov*, 676 F.3d at 82 (quoting *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-22 (1952)). A narrow interpretation is also consistent with the Supreme Court’s recent efforts to restrict the scope of federal public corruption statutes to avoid constitutional problems. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2372 (cautioning that expansive interpretation of “official act” broadly “could cast a pall of potential prosecution” over even ordinary interactions between public officials and constituents). Accordingly, the Court should interpret “business” to apply only to official dealings or functions of the organization or state or local government receiving federal funds that involve something of value of $5,000 or more.

Here, the indictment fails to adequately connect the alleged payments from Mr. Ng to any such official dealings or functions of the UN. The indictment alleges that Mr. Ng sought “UN support” for the Macau Conference Center in exchange for the payments to Ashe (SI ¶¶ 5-6), but it does not allege what this nebulous “support” entailed, how the Macau Conference Center implicated any official dealings or functions of the UN, or even what the relationship of the UN to the Macau Conference Center—if any—was. And the government has not alleged that the UN “support” that Mr. Ng allegedly sought involved the use of any UN funds or implicated the UN’s financial interests. *See supra* Part I.F.

Because the indictment does not allege that any payments from Mr. Ng were tied to any UN “business,” Counts One and Two should be dismissed.

been reversed in this opinion, the money laundering conviction falls with it.”), *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc).

##### IN THE ALTERNATIVE, THE COURT SHOULD ORDER THE GOVERNMENT TO PROVIDE A BILL OF PARTICULARS

If the Court does not dismiss the indictment, it should, at a minimum, order the government to provide a bill of particulars pursuant to Federal Rule of Criminal Procedure 7(f).

A motion for a bill of particulars should be granted where additional details of the charge are “necessary to the preparation of [the] defense, and to avoid prejudicial surprise at the trial.” *United States v. Torres*, 910 F.2d 205, 234 (2d Cir. 1990) (internal quotation marks omitted), *abrogated on other grounds by United States v. Marcus*, 628 F.3d 36 (2d Cir. 2010); *see United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (“Rule 7(f) . . . permits a defendant to seek a bill of particulars in order to identify with sufficient particularity the nature of the charge pending against him, thereby enabling [the] defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense.”). The decision to order the filing of a bill of particulars rests within the sound discretion of the district court. *Bortnovsky*, 820 F.2d at 574; *United States v. Nachamie*, 91 F. Supp. 2d 565, 570 (S.D.N.Y. 2000).

For all the reasons discussed below, the indictment lacks the “particular facts” necessary for Mr. Ng to prepare his defense. By letter dated July 25, 2016, Mr. Ng asked the government to provide certain basic information that goes to the core of his defense. (*See* Shapiro Decl. Ex. F). By letter dated September 9, 2016, the government provided a very limited amount of additional information, but otherwise declined to provide Mr. Ng with a bill of particulars. (*See*

Shapiro Decl. Ex. G). As the following discussion makes clear, the government’s position is wrong.25

##### The Indictment Fails To Specify The Substance And Extent Of The Official Acts Alleged By The Government

As demonstrated in Part I.C *supra*, among the reasons for dismissing the indictment is its failure to allege any acts by Ambassador Ashe that qualify as “official acts” under governing law. Though some acts are mentioned in the Indictment (*e.g.*, “submitt[ing] an official UN document to the UN Secretary-General,” SI ¶ 6), others are described only vaguely (*e.g.*, “us[ing] his position to build UN support,” SI ¶ 6) if at all. In the event that the Court denies Mr. Ng’s motion to dismiss, it should at the very least order the government to provide a bill of particulars specifying all of the acts that it contends constitute “official acts.”

The indictment’s allegation of Mr. Ng’s purported official acts is impermissibly vague and ambiguous in at least three respects. First, paragraph 6 suggests potential official acts beyond those alleged in the indictment, stating that Ashe agreed “among other things to use his position to build UN support for the Macau Conference Center.” These “other things,” however, are left unstated and unspecified. To the extent that there are other alleged official acts that the Government intends to prove, it should specify them now in a bill of particulars. Second, paragraphs 11 and 14 allege that Mr. Ng agreed to pay Ashe in exchange for the taking of official action “as opportunities arose.” Again, however, the indictment provides no details

25 In presenting Mr. Ng’s argument, due to space limitations this Memorandum will not address individually each separate item requested in his request for a bill of particulars. Rather, this Memorandum will group Mr. Ng’s requests into pertinent categories, and set forth his arguments with respect to those categories. In so doing, however, Mr. Ng emphasizes that he continues to seek all of the items listed in his July 25 request, and respectfully refers the Court to that letter in further support of his argument.

whatsoever about such actions or opportunities. These generic references leave Mr. Ng with no ability to prepare his defense.

Third, certain of the official acts alleged by the government are hopelessly vague.

Paragraph 6 alleges that Ashe “agreed . . . to use his position to *build UN support*” (emphasis added) for the Macau Conference Center. Paragraph 9 similarly alleges that Ashe sought additional payments after he left the UN in order to provide “further support” for the Macau Conference Center. These ambiguous terms, however, shed no light on what Ashe actually agreed to do. Given the requirements of *McDonnell*, the government should state with exacting specificity the nature of the official actions it intends to prove at trial.

As one court explained, “the basis of the government’s allegations that the defendant solicited and received things of value” in exchange for “official acts” is “necessary to avoid unfair surprise at trial and is needed for the defendant to prepare a defense.” *United States v. Espy*, 989 F. Supp. 17, 34 (D.D.C. 1997), *rev’d on other grounds*, 145 F.3d 1369 (D.C. Cir. 1998). Thus, the *Espy* court “grant[ed] the defendant’s motion for a bill of particulars [that sought] from the government the conduct, date, place and substance of each official act referred in the indictment.” *Id*. This Court should likewise demand that the Government provide the conduct, date, place, and—most importantly—the substance of all the official acts it intends to prove at trial.

##### The Indictment Fails To Identify Mr. Ng’s Alleged Co-Conspirators

The indictment charges two conspiracy counts, and in both the government alleges that Mr. Ng conspired with co-defendant Jeff Yin as well as “others known and unknown.” (SI ¶¶ 10, 16). Mr. Ng cannot effectively prepare his defense and avoid unfair surprise at trial if he does not know who the government believes were his co-conspirators. The Court should

therefore order the government to provide that information.

Withholding this information will frustrate Mr. Ng’s ability to prepare for trial by leaving him in the dark regarding the nature and scope of the government’s conspiracy allegations. If Mr. Ng does not know who his alleged co-conspirators are, he cannot know precisely what conduct the government is alleging was criminal. Given the vagueness in the indictment, it is critical that Mr. Ng know who else the government thinks was involved. *See, e.g.*, *United States v. Lino*, No. 00 Cr. 632 (WHP), 2001 WL 8356, at \*13 (S.D.N.Y. Jan. 2, 2001) (noting when an alleged conspiracy is broad, “a defendant is more likely to be surprised by the identity of other co-conspirators, whom he may never have met” and ordering the government to identify: (1) all co-conspirators and co-schemers who it would refer to at trial; and (2) everyone described as “others” in the indictment (citations omitted)); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 241 (2000) (ordering government to disclose names of unindicted co-conspirators except where it would risk harm to that person or compromise an ongoing investigation); *United States v. Falkowitz*, 214 F. Supp. 2d 365, 391 (S.D.N.Y. 2002) (ordering the government to provide a bill of particulars identifying unidentified co- conspirators); *see also United States v. Lonzo*, 793 F. Supp. 57, 60 (N.D.N.Y. 1992) (granting “the request that the government disclose the names of unindicted co-conspirators”); *United States v. Holman*, 490 F. Supp. 755, 762 (E.D. Pa. 1980) (directing the Government to disclose “the names of all co-conspirators or participants in the alleged offenses known to the Government”).

The need for this information is particularly pronounced in this case, given the highly unusual nature of the conspiracy charged. In addition to the novel legal issues described above in Parts I-III, the case presents factual challenges. For example, while Mr. Ng is alleged to

have paid bribes to Ambassador Ashe, with one exception (an alleged meeting in Macau) the indictment alleges no actual contact or communication between the two of them. The alleged bribes, according to the government, were paid not directly to Ashe, but through third parties.

Here again the government’s allegations are maddeningly vague. The indictment alleges that Mr. Ng transmitted money to “*one or more* of the PGA accounts” that were controlled by the Ambassador, and through “*one or more* non-governmental organizations in the United States that were purportedly established to promote the UN’s development goals.” (SI ¶ 8 (emphases added)). It also alleges that Mr. Ng “and others” paid bribes to Ashe, his wife, and to “other third-parties to cover the Ambassador’s personal expenses.” (*Id. ¶* 7).

These vague allegations present two problems. First, as discussed further below, the allegations are impermissibly vague in and of themselves. Second, because the allegations contend that bribes were paid through undefined third parties, *i.e.*, “one or more” NGOs, it stands to reason that other persons were involved. This raises multiple questions—who were such persons? what NGO did they work for? were they co-conspirators in the government’s mind?—none of which are answered by the indictment. In order to adequately prepare his defense, Mr. Ng must know the answers.

The government’s voluminous discovery further clouds the picture. The government has provided more than 2 million pages of Bates stamped discovery (plus several terabytes of electronic data that does not contain Bates stamps) related to multiple individuals, entities, corporations, and NGOs. (Park Decl. ¶ 2). Review of the discovery index provided by the government shows that it has produced financial documents or banking statements for no fewer than 30 individuals and 28 entities. This huge volume of data heightens the need for the government to identify both the identities of co-conspirators and, as discussed in section C

below, basic information concerning the bribes that it contends were paid.

Disclosing the identities of alleged co-conspirators would not prejudice the Government or the alleged co-conspirators themselves (so long as disclosure is confidential). Unlike in many criminal cases, the confidential disclosure of alleged co-conspirators will not put anyone in danger or otherwise subvert legitimate law enforcement interests. As one court recently explained, “there is a common thread running through cases where courts have granted disclosure: the identities of unindicted co-conspirators have been disclosed primarily in cases in which violence was not alleged.” *United States v. Barrera*, 950 F. Supp. 2d 461, 477 (E.D.N.Y. 2013) (internal quotation marks omitted). This case shares that thread, and should reach the same result.

##### The Indictment Fails To Specify Critical Aspects Of The Alleged Conduct, Including The Nature And Payment Of Alleged Bribes

In addition to the identities of co-conspirators, the indictment fails to specify other basic facts concerning the conduct of the alleged scheme. Specific failings are discussed below, but as a general matter the Indictment neglects to disclose: (a) exactly what payments the government contends were part of the alleged conspiracy, and with respect to each such payment; (b) how the payment was made; (c) when it was made; (d) to whom it was made; and

(e) who made it. Without these facts, particularly given the broad scope of the Indictment, Mr.

Ng cannot effectively prepare his defense.

For example, the indictment alleges that Mr. Ng paid bribes to the Ambassador in “various forms.” (SI ¶ 7). It then provides a laundry list of methods—including “checks, wires, cash, payments to the Ambassador’s wife, and payments to other third-parties to cover the Ambassador’s personal expenses”—but fails to provide any details concerning such methods. The government’s September 9th Letter added little information, instead referring us

for the most part to thousands of pages of bank statements and other financial records for Ashe, his wife, and the PGA.

As another example, regarding alleged payments to “third parties to cover the Ambassador’s personal expenses:” who were such third parties? what were the personal expenses? and what were the alleged payments? Regarding alleged payments to Ashe’s wife, the indictment lacks similar details. It is no answer for the government to say that defendant was involved in the charged conduct, and therefore is in a position to know the relevant information. The indictment contains no allegation that Mr. Ng himself made a direct payment to either Ashe or his wife. Rather, all of the payments alleged as overt acts (SI ¶ 12(a), (c), (g)) were purportedly made by an NGO. Without a bill of particulars, Mr. Ng cannot determine precisely what conduct the government is relying upon.

Multiple other examples appear in the indictment. Paragraph 8 alleges that payments were made to “one or more non-governmental organizations in the United States,” but fails to specify the NGO, or even whether there was one “or more” of them. The government’s September 9th Letter, though it identified NGO-1, NGO-2, and NGO-3, has not clarified whether Mr. Ng is alleged to have transmitted funds to each of them or whether there are additional NGOs that are implicated in paragraph 8.

Paragraph 9 alleges that Mr. Ng agreed to provide “benefits” to “one or more officials at the UN Development Programme in order to gain further support for the Macau Conference Center,” but fails to specify the officials, whether there was one “or more” of them, or what “benefits” were allegedly provided. The government’s September 9th Letter provides none of this information.

Paragraphs 12 and 12(a) through 12(g) repeatedly allege that Mr. Ng “act[ed] through

NGO-1” but does not identify how he acted through NGO-1 or identify any communications in which he purportedly authorized NGO-1 to act in this matter.

Each of these allegations goes to a fundamental element of the conspiracy alleged— what were the alleged bribes, and how were they paid?—and yet the indictment provides no meaningful information. Without such detail, Mr. Ng cannot prepare his defense.

Consistent with this failing, the indictment is also replete with the open-ended phrase— “among other things”—that places no limitation on the government’s theory and gives Mr. Ng no meaningful notice of the government’s case. The government alleges that Mr. Ng engaged in a scheme to pay hundreds of thousands of dollars to Ashe, “among other things” (SI ¶ 4); that he sought support for the Macau Conference Center “among other things” (*id. ¶* 5); and that Ashe agreed to use his position to build UN support for the Macau Conference Center “among other things” (*id.* ¶ 6). Each of these “other things” must be specified in order for Mr. Ng to know the charges he faces.

##### The Sheer Size Of The Government’s Document Production Further Warrants A Bill Of Particulars

“Perhaps the most frequent case in which particulars are warranted is where discovery is overwhelmingly extensive and the government fails to designate which documents it intends to introduce and which documents are merely relevant to the defense.” *United States v. Mahaffy*, 446 F. Supp. 2d 115, 119 (E.D.N.Y. 2006) (emphasis omitted). As many courts have explained, the government does “not fulfill its obligation merely by providing mountains of documents to defense counsel who were left unguided.” *Bortnovsky*, 820 F.2d at 575; *see also*, *e.g.*, *United States v. Ramirez*, 609 F.3d 495, 503 (2d Cir.2010) (noting that the “district court made clear that it ordered a bill of particulars because so much discovery was produced to the defendants, not too little”); *Mahaffy*, 446 F. Supp. 2d at 120 (“[A] large volume of discovery warrants a bill of

particulars if it obfuscates the allegedly unlawful conduct and unfairly inhibits the defendant’s preparation for trial.”); *Bin Laden*, 92 F. Supp. 2d at 234 (“[S]ometimes, the large volume of material disclosed is precisely what necessitates a bill of particulars.”).

In the alternative, of course, the Court could order the government to cure the vagueness in its indictment by identifying those documents within the millions it has produced that it believes actually substantiate the elements of the charged offenses. (Park Decl. ¶ 2). Only a small subset of this massive production is likely to be relevant at trial—a subset that the government has presumably already identified—and it would be easy for the government to direct the defense to those key documents now. The government is not entitled, however, to both refuse a bill of particulars and decline to do anything more than simply produce millions of documents to the defense. After all, “[i]t is no solution to rely solely on the quantity of information disclosed by the government; sometimes, the large volume of material disclosed is precisely what necessitates a bill of particulars.” *Bin Laden*, 92 F. Supp. 2d at 234; *see also, e.g.*, *Nachamie*, 91 F. Supp. 2d at 572 (“Because the Government has declined to identify which of the documents provided to the defense pursuant to Rule 16(a)(1)(C) it intends to use in its case-in-chief at trial, it must, instead, respond to an appropriate bill of particulars.”); *United States v. Bonventre*, No. 10-cr-228 (LTS), 2013 WL 2303716, at \*7, 10 (S.D.N.Y. May 28, 2013) (ordering government to produce its exhibits and exhibits list no later than 60 days before trial in response to motion for bill of particulars, where there was voluminous discovery). For that reason too, a bill of particulars concerning the issues addressed above is warranted.

Dated: September 19, 2016 New York, New York

Respectfully submitted,

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# IN THE UNITED STATES DISTRICT COURT

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# 3 FOR THE CENTRAL DISTRICT OF CALIFORNIA

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| --- | --- | --- | --- |
|  | UNITED STATES OF AMERICA,  Plaintiff,  v.  THEODORE CHANGKI YOON, PHIC “P.K.” LIM, et al.,  Defendants. | )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  ) | Case No.: 11-922(A)-16-9-DDP  **REDACTED VERSION OF NOTICE OF MOTION AND MOTION TO DISMISS CHARGES AGAINST DEFENDANTS YOON AND LIM;REQUEST FOR EVIDENTIARY HEARING;MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;EXHIBITS**  **DATE: May 22, 2014**  **TIME: 2:30 p.m. COURTROOM: Hon. Dean D.**  **Pregerson** |

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### TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO

1. PLAINTIFF, THE UNITED STATES OF AMERICA, AND ITS ATTORNEYS
2. OF RECORD:
3. PLEASE TAKE NOTICE that on May 22, 2014, at the hour of 2:30 p.m., or
4. as soon thereafter as counsel may be heard, defendants Theodore Yoon and P.K.
5. Lim will and hereby do move this Court for an order dismissing the charges
6. against them.
7. The grounds for this motion are that the government actions in this case
8. resulted in outrageous misconduct that violated the due process rights of
9. defendants Theodore Yoon and Phic Lim. This motion is based on this Notice of
10. Motion, the attached Memorandum of Points and Authorities, the Due Process
11. Clause of the United States Constitution, all exhibits attached hereto, this

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### Court’s supervisory powers and upon any other oral and/or documentary evidence

1. that may adduced at a hearing on this motion.
2. Dated: April 23, 14 Respectfully submitted,

5

### NASATIR HIRSCH PODBERESKY & KHERO

6

### 7 By: /s/

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1. *Greene v. United States,*

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5 454 F.2d 783 (9th Cir.1971) 26, 27

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### 7 425 U.S. 484 (1975) 14

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# MEMORANDUM OF POINTS AND AUTHORITIES

* 1. **I.**
  2. **STATEMENT OF FACTS**
  3. **A. Introduction**

### This case presents the issue of whether the government’s knowing and

* 1. intentional interference with the relationship between defendants, Theodore Yoon
  2. and Phic Lim, and their OxyContin distributor, McKesson Pharmaceuticals, misled
  3. the defendants and deprived them of vital information that would have otherwise
  4. prevented them from unwittingly participating in the diversion of hundreds of
  5. thousands of OxyContin pills onto the streets of Los Angeles. In a strategic effort
  6. to create a case of grand proportions against the Lake Medical defendants, the
  7. government, as the evidence in this case unquestionably demonstrates, used Mr.
  8. Yoon and Mr. Lim, who were not targets of the investigation, to ratchet up the
  9. amount of diverted OxyContin that forms the basis of this prosecution.
  10. The government did so by intentionally cutting off one of the most vital
  11. pieces of information the pharmacy defendants had in thwarting illegal OxyContin
  12. diversion -- the open exchange of information with their supplier and distributor of
  13. OxyContin, McKesson Pharmaceuticals. The evidence shows that these pharmacy
  14. defendants and McKesson openly exchanged information over the years regarding
  15. suspicious activities by doctors engaged in the prescribing of Schedule II narcotics
  16. in an effort to stem the flow of illegal diversion. The conduct by the government
  17. in this case, as to these defendants, is nothing less than outrageous, for by acting in
  18. the manner in which it did, the government ensnared and then prosecuted two
  19. pharmacists who were using their best efforts to ensure that the prescriptions they
  20. were filling were for a legitimate medical purpose.

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### As a byproduct of this outrageous misconduct, the government caused

* + 1. hundreds of thousands of OxyContin pills to be supplied to Lake Medical patients,
    2. knowing that they would end up on the streets and in the hands of addicts.
    3. Between them, these two pharmacists have more than 60 years of untarnished
    4. service to the community. In total disregard for these defendants’ reputation and
    5. character, the government blithely and publicly labels them as “drug dealers,”
    6. while it is the government itself that has mainlined these drugs into our
    7. community. In short, this case is the DEA version of the infamous “Fast and
    8. Furious” scandal.
    9. **B. Chronology of Events**.
    10. On May15, 2009, at a time prior to defendant Yoon and Lim ‘s involvement,
    11. the prosecutor in this case, along with two FBI agents, Special Agents Tammy
    12. Wiser and Theresa Papuyo, debriefed a federal prisoner, , who had
    13. been arrested for bank robbery. How or why came to the attention of the
    14. government with respect to information on Lake Medical is unclear, but it was
    15. who proffered that he was recruited as a patient by Lake Medical and was
    16. taken to pharmacies to fill prescriptions for OxyContin that were ultimately given
    17. to an individual known to as “Big Mike.” (aka Mike Mikaelian). Exhibit A.
    18. also identified another clinic employee, Dr. Eleanor Santiago. Thus,
    19. by May 2009, the government, including the United States Attorney’s Office, was
    20. aware of Dr. Eleanor Santiago and her involvement in the diversion of narcotics
    21. through Lake Medical.
    22. On June 17, 2009, DEA Agent Dennis John, the lead agent in this case,
    23. prepared a case initiation report and began investigating Lake Medical. Exhibit B.
    24. A subsequent interview with federal prisoner was conducted on

26 September 17, 2009. Present at that interview were AUSA Lana Morton-Owens,

27 DEA Agent John, and Special Agent Larry Hyatt of the California Bureau of

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### Medi-Cal Fraud and Elder Abuse. again reiterated his involvement with

1. Lake Medical, which began in December 2008, and the entire scheme to divert
2. OxyContin and defraud Medicare being carried out by the Lake Medical
3. defendants. Exhibit C, at 1.
4. Lake Medical patients first walked into defendants’ pharmacies in or about

6 June 2009. At that time, Mr. Yoon, Mr. Lim and their partner Matthew Cho,

1. conducted their own due diligence by going to Lake Medical Clinic and observing
2. firsthand the patients, the doctors and medical staff. Exhibit D**.** Between June
3. 2009 and September 2009, Mr. Yoon and Mr. Lim took additional steps to ensure
4. that Lake Medical patients’ OxyContin prescriptions had been issued for a
5. legitimate medical purpose. As part of this effort, the defendants established
6. protocols for filling prescriptions for Schedule II narcotics for Lake Medical
7. patients. These protocols were not dissimilar to other protocols and procedures that
8. the defendants had previously developed with other pain management physicians
9. outside Lake Medical. Exhibit E. As their business with Lake Medical began to
10. grow, Mr. Yoon and Mr. Lim requested additional supplies of OxyContin from
11. their distributor, McKesson Pharmaceuticals. In order to obtain the additional
12. OxyContin, the defendants disclosed to McKesson, the physicians they were
13. dispensing for, the nature of the prescriptions, 90 80mg. pills of OxyContin per
14. prescription, and the method of payment, cash. Exhibit F**.**
15. This type of information exchange with McKesson was common practice,
16. and was done as a way to detect potential drug diversion. Exhibit G, at ¶ 57. The
17. defendants were also aware that the industry at large, both manufacturers and
18. distributors, was obligated to perform their own due diligence regarding suspicious
19. activity. Exhibit H; Exhibit I.
20. As part of the industry effort to detect diversion, Tom McDonald, Director
21. of Regulatory Affairs for McKesson contacted DEA Diversion Agent Mike Lewis

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### on October 2, 2009, regarding Lake Medical Clinic, “as he had done many times

1. before.” Exhibit G, at ¶ 38. McDonald informed Agent Lewis that Lake Medical
2. and two doctors, Dr. Santiago and Dr. Halfon, “had popped up,” (Exhibit G, at ¶
3. 39) and that he was going to the clinic. McDonald was immediately put in touch
4. with DEA case agent Dennis John. McDonald informed Agent John that he had
5. questions regarding the clinic and that he was going to visit to the clinic. Agent
6. John told him to “not do that,” and informed McDonald that the clinic was under
7. investigation. Exhibit G, at ¶ 40. When McDonald indicated that he was cutting
8. off customers that were filling prescriptions for the clinic, Agent John replied,
9. “appreciate if you don’t do that … don’t want to effect the supply line right now
10. since they (the clinic) are being investigated right now.” *Id*.
11. After speaking to Agent John, McDonald confirmed their conversation in an
12. email and “stood down,” neither informing Mr. Yoon nor Mr. Lim of what he had
13. learned and what he had been directed to do. Exhibit G, at ¶ 40; Exhibit J. Three
14. days later, Agent John forwarded the McDonald email to California State Agent
15. Larry Hyatt and then responded to McDonald by saying “thanks.” *Id*. Thus**,** it was
16. not only the individuals and physicians at Lake Medical who were misleading the
17. pharmacies, it was also the government, which deliberately maintained the “supply
18. line” by which the pharmacist defendants filled facially valid prescriptions with
19. lawfully obtained OxyContin that unbeknownst to them, ended up being diverted
20. from the patients that they believed were being treated. Exhibit D, at ¶ 40.
21. This was accomplished when DEA Agent Dennis John essentially told
22. McKesson, to not look any further into Lake Medical and to keep increasing the
23. threshold for Lim and Yoon’s OxyContin purchases. *Id*. As a result, the DEA
24. caused the defendants to dispense hundreds of thousands of OxyContin pills
25. through a supply line that the DEA had authorized and was protecting.
26. Government’s Motion to Preclude Evidence and Argument at Trial Regarding the

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### DEA’s Suspicious Ordering System, etc. (Doc. # 590), at 4. In fact, as the record

1. evidence shows, the DEA was fully aware of what was going on at Lake Medical
2. well before Mr. Lim and Mr. Yoon even began filling prescriptions for Lake in

4 June 2009.

1. Even more alarming, is that on September 30, 2009, three days before the
2. conversation with Tom McDonald, DEA Agent John emailed AUSA Lana Morton-
3. Owens and urged her to bring “any and all charges we can move forward with right
4. away” against Mike Mikaelian of Lake Medical. Exhibit K. In that same email,
5. Agent John requested a meeting on October 7, 2009 to discuss this request.
6. Whether or not a meeting actually occurred is not known; what is known, however,
7. is that Agent John’s request was denied and three days later *the supply line for*
8. *hundreds of thousands of OxyContin pills through the defendant’s pharmacies was*
9. *under the exclusive control and direction of the government*.
10. What is also clear from the discovery is that from the inception of the
11. government’s investigation in June 2009 through April 2011, neither Yoon nor
12. Lim were targets of the government’s investigation. Exhibit L. Only after the
13. government had used and ensnared them into being conduits by which to supply
14. OxyContin to the Lake Medical defendants did the government move to prosecute
15. Mr. Yoon and Mr. Lim. Interestingly, it did so not through DEA Agent John, the
16. case agent who was in charge of this investigation, but through the FBI. One can
17. only assume such a maneuver provided the government with plausible deniability
18. for the trap they had set for Mr. Yoon and Mr. Lim when they cut off their warning
19. system and used them as an unwitting conduit to provide OxyContin to Mikaelian
20. and the rest of the Lake Medical defendants.
21. **C. The Nature of the Defendant’s Relationship with McKesson**.
22. To properly set the stage for what occurred, Mr. Yoon and Mr. Lim had been
23. running neighborhood pharmacies for many years. Mr. Yoon was a long-time and

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### highly valued customer of McKesson. His relationship with the company

1. substantially predates his involvement with Lake Medical. Exhibit M**;** Exhibit N,

3 at ¶11.

### In 2007, McKesson approached Ted Yoon to purchase an existing group of

1. pharmacies known as the Gemmel Pharmacies. In an effort to keep these
2. pharmacies from being sold to Longs Drugs (who was not a McKesson customer)
3. and keep their orders within the McKesson fold, McKesson offered to finance Mr.
4. Yoon’s purchase of these pharmacies. Exhibit M**;** Exhibit N, at ¶11. When
5. McKesson approached Mr. Yoon, Mr. Yoon was a highly valued customer of
6. McKesson, and also shared a close working relationship with McKesson’s
7. representative, Sheree Vath. Exhibit N, at ¶ 11; Exhibit O, at ¶ 6. According to
8. McKesson, Ted Yoon was an extremely profitable customer for McKesson,
9. purchasing and selling some of McKesson’s best independent pharmacy accounts,
10. as well as “bringing more pharmacies to McKesson from the Korean Pharmacy
11. Association group. . . .” Exhibit M; Exhibit N, at ¶11.
12. In short, McKesson had a vested interest in the success of the defendants and
13. their pharmacies. The closeness and strength of the McKesson/Yoon relationship
14. is best summed up by McKesson itself: “The entire management team in Southern
15. California is very close to Ted Yoon and his never-ending pursuit to save the
16. independent pharmacies in our market.” Exhibit M.
17. As industry partners, McKesson and the defendants continuously had regular
18. contact and open communication about numerous matters, including controlled
19. substances. The defendants’ contract with McKesson expressly indicates
20. McKesson’s connection to the DEA and specifies that if McKesson had any
21. suspicion about illegal activities they would immediately deny any order for
22. controlled substances and terminate the agreement between McKesson and our
23. pharmacies. If by continuing to perform any part of the agreement, McKesson

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### violated any federal, state or local law, rule or regulation, or was in jeopardy of

1. violating any such law or regulation, it would immediately terminate the
2. agreement. Exhibit P, at ¶ 15.
3. In the government’s own interview with Tom McDonald, McKesson’s
4. Western Region Director of Regulatory Affairs, McDonald related that the
5. defendants were aware that McKesson would investigate when it had questions
6. about a doctor. McDonald had previously visited with Mr. Yoon when he had
7. concerns about, Dr. Forest Tennant, a physician whose prescriptions Yoon’s
8. pharmacy was filling. Yoon and McDonald apparently had a detailed conversation
9. about Dr. Tennant in which McDonald confirmed that Yoon understood that pain
10. management patients were long-term patients. Exhibit G, at ¶ 57.1
11. McDonald also met with Mr. Lim to specifically discuss Lake Medical.
12. These discussions were open and frank. Just as Mr. Yoon had a close and cordial
13. relationship with Sheree Vath, Mr. Lim saw nothing adversarial about his
14. relationship with Mr. McDonald whom he saw as protecting the interests of his
15. pharmacies, as well as McKesson’s. In the course of their meetings, Mr. Lim
16. reviewed the protocols that he and his partners had instituted to satisfy themselves
17. that Lake Medical’s prescriptions appeared to be legitimate and were being
18. delivered to patients. An internal McKesson memorandum from August 26, 2009,
19. that was approved by Tom McDonald notes that Gemmel Ontario had reported that
20. they were working with a pain clinic called Lake Medical Group on 8th Street in
21. Los Angeles. The memorandum further states:
22. This clinic is being closely monitored by Ted Yoon and will increase
23. the volume for some of the other stores. Sheree varth[sic] is gathering
24. dispensing data for this account.

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### 1 Dr. Tennant, who is referred to as renown by McKesson itself, has authored over 200 articles and books and is editor-in-chief of the journal, Practical

1. Pain Management.

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### Exhibit Q.

1. Accordingly, McKesson had noted its approval of the means that Yoon and
2. his partners were using to maintain controls on Lake Medical. The memorandum
3. further substantiates that McKesson knew that the defendants were spreading
4. Lake’s prescriptions to its other pharmacies, including the Ontario Gemmel, which
5. was located approximately 40 miles from Lake Medical. Tom McDonald, in fact,
6. stated that the distance was not necessarily a factor that he considered a “red flag.”
7. Exhibit D, at ¶ 51.
8. Various precautions, which were discussed with McKesson, were taken by
9. the pharmacies.2 During the first three months that the defendants worked with
10. Lake Medical, they remained in regular contact with McKesson. Each time the
11. defendants needed to increase the amount of OxyContin they had to purchase from
12. McKesson, the defendants spoke with McKesson representatives and exchanged
13. information.
14. In all of their communications, the defendants were open with McKesson
15. and defendants believed that McKesson was open with them. As Mr. McDonald
16. has explained, McKesson trusted its customers. Exhibit G, at ¶51. The defendants
17. felt the same way. Likewise, when McKesson felt something was amiss or of
18. concern, it would question or decline to fill orders. As Tom McDonald explained,
19. this happened every time a pharmacy exceeded its allotment of OxyContin.
20. Exhibit G. It was likewise clear that when Mr. McDonald came to speak about Dr.
21. Tennant, he would have cut off the pharmacy’s supply of OxyContin if McDonald
22. had not felt satisfied that Dr. Tennant was writing legitimate pain prescriptions.

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### 2 This included obtaining Patient Evaluation Forms, which were to accompany every prescription for OxyContin, as well as copies of patients’

1. identification, HIPPA release forms that authorized Lake’s drivers to pick up
2. medication on behalf of patients, and written confirmations signed by patients that
3. they had received their medications. Exhibit E; Exhibit D.

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### Exhibit G. On several occasions, the defendants’ orders ***were*** suspended by

1. McKesson because their threshold had been exceeded and a threshold change form
2. needed to be prepared. This was a commonplace procedure with which the
3. defendants were well acquainted, both before and after they started doing business
4. with Lake. Exhibit P.
5. Up until approximately the end of September 2009, Tom McDonald
6. remained in contact with the defendants and continued to allow McKesson to
7. supply OxyContin to Lake’s patients. Many of the threshold change forms
8. reference either Lake or its doctors as the reason for the pharmacies' increased
9. demand. Exhibit R. Some threshold change forms note that the increase in
10. OxyContin purchases is commensurate with the pharmacies’ overall business and
11. that McKesson representatives found that the pharmacy had adequate controls in
12. place, Exhibit S. Mr. Yoon and Mr. Lim even provided dispensing data to
13. McKesson representative Sheree Vath, which clearly showed the type of
14. OxyContin prescriptions being filled (90 pills 80 mg. each) as well as the
15. prescribing doctors and the method of payment, cash. Exhibit F.3 With all this
16. information, McKesson never once raised any concerns or alerted Mr. Yoon or Mr.
17. Lim to any potential problems with Lake Medical.
18. **D. The Government’s Failure to See or Recognize the Extent of Its**
19. **Culpability**.
20. The government refuses to admit its determinative role in facilitating and
21. manipulating the perpetuation of Lake’s illegal narcotics activities. Even when
22. confronted with clear evidence that it deliberately blocked the normal flow of
23. information that would have caused the defendants to stop filling prescriptions for
24. Lake patients, the government claims to have no idea how its conduct, which

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### 3 This is a representative sample of data from a 51-page printout. Only five pages are attached in the interests of economy and not burdening the Court with

1. excessive exhibits.

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### involved using the defendants to unwittingly help it flood the black market with

1. hundreds of thousands of OxyContin pills, might be considered outrageous. See
2. Government’s Reply in Support of its Motion to Preclude Evidence (“Govt’s
3. Reply”) (Doc. No. 624).
4. To be clear, the defendants do not, as the government claims, consider any
5. of the conclusions that have been drawn from the evidence to be “hyperbol[e]” or
6. “histrionics,” and there is nothing “thinly veiled,” *id*. at 1, about the government’s
7. violation of their rights to basic due process and its callous disregard for the safety
8. of the public. When the government intervened to circumvent the normal flow of
9. information to Mr. Yoon and Mr. Lim, and to increase the flow of OxyContin to
10. the streets, there had previously been an open line of communication between
11. McKesson and the defendants’ pharmacies. Prior to this time, Mr. Lim had met
12. and spoken with McKesson’s representatives to discuss the pharmacies’ business
13. with Lake Medical and the steps that the pharmacies were taking to assure that
14. diversion of OxyContin was not taking place. On each of these occasions,
15. McKesson had approved increases in the amount of OxyContin, thereby clearly
16. signaling that it had no information or other basis to suspect that the physicians at
17. Lake Medical were criminals and not legitimate doctors. Exhibit R.
18. It was only when McKesson reached a level of concern about Lake Medical,
19. that the government told McKesson to continue green lighting the pharmacies’
20. requests for increased amounts of OxyContin to fill Lake Medical prescriptions.
21. Thus, when the government moved to preclude evidence of McKesson’s reporting
22. obligations, Mr. Yoon and Mr. Lim opposed the motion, asserting that the
23. evidence was both relevant at trial to establish their lack of knowledge and intent
24. and for purposes of a motion to dismiss based on government misconduct.

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# E. The Government’s Outrageous Interference with the Ordinary

1. **Communications Between McKesson and It’s Valued Customers**.

#### As of June 2009, the DEA had an active ongoing investigation of Lake

1. Medical. Surveillance was being conducted and evidence of both false Medicare
2. practices and OxyContin street sales by Lake Medical defendants was being
3. accumulated by the government. On September 30, 2009, Agent John wrote an email
4. to AUSA Lana Morton-Owens in which he specifically asked to meet with her “to
5. discuss any and all charges we could move forward with right away” against Mike
6. Mikaelian. Exhibit K. John requested a meeting on October 7, 2009. Rather than
7. move forward as Agent John had suggested, a decision was apparently made to
8. continue to funnel OxyContin to Lake Medical through the defendants’ pharmacies.
9. On October 2, 2009, when Tom McDonald contacted the DEA about his concerns
10. regarding Lake Medical and its doctors, Exhibit G, at ¶38**,** Agent John instructed
11. McDonald not to go to Lake Medical because it was under investigation. Agent John
12. further directed McDonald not to cut off his customers’ OxyContin. “[D]on’t do
13. that... don’t want to interfere with the supply line right now.” Exhibit G, at ¶ 40.
14. McDonald wrote to Agent John to confirm his understanding of what he had
15. been told, stating that McKesson “will not change our current process or alter our
16. service to our customer that is filling prescriptions written by doctors associated with
17. [Lake Medical Group].” Exhibit J. Agent John acknowledged McKesson’s
18. compliance with a “thanks.” *Id.*
19. Thus, at the behest and direction of the DEA, McKesson deliberately did not
20. report Lake Medical and instead effectively misled these pharmacy defendants, even
21. though the defendants specifically requested that McKesson inform them if McKesson
22. had any problems with Lake Medical or its doctors. As a consequence of this
23. conduct, McKesson continuously raised the OxyContin threshold for defendants’
24. pharmacies beginning in October 2009 through the remainder of Lake’s conspiracy.

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#### What the government engineered and directed in this case was to remove an

* 1. important safeguard on which the defendants’ relied to know whether prescriptions
  2. they were filling were considered suspicious. Regardless of whether McKesson had a
  3. fiduciary responsibility to Mr. Yoon and Mr. Lim, the facts establish that there was
  4. open and cooperative communication between them about issues surrounding drug
  5. diversion and a close and longstanding trust relationship that was intact before the
  6. government inveigled to disrupt it and the flow of important information between
  7. them.
  8. From the defendants’ perspectives, interaction with McKesson provided a
  9. safeguard on their actions. They were forthcoming with McKesson’s representatives
  10. for this very reason.
  11. While it is not misconduct for the government to use “artifice and stratagem to
  12. ferret out criminal activity,” *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013),

#### it is misconduct for the government to do what it did here. Neither Mr. Lim nor Mr.

* 1. Yoon had any prior connection to criminal conduct and were not targets of this
  2. investigation. The entire proof of their alleged participation in this conspiracy is that
  3. they filled prescriptions that, on their face, were issued for real patients with real
  4. ailments in the course of a genuine medical practice. The subterfuge was not meant to
  5. ferret out Mr. Yoon and Mr. Lim, but to help build cases against the real
  6. coconspirators at Lake Medical. Exhibit L.

#### It was only because of the intervention of the government, including the DEA

* 1. and this United States Attorney’s Office, that the ordinary reciprocal flow of
  2. information between McKesson and the defendants was interrupted, and Mr. Yoon
  3. and Mr. Lim, who would have ordinarily learned instantly of McKesson’s misgivings,
  4. continued to supply OxyContin to Lake.
  5. What happened here was a basic denial of Mr. Yoon and Mr. Lim’s due
  6. process rights. While they made assumptions based on information that they

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1. received, they were affirmatively misled, not only by the personnel at Lake
2. Medical, but also by the government, which, by design, deliberately allowed Lake
3. to continue obtaining OxyContin and traffic it to other criminals. The
4. consequences of the government’s actions were that Lake continued to divert
5. OxyContin while these defendants became pawns in its investigation -- never
6. getting the critical information they needed. This callous violation of Mr. Lim and
7. Mr. Yoon’s due process rights calls for a dismissal of the charges against them.
8. **II.**
9. **ARGUMENT**
10. **A. By Subverting an Established System of Diversion Control, of which**
11. **Defendants Were a Part, the Outrageous Government Conduct in this**
12. **Case Was Far More Egregious than in any Reported Circuit Case.**
13. Although Mr. Lim and Mr. Yoon maintain that they never knowingly
14. assisted anyone to break the law, the actions in question are those of the
15. government, not the defendants. *United States v. Restrepo*, 930 F.2d 705, 712 (9th

### Cir. 1991). Thus, while the government hinges its prosecution on *post-hoc* second

1. guessing judgments that the defendants made, the question to be answered is
2. whether “the conduct of law enforcement officials is so outrageous that due
3. process principles would absolutely bar the Government from invoking judicial
4. process to obtain a conviction.” *United States v. Russell*, 411 U.S. 423, 431-32

### (1973). That is what happened here.

1. When the government crosses the line from apprehending criminals to
2. creating crime, the government's conduct violates due process. The government
3. intentionally circumvented procedures that were implemented to ensure that
4. dangerous drugs did not make their way into the community. Those procedures, if
5. followed, would have protected the community in this case. The defendants would
6. have heeded McKesson’s warnings and the public would have been protected from

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### an enormous quantity of illicit OxyContin. The government actually facilitated the

1. crime that was taking place at Lake Medical and ensnared innocent pharmacists.
2. By abdicating its law enforcement role, the government engaged in the type of
3. government action that *Russell* recognized would be outrageous misconduct. The
4. Supreme Court has thus authorized this Court to dismiss the case against Mr. Yoon
5. and Mr. Lim.
6. The Court may also invoke its supervisory powers to prevent the
7. government from unjustly obtaining a conviction. *United States v. Simpson*, 813

9 F.2d at 1465 n.2 (9th Cir. 1987); *Hampton v. United States*, 425 U.S. 484, 493-94

### (1975) (Powell, J. concurring). This is particularly apt when, as here, the

1. government denies having any reservations about its conduct. The Court need not
2. stand by when the government has not only allowed, but has helped, funnel huge
3. amounts of dangerous drugs into the community.
4. Throughout every motion, opposition and reply in this case, the government
5. ignores the steps taken by the defendants to corroborate not only Lake Medical
6. Group and its doctors, but also every one of its prescriptions. At the same time, it
7. turns a blind eye to its own misconduct. Had it not been for the government’s
8. interference, McKesson would have exercised the controls that it had established.
9. Meeting with Mr. McDonald and discussing Lake’s methods of operation and their
10. own efforts to prevent diversion, as well as receiving McKesson’s approval for
11. further OxyContin orders, allayed Mr. Yoon and Mr. Lim’s qualms about
12. continuing to accept Lake’s patients.
13. What they did not know was that, well before September 2009, both the
14. DEA and the prosecutor assigned to this case were investigating Lake’s Medical
15. Director, Dr. Eleanor Santiago, as well as Lake’s other doctors and staff, for
16. suspected drug diversion. Mr. Lim and Mr. Yoon also could not have known that
17. Lake was using recruited patients whose records were falsified and who never

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### received their prescribed medications. It never even crossed their minds that all of

1. the drugs that they dispensed were being delivered to one individual who was
2. selling the drugs on the street. All of this information was uniquely in the hands of
3. the government.
4. Unfortunately, and solely through the intervention of the government,
5. McKesson “stood down” at the very moment that it was ready to take action.
6. Exhibit G, at ¶ 40. The unfortunate result is that the government ordered that
7. hundreds of thousands of OxyContin pills be supplied to Lake Medical patients
8. while knowing that the pills would end up sold to addicts and drug dealers on the
9. streets. Solely for its own purposes, the government kept secret from the
10. defendants that it knew that the prescriptions written by Lake’s doctors had no
11. medical purpose.
12. This outrageous directive to McKesson eliminated an established pattern and
13. practice of sharing of knowledge between McKesson and these pharmacists that
14. would have prevented this flood of pharmaceuticals from hitting the streets. Not
15. realizing that these machinations were taking place, Ted Yoon and P.K. Lim were
16. literally caught in the middle of the government’s investigation of drug trafficking
17. at Lake Medical. Never once considering its own outrageous actions, the
18. government now calls Mr. Yoon and Mr. Lim “drug dealers” when the government
19. was the party that was actually facilitating Lake’s narcotics trafficking. Although
20. they were not targets in September 2009 or even 2010, Mr. Yoon and Mr. Lim are
21. now defendants because the government wanted to keep Lake in business.
22. The government cannot, and has not, presented this Court with any evidence
23. that refutes the evidence showing its heavy hand in perpetuating the conspiracy at
24. Lake Medical. This case has all the earmarks of the scandal surrounding the
25. ATF’s “Fast and Furious” operation in 2010 that flooded Mexico with illegal
26. weapons that were later recovered at hundreds of crime scenes. Because drugs are

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### not as easily traced as guns, it may not be possible to know how many deaths and

1. related crimes were caused by the government’s deliberate release of narcotics. In
2. both cases, public safety was disregarded out of a zeal to expand investigations that
3. yielded very little that was new. In this case, the government had already
4. identified key individuals at Lake Medical as early as May 2009, Exhibit C, and
5. was well aware of the identities of many of Lake’s doctors and staff well before it
6. prevented McKesson from halting the flow of narcotics to Lake through the
7. defendants’ pharmacies, Exhibit G, at ¶ 39. It was in fact already prepared to make
8. arrests, including at least one of the leaders of the conspiracy, Mike Mikaelian by
9. late September 2009. Exhibit K.
10. In a related context, Judge Otis Wright of this district dismissed charges
11. against a man caught up in a reverse sting on due process grounds. *United States*
12. *v. Hudson, et al.*, Case No. 13-00126-ODW (March 10, 2014). The difference is

### that, in the *Hudson* case, the government had fabricated information to induce the

1. defendant to commit a crime, whereas in this case, the government deliberately
2. withheld information and manipulated facts in such a way that Mr. Yoon and Mr.
3. Lim became caught up in a crime that they never intended to commit. As Judge
4. Wright stated, “Society does not win when the Government stoops to the same
5. level as the defendants it seeks to prosecute.” *Hudson* Slip Op. (No. 13-00126), at
6. 20. Whereas the crime in *Hudson* involved a fictitious stash house containing 25
7. kilograms of fictional cocaine, the drugs that were distributed in this case were
8. quite real and caused the precise harm that the drug laws are designed to prevent.
9. The government’s attempt to distinguish *Hudson* in the margins of its reply
10. to the defendant’s opposition to the motion to preclude evidence, Govt’s Reply at 9
11. n.7, is not persuasive in the least. Although it certainly is true that the government
12. created the scheme in *Hudson*, the scheme, which involved an armed robbery of a
13. stash house, was highly illegal on its face. Conversely, there was nothing illegal

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### about Mr. Lim and Mr. Yoon filling prescriptions for patients. There is no

1. evidence that prior to October 2, 2009, they knew or should have known that Lake
2. was diverting drugs, and they were prevented from learning more about Lake
3. because it was the government’s design to maintain their ignorance. This fact
4. alone makes this case more compelling than *Hudson*. While the defendant in
5. *Hudson* set off to commit a crime, Mr. Lim and Mr. Yoon set out to dispense
6. needed medication pursuant to facially valid and legitimate prescriptions. The fact
7. that the defendants did not scheme to commit a crime is a fundamental distinction
8. that the government refuses to grasp.
9. The government’s observation that “the defendants [in *Hudson*] had no prior
10. involvement in robberies of drug stash houses” is on all-fours here. Mr. Yoon and
11. Mr. Lim not only have no prior involvement in drug diversion, they have no
12. criminal records. They had never been the subjects of any discipline and were not
13. suspected of anything. The fact that a confidential informant was used in *Hudson*
14. only helps to define how much more outrageous the government misconduct was
15. in this case. Here, rather than relying on an informant who came “out of the blue,”
16. *Hudson*, Slip Op. at 3, Mr. Yoon and Mr. Lim relied on a trusted business partner.
17. Thus, in every way, this case stands as a far more egregious case of government
18. overreaching than *Hudson*.

# 1. This Was a Patent Case of Outrageous Government Misconduct.

### In this Circuit, the Court is to examine the totality of the circumstances to

1. determine whether a prosecution is based on outrageous government conduct.
2. *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013). Among the factors to be

### considered are:

1. (1) known criminal characteristics of the defendants; (2)
2. individualized suspicion of the defendants; (3) the government’s role
3. in creating the crime of conviction; (4) the government’s

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5 *Id*.

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### encouragement of the defendants to commit the offense conduct; (5) the nature of the government’s participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

* 1. ***The Known Criminal Characteristics of the Defendants and Individualized Suspicion of the Defendants.***

With respect to Mr. Lim and Mr. Yoon, the first two factors are clearly met.

1. They had *no known criminal characteristics*, and there was *no individualized*
2. *suspicion of either of them*. Exhibit L.
3. ***b) The Government’s Role in Creating the Crime of Conviction.***
4. This is a case about the government taking *a role in criminal activities* that

### no one, least of all, Mr. Yoon and Mr. Lim, anticipated. Rather than preventing

1. illicit drug distribution, the government encouraged it, actually thwarting the
2. systems that were in place to alert Mr. Yoon and Mr. Lim that they were filling
3. prescriptions for a drug trafficker. Mr. Yoon and Mr. Lim are now on trial because
4. the government and, at the DEA’s behest, McKesson concealed that Lake Medical
5. was diverting all of the narcotics it prescribed for illegal purposes.
6. The government's allegation that the defendants are trying to blame the
7. government for letting them commit a crime, Government’s Motion to Preclude
8. Evidence (Doc. No. 590) at 12, is not only false, it is a complete denial of what
9. really happened here. If there is one party in this case that had clear knowledge of
10. what Lake was doing and who it was at Lake that was breaking the law, *it was the*
11. *government*. The evidence plainly shows that the government was well aware of
12. what was going on at Lake Medical well before Mr. Lim and Mr. Yoon even began
13. filling prescriptions for Lake in June 2009. At the time that it took the
14. extraordinary step of corrupting the trust relationship that the defendants had with

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### McKesson, the DEA, at least, was ready to make arrests, only to have that plan

1. sidelined by the United States Attorney.
2. At the time, there was nothing distinctive about the defendants’ pharmacies
3. and other pharmacies, both big and small, that were dispensing to Lake’s patients.
4. Although the government finds it convenient to mock the extraordinary measures
5. that the defendants took to prevent diversion, Government’s Opposition to Motion
6. to Exclude Other Act Evidence (Doc. No. 603) at 7, Mr. Lim and Mr. Yoon were
7. proactive in their dealings with Lake Medical from early on, and McKesson
8. repeatedly inquired and then approved Lake’s prescriptions. From July through

10 September 2009, **t**he defendants did not hesitate to justify their orders due to

1. increases in their OxyContin sales from filling prescriptions for Lake Medical and
2. its doctors. Exhibit H.
3. The pharmacies began to interact with McKesson about Lake’s prescriptions
4. from at least July 8, 2009. The threshold change form for this date references two
5. doctors who have either been charged or convicted, Morris Halfon and Eleanor
6. Santiago, as well as a third doctor, Cindy Seideman. After noting that these
7. doctors were prescribing 1500 pills a month, McKesson approved the increase in
8. the pharmacy’s allotment of OxyContin, adding, “Spoke with the group and found
9. that they do 1500 doses between them per month. Being proactive to find out what
10. there [sic] needs are and that we monitor it.” Exhibit T.
11. Having been candid with McKesson from the very beginning, Mr. Yoon and
12. Mr. Lim came away with the impression that Lake Medical and its doctors had
13. withstood McKesson’s monitoring and scrutiny. This impression was reinforced
14. after defendants spoke with Tom McDonald, McKesson’s regional head of
15. regulatory affairs, to specifically discuss Lake Medical and the nature and volume
16. of its prescriptions. When McKesson continued to authorize OxyContin orders to
17. fill Lake’s prescriptions and increased OxyContin thresholds to accommodate

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### Lake’s business, Mr. Lim and Mr. Yoon were certain that, despite the increased

1. demand for OxyContin, the prescriptions were legitimate.
2. Thus, with protocols in place, regular communication with McKesson, and
3. consistently approved threshold changes, the defendants were able to gain
4. assurance that Lake was a legitimate medical provider. Many of the Threshold
5. Change Forms indicate that the pharmacists were cooperative, provided dispensing
6. data and had enough overall business to support the OxyContin increases. It was
7. only during September 2009, the same month that the government uses to
8. exemplify the volume of Lake’s prescriptions being filled at the defendant’s
9. pharmacies, that Tom McDonald began to conclude that something was amiss.
10. McDonald had decided to see for himself what was going on at Lake Medical,
11. Exhibit G, at ¶ 40, and he was likely ready to move his concerns to senior
12. management to make a decision about what further action McKesson might take,
13. Exhibit G, at ¶ 18.
14. McDonald’s focus was on the doctors at Lake Medical, not on Mr. Yoon and
15. Mr. Lim. Exhibit G, at ¶ 39. The ordinary course of business between McKesson
16. and its customers, particularly trusted and highly valued customers like the
17. defendants, relied on open and reciprocal communication. It was only when Mr.
18. McDonald ran his concerns by his contact at the DEA, *id*. at ¶ 38, that this
19. expected mutual candor was derailed. According to McDonald, this was *a “rare*
20. *and unusual” situation*. *Id*. at ¶ 40.

### It cannot be emphasized enough that Mr. Lim and Mr. Yoon have no

1. criminal histories, were not suspected of conspiring to traffic drugs and were not
2. targets during the DEA’s investigation of Lake. They were credulous in their
3. dealings with Lake, which seemed to address all of their concerns, and they had
4. faith in McKesson. Mr. Lim and Mr. Yoon were certain that if McKesson or the
5. DEA had become alerted to irregularities at Lake, they would soon be aware of it.

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### This was why they made sure to give as much information as possible to

1. McKesson. Just as Mr. Lim and Mr. Yoon had never conceived that Lake, and all
2. of its prescriptions, doctors and patients were a part of a fraud, they had never
3. imagined that McKesson would betray their trust or that the DEA would
4. intentionally cause illegal narcotics to be distributed.
5. Certainly, Mr. Lim and Mr. Yoon were aware that there had been a
6. significant increase in the amount of prescriptions that their pharmacies had been
7. filling for Lake’s patients. But, so was McKesson, which routinely inquired about
8. the pharmacies’ increased needs and represented that it was monitoring these
9. prescriptions and subjecting them to its controls. McKesson had also looked into
10. the pharmacies’ own controls on diversion and found them adequate.
11. Along with the other anti-diversion practices that the defendants had in
12. place, they relied on McKesson’s oversight as integral to their compliance. After
13. all, they were just three men running thirteen far flung pharmacies with vastly
14. more patients and prescriptions to fill than those that came from Lake. In fact,
15. Lake accounted for no more than five percent of the pharmacies’ prescriptions.
16. They also had relationships with other medical practices, some of which did and
17. others of which did not have pain practices. B&B pharmacy received almost half
18. its prescriptions from Worker’s Compensation patients and mailed the
19. prescriptions to patients. It was also under contract with the Department of Mental
20. Health. Other “mail order” prescriptions were for patients living at assisted living
21. and nursing facilities that were miles away. Moreover, an additional ten percent of
22. the pharmacies’ business came from compounding prescriptions.
23. On their own, each pharmacy was a very active business, each with its own
24. staff and diverse customers and products. If there was ever a time that the
25. defendants relied on McKesson and its overall knowledge of OxyContin ordering,
26. it was during the period that Lake was ramping up the number of prescriptions

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### being referred to their pharmacies. Yet, every indicator that the defendants

1. received from McKesson was that it knew of no cause to cut off Lake or any of its
2. patients. *Because the government requested it*, McKesson was treating Lake’s

### orders as business as usual. Exhibit J.

1. Eventually, the defendants had to find out on their own that Lake had
2. deceived them. This came about with the advent of online access to CURES
3. reports, which the defendants gained access to in approximately March 2010.
4. Shortly afterward, they checked a few of Lake’s patients on the system and
5. discovered that, contrary to the patient information that Lake provided, these
6. patients had no prior history of using prescription pain medication. With this
7. revelation, Mr. Lim, Mr. Yoon and Mr. Cho met together in April 2010 and
8. decided that they could no longer fill prescriptions for Lake’s patients. Still
9. believing that Lake had some legitimate patients, and out of concern that some of
10. these patients could experience withdrawal, Mr. Yoon gave Lake 30-days’ notice
11. before the decision became final. By approximately May 2010, all of the
12. defendants’ pharmacies had instructions to refuse to fill prescriptions for Lake’s
13. patients. Exhibit D**,** at ¶¶ 104-05.
14. With this new information, the defendants also updated the way they did
15. business. With the new access to CURES data, employees were now required to
16. check patients’ prescription histories and cash payments would no longer be
17. accepted. *Id*. at ¶ 106.
18. ***c) The Government’s Encouragement of the Defendants to Commit***
19. ***the Offense Conduct and the Nature of the Government’s***
20. ***Participation in the Offense Conduct.***
21. As the foregoing illustrates, McKesson’s approval of Lake’s prescriptions
22. was a critical element in the defendants’ belief that they could continue to supply
23. Lake’s patients. The defendants were open with McKesson about the clinic, the

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### doctors and Lake’s location, including when several of its doctors moved to Santa

1. Monica Blvd., and they provided dispensing data that showed what drug was
2. dispensed, its quantity and strength, as well as which doctor issued the prescription
3. and the method of payment. Following defendants’ discussions with McKesson,
4. and McKesson’s further approval of an increased OxyContin threshold, the
5. defendants were manifestly encouraged that they could continue to dispense
6. medication to Lake’s patients.
7. The government’s assertion that the defendants had already dispensed about
8. 1700 bottles of OxyContin before the government ever got involved, Govt’s Reply
9. at 10, myopically overlooks the precise element of the defendants’ beliefs and
10. actions that the government subverted. From early on, the only reason that the
11. defendants continued to fill Lake’s prescriptions was because McKesson allowed
12. it, and the only reason that the volume of prescriptions had reached the level that
13. the government cites was because McKesson had kept approving increases to the
14. pharmacies thresholds, knowing all along that the prescriptions were primarily for
15. a particular group of doctors and their patients. The defendants engaged in no
16. deception with McKesson and reasonably assumed that McKesson would not
17. mislead them in its actions and communication. Obviously, until McKesson
18. contacted the DEA, the company itself was seeing nothing wrong with the Lake
19. prescriptions since it was McKesson who supplied those 1700 bottles. Prior to

21 October 2, 2009, there is no evidence that McKesson reported any suspicious

1. activity about Lake.
2. When the government told McKesson to do nothing, it was well aware of
3. this relationship and that the “supply line” would remain open only so long as
4. McKesson “stood down,” Exhibit G, at ¶ 40, and did not alter its service to Mr.
5. Yoon and Mr. Lim, Exhibit J. As a result, Lake’s doctors were able to fill
6. approximately ***2300 more*** OxyContin prescriptions through the defendants’

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### pharmacies until May 2010 when the defendants themselves cut Lake off. The

1. government’s *role in encouraging* the defendants is just as clear as if the

### government had gone undercover at McKesson to approve the orders itself.

1. Considering that the government’s stated intent was to make sure that Lake
2. Medical received all the OxyContin it wanted, the government was clearly a
3. *primary participant in the offense conduct*. The defendants, on the other hand,

### were unwitting conduits. Once it had interceded, the government was in complete

1. control of the crime. It had assured that McKesson would continue to supply the
2. OxyContin; it had prevented the disruption of the narcotics that passed through the
3. defendants’ pharmacies to Lake; and, on December 10, 2009, it was even waiting
4. at the other end of the “supply line” to engage in a controlled buy of the same pills
5. it had caused McKesson to supply. Patently, the government was *deeply involved*
6. in the offense conduct.
7. Yet, even after this much evidence had been gathered, including the
8. controlled purchase from Mikaelian during which he was recorded as stating he
9. could get 150 bottles a day, the government allowed the same doctors to continue
10. writing illicit prescriptions and saw to it that there were drugs to fill those
11. prescriptions. See *Hudson*, Slip. Op., at 7 (finding that the government’s extensive
12. involvement transcends the bounds of due process and renders the Government’s
13. actions outrageous).
14. The time has come to remind the Executive Branch that the
15. Constitution charges it with law enforcement—not crime creation. A
16. reverse-sting operation like this one transcends the bounds of due
17. process and makes the Government “the oppressor of its people.”
18. *Id*., at 24 (citing *Black*, 733 F.3d at 318 (Noonan, J., dissenting)).

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## *d) The Nature of the Crime Being Pursued and Necessity for the*

* 1. ***Actions Taken in Light of the Nature of the Criminal Enterprise***
  2. ***at Issue.***

### Even by the government’s calculation, more OxyContin was dispensed after

* 1. the government cut off McKesson’s communication with the defendants than
  2. before its outrageous conduct. At the same time, the exploitation of the
  3. defendants’ pharmacies, which had only gone on for about three months, continued
  4. for almost another eight months. With respect to *the criminal enterprise at issue*,

### this was the drug trafficking organization that was using Lake Medical as a shell

* 1. for its OxyContin purchases. At the time of the investigation, Mr. Yoon and Mr.
  2. Lim were never considered members of that criminal enterprise. As for the *nature*
  3. *of the crime itself*, the government was responsible for the majority of the

### OxyContin dispensed through the defendants’ pharmacies.

* 1. This is a case where the crime that the government allegedly sought to
  2. prevent was instead facilitated by the government’s deliberate intervention.
  3. Instead of stepping in to make arrests and stem the flow of illegal drugs, the
  4. government may as well have sold hundreds of thousands of OxyContin pills on
  5. the streets itself. When looked at in terms of *necessity*, it is hard to find any kind
  6. of justification for these actions, which endangered public safety and caught the
  7. defendants up in the magnitude of its wake. This is where this violation of
  8. defendants’ rights truly “shocks the conscience.” *United States v. Smith*, 924 F.2d

### 889, 897 (9th Cir. 1991). As the Court observed in *Hudson*:

* 1. [I]t is not the role of the Judicial Branch to merely rubberstamp whatever
  2. imaginative device the ATF and other agencies dream up. Rather, it is the
  3. duty of the courts “to declare all acts contrary to the manifest tenor of the
  4. Constitution void. Without this, all the reservations of particular rights or
  5. privileges would amount to nothing.”

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* + 1. *Hudson*, at 23-24 (citing Hamilton, Alexander, *The Federalist* No. 78).

# 2. The Government’s Endangerment of Public Safety and Its

* + 1. **Disregard for Defendant’s Rights.**

### In this case, it is the government’s machinations that were responsible for

* + 1. widespread distribution of narcotics with no thought to the consequences of these
    2. actions to Mr. Yoon and Lim, whose alleged culpability arises as an afterthought
    3. fueled by the extended period during which the government used them as a pass-
    4. through for Lake’s drugs. The defendants have no reason to doubt the Court’s
    5. observation in *Black* that there are only two reported decisions in which a federal
    6. circuit court has reversed convictions under this doctrine. *United States v. Black*,
    7. 733 F.3d 294, 302 (9th Cir. 2013) (citing *United States v. Twigg*, 588 F.2d 373 (3d
    8. Cir.1978); *Greene v. United States*, 454 F.2d 783 (9th Cir.1971). With only two

### decisions having found the doctrine applicable, it is specious for the government to

* + 1. chide the defendants for not having a case on point. In part, this is because this
    2. case is far more egregious and outrageous than anything seen in a published
    3. opinion at the circuit level.
    4. In neither *Twigg* nor *Greene* did the government ignore public safety and
    5. arrange to allow the trafficking of large quantities of narcotics. In *Twigg*, the
    6. government assisted with setting up a methamphetamine laboratory, but it seized
    7. the six pounds that were manufactured and made arrests before any drugs were
    8. distributed. *Twigg*, 588 F.2d at 376. *Greene* involved a bootlegging conspiracy
    9. and a group of defendants who proved quite inept at producing the quantities of
    10. moonshine they promised. “During the extended period relevant to the charged
    11. offenses, the defendants sold illicit spirits only to the Government, through its
    12. undercover agent Courtney.” *Greene*, 454 F.2d at 786.
    13. Moreover, both cases involved defendants who clearly understood
    14. beforehand what they were getting themselves into and still chose to participate in

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### what they knew was a crime. The Ninth Circuit, in fact, specifically rejected the

1. defendants’ entrapment defense in *Greene*, finding that they “had a predisposition
2. to manufacture and sell bootleg whiskey.” *Id*.
3. This case stands far apart from even the two cases where outrageous
4. government conduct was found. Mr. Lim and Mr. Yoon were pharmacists with
5. unblemished careers and personal histories, who first encountered Lake Medical
6. when one of their pharmacies filled Lake’s prescriptions. The prescriptions were
7. real; the physicians were licensed; the clinic existed; and it appeared to have
8. patients and a medical staff. In addition to learning this information, the
9. defendants obtained further assurances that Lake was writing medically necessary
10. prescriptions, not the least of which was counting on McKesson to have controls in
11. place when Lake’s prescriptions began to exceed their pharmacies’ thresholds.
12. Practicing one’s profession is a far cry from being directed to an illegal laboratory
13. or still and being told to start “cooking.”
14. *Greene* and *Twigg* are the two cases in which a circuit court has applied the
15. doctrine of outrageous government conduct. Neither is on a par with this case,
16. whether in terms of the egregiousness of the *government’s actions* or the effect of

### those actions on the defendants. In the cases where the doctrine has been rejected,

1. there has also been clear evidence that the defendant did not merely stumble into a
2. crime, but, in fact, embraced it. In *United States v. Citro*, 842 F.2d 1149 (9th Cir.

### 1988), for example, the Court noted that, although an informant had initiated a

1. discussion of a counterfeit credit card scheme with the defendant, it was the
2. defendant who volunteered that he might know of some merchants who would be
3. willing to accept counterfeit cards, and it was the defendant, on his own initiative,
4. who negotiated a better cut for an undercover officer posing as the informant’s
5. partner. The defendant was also savvy enough to insist on patting the undercover
6. officer down to check for a wire prior to each transaction. *Id*. at 1152. There was

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### nothing in the behavior of Mr. Yoon or Mr. Lim that indicated criminal knowledge

1. or behavior.
2. While in *Black*, the Ninth Circuit expressed concerns that the case before it,
3. which was very much like *Hudson*, might have drawn the defendants into a crime
4. that was orchestrated by the government, it found that its qualms were mitigated by
5. the defendants’ readiness to rob a purported stash house. They tried to sell
6. themselves to the undercover officer, bragging about their experience with
7. robberies and their criminal records. One defendant “bragged that he had been
8. convicted of four felonies and 17 misdemeanors, all involving drugs or guns, while
9. [the other defendant] said he had ‘just’ performed a stash house robbery, had done
10. so several times and had stash house robberies ‘down to a science.’” *Black*, 733

12 F.3d at 307.

1. Moreover, as in *Twigg* and *Greene*, the crimes in *Citro* and *Black* were

### grand deceptions that never caused an actual risk to the public. The crime that the

1. government facilitated in this case was very real and involved a large amount of
2. dangerous narcotics. Had the government not insured that McKesson kept giving
3. the approvals on which Mr. Yoon and Mr. Lim relied, the crime would not only
4. have been stopped, the defendants would have learned the truth.

#### The Fifth Amendment to the Constitution commands that “[n]o person shall ...

1. be deprived of life, liberty, or property without due process of law.” U.S. Const.
2. amend. V. On the facts here, the government deliberately interfered with a trust
3. relationship to cut off the flow of information that would have allowed the defendants
4. to recognize that they were caught up in an illicit drug operation. As to the
5. defendants, this was an arbitrary governmental decision for which the defendants are
6. now facing trial simply because the government wanted to keep the drug trafficking
7. organization it was investigating supplied. The government’s manipulation of this
8. case from an early point when the defendants could have learned the truth, was an

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#### extreme denial of their due process rights. Accordingly, the charges against Mr. Yoon

1. and Mr. Lim should be dismissed.
2. **B. An Evidentiary Hearing Will Establish the Full Facts Underlying**
3. **Defendants’ Claims**.
4. In the pleadings filed to date, the government questions the nature of the
5. defendant’s relationship with McKesson, disputes the reasonableness of the
6. defendants’ belief that McKesson would advise them if Lake Medical came under
7. suspicion, denies that the defendants were candid with McKesson and claims that the
8. defendants had already entered into the charged conspiracy when they first dispensed
9. medication to Lake’s patients. The government further denies that McKesson’s
10. approvals had anything to do with convincing the defendants that Lake was a
11. legitimate business and that its subversion of the regular communication between
12. McKesson and the defendants in order to maintain the flow of hundreds of thousands
13. of OxyContin tablets was a fair use of “artifice and stratagem.”
14. The defendants could not disagree more. Once again the government is in total
15. denial of what they did and the harm they caused. There was nothing fair about the
16. way that the defendants were exploited by the government, and an evidentiary hearing
17. will firmly demonstrate these facts. Among the relevant witnesses at such a hearing
18. will be the prosecutor in this case, AUSA Lana Morton-Owens, who was involved
19. from at least May 2009 to the present and was clearly part of the decision to delay
20. making arrests at Lake in order to perpetuate Lake’s drug trafficking organization
21. through the defendants’ pharmacies. There are serious questions that need to be
22. addressed, and the Court should demand answers.

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* 1. **III**
  2. **CONCLUSION**

#### Based on the foregoing reasons, an evidentiary hearing should be held and the

* 1. charges against Mr. Yoon and Mr. Lim must be dismissed.

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### 6 Dated: April 23, 14 Respectfully submitted,

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### NASATIR HIRSCH PODBERESKY & KHERO

8

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THE HONORABLE ROBERT B. LEIGHTON

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1. IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
2. AT TACOMA

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|  |  |
| --- | --- |
| UNITED STATES OF AMERICA,  Plaintiff,  vs.  TROY X. KELLEY,  Defendant. | Case No. 3:15-cr-05198-RBL  DEFENDANT’S MOTION TO CONSOLIDATE PROCEEDINGS AND FOR EVIDENTIARY HEARING REGARDING PRETRIAL SEIZURE OF ASSETS  **NOTED FOR:**  **FRIDAY, OCTOBER 9, 2015** |

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##### I. INTRODUCTION

1. On September 2, 2015, the United States Attorney’s Office obtained a seizure warrant
2. from a U.S. Magistrate Judge in Seattle to confiscate nearly one million dollars that had been
3. deposited into an attorney trust account at the law firm that formerly represented Mr. Kelley.
4. This appears to be the first instance (and, if not, one of the very rare instances) in which the
5. U.S. Department of Justice has seized funds in a lawyer’s trust account in this District. It
6. cannot be lost on federal prosecutors that a distinct tactical advantage is gained by depleting
7. their investigative target’s resources, which might otherwise be available to defend the
8. prosecution. Nothing could more poignantly demonstrate this than the government’s taking of
9. money from the hands of a criminal defendant’s lawyers.
10. Prosecutors often justify seizing property without a hearing by saying that a criminal
11. defendant should not be able to use the proceeds of crime to defend his case. Of course, that is

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1. true and unassailable, but the whole point of this prosecution is to determine whether the funds
2. in question are indeed proceeds of any crime. Here, the government claims to have traced
3. “criminal proceeds” to the law firm trust account by filing an *ex parte* affidavit from a Special
4. Agent of the Federal Bureau of Investigation, Michael Brown (“Brown Affidavit”),[1](#_bookmark0) who in
5. turn relies on what was an allegedly extensive accounting analysis performed by an unnamed
6. “FBI forensic accountant.” The Brown Affidavit says that the FBI accountant performed a
7. tracing analysis, but it fails to specify with any level of detail how the analysis was
8. performed—it simply asserts that the tracing was done and that it shows that $908,000 in the
9. law firm’s trust account are criminal proceeds. Brown Affidavit ¶¶ 83, 93–100. No
10. spreadsheets detailing the movement of funds or other backup information supports the
11. unnamed FBI accountant’s conclusions. *Id.* The highly conclusory nature of the FBI
12. accountant’s report leaves serious room for doubt whether there is an adequate basis to rely on
13. it. This is particularly true here where, as here, the government’s tracing analysis presented to
14. the grand jury contradicts the unnamed FBI accountant’s tracing of assets. Calfo Decl. ¶ 3,
15. Exh. B.
16. What is more, a full two paragraphs of the Brown Affidavit are devoted to explaining
17. the potential credibility issues inherent in this mystery FBI accountant’s background. Brown
18. Affidavit ¶¶ 74–75. Agent Brown discloses that the very accountant who did the analysis
19. essential to justifying the seizure is also currently being audited by the IRS for unlawfully
20. taking thousands of dollars in deductions. Separately, he is also involved in a criminal
21. investigation relating to payments made by his former employer that are being scrutinized as
22. potential acts of tax evasion. This FBI accountant’s suspect background, coupled with his
23. conclusory allegations, which are themselves contradicted by other government tracing 24

25 1 The Brown Affidavit is attached to the contemporaneously filed Declaration of Angelo J. Calfo in Support of

Motion To Consolidate Proceedings And For Evidentiary Hearing Regarding Pretrial Seizure of Assets (“Calfo

Decl.”) ¶ 2, Exh. A.

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1. analyses, demonstrate why a hearing is necessary to determine whether the government has
2. properly seized the trust account funds.
3. In any event, the Ninth Circuit *requires* the government to promptly arrange for and
4. conduct an adversarial evidentiary hearing justifying its seizure. *United States v. Crozier*, 777
5. F.2d 1376 (9th Cir. 1985). This hearing is required regardless of how weak or strong the
6. government’s case for pretrial seizure appears to be based on an uncross-examined affidavit, or
7. based on the allegations contained in an indictment. As *Crozier* held, there would be serious
8. due process concerns inherent in allowing the government to freeze a criminal defendant’s
9. assets prior to trial without a hearing at which its evidence could be subject to cross-
10. examination. Here, there are substantial reasons to believe that the government will be unable
11. to prove traceability. Mr. Kelley requests that the Court promptly schedule a *Crozier* hearing.

##### II. BACKGROUND

1. Mr. Kelley was charged by indictment on April 15, 2015, Dkt. No. 1; on September 3,
2. 2015, the government returned a Superseding Indictment. Dkt. No. 38. On September 2,
3. 2015, one day before filing the Superseding Indictment, the government applied for a warrant
4. to seize property subject to forfeiture in a separate, miscellaneous proceeding in Seattle based
5. on the Brown Affidavit. Case No. 2:15-mc-00129, Dkt. No. 1. A warrant was issued the same
6. day and was returned executed on September 8, 2015. *Id.*, Dkt. No. 3. Pursuant to the warrant,
7. the government seized $908,397.51 from a trust account held by Mr. Kelley’s former counsel,
8. which is also alleged to be forfeitable in the Superseding Indictment. Dkt. No. 38 ¶ 159(a).
9. According to the Superseding Indictment and the Brown Affidavit, Mr. Kelley
10. allegedly retained fees collected by his company, to which he was not entitled, from 2006 to
11. 2008. *See* Dkt. No. 38 ¶ 105. He is not charged with theft, but is charged with possession and
12. concealment of allegedly stolen property from 2008 to 2012. The government alleges that on

25 June 27, 2008, Mr. Kelley transferred $3,634,673 to a Vanguard bank account in the name of a

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1. company called Berkeley United; according to the government, $1,463,171 constituted tainted
2. proceeds. Brown Affidavit ¶ 83. The Brown Affidavit, but not the Superseding Indictment,
3. refers to the transfer as money laundering; Mr. Kelley is not charged criminally with money
4. laundering based on this June 27, 2008, transfer. *See id.* ¶ 84.
5. Several years later, in 2011, Mr. Kelley settled a civil lawsuit regarding the fees and
6. paid $1,050,000 from the Berkeley United Vanguard account. *Id.* ¶ 93. Then, in each of June
7. 2011 and January 2012, the government alleges that Mr. Kelley withdrew approximately
8. $245,000, paying taxes on the income. *Id.* ¶¶ 94–96. In February 2012, Mr. Kelley allegedly
9. transferred $2,090,818 from the Berkeley United Vanguard account to a Vanguard account in
10. the name of Blackstone International, Inc. *Id.* ¶ 96. He allegedly made three more
11. withdrawals of $245,000 from the Blackstone Vanguard account in 2013, 2014, and 2015. *Id.*
12. ¶ 97. The five $245,000 withdrawals are charged in the Superseding Indictment as money
13. laundering, but the Brown Affidavit does not rely on them as such. *See* Dkt. No. 38 ¶¶ 126– 14 135.
14. Mr. Kelley allegedly drew down the Blackstone Vanguard account on March 26, 2015,
15. by paying taxes in the amount of $447,421 and transferring $908,397.51 to his then-counsel’s
16. trust account. Brown Affidavit*.* ¶¶ 98–99. The government has now seized the $908,397.51
17. and, incredibly, alleges that the $447,000 paid to the IRS is also forfeitable. Dkt. No. 38 ¶ 19 159(b).

##### III. DISCUSSION

1. **A. The Government’s Power to Seize Property Prior to a Criminal Trial Is a Drastic**
2. **Remedy That Should be Carefully Scrutinized.**

The pretrial restraint or seizure of property belonging to a defendant who has only been

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accused of a crime (and indeed is still presumed to be innocent) is a “drastic remedy.” *United*

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*States v. Ripinksy*, 20 F.3d 359, 365 (9th Cir. 1994). The Ninth Circuit has expressed

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misgivings about the far-reaching consequences that such a “powerful weapon” may have in

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* 1. the hands of the government, warning that “[s]uch restraints can cripple a business and destroy
  2. an individual’s livelihood.” *Id.* And the Supreme Court has characterized pre-judgment
  3. restraint of private assets as a “nuclear weapon of the law.” *Grupo Mexicano de Desarrollo,*
  4. *S.A., v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999) (internal quotation marks omitted).
  5. In light of the severe, punitive nature of the pretrial restraint and seizure statutes, the
  6. government should scrupulously observe the substantive and procedural requirements set forth
  7. in the statutes and case law.

##### B. To Properly Scrutinize the Government’s Seizure of Assets, the Court Should

* 1. **Consolidate the Seizure Warrant and Criminal Case.**

The government has seized property under a miscellaneous action filed in Seattle which

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relates to the same property and factual subject matter as the property the government claims is

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forfeitable in the Superseding Indictment. In fact, pursuant to the warrant, the government

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seized property from a bank account specifically enumerated in the forfeiture allegation of the

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Superseding Indictment. It makes sense to consolidate these different proceedings before the

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same district judge and under the same case file. Doing so would avoid the potential for

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inconsistent rulings and further the goal of judicial economy. *See, e.g.*, *United States v.*

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*Certain Real Property*, 972 F.2d 136, 136 (6th Cir. 1992) (district court can consolidate

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criminal and civil forfeiture actions brought by United States against defendant’s property);

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*United States v. 228 Acres of Land and Dwelling*, 916 F.2d 808, 810 (2d Cir. 1990) (permitting

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the consolidation of two civil forfeiture proceedings against the same defendant but involving

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different property); *United States v. Real Prop. Located at 1808 Diamond Springs Rd.*, 816 F.

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Supp. 1077, 1085 (E.D. Va. 1993) (consolidating criminal and civil forfeiture actions); *United*

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*States v. Sharir*, 755 F. Supp. 77, 78 (S.D.N.Y. 1990) (defendant was entitled to adversarial

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hearing on probable cause where government first seized assets in civil cases; assets were later

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named in indictment and civil and criminal cases were consolidated). By consolidating the

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different proceedings the government has brought in two different divisions of this District,

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1. this Court can properly manage and scrutinize all the government’s actions in seizing and
2. seeking to forfeit the trust account funds held by Mr. Kelley’s former lawyers.[2](#_bookmark1)

##### C. The Government’s Power to Seize Property Prior to a Criminal Trial Is Limited

1. **to Property Traceable to Specified Federal Criminal Violations.**

The Supreme Court in its last term held that property may be forfeited pretrial where

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there is probable cause to conclude “(1) that the defendant has committed an offense permitting

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forfeiture, and (2) that the property at issue has the requisite connection to that crime.” *Kaley*

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*v. United States*, 134 S. Ct. 1090, 1095 (2014). The “requisite connection” to property is

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typically shown by proof that the seized funds are the direct proceeds of—or are “traceable

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to”—the specified crime. In other words, in order to seize property pretrial, the government

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must not only show probable cause to believe that a specified crime has been committed (such

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as money laundering or mail or wire fraud), but also that the property seized is sufficiently

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connected to or traceable to that crime. *Ripinksy*, 20 F.3d at 365.

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It follows that, prior to trial, the government is *not* permitted to seize assets that are *not*

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traceable to criminal activity. *Id.* Such non-traceable assets which the government may not

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seize are often referred to as “substitute assets”—or, in other words, assets which may be

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available *after* any forfeiture conviction to satisfy any judgment the government may obtained

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(and act as a “substitute” for actual criminal proceeds). Consequently, to the extent this Court

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determines that the government’s seizure of funds via the Brown Affidavit is of “substitute”

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rather than “traceable” assets, the government must be directed to release the funds to Mr.

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Kelley. *Id.*

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##### D. Ninth Circuit Law Requires a Prompt, Adversarial Evidentiary Hearing at Which The Government Must Prove Probable Cause.

1. The law relating to pretrial seizure of forfeitable assets is unsettled and varied among 24

2 The government could have avoided separate, parallel proceedings simply by seeking a restraining order from

25 this Court based on the allegations in the Superseding Indictment. It chose not to ask the Court for that relief but instead chose to proceed before a different judge in Seattle. The government has not explained its decision in this

regard, which was obviously strategic in nature.

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1. the different judicial circuits in the country. However, in the Ninth Circuit, the precedent has
2. not changed for more than twenty-five years. In *United States v. Crozier*, the court issued two
3. written opinions considering the due process implications of *ex parte*, pretrial restraining

4 orders in criminal cases. 777 F.2d 1376 (9th Cir. 1985); 674 F.2d 1293, 1297 (9th Cir. 1982).

1. Both opinions concluded that requiring a defendant whose assets have been so restrained to
2. wait until trial to challenge the restraint would deprive him of his Fifth Amendment due
3. process rights. 777 F.2d at 1383–84; 674 F.2d at 1297. Accordingly, in its second opinion, the
4. court held the seizure and restraint provisions of 21 U.S.C. § 853—the criminal equivalent of
5. 18 U.S.C. § 981(a), under which the trust account funds were seized—to be unconstitutional to
6. the extent that they fail to provide defendants with an opportunity to challenge such restraints
7. prior to trial. 777 F.2d at 1384.
8. To remedy the due process deficiency, the *Crozier* court held that pre-trial orders
9. restraining a defendant’s assets were to be treated as preliminary injunctions, governed by Rule
10. 65 of the Federal Rules of Civil Procedure. *Id.* Rule 65 requires that a party who obtains a
11. temporary restraining order *ex parte* must move promptly thereafter to convert the order into a
12. preliminary injunction and must demonstrate its entitlement to the injunction at an evidentiary
13. hearing. Accordingly, when the government obtains an *ex parte* order restraining the assets of
14. a criminal defendant, *Crozier* requires that the district court hold a prompt hearing under Rule
15. 65 to determine whether the preliminary order should be extended. *See also United States v.*
16. *Roth*, 912 F.2d 1131, 1133–34 (9th Cir. 1990) (reaffirming *Crozier* and requiring Rule 65
17. hearing following pretrial restraint of assets).[3](#_bookmark2)

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3 While *Crozier* and *Roth* provided for hearings in the context of pretrial asset restraining orders, their reasoning

1. applies equally to pretrial asset seizures. Seizure is a more drastic remedy than restraint. *See* 21 U.S.C § 853(f) (providing for issuance of a seizure warrant if the court determines that a restraining order “may not be sufficient
2. to assure the availability of the property”); *U.S. v. Miller*, 26 F. Supp. 2d 415, 432 (N.D.N.Y. 1998) (contrasting seizure to “the less drastic remedy of restraint”). The protections available to defendants should therefore be at
3. least as strong, and nothing in *Crozier* or *Roth* restricts their applicability. The Ninth Circuit provides the safeguard of an evidentiary hearing for defendants whose property has been taken away, and Mr. Kelley is entitled

to such a hearing.

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* 1. In other circuits, there are various burdens and requirements imposed on a defendant to
  2. successfully obtain a pretrial hearing. Some circuits require that the defendant show that he
  3. needs the seized money for living expenses or to pay for counsel prior to trial. The Ninth
  4. Circuit is unique in that it does not require a defendant to make a preliminary showing before
  5. being entitled to a hearing under *Crozier* and *Roth*. *See U.S. v. Holy Land Found. for Relief &*
  6. *Dev.*, 493 F.3d 469, 475–76 (5th Cir. 2007) (contrasting *Roth* with the Eleventh Circuit’s rule
  7. that a hearing is never required, and concluding that in the Fifth Circuit, the court may grant a
  8. hearing upon weighing the private interest that will be affected, the risk of an erroneous
  9. deprivation of such interest, the probable value of additional safeguards, and the government’s
  10. interest).
  11. In sum, *Crozier* and *Roth* hold that (1) a prompt, adversarial hearing under the
  12. provisions of Federal Rule of Civil Procedure 65 is required; and (2) the government bears the
  13. burden of proof at the hearing to establish probable cause that the federal crime purporting to
  14. form the basis of the seizure occurred, and that the seized asserts are traceable to that crime
  15. (and are not substitute assets). Neither *Crozier* nor *Roth* requires the defendant to show “need”
  16. for the assets in order to obtain the required hearing.

##### E. The Supreme Court’s Decision in *Kaley* Permits the Government to Rely on the Grand Jury’s Indictment to Establish Probable Cause That a Crime Was

* 1. **Committed But Not To Establish that the Seized Asserts are Traceable**.
  2. In *Kaley*, the Supreme Court modified the Ninth Circuit’s *Crozier* decision in one
  3. respect. *Crozier* requires a hearing under Rule 65 to justify (1) the government’s pretrial
  4. seizure based on probable cause that an offense permitting forfeiture was committed and (2)
  5. that the property seized is traceable to that offense. In *Kaley*, the Supreme Court held that, to
  6. the extent the government relies on an indictment—and, therefore, a finding by a grand jury—
  7. to show probable cause to believe the offense permitting forfeiture was committed, it does not 25

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* + 1. have to re-litigate that probable cause issue at the pretrial evidentiary hearing. 134 S. Ct. at
    2. 1094. Whether the government is entitled to rely on the grand jury’s probable cause
    3. determination depends on the theory the government espouses at the evidentiary hearing to
    4. justify its seizure of assets. If it relies on the probable cause theory set forth in the indictment,
    5. then it will be excused by the *Kaley* decision of proving probable cause at the evidentiary
    6. hearing. However, if it relies on some other theory not contained in the Superseding
    7. Indictment to support its tracing theory, then the government will not be able to rely on *Kaley*
    8. and the requested hearing will need to address probable cause both as to the commission of the
    9. alleged crime permitting forfeiture and the government’s tracing theory.

##### F. The Government Will be Unable to Prove Probable Cause That the Seized Assets

* + 1. **are Traceable**.

While it is not Mr. Kelley’s burden to establish probable cause or prove anything to

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obtain a *Crozier* hearing, there are patently obvious grounds to question whether the

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government will be able to show probable cause that the seized funds can be traced to the

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alleged criminal activity.

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##### 1. The seized funds are not traceable to the alleged possession and concealment of stolen property.

1. Simple arithmetic shows that the seized funds are not traceable to the only allegation in
2. the Brown Affidavit actually charged in the Superseding Indictment: Possession and
3. concealment of stolen property.[4](#_bookmark3) The Brown Affidavit states that on June 27, 2008, Mr. Kelley
4. transferred $3,634,673 to a Vanguard bank account in the name of a company called Berkeley
5. United, $1,463,171 of which represented funds that Kelley had allegedly failed to refund to
6. borrowers. Brown Affidavit ¶ 83. The Brown Affidavit, but not the Superseding Indictment,
7. refers to this transfer as money laundering. *See id.* ¶ 84. Since then, the government alleges 24

25 4 Possession and concealment of stolen property, on its own, does not allow the government to seize property; the Brown Affidavit only raises this allegation as a predicate to the money laundering allegation. *See* Brown

Affidavit at 25:14–16.

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1 that $1,050,000 was withdrawn from the Berkeley United account as part of a civil settlement 2 on May 3, 2011, *id.* ¶ 93, $245,030 was withdrawn on June 3, 2011, *id.* ¶ 95, and $245,000 was

1. withdrawn on January 6, 2012, *id.* ¶ 96. Under the government’s “last-in-first-out” accounting
2. principle, *id.* ¶ 11, this means that the allegedly tainted proceeds ($1,463,171) were completely
3. gone from the account by January 6, 2012—a fact that goes completely unrecognized in the
4. Brown Affidavit. This calculation is confirmed by the government’s own grand jury exhibit
5. stating that, after the $1,050,000 settlement payment, only $412,876 ($1,463,171 minus
6. $1,050,000, give or take some interest or other amounts not explained by the government) in
7. “unlawfully retained money” remained in the Berkeley United Vanguard account. Calfo Decl.
8. ¶ 3, Exh. B. The Superseding Indictment itself also supports this calculation, given that it
9. charges Mr. Kelley with possession and concealment of stolen property only from 2008
10. through January 2012. *See* Dkt. No. 38 ¶ 105.
11. Therefore, as of January 6, 2012, no tainted proceeds remained in the Berkeley United
12. Vanguard account. The Brown Affidavit states that on February 1, 2012, Mr. Kelley
13. transferred $2,090,818 from the Berkeley United Vanguard account to the Blackstone
14. Vanguard account. Brown Affidavit ¶ 96. In each of 2013, 2014, and 2015, Mr. Kelley
15. allegedly withdrew $245,000 from the Blackstone Vanguard account. *Id.* ¶ 97. On March 26,
16. 2015, Mr. Kelley allegedly wrote a check to the IRS for $447,421 and transferred $908,397.51
17. to the law firm trust account held by Mr. Kelley’s former counsel. *Id.* ¶¶ 98–99. But since the
18. Blackstone Vanguard account never contained tainted proceeds, the $908,397.51 could not
19. possibly be traceable to illegal activity. Under the Ninth Circuit’s *Ripinsky* decision, which
20. clearly states that legitimately-derived funds may not be seized pretrial, the $908,000 should be
21. returned to Mr. Kelley. 20 F.3d at 365.

##### 2. The Brown Affidavit’s money laundering allegation will not save the government’s tracing allegations.

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The money laundering theory espoused in the Brown Affidavit—but which was not

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* 1. included in the Superseding Indictment—does not justify the government’s seizure of the funds
  2. in the law firm trust account. The government cannot get around the fact that, under its tracing
  3. theory set forth in the Brown Affidavit, none of the $908,000 transferred from that account to
  4. the law firm trust account were tainted funds.
  5. The government must therefore resort to a “commingling” theory—that somehow Mr.
  6. Kelley furthered his money laundering scheme by (1) commingling tainted with non-tainted
  7. funds into an account; (2) transferring all allegedly tainted funds out of the account; and (3)
  8. *after all tainted funds had been depleted from the account*, transferring funds the government
  9. must concede are untainted. Brown Affidavit ¶ 84. This theory, however, will be insufficient
  10. to demonstrate probable cause for at least two reasons. *First*, “[C]ourts agree innocent funds
  11. are not forfeitable simply because they have been commingled with tainted funds.” *United*

12 *States v. Contents in Account No. 059-644190-69*, 253 F. Supp. 2d 789, 799 (D. Vt. 2003).

1. Where the government alleges that the transfer of funds from one account to another
2. constituted money laundering, the mere inclusion of innocent funds does not make them
3. subject to forfeiture because laundering would have occurred even without those funds. *Id.* at
4. 800 (transfer did not contaminate the untainted funds because “the money laundering would
5. have been equally as effective if it had not involved any untainted funds but merely the transfer
6. of LCCP funds to accounts in Capoccia’s personal control”). To establish probable cause, the
7. government must make some showing that the commingling of non-tainted funds was done
8. with the intent to conceal the tainted funds and that the non-tainted funds in fact furthered that
9. concealment. The Brown Affidavit makes no such showing.
10. *Second*, the alleged money laundering set forth in the Brown Affidavit, pursuant to
11. which the attorney trust account was seized, is neither charged nor chargeable because it is
12. based on alleged money laundering violations for which the statute of limitations has passed.
13. The Brown Affidavit justifies pretrial seizure based solely on the June 27, 2008, transfer of

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1. $3,634,673 into the Berkeley United Vanguard account, describing that transfer as money
2. laundering even though it occurred more than seven years ago. Brown Affidavit ¶ 84.
3. However, the forfeiture statute on which the government’s seizure was based, 18 U.S.C. §
4. 981(a)(1)(A), provides that property “involved in a transaction or attempted transaction *in*
5. *violation of* section 1956 [money laundering]” is subject to forfeiture. 18 U.S.C. §
6. 981(a)(1)(A) (emphasis added). The government does not—and cannot—charge Mr. Kelley
7. with money laundering for the alleged 2008 transfer, which is outside of the statute of
8. limitations. *See* 18 U.S.C. § 3282(a) (5-year statute of limitations). Where a defendant could
9. not be found guilty of an underlying crime, there is no basis on which to seek forfeiture. *See*
10. 18 U.S.C. § 981(a)(1)(A) (requiring a “violation” of the money laundering statute).

##### 3. The government’s tracing analysis is highly suspect, given the FBI accountant’s prior conduct.

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Finally, the FBI accountant tasked with conducting the tracing analysis is, by the

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government’s own admission, of suspect credibility. He is currently being audited by the IRS

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in connection with his personal 2012 tax filing because the IRS challenged more than $25,000

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of claimed deductions—the very act for which Mr. Kelley is charged in the Superseding

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Indictment. Brown Affidavit ¶ 74. As if that wasn’t enough, the same accountant is currently

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involved in a criminal investigation into the accountant’s former employer. *Id.* ¶ 75. The

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accountant, as a former comptroller at a Seattle firm, issued payments to an individual indicted

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for tax evasion, despite warnings by a lawyer that direct payments to that individual might be

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illegal. *Id.* Given that the accountant responsible for tracing the relevant funds is personally

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dealing with two outstanding government actions that call into question the accountant’s

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judgment on matters of tax evasion and deductible expenses, a hearing is necessary to

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determine whether the tracing analysis proffered by the government is legitimate or created by

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someone seeking to curry favor with government officials because of his own involvement in

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government civil and criminal investigations. It is noteworthy on this point that the Brown

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* 1. Affidavit, which is highly conclusory in describing the FBI accountant’s work, does not attach
  2. the spreadsheets (or other detail) created by the FBI accountant to support the tracing analysis
  3. the accountant performed.

##### IV. CONCLUSION

* 1. For the foregoing reasons, Mr. Kelley requests that the court consolidate this action
  2. with the miscellaneous proceeding for the seizure warrant and schedule an evidentiary hearing
  3. to determine whether the government has probable cause to seize $908,397.51 in his former
  4. counsel’s trust account.
  5. DATED this 29th day of September, 2015.
  6. CALFO HARRIGAN LEYH & EAKES LLP 11

1. By *s/Angelo J. Calfo*

Angelo J. Calfo, WSBA #27079

1. 999 Third Avenue, Suite 4400

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* 1. **CERTIFICATE OF SERVICE**
  2. I hereby certify that on September 29, 2015, I electronically filed the foregoing with the
  3. Clerk of the Court using the CM/ECF system which will send notification of such filing to the
  4. following:
  5. Andrew C. Friedman [andrew.friedman@usdoj.gov](mailto:andrew.friedman@usdoj.gov)
  6. Arlen R. Storm [arlen.storm@usdoj.gov](mailto:arlen.storm@usdoj.gov)
  7. Katheryn Kim Frierson [katheryn.k.frierson@usdoj.gov](mailto:katheryn.k.frierson@usdoj.gov)
  8. Richard E. Cohen [richard.e.cohen@usdoj.gov](mailto:richard.e.cohen@usdoj.gov) 9

10 *s/Susie Clifford*

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Pages 1 - 17 UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA BEFORE THE HONORABLE CHARLES R. BREYER

UNITED STATES OF AMERICA, )

)

Plaintiff, )

)

vs. ) NO. CR 14-0341 CRB

)

ALEXANDER VASSILIEV, et al, )

) San Francisco, California

Defendants. ) Friday

) April 17, 2015

) 10:00 a.m.

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**For Plaintiff**: MELINDA HAAG

United States Attorney

450 Golden Gate Ave.

San Francisco, California 94102

##### BY: WAI SHUN WILSON LEUNG, AUSA DAMALI TAYLOR, AUSA

**For Defendant:** Boersch Shapiro, LLP

235 Montgomery Street Suite 835

San Francisco, California 94104

##### BY: MARTHA A. BOERSCH, ESQ.

NOLAN ARMSTRONG & BARTON

600 University Avenue

Palo Alto, California 94301

##### BY: DANIEL BENJAMIN OLMOS, ESQ.

***Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR***

*Official Reporter - US District Court Computerized Transcription By Eclipse*

1 **P R O C E E D I N G S**

2 **APRIL 18, 2015 9:59 a.m.**

1. (Defendant Vassiliev not present.)
2. (Defendant Siciliano present, out of custody.)
3. **THE CLERK:** Calling Case CR 14-0341, the United
4. States of America versus Alexander Vassiliev and Mauricio
5. Siciliano.
6. Appearances counsel.
7. **MR. LEUNG:** Wilson Leung and Damali Taylor for the
8. Government. Good morning, your Honor.
9. **THE COURT:** Good morning.
10. **MS. BOERSCH:** Good morning, your Honor. Martha
11. Boersch for Alexander Vassiliev, who is not present.
12. **MR. OLMOS:** Good morning, your Honor. Daniel Olmos
13. with Mauricio Siciliano. He is present before the Court.
14. **THE COURT:** Okay. Good morning. What is the status
15. of the -- there are three defendants in the indictment, is that
16. correct?
17. **MR. LEUNG:** That's correct, your Honor.
18. **THE COURT:** And what is their -- what's their status?
19. **MR. LEUNG:** The lead defendant, Mr. Sidorenko is at
20. liberty in his homeland -- well, in his adopted homeland of the
21. United Arab Emirates.
22. And Mr. Siciliano is obviously here.
23. And the second defendant, Mr. Vassiliev, is in custody in
    1. Switzerland pursuant to a provisional arrest warrant. He has
    2. been ordered extradited to the United States, but my
    3. understanding is that he's appealing the order of extradition.
    4. **THE COURT:** And the warrant was issued -- who issued
    5. the warrant?
    6. **MR. LEUNG:** It was issued here in the Northern
    7. District of California. I forgot which particular judge. I
    8. believe it was Magistrate Judge Vadas after -- actually, no.
    9. The extradition package had been issued by Magistrate
    10. Judge Vadas. I'm not sure which particular magistrate issued
    11. the arrest warrant in connection with the indictment, your
    12. Honor.
    13. **THE COURT:** Okay. All right.
    14. So this matter is on for a motion to dismiss. A number of
    15. grounds have been urged. And the defendants are basically
    16. charged with an honest services wire fraud and a bribery -- a
    17. series of bribery charges. There are, I guess, what, five
    18. counts more?
    19. **MR. LEUNG:** Correct, your Honor.
    20. **THE COURT:** Five counts. And the counts, you know,
    21. allege a violation of honest services, alleges a violation of
    22. bribery. There are some variations within the counts, but
    23. essentially those are the nature of the charges.
    24. What I'm going to do is read the facts as I have gleaned
    25. them from the indictment and I'd like the Government to -- if
24. the Government believes that I've misstated it, I would like
25. you to make note.
26. The International Civil Aviation Organization has been a
27. United Nations specialized agency since 1944. The United
28. States has been a member of this agency since its formation.
29. One of the agency's responsibilities is standardizing machine
30. readable passports. The standards that this agency established
31. were used to determine which features would be utilized in
32. passports in a variety of countries, including the United
33. States.
34. The time period relevant to the indictment is 2005, 2010.
35. And during this time, the United States made annual monetary
36. contributions to the agencies exceeding $10,000 per year.
37. Throughout this time period contributions from the United
38. States constituted 25 percent of the agency's annual budget.
39. Mr. Siciliano was an employee of this agency and was
40. specifically assigned to work in the Machine Readable Travel
41. Documents Program. Mr. Siciliano worked and resided in Canada,
42. where the agency that we've just discussed is headquartered.
43. He held a Canadian passport, but is actually a Venezuelan
44. national.
45. Mr. Sidorenko and Mr. Vassiliev were chairmen of a
46. Ukrainian conglomerate of companies that manufactured and
47. supplied security and identity products and their consortium,
48. how they acted, was called EDAPS. It's called the EDAPS
49. Consortium.
50. Mr. Sidorenko is a citizen of Ukraine, Switzerland and
51. St. Kitts and Nevis. Not of the United States. But he
52. primarily resided in Dubai during the relevant time period.
53. Mr. Vassiliev also resided in Dubai, but he is a citizen
54. of Ukraine and St. Kitts and Nevis. He's not an American
55. citizen either.
56. And, of course, the company is not -- I mean, the agency
57. is not an American agency.
58. The indictment alleges that Mr. Sidorenko and
59. Mr. Vassiliev provided money and other things of value to
60. Mr. Siciliano in exchange for Mr. Siciliano using his position
61. at this agency to benefit EDAPS, as well as Sidorenko and
62. Vassiliev personally. That is to say, the allegation is that
63. the -- that Mr. Sidorenko and Vassiliev, Ukrainians, provided
64. things of value to Mr. Siciliano in Canada in exchange for
65. Mr. Siciliano using his position at a place in Canada to
66. benefit an Ukrainian company, as well as these -- Mr. Sidorenko
67. and Mr. Vassiliev personally, these Ukrainians personally.
68. Mr. Siciliano sought to benefit the Ukrainian consortium
69. by introducing and publicizing EDAPS to Government officials
70. and entities, by arranging EDAPS to appear at the agency's
71. conferences, and by endorsing the Ukrainian consortium to other
72. organizations and contacts.
73. The indictment also alleges that Mr. Siciliano assisted
    1. Mr. Vassiliev's girlfriend in obtaining a visa to travel to
    2. Canada in 2007.
    3. Around the same time Mr. Siciliano also considered
    4. arranging to obtain a visa for Mr. Sidorenko by hiring
    5. Mr. Sidorenko as a consultant for this agency.
    6. Additionally, the three defendants arranged to have
    7. Mr. Siciliano's son sent to Ukraine to work for Mr. Sidorenko.
    8. During there time period, Mr. Siciliano wrote an email
    9. message to Mr. Vassiliev seeking payment of dues via wire
    10. transfer to a Swiss bank account.
    11. A few years later, Mr. Siciliano sent an email advising
    12. Mr. Vassiliev and Mr. Sidorenko that they owed him three months
    13. payment. A few weeks after this email, Mr. Siciliano sent
    14. another email to Mr. Vassiliev referencing future projects,
    15. receiving the fruits of their marketing agreement, and
    16. inquiring about picking up his dues.
    17. All of those activities, everything that I have said,
    18. occurred outside the United States of America between these
    19. three defendants, who, by the way, aren't United States
    20. citizens, who never worked in the United States and whose use
    21. of the wires did not reach or pass through the United States.
    22. Okay. That's what I get out of the indictment. Anything
    23. wrong?
    24. **MR. LEUNG:** The only correction I make, your Honor,
    25. is that Mr. Siciliano's son actually went to Dubai and not
74. Ukraine for the job.
75. **THE COURT:** Great. Okay. I will take that into
76. account. Dubai.
77. Now, when last I looked, the Ukraine, what's left of it,
78. was not a state of the United States.
79. That's correct, right?
80. **MR. LEUNG:** Correct, your Honor.
81. **THE COURT:** Okay. So my first reaction in reading
82. this indictment is that your office is to be congratulated
83. because, apparently, you have reduced crime in the Northern
84. District of California, and indeed in the United States of
85. America, to such a point that you are using resources of your
86. office to go after criminal activity that occurs in foreign
87. countries and for that -- that's a rather interesting concept
88. that, apparently, you thought this is a good use of assets and
89. resources of the United States Attorney's Office for the
90. Northern District of California.
91. So it occurred to me: Is this statute or statutes, the
92. honest services statute and the bribery statute,
93. extraterritorial? And, fortunately, the Supreme Court has
94. addressed this issue. As recently as 2010, they have said --
95. Justice Scalia writing the opinion for a unanimous court, I
96. might add, said that you just look at the statute. See what
97. Congress said. Did Congress say it should be applied
98. extraterritorial?
    1. And you would concede, wouldn't you, Mr. Leung, there is
    2. nothing in the statute that talks about extraterritorial
    3. application, is there?
    4. **MR. LEUNG:** There is nothing in the text of 666 or 5 1343.
99. I would submit that the legislative history of 1343
100. suggests that it was meant to be applied extraterritorially.
101. **THE COURT:** But you know there are those people, like
102. judges, who look first to the statute. There is nothing in the
103. statute.
104. **MR. LEUNG:** That is correct, your Honor.
105. **THE COURT:** Okay. So then if there is nothing in the
106. statute, that doesn't preclude necessarily the application of
107. the statute extraterritorial, but we have to see whether or not
108. that's consistent with the general purpose of the statute.
109. **MR. LEUNG:** Correct, your Honor.
110. **THE COURT:** And it's your view that since the
111. Government contributes some funds to this agency, which is
112. involved in national security -- I guess we can talk about it
113. in open court, can't we?
114. **MR. LEUNG:** Yes, your Honor.
115. **THE COURT:** Okay. I didn't want to clear the Court
116. because of this strong national security interests that
117. apparently are at issue here.
118. But because they give money to this agency which is
     1. engaged in activities, some of which may impact national and
     2. international security arrangements, that's the nexus for the
     3. United States Government to apply the statute in an
     4. extraterritorial way, is that correct?
     5. **MR. LEUNG:** That's certainly one of the key --
     6. **THE COURT:** That's your first point. We'll get to
     7. the other points, but let's deal with this first point first.
     8. And so it occurred to me by that logic, the United States
     9. being a very generous country, gives a lot of money to a lot of
     10. foreign countries. They give over a billion dollars to Egypt.
     11. They give vast sums of money to Mexico. They give sums of
     12. money to many, many countries all over the world.
     13. And then I wonder by their giving some money to a foreign
     14. country, does that then give them jurisdiction to apply
     15. statutes, such as the honest services statute, to individuals
     16. who are operating in that country or outside the United States?
     17. For example, can you prosecute -- you give some money,
     18. let's say, to Mexico and -- for programs involving security in
     19. Mexico, the border. Let's make it right down your alley. And
     20. it turns out that somebody who is running one aspect of that
     21. program in Mexico, a Mexican national, favors his
     22. brother-in-law and takes a bribe from his brother-in-law to get
     23. his brother-in-law's children a job somewhere.
     24. Are you suggesting that the United States of America under
     25. an honest services theory could prosecute the individual in

1 Mexico?

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**MR. LEUNG:** Under honest services, there would have

1. to be the use of a mailing or wire. Under 666 I believe those
2. facts would support a prosecution, if the funding were made
3. pursuant to a federal program.
4. **THE COURT:** So, in other words, if I -- it's your
5. view, your view, that the United States of America can police
6. foreign companies in the exercise of their operation involving
7. foreign citizens on matters unrelated to the program which the
8. United States gave money for -- that is, for the specific
9. purpose of the program -- and that they then have jurisdiction
10. to act in that regard.
11. **MR. LEUNG:** It is, your Honor, if it is pursuant to a
12. federal program.
13. **THE COURT:** And do you have one case that says that?
14. **MR. LEUNG:** We have *Campbell*, your Honor, which was a
15. District of Columbia case in which an Australian national was
16. charged with bribery under 666 for conduct in Afghanistan
17. relating to his work with a private contractor that received
18. aid from the US AID.
19. **THE COURT:** And the program involved was a program
20. for the benefit of the United States, is that correct, in that
21. case?
22. **MR. LEUNG:** It was a program through which the United
23. States policy interests were advanced, your Honor.
    1. **THE COURT:** So if there is ever, ever a policy
    2. interest of the United States of America in anything a foreign
    3. country -- that occurs in a foreign country, the United States
    4. Attorney's Office for the Northern District of California will
    5. vindicate the way the laws apply -- the honest services law
    6. applies. You're going to wipe out bribery and honest services
    7. throughout the world. I want to congratulate you for that.
    8. And I never in my life, in 50 years of criminal practice,
    9. seen a more misguided prosecution as the one that you've
    10. brought. I just don't even get it. I don't get it, how you
    11. can -- how you can use resources of the United States
    12. Attorney's Office to prosecute some foreign nationals involved
    13. in a foreign company, engaged in conduct which was foreign, on
    14. doing things that weren't directly related to the contribution
    15. of the United States to that entity.
    16. **MR. LEUNG:** Your Honor --
    17. **THE COURT:** Who did you get permission from to bring
    18. this prosecution? Anybody in Washington?
    19. **MR. LEUNG:** We -- this was a Northern District of
    20. California prosecution, your Honor.
    21. **THE COURT:** Did you get permission from anyone in the
    22. Department of Justice in Washington DC to bring this
    23. prosecution?
    24. **MR. LEUNG:** It was not required. We coordinated --
    25. **THE COURT:** It implicates foreign countries, doesn't

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| --- | --- | --- | --- |
| 1 | it? |  |  |
| 2 | **MR. LEUNG:** | It does, your Honor. |
| 3 | **THE COURT:** | And you didn't choose fit to ask the |
| 4 | Department of Justice | whether in their smarter sentencing, |
| 5 | smarter criminal law | enforcement program this is a good use | of |
| 6 | your resources? |  |  |
| 7 | **MR. LEUNG:** | We received office approval. We also |  |
| 8 | coordinated with the | State Department, your Honor. |  |
| 9 | **THE COURT:** | Pardon? |  |
| 10 | **MR. LEUNG:** | We also coordinated with the State |  |
| 11 | Department. |  |  |
| 12 | **THE COURT:** | In other words, it was the State |  |
| 13 | Department, and that | was whether or not this person had |  |
| 14 | diplomatic immunity. | I'm not even going to address that. |  |
| 15 | That's another issue | entirely. |  |

1. But you're telling me this was a decision of the United
2. States Attorney to bring this prosecution without the knowledge
3. of the Department of Justice.
4. **MR. LEUNG:** It was a duly authorized decision by this
5. office to do so.
6. **THE COURT:** My suggestion, since I'm dismissing this
7. indictment, is that you bring an appeal, right away. I would
8. be very interested in what the Ninth Circuit has to say about
9. this, whether they think that there is enough of a nexus to
10. apply statutes, such as the bribery statute and the honest
11. services statute, to the conduct that's alleged in this
12. particular case.
13. **MR. LEUNG:** Understood, your Honor.
14. Would the Court like to hear further argument just to
15. complete the record?
16. **THE COURT:** Sure. You can -- anything I've said, you
17. can respond to. I invite you to do that.
18. **MR. LEUNG:** Can we rely on the briefing --
19. **THE COURT:** You can say whatever -- you've now heard
20. my views. If you disagree with them, if you have some
21. explanation, you can certainly give it to me now, if it's not
22. in your papers. You don't have to recite what's in your
23. papers, but now you've heard what my views are of this.
24. **MR. LEUNG:** Understood.
25. **THE COURT:** My view is these statutes aren't intended
26. to apply extraterritorially to the conduct that's alleged in
27. this case. And just -- and the very fact that you get up and
28. say: Well, we could have prosecuted somebody in Mexico if
29. American interests are implicated, or we can prosecute somebody
30. in Canada -- by the way, we could phone the Royal Canadian
31. Mounted Police. They actually have law enforcement in Canada.
32. If you're so concerned about the way some Canadians are
33. operating with a Canadian-based company in dealing with
34. Ukrainians, you can always phone the Mounties and they will
35. investigate it if they think it's appropriate.
    1. But if you'd like to respond to anything I said, go right
    2. ahead.
    3. **MR. LEUNG:** Well, your Honor, we respectfully submit
    4. that under *Bowman*, certainly, the 666 statute --
    5. **THE COURT:** The 1922 case?
    6. **MR. LEUNG:** Correct, your Honor.
    7. **THE COURT:** Okay. Got it.
    8. **MR. LEUNG:** It has never been overruled. The Ninth
    9. Circuit applied in it a non-published opinion granted as
    10. recently as November 26, 2014.
    11. **THE COURT:** There are really no limits to your
    12. argument. There are just no limits. I don't understand where
    13. you really draw the line.
    14. The United States never gives anything to anybody unless
    15. there is some interest in it. And you're saying whenever they
    16. give something to somebody, they can prosecute them, even
    17. though everything happens in some other place.
    18. **MR. LEUNG:** As the Second Circuit in *Bahel*
    19. distinguished, it's -- there is a difference between a federal
    20. program which advanced a U.S. policy interest versus paying,
    21. say, a contractor to buy the services to pay for goods.
    22. **THE COURT:** This program, this program -- there is no
    23. allegation here that somehow the program failed or was in
    24. jeopardy by virtue of -- by virtue of this purportedly
    25. allegedly corrupt person giving a contract or favoring somebody
36. in Ukraine. That's not -- that's not what's alleged here.
37. **MR. LEUNG:** That's correct, your Honor, but there is
38. no requirement that the program fail or be jeopardized by the
39. corrupt conduct.
40. Rather, the statutory interest recognized by the Supreme
41. Court is that the United States has an interest to ensure that
42. the money that it distributes pursuant to federal programs are
43. free from corruption.
44. **THE COURT:** That's right. So if you give -- your
45. argument is, you give a dollar to some foreign entity, you can
46. then prosecute people who engage -- who are involved with that
47. foreign entity even though there are -- even though they do it
48. all abroad and do it in connection with something else. They
49. don't take the dollar. Something else. You say: Well, we can
50. prosecute them for honest services.
51. How do you actually -- do you really think this is going
52. to fly anywhere?
53. Anyway, I invite you, I invite you to get the judgment of
54. the Ninth Circuit. Obviously, I'll be bound by it.
55. **MR. LEUNG:** Thank you, your Honor.
56. **THE COURT:** So the next question -- so I'm granting
57. the motion to dismiss.
58. Very powerful advocacy on your parts. I want to
59. congratulate you for your oral argument today.
60. (Laughter.)
    1. **THE COURT:** The issue, I think, is what to do about
    2. this warrant that's out there.
    3. **MS. BOERSCH:** We would ask that it be quashed.
    4. **MR. OLMOS:** It's a joint request, your Honor.
    5. **THE COURT:** Granted.
    6. And I'm going to write something so you have my reasons,
    7. and you take it right up to the Ninth Circuit and see what they
    8. have to say about it. And I don't even think you have to ask
    9. Washington, right?
    10. **MR. LEUNG:** I think we do in this case, your Honor.
    11. **THE COURT:** Really? I mean, you brought the
    12. indictment without asking them. I don't know why you can't
    13. appeal it without asking them. But you follow whatever
    14. procedure you think is appropriate.
    15. And you please put in the comment that I actually think
    16. this is a serious waste of scarce resources. If you're not
    17. addressing crime in the Northern District of California, you're
    18. not doing your job. And I think this -- I think this
    19. prosecution is really a -- brings into serious question the
    20. manner in which decisions are made by the United States
    21. Attorney for the Northern District of California.
    22. Okay.
    23. **MR. OLMOS:** Your Honor, I have one administrative
    24. issue and that is, I would like the Court to order my client's
    25. passport and other items that were seized returned today.
        1. **THE COURT:** Forthwith. Give it to him forthwith.
        2. **MR. OLMOS:** He is also required to wear a GPS monitor
        3. on his ankle --
        4. **THE COURT:** That requirement is lifted.
        5. **MR. OLMOS:** Thank you, your Honor.
        6. **MS. BOERSCH:** Your Honor, with respect to
        7. Mr. Vassiliev, since he has been sitting in a Swiss jail for
        8. eight months, I ask that the order quashing the warrant be
        9. issued immediately.
        10. **THE COURT:** I think I would like to have a proposed
        11. form of order listing all these things. Please show it to the
        12. United States Attorney.
        13. **MR. LEUNG:** Your Honor, would you consider staying
        14. the order while we --
        15. **THE COURT:** No.
        16. **MR. LEUNG:** Thank you.
        17. **MS. BOERSCH:** Thank you, your Honor.
        18. **MR. OLMOS:** Thank you, your Honor.
        19. **THE COURT:** Go right to the Ninth Circuit. Get a
        20. stay, if you think that's an appropriate use of your resources.
        21. (Proceedings adjourned.) 22

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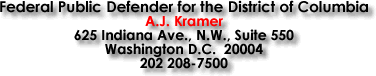
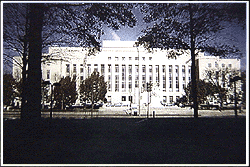
**CERTIFICATE OF OFFICIAL REPORTER**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, April 17, 2015

Disclaimer: The above materials were collected in order to aid you in creating and writing motions. Be advised that many of the motions were computer-scanned and, therefore, may have errors in formatting and text. These errors did not appear in the original documents and should in no way reflect upon the contributors. Also, this collection contains motions from a variety of jurisdictions; hence, many documents may contain case law not applicable to your circuit. Furthermore, each document may not meet the requirements of the local rules in your district. Finally, we do not guarantee the research, legal authority, or quotes included in this collection of motions. Please be sure to check each cite and quote for accuracy, as well as, to Shepardize all authorities.



SECTION 1 - PROCEDURAL MOTIONS (Procedure) 

Additional Time

Adopt Co-Defendants Motions Amend Conditions of Release Appeal Bond

Compel Election Between Multiplicitous Counts Continue Trial 1

Continue Trial 2

Continue Trial Due to Complexity De Nevo Review of Bond Dissolution of Stay

Emergency Release

Exparte Meeting with Judge Insanity Notice

Inspect Jury Records

Inventory and Return of Propery Opposition to Government Deposition

Preclude AUSA From Filing Documents Under Seal Preclude AUSA From Making Reference to Marine Service Preserve Dispatch Tapes

Preserve Evidence Preserve IRS Records

Pretrial Subpoena Due Tecum Quash Government Subpoena Reconsider Conditions of Release

Reply to Governments Motion to Amend Conditions of Release Rule 17(b) Subpoena

Sever Counts Sever Counts

Sever Counts and Defendants Sever Counts and Defendants Strike Surplusage

Strike Surplusage Strike Surplusage Transport Defendant

Travel Funds for Defendant Venue

Venue

Venue Withdraw

Writ Ad Testificacdum Writ Habeas Corpus

SECTION 2 - MOTIONS TO DISMISS INDICTMENT (Dismiss) 

1326(b) Underlying Felony is not an Aggravated Felony 1326(b) Underlying Felony is not an Aggravated Felony 922(g) Unconstitutional

922(g) Unconstitutional - US District Court for Northern California 922(g) Unconstitutional - Superior Court, Washington DC

Civil

Defendant is a Juvenile

Deportation Proceeding in Violation of Due Process Destruction of Evidence

Double Jeopardy After Mistrial Double Jeopardy, Same Offense Duplicity

Estoppal Estoppal

Failure to Allege an Offense Failure to Allege an Offense

Failure to Preserve Exculpatory Evidence Fifth Amendment

Hobbs Act (No Interstate Nexis, Double Jeopardy with 924(c)) Lack of Jurisdiction of **SAUSA**

Lack of Subject Matter Jurisdiction Lopez

Pre-Grand Jury Publicity Racially Applied Statute

Racially Biased Grand Jury Selection Process Racially Biased Jury Selection

Repressed Memory Evidence Statute of Limitations

Unconstitutional Statute -car jacking Unconstitutional Statute -unregistered firearm Unconstitutional Statute - interstate commerce Unconstitutional Statute -vagueness Unconstitutional Statute -child support Violation of Interstate Agreement on Detainers

SECTION 3 - DISCOVERY MOTIONS (Discover) 

404b and Inspect Evidence Bill of Particulars

Bill of Particulars Brady

Brady

Brady, Specific Brady Violation

Co-Defendant's Statement Compel

Compel Polygraph Results of Government Witness Drug Dog

Electronic Surveillance Electronic Surviellance Expert Testimony Expert Testimony Forfeiture Proceedings Grand Jury Proceedings Grand Jury Proceedings Hearsay Evidence

Impeachment Evidence of Government Witnesses Informant Information

Informant Information Informant Information Informant Information Informant Information

Informant Information - Post Apprendi Inspect evidence

Inspect and Test Jencks

Jencks, In Camera Inspection of Law Enforcement Notes Notice of 404B

Pretrial Discovery Pretrial Jencks Prior Bad Acts

Promises and leniency Promises and leniency Promises and leniency Racially Applied Statute Retain Notes

Reveal the Deal Rule 16

Scientific Evidence Selective Prosecution Sentencing Guideline State Police Reports

Stipulation Regarding Discovery True ID of Informant

Witness List and Statements

SECTION 4 - MOTIONS TO EXCLUDE (Exclude)

404B Evidence

Agent from Courtroom Co-conspirator Hearsay Civil Judgement

Civil Violation Drug Dog

Drug ID Expert Testimony Expert

Expert

Extrinsic Evidence Extrinsic Evidence Handwriting Expert Handwriting Expert Hearsay from a Child ID Expert

In Court Identification James Hearing James Hearing

Prior Arrest Prior Conviction Prior Sex Acts

Repressed Memory Expert Settlement in Civil Case Tape Recordings

Tape Recordings Tape Recordings

SECTION 5 - **MOTIONS** TO **SUPPRESS** (Suppress) 

Bad Warrant Border Stop

Detention of Luggage Entry Without Consent Franks Hearing

Frisk Frisk

Identification Identification Identification ID Reply

Jackson/Denno Hearing No Knock Warrant

No Probable Cause for Warrant Photographic Line-up

Port of Entry Search Port of Entry Search Singleton

Statement of Defendant Statement of Defendant Statement of Defendant Traffic Stop

Traffic Stop Vehicle Search

Violation of State Law

SECTION 6 - **TRIAL MOTIONS** (Trial)

Admit ID Expert Admit Polygraph Admit Polygraph Admit Polygraph

Admit Testimony Regarding Veracity Admit Testimony Regarding Veracity Attorney to Participate in Voir Dire Attorney to Participate in Voir Dire In Court Lineup

Judgement of Acquittal Judgement of Acquittal Judgement of Acquittal

Jury Questions on Pornography Jury Questions

Jury Questions Jury Questions Jury Selection Jury Selection

Notice of Government's Intent to Introduce Certain Evidence Prohibit Witness from Viewing Defendant

Objection to Giving Deliberate Ignorance Charge Objection to Giving Deliberate Ignorance Charge Old Chief

Old Chief

Redact Statement

Response to Gov.'s Motion Precluding Theory of Defense Transcript of Preceding

Waive Defendant's Presence

SECTION 7 - SENTENCING MOTIONS (Sentenc)

1326(b) Aggravated Felony 5K2.0

Aberrant Behavior

Assorted Grounds for Departure Battered Woman

Diminished Capacity

Entrapment

Family Circumstances Mental Illness Mental Illness

Reconsider Substantial Assistance

SECTION 8 - POST CONVICTION MOTIONS (Post Con) 

Application for Post Conviction Relief Correct Sentence

Correct Sentence New Trial

New Trail

Rule 35 (Allocution) Vacate Sentence