MAYER | BROWN

Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006-1101
United States of America

T: +1 202 263 3000
F: +1 202 263 3300
mayerbrown.com

Kelly B. Kramer

April 10, 2019

BY COURIER

Corey Amundson, Esq.
Director and Chief Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, DC 20530-0001

Michael E. Horowitz, Esq.
U.S. Department of Justice
Office of the Inspector General
Investigations Division
950 Pennsylvania Avenue, N.W., Room 4706
Washington, DC 20530

Re: United States v. Richard Renzi

Dear Messrs. Amundson and Horowitz:

I write on behalf of my client, Richard Renzi, to request that you investigate misconduct by, among others, Gary Restaino, Esq., an Assistant United States Attorney in the District of Arizona ("AUSA Restaino"); and Daniel Odom, a Special Agent of the Federal Bureau of Investigation ("SA Odom") during the Department of Justice's investigation and prosecution of Mr. Renzi.

I do not make this complaint lightly. In more than 20 years of practice as a white-collar criminal defense attorney in Washington, D.C., I have never had occasion to file a complaint about the conduct of federal law enforcement officials, for whom I have the utmost respect. I submit this letter because, in my view, the misconduct in Mr. Renzi's case was repeated, concealed, and corrosive—occurring before, during, and after the trial. In my view, the government's misconduct not only deprived Mr. Renzi of his constitutional right to a fair trial, but it allowed the jury to convict an innocent man.

Summary of Government Misconduct

This public-corruption case centered on whether Mr. Renzi, a Republican, abused his position as a Member of Congress in connection with two legislative land-exchange proposals. As the record establishes, the investigation and prosecution were marred by knowing and deliberate misconduct, including the following:

Mayer Brown is a global services provider comprising an association of legal practices that are separate entities including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian partnership).

- ***Improper Media Leaks:*** The investigation took place against the backdrop of the hotly-contested 2006 mid-term elections. Mr. Renzi's seat was one of the Democrat's top targets. In the weeks leading up to the election, news of the investigation broke in the Arizona and national media; some of the stories cited Department of Justice officials.[1] Acting as an "October surprise," the leaks damaged Mr. Renzi's reelection prospects. Although Mr. Renzi won re-election anyway, the leaks about him and other members of Congress—nearly all House Republicans—were so pervasive that the DOJ officials (including the FBI Director) issued a memorandum to all employees with a "stern message" about their obligations to preserve the confidentiality of their investigations.[2]

- ***Illegal Wiretap:*** During a Title III wiretap, the government recorded dozens of attorney-client privileged calls. When Mr. Renzi raised concern about these recordings, the government denied all wrongdoing. It fought bitterly (but unsuccessfully) against allowing any discovery. The ensuing evidentiary hearing revealed wide-spread misconduct. The district court found that the government had *deliberately* and *illegally* recorded dozens of privileged phone calls between Mr. Renzi and his counsel.[3] Moreover, the district court found that the government had lied to the supervising court about its misconduct.[4] Although the district court took the extraordinary step of suppressing the wiretap in its entirety, it refused to dismiss so much as a single count of the indictment.[5] Substantial evidence suggests that the government used privileged information to advance its investigation—indeed, one of the case agents kept a compact disc containing a sensitive privileged call at his desk for years.[6]

- ***Concealment of Exculpatory Evidence:*** In the early stages of the investigation, SA Odom interviewed Philip Aries, a key witness who would later sign on as a "Confidential Human Source." Mr. Aries told SA Odom that he first learned about an alfalfa farm (the "Farm") at the center of this case from Joanne Keene (then Mr. Renzi's District Director)—*not* from Mr. Renzi. SA Odom and his partner concealed this exculpatory information, which he later conceded was "important," by leaving it out of their FBI report of interview—even though this fact was clear from the face of their handwritten notes.[7] Critically, the report

---

[1] *See* Jennifer Talhelm, *Officials Scrutinize Arizona Land Deal*, AP, Oct. 25, 2006; David Johnston, *Congressman From Arizona Is the Focus Of an Inquiry,* NY Times, Oct. 25, 2006; Dennis Wagner and Billy House, *Inquiry on Renzi: Real Deal or Campaign Trickery?; Justice Official Cautions not to Jump to Conclusions About Investigation,* Ariz. Republic, Oct. 26, 2006.

[2] *See* David Johnson, *Leaks About Lawmakers Prompt Warning*, N.Y. Times (Nov. 6, 2006).

[3] *See United States v. Renzi*, 722 F. Supp.2d 1100 (D. Az. 2010) (attached as Exhibit A).

[4] *See id.* at 1108-09.

[5] *See id.* at 1118.

[6] *See id.* at 1109 & 1116.

[7] Transcript 75 (Oct. 26, 2015) (attached as Exhibit B).

of interview was provided to the defense, but the agents' notes were not revealed until after Mr. Renzi reported to prison.

- ***Concealment of Impeachment Evidence:*** During the investigation of this case, Mr. Aries balked at continuing to cooperate. To convince him to continue, SA Odom secretly told him that the FBI offered monetary awards to cooperators. The government not only concealed this classic impeachment evidence; it capitalized on it, by "misleading" the jury (in the district court's words) that Mr. Aries' testimony was untainted by financial motives.[8]

- ***Introduction of False Testimony:*** After learning that he stood to receive money for his cooperation, Mr. Aries' changed his story about the origins of the land exchange. Whereas he originally told SA Odom that he learned about the Farm at the center of his proposed exchange from Mr. Renzi's District Director—not from Mr. Renzi—he testified before the Grand Jury (and again at trial) that he only heard about the farm when Mr. Renzi sprung it upon him during their one and only face-to-face meeting. The government knew that Mr. Aries' testimony was false—after all, Mr. Aries had told SA Odom as much during his initial interview. But the government sponsored this false claim, both at trial and in the grand jury, while concealing Mr. Aries' initial statement.

In addition to these matters of record, Mr. Renzi has discovered additional facts calling into question the fairness and impartiality of the investigation. For one thing, Mr. Renzi has learned that the government opened its investigation based on a fabricated dossier provided by Democratic lobbyists working for the Resolution Copper Company ("Resolution"). Resolution dubbed this plan "Operation Eagle," which appears to have been an effort by a foreign-owned corporation to "weaponize" the Department of Justice ("DOJ") in order to defeat Mr. Renzi at the polls.

Mr. Renzi and his legal team also learned that AUSA Restaino was married to a senior advisor to Arizona's Democratic Governor, Janet Napolitano.[9] Governor Napolitano was not only one of Mr. Renzi's fiercest political rivals in Arizona, but she also played an active political role in Resolution's land-exchange proposals. Furthermore, since 2008, AUSA Restaino and his wife have donated nearly $10,000 to Hillary Clinton, Barack Obama, and other Democratic candidates for federal office.[10] AUSA Restaino's partisan political leanings, along with his spouse's close

---

[8] *United States v. Renzi*, No. 08-CR-212-TUC-DCB (BPV), Order at 8 (Dec. 30, 2015) (attached as Exhibit C).

[9] Between 1996 and 2003, AUSA's Restaino's wife worked for a private law firm. In 2003, she became the Executive Director of the Governor's Citizens Finance Review Commission. She then became the Treasurer of Governor Napolitano's 2006 gubernatorial campaign and of the Governor's Competitive Edge PAC. She next became Governor Napolitano's General Counsel in February 2008. After Governor Napolitano was confirmed as Secretary of the Department of Homeland Security, she joined her in Washington as a Deputy General Counsel. She left the Department of Homeland Security in 2010 after the media reports alleging that she was involved in efforts to stifle responses to politically-sensitive Freedom of Information Act requests. *See* Ted Britis, *Playing Politics with Public Records Requests*, AP, July 21, 2010.

[10] *See* www.opensecrets.org.

personal relationship with Governor Napolitano, calls into question whether any prosecution decisions were influenced by "improper considerations, such as partisan or political or personal considerations…."[11]

The federal courts have reviewed some of the misconduct discussed herein, but because much of it was concealed until after Mr. Renzi's direct appeal, they have never had the opportunity to consider the cumulative impact of the misconduct, which I believe to have been substantial. On behalf of Mr. Renzi, I respectfully request that you conduct a full and fair investigation.

Background Facts

I. RICK RENZI'S LONG-RUNNING AND CLOSE RELATIONSHIP WITH FORT HUACHUCA

The son of an Army Major General, Rick Renzi came of age at Fort Huachuca in southern Arizona.

In November 2002, the people of the First Congressional District of Arizona elected Mr. Renzi to the United States House of Representatives. During his term in office, Mr. Renzi took pains to preserve and protect Fort Huachuca, which was and is the home of the U.S. Army's Intelligence Center of Excellence. Military officials testified at his trial that his interest in the Fort was unique, heartfelt, and genuine. He not only participated in briefings and training exercises at Fort Huachuca, he also traveled to Iraq and Afghanistan, where he learned first-hand about many of the tactics employed in the War on Terrorism, including so-called enhanced interrogation techniques. Many of his overseas activities are classified. Suffice it to say that these experiences informed and reinforced Mr. Renzi's view that Fort Huachuca was absolutely essential to our national security.

Mr. Renzi also knew that a regional water shortage threatened Fort Huachuca's future viability. During his time in office, the U.S. Army, he Nature Conservancy ("TNC"), the Upper San Pedro River Partnership, Congressman James Kolbe, Senator John McCain and others lobbied Mr. Renzi about possible solutions. All of these stakeholders agreed that the best way to help resolve the situation would be to retire water usage on the Farm just outside the Fort's boundaries. The Nature Conversancy knew that Mr. Renzi had associated with the Farm's owners, Jim and Terry Sandlin.[12] Although these groups had tried to buy the Farm or to relocate its operations to

---

[11] American Bar Association, Standard 3.16 of the Criminal Justice Standards for the Criminal Justice Function (2015).

[12] Mr. Renzi knew Mr. Sandlin's wife from high school. In addition, Mr. Renzi and the Sandlins had briefly co-owned a real-estate development project in northern Arizona (more than 300 miles away from the Farm) but the Sandlins bought out Mr. Renzi's interest in early 2003. Thereafter, as a result of that transaction, Mr. Sandlin owed money to a corporation owned by Mr. Renzi. This was a legitimate debt which Mr. Renzi publicly disclosed on his Congressional Financial Disclosure Statement to the Committee of Standards and Conduct. At all times relevant to the land exchange proposals at issue here, Mr. Renzi and the Sandlins were not business partners and did not have any ongoing business relationship.

another part of Arizona, they had never come to terms with the Sandlins. They lobbied Mr. Renzi to try to convince Mr. Sandlin to stop using water on the Farm to help save the Fort.

Importantly, as the government eventually stipulated, what these groups were asking Mr. Renzi to do—namely, retire water usage on the Farm—would have been in the public interest. That's because the Farm was the last significant agricultural parcel in the watershed, and retiring water usage on the parcel would have materially benefitted the Fort and enhanced U.S. national security.[13]

II. FIRST PROPOSED LAND EXCHANGE—RESOLUTION COPPER

In 2003, just after Mr. Renzi's election, Resolution, a joint venture controlled by foreign mining giants Rio Tinto and BHP Billiton, began lobbying Congress and state officials for land-exchange legislation that would grant it the right to mine federal park lands inside Mr. Renzi's district.

Resolution's proposal was both controversial and politically charged. In 2003 and 2004, Arizona's then-Governor, Janet Napolitano, was intent on helping her party to defeat Mr. Renzi. (At that time, Mr. Renzi was perceived to be a highly-vulnerable freshman member.) Concerned that Mr. Renzi could bolster his political standing by advancing Resolution's proposal, Governor Napolitano played hardball: she told Resolution and its Democratic lobbyists that she would oppose the exchange if Mr. Renzi sponsored it.[14] Acceding to Governor Napolitano's threat, Resolution sought to work with other legislators, such as Congressman Kolbe, but it was unable to convince anyone to introduce its bill.

In November 2004, Mr. Renzi resoundingly won re-election. In light of the result, Resolution concluded that it would be better served by asking Mr. Renzi to sponsor its legislation. Having been lobbied extensively by the U.S. Army, TNC, and the Upper San Pedro River Partnership about the environmental threats to Fort Huachuca, Mr. Renzi knew that water use on the Farm threatened the Fort's viability. So when Resolution asked for suggestions to improve its draft bill, he thus suggested that it work with TNC to acquire a conservation easement on the Farm. Notably, Resolution knew that Mr. Renzi had once had a business relationship with the Sandlins.

Resolution went through the motions of following up Mr. Renzi's suggestion, but it never seriously considered acquiring an easement on the Farm. Mr. Renzi eventually became frustrated by what he perceived to be Resolution's arrogance and its unwillingness to address the Fort's biggest threat. When Resolution claimed that it did not think that it would acquire the easement, Mr. Renzi told

---

[13] At the time of these events, the Base Realignment and Closure Commission was undertaking a review of United States military installations. Fort Huachuca's viability was in question because of environmental litigation and a regional water shortage. *See, e.g.*, Center for Biological Diversity, *Pentagon Cover-up of Fort Huachuca's Water Problem* (June 21, 2005).

[14] Transcript at 91-92 (May 15, 2013).

it that he would not support the bill unless it addressed the threat to Fort Huachuca—through the Farm or otherwise.

Notwithstanding all of this, Mr. Renzi continued to work on Resolution's draft bill. Several interest groups, including the San Carlos Apache Indian tribe, environmentalists, and rock climbers came out in opposition to Resolution's proposal. Seeking to broker these controversies, Mr. Renzi introduced Resolution's bill in late 2005, but it did not advance in that Congress. (In fact, Congress did not pass Resolution's proposal until 2014—some six years after Mr. Renzi left Congress.)

III. SECOND PROPOSED LAND EXCHANGE—PHILIP ARIES

In early 2005, Phillip Aries approached Mr. Renzi's District Director, Joanne Keene, about a new land-exchange proposal that he had developed with former Secretary of the Interior Bruce Babbitt. Mr. Aries had a close relationship with Ms. Keene, whom he had known for years. Ms. Keene, Mr. Aries, and Mr. Babbitt worked to refine and improve Mr. Aries's proposal. They eventually devised a draft bill that would have allowed the federal government to obtain a conservation easement on the Farm. Mr. Renzi played no role in these discussions.

Once the bill was sufficiently advanced, Ms. Keene put Mr. Aries in touch with Mr. Sandlin to discuss a possible transaction. She also arranged for Mr. Aries to meet Mr. Renzi at a constituents' event in April 2005. Shortly before that meeting, Ms. Keene submitted Mr. Aries's draft bill to the Office of Legislative Counsel of the U.S. House of Representatives and put a copy of it in the briefing book that she provided to Mr. Renzi. The draft legislation contemplated that, as part of the exchange, the government would obtain a conservation easement on the Farm.

During this meeting, Mr. Aries and Ms. Keene explained the draft bill. They stressed that even former Secretary Babbitt endorsed the plan to retire water usage on the Farm. Knowing that reducing water use on the Farm was a top priority for both the U.S. Army and TNC, Mr. Renzi endorsed Mr. Aries' proposal. He urged Mr. Aries to meet with the officials at Fort Huachuca and TNC to get their endorsements.[15]

---

[15] According to Mr. Aries, Mr. Renzi also told him that he would be willing to use a "free pass" with the Chairman of the Natural Resources Committee to advance the legislation. Ms. Keene did not recall Mr. Renzi promising Mr. Aries a "free pass," but she did recall that he said that he would speak with the Chairman about a "placeholder." A "placeholder" is when a member reserves a timeslot on the Chairman's calendar to debate the legislation on the merits. The insertion of a placeholder does not imply that a bill or amendment would bypass Committee consideration. *See* 152 Cong. Rec. H4689-03, 2006 WL 1789221 (2006) (supporting a placeholder so the specific issue could be revisited at the bill's conference); 147 Cong. Rec. H4553-03, 2001 WL 837747 (2001) (proposing an amendment "with the express intent and purpose of being the placeholder that we need as we continue to work with the Senate and in conference . . . in fashioning the final bill"); 145 Cong. Rec. S6160-01, 1999 WL 341139 (1999) (Senator John McCain describing language in a bill as being "a placeholder" to ensure that a further proposal could be "appropriately considered in the normal legislative process").

After this meeting, Mr. Aries sought to line up support for his draft legislation. He met with officials at Fort Huachuca, who supported his effort to retire water use on the Farm. TNC took the view that a conservation easement would be inadequate; it told Mr. Aries that it would only support the legislation if he purchased the property outright—something Mr. Renzi had never suggested. Mr. Aries then decided, of his own accord and without consulting Mr. Renzi, that he would purchase the Farm. He negotiated a purchase price of $4.5 million. Mr. Aries testified that this was a fair price; indeed, he admitted that he had turned down a $5.2 million offer to sell the property only a few weeks after closing on the purchase.

Mr. Sandlin used a portion of the proceeds from the sale of the Farm to pay off the debt he owed to Mr. Renzi's company. Mr. Renzi did not know that Mr. Sandlin used these funds to pay off the debt. No one disputes that this pre-existing debt was entirely legal and appropriate. And no one disputes that Mr. Renzi did not receive even a penny more than he was due under the terms of that debt agreement.

THE INVESTIGATION

I. RESOLUTION AND ITS CONSULTANTS LAUNCH "OPERATION EAGLE"

After introducing Resolution's bill, Mr. Renzi sought to broker an agreement between Resolution and the bill's opponents, including especially the San Carlos Apache Tribe. Frustrated by Mr. Renzi's efforts to accommodate the Tribe's concerns, Resolution and its lobbyists arranged for *The Arizona Republic* to run an op-ed piece criticizing Mr. Renzi's approach.[16] Resolution's effort to use the media to influence public policy was legitimate.

More than a year earlier, Resolution and its lobbyists had launched "Operation Eagle"—which appears to have been an illegitimate effort to use the DOJ to defeat Mr. Renzi at the polls. The effort began as early as February 2005, when Resolution's lobbyists Tom Glass and Ron Ober made contact with former FBI agent Jim Elroy.[17] Mr. Ober is a long-time Democratic political operative with close ties to Governor Napolitano.[18] Mr. Glass is a former Colorado State Senator

---

[16] *Firm Hand Needed to Guide Mining Deal*, The Arizona Republic (Aug. 24, 2006) ("Renzi is the logical representative to carry the bill in the House. But if he can't bring himself to act in Arizona's best interest, he should step aside and let another House member … take the leadership role.").

[17] After retiring from the FBI, Mr. Elroy worked as a private investigator. Among other things, he worked for well-heeled interests to "prepare … criminal case[s] … which could ultimately be handed to federal authorities." Patrick Radden Keefe, *The Jefferson Bottles*, The New Yorker (Sept. 3, 2007). Despite Mr. Elroy's central role in launching this investigation, the government refused to provide Mr. Renzi's defense with access to his source file.

[18] At the time of Resolution's proposal, Ron Ober was a "longtime Democratic operative" who "boast[ed] on his Web site of ties to Napolitano." Jerry Kammer, *Environmental Activist Aims to Alter Land Swap*, The Arizona Republic (Oct. 18, 2008). Mr. Ober also played a leading role in the Keating Five scandal by doing more than $110 million worth of business with Charles Keating while his boss, Governor Dennis DeConcini, was

and a Democratic campaign advisor. Together, they falsely told Mr. Elroy that Mr. Renzi and Mr. Sandlin were systemically "shaking-down" land-developers through a series of extortion schemes. Mr. Elroy compiled a dossier reflecting these false claims, which he provided to SA Odom. About one month later, Mr. Elroy re-submitted a slightly revised but anonymous letter, apparently to disguise his role in developing the extortion theory. The timing is striking: months before the telephone conversation in which Bruno Hegner claimed that Mr. Renzi told him "no Sandlin property, no bill," Resolution's Democratic lobbyists were secretly back-channeling false claims about Mr. Renzi to the FBI.

Although the entire premise was false, the dossier appears to have caught the attention of law enforcement. The partisan political overlay is apparent. AUSA Restaino must have recognized the threat that Mr. Renzi posed to Gov. Napolitano's political dominance in Arizona.[19] Disregarding the conflict of interest arising out of his wife's relationship with the Governor and his own partisan leanings, AUSA Restaino led the aggressive investigation that followed.

II. THE FBI CULTIVATED WITNESSES AND CONCEALED EXCULPATORY INFORMATION

Seeking to prove the truth of Mr. Elroy's furtive dossier, SA Odom began recruiting witnesses. One of his first targets was Mr. Renzi's former district director, Ms. Keene. By then, she had resigned from Mr. Renzi's office after being passed over for a promotion. In the weeks and months that followed, SA Odom met with Ms. Keene over 50 times; she testified that she was "personally invested" in the case and that she had come to view herself as "part of the investigation team."[20] The true nature of SA Odom's meetings with Ms. Keene is still uncertain. Although the government produced Form 302 reports of interviews regarding these meetings, it refused to produce copies of the agents' handwritten notes.

The government's refusal to produce these handwritten notes is especially troubling given what we now know about the notes from contemporaneous witness interviews. Soon after targeting Ms. Keene, SA Odom set his sights on Mr. Aries. When SA Odom first approached Mr. Aries, Mr. Aries told him that he first learned of the plan to retire water use on the Farm for the benefit of Fort Huachuca from Ms. Keene (*not* from Mr. Renzi). Even though SA Odom would later concede that this exculpatory evidence was "important," and even though it was clear on the face of SA Odom's handwritten interview notes that Mr. Aries had not learned of the Farm from Mr. Renzi, the FBI concealed this information by leaving it out of its Form 302—the only record of the interview that was accessible to the defense. Concealing this information empowered the

---

intervening with thrift regulators on Mr. Keating's behalf. *See* John Dougherty, *DeConcini and Keating*, The Phoenix New Times (July 14, 1993).

[19] In March 2005, multiple media reports suggested that Mr. Renzi might challenge Governor Napolitano in the upcoming gubernatorial election. *See, e.g.,* United Press International, *Hayworth Will Not Run for Arizona Governor* (March 10, 2005) ("U.S. Rep. Rick Renzi ... may take a look at the race.").

[20] Transcript at 206 (May 17, 2013).

government to argue that Mr. Renzi had used the power of his office to force Mr. Aries to purchase the Farm.

III. THE DOJ AND THE FBI ILLEGALLY WIRETAPPED MR. RENZI

Selectively using information provided by Ms. Keene and Mr. Aries, the government obtained a wiretap on Mr. Renzi's cell phone. The implementation of that wiretap was definitively illegal. The district court found that it violated Mr. Renzi's constitutional rights, in multiple respects.

First, the government made an affirmative decision to record Mr. Renzi's conversations with one of his defense attorneys for later review by a "taint team." The government's purported justification for recording these attorney-client privileged calls was that one of Mr. Renzi's attorneys was a "political operative"—not a member of the Arizona Bar. That was false. And the government knew it: the district court specifically found that, on the day that the wiretap began, an FBI agent "accessed the Arizona State Bar's public website and determined that [she] was a licensed attorney and printed a copy of her profile from the website."[21]

Second, during the course of the wiretap, the government provided periodic reports to the supervising judge about the implementation of the wiretap. In those reports, the government knowingly and falsely claimed that it had "minimized," *i.e.*, not recorded, any conversation involving Mr. Renzi's attorneys. In reality, the government recorded dozens of calls involving Mr. Renzi's counsel for later review by a taint team and their agents.[22]

Third, after recording these privileged calls, the government did not seal them. Moreover, the electronic records established that FBI agents had accessed and presumably listened to dozens of privileged phone calls. The government could not provide an innocent explanation for why they accessed any of these calls.[23]

Fourth, the government monitored, summarized, and even created a transcript of one especially sensitive call between Mr. Renzi and one of his campaign-finance lawyers. Remarkably, rather than seal and secure this evidence so that the defense would be able to know the true extent of the government's intrusion upon the privilege, SA Odom ordered the FBI to destroy the summary and the transcript of this privileged call. On cross examination, SA Odom justified his order by stating

---

[21] *Renzi*, 720 F. Supp.2d at 1108 (attached as Exhibit A). The government also chose to monitor and record dozens of calls regarding campaign issues and national politics, including substantial portions of the Republican Caucus' post-election teleconference in which the leadership analyzed the outcome and discussed its going-forward strategy.

[22] *See id.* at 1109.

[23] *See id.*; *see also id.* at 1115.

that he did it to "prevent agents from being tainted by exposure to the privileged calls." Yet another case agent kept a CD with a copy of this call in his desk throughout the investigation.[24]

The district court found that the government's conduct violated Title III and breached Mr. Renzi's Fourth Amendment right against unreasonable searches and seizures.[25] The district court additionally found that the government "breached its duty of candor" to the supervising court by falsely claiming that it had minimized all attorney calls, when it was instead recording dozens of them.[26] As a sanction for this misconduct, the district court ordered the suppression of the entirety of the wiretap. However, even though the defense proved that multiple FBI agents had been exposed to privileged information, and that at least one agent involved in the prosecution maintained unsecured copies of privileged calls at his desk, the district court credited the government's bald claim that it had made no use of these calls. The court declined to dismiss any of the charges against Mr. Renzi.[27]

IV. SA ODOM DANGLED MONEY TO INDUCE MR. ARIES' COOPERATION

In the midst of the wiretap, having found nothing incriminating, SA Odom approached Mr. Aries about placing a call directly to Mr. Renzi. Mr. Aries balked. As he would later testify, he was in the middle of a family counseling session when SA Odom requested that he place the call to Mr. Renzi. Mr. Aries told SA Odom that he was uncomfortable with the request. SA Odom overcame Mr. Aries' reluctance by telling him that the government paid cooperators who made recorded calls.

SA Odom's comments undoubtedly influenced Mr. Aries. Mr. Aries would later testify that he not only believed that a reward was possible, but that he "deserved" to be paid for his cooperation. In terms of the amounts at issue, he testified that a $10,000 reward would have been a "home run" and that a $25,000 reward would have been like "hitting the lottery."[28]

SA Odom's comments also led Mr. Aries to change his story. After learning that he could be paid for his cooperation, the government called Mr. Aries to testify before the grand jury. Although he originally told the FBI that he had learned about the Farm from Ms. Keene (which was true), he lied to the grand jury by testifying that he only learned about the Farm when Mr. Renzi demanded that he acquire it during their meeting. SA Odom knew that testimony was false—after all, Mr. Aries had told him the opposite during their initial interview—but the government sponsored it

---

[24] *See id.*; *see also id.* at 1115.

[25] *See id.* at 1111.

[26] *See id.*

[27] *See id.* at 1118.

[28] Transcript at 18 (Oct. 26, 2015) (attached as Exhibit B).

anyway. (Mr. Aries's grand jury testimony—unlike his initial, concealed statement to SA Odom—lined up with Mr. Elroy's dossier's depiction of Mr. Renzi as the perpetrator of systemic extortion.)

Thereafter, Mr. Aries received an annual admonishment about his obligations as a Confidential Human Source. As part of the admonishments, the FBI reminded him that he would be liable for paying taxes on any reward that he received from the government. Mr. Aries testified that these admonishments buttressed his belief that he could be—and deserved to be—paid for his help.[29]

THE TRIAL

At trial, the government argued that Mr. Renzi acted corruptly, for his own personal benefit. The defense argued that Mr. Renzi acted in the public interest and to protect Fort Huachuca. The defense also attacked the credibility of the government's witnesses and the quality of its investigation. Faced with these questions of Mr. Renzi's intent, the jury eventually returned a split verdict. But the government misled the jury regarding key facts, such as Mr. Aries' financial motives, and deprived it of critical exculpatory and impeachment evidence.

I. MR. RENZI WAS PROHIBITED FROM EXPLAINING TO THE JURY THE REASONS WHY HE WAS SO ADAMANT ABOUT PROTECTING FORT HUACHUCA

At trial, a threshold question was whether Mr. Renzi, who had served on the Permanent Select Committee on Intelligence, would be able to explain to the jury *why* he had responded to Resolution and Mr. Aries in the ways that he had. To do so, Mr. Renzi would have needed to reveal classified information about his experiences in Iraq and Afghanistan, the efforts of military intelligence to obtain information from detainees in the Middle East and elsewhere, and Fort Huachuca's role in these activities.

As he was obligated to do under the Classified Information Protection Act, Mr. Renzi made a submission to the Court regarding the classified information that he would need to reveal in order to defend himself effectively. The district court would not hear of it; it categorically precluded Mr. Renzi from revealing any classified information as part of his defense. All the district court would do was require the DOJ to stipulate—as was obviously true—that Fort Huachuca was "essential" to national security and that Renzi's efforts to preserve its viability by retiring the water usage at the alfalfa farm would therefore have been "in the public interest."

Accordingly, instead of hearing evidence about the specific facts and circumstances that prompted Mr. Renzi's efforts to protect Fort Huachuca, the jury learned only conclusory information about Mr. Renzi's motives. The government exploited this by arguing to the jury that Mr. Renzi had sought to defend the case by "wrapping himself in the flag." The jury did not know that Mr. Renzi

---

[29] *Id.* at 26.

had far more hands-on experience with the War on Terror than nearly any other member of Congress. By prohibiting Mr. Renzi from articulating the actual facts and experiences that compelled him to fight to protect Fort Huachuca, the district court ensured that the jury would not have access to evidence critical to assessing his intent.

II. MR. RENZI'S ACTIONS INDISPUTABLY WERE IN THE PUBLIC INTEREST

Although the district court blocked Mr. Renzi from introducing any classified evidence about Fort Huachuca's role in the War on Terrorism, the evidence showed that Renzi was the target of a sustained lobbying campaign by Army officials and Congressman Kolbe's staff to end water usage at the Farm. Between 2002 and 2006, Mr. Renzi advocated for Fort Huachuca in public hearings, repeatedly arguing that retiring water use on the alfalfa farm would be the single most important step that the community could take to resolve a regional water deficit that threatened Fort Huachuca's viability and possible base closure.

The evidence establishing the need to retire water usage at the Farm was overwhelming. Matt Walsh, who represented Fort Huachuca as a Congressional liaison, testified about Mr. Renzi's many efforts to assist the Fort, including his efforts to address the regional water shortage. Holly Richter of TNC testified about TNC's multi-year effort to purchase or to obtain a conservation easement over the property. She also testified to her personal efforts to enlist Mr. Renzi to help TNC in retiring water usage at the Farm, as well as briefing Joanne Keene and Mr. Renzi's staff on the specifics of the plan.[30] Other TNC executives confirmed its historic efforts to purchase the property, its inability to reach an agreement with Mr. Sandlin, and its requests to Mr. Renzi to intervene to convince Mr. Sandlin of the merits of its efforts.

All of the sustained lobbying efforts contributed to Mr. Renzi's interest in resolving the water crisis and to benefit the Fort where he had grown up. The Babbitt/Aries draft bill would have been a godsend to the Fort. Indeed, as former Representative James Kolbe's Chief of Staff wrote upon seeing the initial draft of the legislation: "This is a great bill."

III. THE GOVERNMENT INTENTIONALLY SUPPRESSED EXCULPATORY EVIDENCE AND KNOWINGLY PRESENTED FALSE TESTIMONY

At trial, the government relied heavily on Mr. Aries' testimony. At the time of his testimony, Mr. Aries not only desperately hoped to be, but believed he deserved to be, paid for his cooperation. But the government was careful to conceal from the defense team any information about a possible payoff. In that regard, AUSA Restaino later admitted that he made an intentional decision not to provide the defense with FBI records showing that the government had told Mr. Aries repeatedly that he would need to pay taxes on whatever reward he might receive in exchange for his cooperation.

---

[30] *See* Transcript at 124-95 (May 30, 2013).

At trial, the government—as it had in the grand jury—knowingly elicited through Mr. Aries the false claim that Mr. Aries did not learn about the Farm until his meeting with Mr. Renzi. In actuality, Mr. Aries proposed the plan to acquire a conservation easement on the Farm to Mr. Renzi. On cross-examination, Mr. Renzi's counsel demonstrated that this narrative was false, but Mr. Aries' claimed—persuasively, at least in the jury's view—that he had made an innocent mistake in recalling how he learned of the Farm. At the time, Mr. Renzi's counsel did not know, and the jury thus never learned, that Mr. Aries had only changed his account about his meeting with Mr. Renzi after learning from the FBI that he could be paid for his cooperation.

The government knew that Mr. Aries' credibility was critical to its case. Accordingly, the government dedicated significant time and attention to this issue in its closing argument. After the defense argued that Mr. Aries could not be believed, the government misled the jury about Mr. Aries' credibility in its rebuttal argument. In particular, the government emphatically told the jury that Mr. Aries had not received "one thin dime" for his cooperation, cunningly leading the jury to believe that Mr. Aries had no financial motive to lie and effectively concealing SA Odom's use of a reward to cinch Mr. Aries' cooperation.

When the government sponsored Mr. Aries' false testimony, it knew that Mr. Aries had changed his story from the time of his initial interview, but, having concealed the original story, it presumed that Mr. Renzi would be unable to demonstrate that it was false. The transcript of the post-trial hearing reveals Mr. Aries' contradictory testimony on these topics.

IV. THE JURY'S VERDICT AND THE INITIAL APPEAL

After a five-week trial, the jury returned a split verdict. It convicted Mr. Renzi on about half of the public corruption charges, but acquitted him on the other half. That jury did not know anything about the classified information that prompted Mr. Renzi's efforts. In addition, it had no idea that the government had concealed information about Mr. Aries' financial motives, that Mr. Aries believed that he deserved to be paid for his cooperation, that the FBI case agents were planning to pay him for his assistance, or that the government had unconstitutionally monitored privilege calls while misleading the supervising court as to its actions.

APPEAL AND POST-TRIAL DISCLOSURES

Unaware of most of the government's misconduct, Mr. Renzi appealed his convictions to the U.S. Court of Appeals for the Ninth Circuit. That court granted bail pending appeal, but ignorant of the suppressed evidence, it eventually affirmed the convictions.[31]

---

[31] *See United States v. Renzi*, 769 F.3d 731 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2889 (2015).

After the Ninth Circuit's decision, Mr. Aries began soliciting payment from the FBI.[32] In a March 18, 2015 email to AUSA Restaino, Mr. Aries wrote:

> I was very glad to see that the Renzi matter seems to be finalized. Although, further appeal is mentioned in the press. The subject of a 'possible' reward for my help was mentioned to me on numerous occasions. Is this still a possibility?

In a follow-up interview with the FBI, Aries explained that "he had casual conversations with [Agents Odom and Burris] about individuals potentially receiving money for cooperating with FBI investigations." These conversations, which he said took place over the phone and in person, all occurred before Mr. Renzi's and Mr. Sandlin's trials, and were in addition to the annual CHS Admonishments. According to the FBI memorandum of interview, Mr. Aries stated that he felt that he was "entitled to some compensation if some is given." *Id.*

In April 2015, with Mr. Renzi imprisoned, AUSA Restaino disclosed Mr. Aries's request for payments to the defense. Mr. Renzi moved for a new trial. In response, the government produced additional discovery materials, including the agents' notes of their initial conversation with Mr. Aries, which showed for the first time that *the government knew all along that Mr. Aries first heard about Mr. Sandlin's property from Joanne Keene*.

In July, after the Supreme Court's denial of Mr. Renzi's petition for certiorari, Mr. Aries again e-mailed the AUSA seeking his reward, stating:

> I was not promised anything, but was told it was a possibility that I would be rewarded. I feel that I truly extended myself during the taped phone call process, and tried always to be helpful in general. The whole experience took an emotional and financial toll on me. Money is extremely tight, and if there was a chance for a reward, I would like to be considered.

The district court held a hearing on Mr. Renzi's motion for a new trial, where Mr. Renzi proved that the FBI had knowingly concealed "important" information about its initial meeting with Mr. Aries, that SA Odom had illegally induced Mr. Aries to continue cooperating by dangling a payoff, and that Mr. Aries believed that he deserved a reward for his cooperation. Indeed, Mr. Aries testified that a $10,000 reward would be "a home run" for him and that a $25,000 reward would be "like winning the lottery."

The district court ruled that the government had wrongly deprived Mr. Renzi of evidence that would have undercut Mr. Aries' credibility. It also ruled that the government's claim in its rebuttal argument that Mr. Aries had not received "one thin dime" was "disingenuous" and "misleading."[33] Despite condemning the government's misconduct, both the district court and the

---

[32] *See generally* Transcript (Oct. 26, 2015) (attached as Exhibit B).

[33] Order at 8 (Dec. 30, 2015) (attached as Exhibit C).

Court of Appeals declined to grant Mr. Renzi a new trial, claiming that the suppressed evidence was "immaterial."

However, because the government successfully concealed this evidence until after Mr. Renzi's original appeal and until Mr. Renzi was already incarcerated in federal prison, no court has ever considered whether the cumulative misconduct in Mr. Renzi's case deprived him of a fair trial. Indeed, evidence of prosecutorial misconduct discovered since Mr. Renzi's appeal, along with well-supported evidence of the government's misconduct during this case, are the crux of our complaint and the basis our request for an investigation.

Request for Investigation

Over the past thirteen years, Mr. Renzi has always maintained his innocence. He and his twelve children have paid a heavy price for his efforts; it would have been far easier for them had he simply pled guilty to a false-statement offense. But convinced of his own innocence, Mr. Renzi could not plead guilty to a crime he did not commit. As Mr. Renzi has come to learn, a man who has been unfairly and unjustly imprisoned experiences a unique form of brutality. He is forced to relive the nightmare with every attempt to prove his innocence, with every reminder of the injustices he and his family have suffered, and with every new piece of evidence he uncovers about government misconduct.

We submit that the prosecution and investigation of Mr. Renzi's case violated his basic constitutional right to a fair trial. Mr. Renzi respectfully requests that you conduct a full, fair, and thorough review.

Sincerely,

Kelly B. Kramer

Enclosures

EXHIBIT A

KeyCite Yellow Flag - Negative Treatment
Distinguished by United States v. Zigmond, E.D.Mich., July 25, 2017

722 F.Supp.2d 1100
United States District Court, D. Arizona.

UNITED STATES of America, Plaintiff,
v.
Richard RENZI, James Sandlin, Andrew Beardall, and Dwayne Lequire, Defendant.

No. CR08–212 TUC DCB BPV.
|
June 4, 2010.

Synopsis
Background: Defendant moved to dismiss indictment based on government's unlawful recording of privileged counsel calls.

Holdings: The District Court, David C. Bury, J., adopted the opinion of Bernardo P. Velasco, United States Magistrate Judge, which held that:

[1] government unlawfully intercepted defendant's privileged attorney-client communications, in violation of defendant's Fourth Amendment rights;

[2] government's unlawful interception of defendant's privileged attorney-client communications warranted suppression of entire wire; but

[3] defendant was not entitled to dismissal of indictment.

Motion granted in part and denied in part.

West Headnotes (37)

[1] **United States Magistrate Judges**
Failure to Object;Uncontested Findings

When no objections are filed to a magistrate judge's report and recommendation (R & R), the district court need not review the R & R de novo. 28 U.S.C.A. § 636(b)(1).

Cases that cite this headnote

[2] **Criminal Law**
Adversary or judicial proceedings
Criminal Law
Grand jury;indictment, information, or complaint

The Sixth Amendment right to counsel attaches when the government initiates adversarial proceedings; once indicted a defendant has a right to rely on his counsel as a medium between himself and the government. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[3] **Criminal Law**
Interference in attorney-client relationship

The governmental conduct of deliberately intruding into the attorney-client relationship and the prejudice suffered by the defendant must be very severe to violate the Fifth Amendment. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[4] **Telecommunications**
Scope;minimization

The government's compliance with requirement to minimize interception of conversations that are not otherwise subject to interception in conducting a wiretap is assessed on the facts and circumstances of each case based on a standard of objective reasonableness. 18 U.S.C.A. § 2518(5).

Cases that cite this headnote

[5] **Telecommunications**
Scope;minimization

While bad faith is irrelevant to determining whether the government, in conducting a wiretap, violated requirement of minimizing the interception of conversations that are not otherwise subject to interception, courts

may impose more significant sanctions upon finding bad faith. 18 U.S.C.A. § 2518(5).

Cases that cite this headnote

[6] **Telecommunications**
Scope;minimization

While the use and disclosure of privileged calls is addressed by the statute requiring minimizing the interception of conversations not otherwise subject to interception, there is no statutory requirement that attorney-client privileged calls be minimized, per se. 18 U.S.C.A. § 2518(5).

3 Cases that cite this headnote

[7] **Telecommunications**
Scope;minimization

By knowingly recording privileged calls between defendant and his attorneys, government violated wiretap order for defendant's cell phone and seized evidence beyond that which was authorized, and thus violated the Fourth Amendment, even though the wiretap order did not address specifically the monitoring of privileged conversations, where case agent specifically represented to the supervising court in his wiretap affidavit, that the government would minimize privileged calls and carefully train the monitors to recognize calls between lawyers and clients. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(10)(a)(i).

2 Cases that cite this headnote

[8] **Searches and Seizures**
Necessity of and preference for warrant, and exceptions in general

Searches and Seizures
Execution and Return of Warrants

Searches and Seizures
Scope of Search

A search is unreasonable, and thus violates the Fourth Amendment, when it is performed without proper judicial authorization, when the government seizes evidence beyond that which is authorized in the warrant, or when the government executes the search in an unreasonable manner. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[9] **Telecommunications**
Scope;minimization

Telecommunications
Reports;delivery and sealing

Government acted unreasonably in executing wiretap search in violation of the Fourth Amendment, by recording calls between defendant and lawyers the government knew or should have known to be representing him, and failing entirely to seal any of those calls in violation of Department of Justice procedure, and despite the inevitable, and reasonably foreseeable, risks to the privilege that were created when the government seized privileged information for taint review. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(10)(a)(i).

1 Cases that cite this headnote

[10] **Telecommunications**
Scope;minimization

Government failed to reasonably comply with requirement of minimizing the interception of conversations not otherwise subject to interception, in conducting wiretap of defendant's cell phone, and thus violated defendant's Fourth Amendment rights, by failing to direct minimization of defendant's calls with a certain individual after defendant identified that individual as his "personal attorney" and government investigation revealed that the individual was a licensed attorney. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(5).

Cases that cite this headnote

[11] **Telecommunications**
Scope;minimization

Government failed to reasonably comply with requirement of minimizing the interception of conversations not otherwise subject to interception, in conducting wiretap of defendant's cell phone, and thus violated defendant's Fourth Amendment rights, by failing to direct the minimization of defendant's "personal attorney" calls after government's taint attorney determined that the calls were privileged. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(5).

2 Cases that cite this headnote

[12] **Telecommunications**
Scope;minimization

Government failed to reasonably comply with requirement of minimizing interception of conversations not otherwise subject to interception, in conducting wiretap of defendant's cell phone, and thus violated defendant's Fourth Amendment rights, by failing to immediately minimize defendant's call with individual defendant identified in earlier calls as his attorney. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(5).

Cases that cite this headnote

[13] **Telecommunications**
Scope;minimization

Government acted unreasonably in conducting wiretap of defendant's cell phone, and thus violated defendant's Fourth Amendment rights, by failing to designate privileged calls as privileged, which would have restricted the number of agents who had access to those calls. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(5).

Cases that cite this headnote

[14] **Telecommunications**
Use of information obtained

Government acted unreasonably in conducting wiretap of defendant's cell phone, and thus violated defendant's Fourth Amendment rights, by distributing privileged calls to defendant's co-defendants. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(5).

Cases that cite this headnote

[15] **Telecommunications**
Reports;delivery and sealing

Government acted unreasonably in conducting wiretap of defendant's cell phone, and thus violated defendant's Fourth Amendment rights, by failing to inform the supervising court of calls which were monitored and recorded in violation of defendant's attorney-client privilege. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(5).

Cases that cite this headnote

[16] **Telecommunications**
Reports;delivery and sealing

Government acted unreasonably in conducting wiretap of defendant's cell phone, and thus violated defendant's Fourth Amendment rights, by failing to seal all calls and seek direction from the supervising court at the conclusion of the intercept. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(8)(a).

Cases that cite this headnote

[17] **Telecommunications**
Scope;minimization

The use of taint review to minimize interception of conversations that are not otherwise subject to interception in conducting a wiretap is not per se unreasonable under the Fourth Amendment. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2518(5).

Cases that cite this headnote

[18] **Telecommunications**
Scope;minimization

An agent, pursuant to a wiretap order, cannot minimize the interception of communications that should not be intercepted by intercepting

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

all communications and sorting them out later. 18 U.S.C.A. § 2518(5).

1 Cases that cite this headnote

[19] **Telecommunications**
Reports;delivery and sealing

Government breached its duty of candor to the court about the manner in which wiretap would be conducted, by failing to advise the court that defendant was represented by multiple counsel, making false statements to the supervising court as to the minimization of calls with certain attorneys, and failing to advise the supervising court that it had monitored calls in which defendant referred to a licensed attorney as his "personal lawyer," and that its own taint attorney had concluded that an attorney-client privilege existed between defendant and the licensed attorney. 18 U.S.C.A. § 2518(5).

1 Cases that cite this headnote

[20] **Criminal Law**
Exclusionary Rule in General

Evidence derived in violation of the Fourth Amendment may not be introduced at trial to prove a defendant's guilt. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[21] **Criminal Law**
Electronic surveillance; telecommunications

Criminal Law
Violation of privilege

Government's unlawful interception of defendant's privileged attorney-client communications, in violation of defendant's Fourth Amendment rights, warranted suppression of entire wire, in light of government's insistence in pursuing defendant's "personal attorney" calls after they were deemed privileged. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[22] **Criminal Law**
Consultation with counsel;privacy

Criminal Law
Adequacy of Representation

The Sixth Amendment grants criminal defendants the right to effective assistance of counsel, including the right to private consultation with counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[23] **Criminal Law**
Adversary or judicial proceedings

Sixth Amendment rights do not attach until criminal proceedings are formally instituted against a defendant. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[24] **Criminal Law**
Official Action, Inaction, Representation, Misconduct, or Bad Faith

Dismissal of an indictment is warranted where outrageous law enforcement conduct violates due process. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[25] **Constitutional Law**
Conduct of Police and Prosecutors in General

To warrant dismissal of an indictment on due process grounds, government conduct must be so grossly shocking and outrageous as to violate the universal sense of justice. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[26] **Indictment and Information**
Grounds

Dismissal of an indictment is a drastic measure and a court, when faced with prosecutorial conduct, should tailor relief appropriate in the circumstances.

Cases that cite this headnote

[27] **Criminal Law**
Adequacy of Representation

The Fifth Amendment's due process clause guarantees a suspect's right to effective and substantial assistance of counsel. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[28] **Constitutional Law**
Conduct of Police and Prosecutors in General

A defendant's remedy for prosecutorial misconduct in the pre-indictment stage is provided in the due process protections of the Fifth Amendment. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[29] **Criminal Law**
Official Action, Inaction, Representation, Misconduct, or Bad Faith

A claim of outrageous government conduct premised upon deliberate intrusion into the attorney-client relationship will be cognizable where the defendant can point to actual and substantial prejudice; the defendant bears both the burden of production and persuasion on his outrageousness claim.

1 Cases that cite this headnote

[30] **Constitutional Law**
Conduct of Police and Prosecutors in General

Constitutional Law
Entrapment

The defense of outrageous government conduct is limited to extreme cases in which the government's conduct violates fundamental fairness and is shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment; extreme cases in which the due process clause might merit dismissal are limited to entrapment scenarios in which the government engineers the crime and cases involving physical or psychological coercion of a defendant. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[31] **Constitutional Law**
Witnesses

In a case alleging misconduct for the delayed production of impeachment material, dismissal of an indictment under the due process clause is inappropriate where there is no evidence the government deliberatively withheld material, lied about the material or failed to "own up" to the mistake once it was discovered. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[32] **Constitutional Law**
Immunity and privilege

Deliberate intrusion, in the context of an intrusion into the attorney-client privilege in the due process context, is inapplicable in the setting of a taint team where the prosecution cannot access the material. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[33] **Constitutional Law**
Electronic surveillance or eavesdropping

Criminal Law
Remedies

Defendant failed to demonstrate substantial prejudice from government's actions during electronic surveillance, in unlawfully intercepting defendant's privileged attorney-client communications, as required to entitle defendant to dismissal of indictment under

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

the Fifth Amendment Due Process Clause. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[34] **Constitutional Law**
Evidence in general;disclosure
Prejudice in the intrusion into the attorney-client privilege in the due process context means actual prejudice, not some vague notion of unfairness. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[35] **Indictment and Information**
Grounds
Even where no due process violation exists, a federal court may dismiss an indictment pursuant to its supervisory powers. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[36] **Criminal Law**
Official Action, Inaction, Representation, Misconduct, or Bad Faith
Reckless government conduct may be remedied under a court's supervisory powers even when prosecutors act in good faith; while accidental or merely negligent governmental conduct is insufficient to establish flagrant misbehavior, a finding of willful misconduct in the sense of intentionality is not required.

Cases that cite this headnote

[37] **Criminal Law**
Official Action, Inaction, Representation, Misconduct, or Bad Faith
Reckless disregard satisfies the standard for sanctions for reckless government conduct, including dismissal of an indictment; when the government acts with reckless disregard for a defendant's rights, dismissal is appropriate if the defendant would otherwise suffer substantial prejudice and if no lesser remedial action is available.

Cases that cite this headnote

Attorneys and Law Firms

***1104** Brian Matthew Heberlig, David Matthew Fragale, Reid Henry Weingarten, Henry Parker Vandyck, Steptoe & Johnson LLP, Kelly B. Kramer, Emily Crandall Harlan, Nixon Peabody LLP, Washington, DC, Francis J. Burke, Stacey Faith Gottlieb, Steptoe & Johnson LLP, Collier Ctr., Phoenix, AZ, for Defendant.

ORDER

DAVID C. BURY, District Judge.

This matter having been referred to Magistrate Judge Bernardo P. Velasco, he issued a Report and Recommendation (R & R) on March 11, 2010. (Doc. 594.) The Magistrate Judge recommended denying in part and granting in part Defendant Renzi's Motion to Dismiss the Indictment Based on the Government's Unlawful Recording of Privileged Counsel Calls. (Doc. 87.) Defendant Renzi argued that the wiretap violated Title III, 28 U.S.C. § 2518, and the Fourth, Fifth and Sixth Amendments to the United States Constitution. The Magistrate Judge found violations of Title III and the Fourth Amendment, but not the Fifth and Sixth Amendments. He recommended suppression of all evidence obtained by the illegal wiretap, but denial of Defendant Renzi's request to dismiss the Second Superseding Indictment (SSI) or disqualify the prosecutors involved in his investigation and prosecution.

The parties filed objections to the R & R, pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed.R.Crim.P. 59(b). After *de novo* review, the Court adopts the Magistrate Judge's R & R as the opinion of the Court.

[1] The duties of the district court in connection with a R & R are set forth in Rule 59(b)(3) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 636(b)(1). The district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Fed.R.Crim.P. 59(b)(3); 28 U.S.C. § 636(b)(1). Where the parties object to a R & R, "[a] judge of the [district] court shall make a *de novo* determination of

those portions of the [R & R] to which objection is made." 28 U.S.C. § 636(b)(1); *see Thomas v. Arn,* 474 U.S. 140, 149–50, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). When no objections are filed, the district court need not review the R & R *de novo. Wang v. Masaitis,* 416 F.3d 992, 1000 n. 13 (9th Cir.2005); *United States v. Reyna–Tapia,* 328 F.3d 1114, 1121–22 (9th Cir.2003) (en banc).

THE R & R

The R & R appropriately began with the wiretap Order and the minimization protocol for attorney-client calls in the application for the wiretap approved by the Supervising Court. Prior to obtaining the wiretap, the Government identified the Patton Boggs law firm as representing Renzi from the Federal Election Commission (FEC) inquiry and criminal attorney, Grant Woods, as a possible additional lawyer. Agent Odom represented to the Supervising Court that *all* attorney-client privileged conversations would be minimized. The Supervising Court issued the wiretap Order directing the Government to ***1105** minimize all such interceptions in accordance with Title III. (R & R at 1119–20.)

The wiretap Order included provisions for a "taint team" to be established to address contemplated interception of communications that implicated the Speech or Debate Clause, but it did not include any taint team provision to allow the Government to record or review communications implicating the attorney-client privilege. *Id.* at 1120.

"The Government instructed the monitoring agents, via memorandum, that '[n]o conversation may be intercepted that would fall under any legal privilege.' Monitoring agents were directed to never knowingly listen to or record a confidential legal conversation involving an attorney. The monitoring agents were directed to notify the supervising agent of the conversation, shut off the monitor and stop recording. The memorandum instructed the agents not to listen to any conversation involving the referenced attorneys, Grant Woods and Patton Boggs." *Id.*

The Government, however, did not apply these procedures and protocols to telephone communications between Defendant Renzi and attorney Maria Baier. The Government also failed to follow attorney-client protocols for two privileged telephone calls with Glenn Willard and one with Kelly Kramer.

The Magistrate Judge found that the Government seized evidence beyond that authorized by the wiretap Order when it recorded for taint team review attorney-client privileged communications between Defendant and attorney Maria Baier. The Magistrate Judge found that the Government unreasonably executed the wiretap when it recorded calls it knew or should have known were from attorneys representing the Defendant and then failed to seal and report to the Supervising Court the privileged information it seized. *Id.* at 1127. Specifically, the Magistrate Judge found 12 violations where the Government seized evidence beyond that authorized by the wiretap Order and unreasonably executed the search, as follows:

1. The government's failure to direct the minimization of the Baier calls after Renzi identified Baier as his "personal attorney" and an investigator found proof of Baier's licensure. R & R at 1128.

2. The government's failure to direct the minimization of the Baier calls after the initial consultation during the interception period with the taint attorney. R & R at 1125, 1128.

3. The failure to minimize session 2997 with Glenn Willard, an attorney for Renzi. R & R at 1128.

4. The government's failure to immediately minimize the call, session 3084, with Kelly Kramer. R & R at 1128.

5. The government's failure to designate any of the privileged calls as privileged [on the Voicebox system]. R & R at 1128.

6. Agent Dillender's recording, monitoring, synopsizing and designation of session 2997 as pertinent. R & R at 1128.

7. The government's failure to designate the recorded portion of session 3295 [with Glenn Willard] as privileged. R & R at 1128.

8. The government's distribution of privileged calls to Renzi's co-defendants. R & R at 1128.

9. The government's failure to inform the Supervising Court of calls which were monitored and recorded in

violation of Renzi's attorney-client privilege. R & R at 1128.

10. The failure to seal all calls and seek direction from the Supervising Court at the conclusion of the interception, pursuant ***1106** to 18 U.S.C. § 2518(8)(a). R & R at 1128.

11. The failure of the government at the outset of the wire to notify the Court of Renzi's representation by multiple counsel. R & R at 1128–29.

12. False statements in the ten-day reports, to include statements as to Baier's status, the minimization of calls with other attorneys, the omission of the statement [in an untranscribed call] that Baier was Renzi's personal attorney, and the omission of the taint attorney's initial conclusions [from the second and third ten-day reports]. R & R at 1129.

(Taint Attorney's Sealed Proposed Findings of Fact in Further Support of the Government's Objections to the Findings and Recommendation on the Motion to Dismiss the Indictment ... (doc. 610/612) (Taint Attorney's Objection) at 2).

UNITED STATE'S OBJECTIONS

The Government admits mistakes were made, but asserts that "nonetheless, the record makes very clear that the interception procedures were reasonable, professional, and effective, and that the prosecutors acted in good faith in all of their representations to the Supervising Court." (Government's Objections (doc. 604) at 1–2.) The Government argues the Magistrate Judge erroneously recommended the extraordinary remedy of suppressing all the wiretap evidence, and the Court should only have suppressed the privileged evidence. *Id.* at 24. The Government argues it acted reasonably to minimize communications it inadvertently intercepted of non-Baier attorney calls from Kramer and Willard, *id.* at 28–31, and it was reasonable to use a taint team to review the intercepted Baier attorney calls, *id.* at 31. Regardless of any error, the interceptions of these privileged communications were "a small window of the overall interception period." *Id.* at 26. Because the privileged interceptions were kept to a practical minimum, the extraordinary remedy of full suppression was not warranted because it should only be used when the violations of a warrant's requirements are so extreme that the search is essentially transformed into an impermissible general search. *Id.* at 27 (citing *United States v. Mittelman,* 999 F.2d 440, 444 (9th Cir.1993)).

RENZI'S OBJECTIONS

The Defendant argues that the Government's deliberate targeting of privileged calls supports the Magistrate Judge's recommendation for a broad suppression of all the wiretap evidence. Defendant argues the Government intentionally or at least recklessly disregarded Title III requirements, which warrants total suppression. The Government's proposal to suppress only the privileged evidence is no remedy at all. Even suppression of all the wiretap evidence will not remedy the Government's unlawful conduct because the Government, including the prosecution team, has had access to the privileged information which led to the indictment of Codefendant Beardall and has provided insight into possible defenses Renzi may make at trial. This violates his Fifth and Sixth Amendment rights. Additionally, the Defendant argues the Magistrate Judge mis-allocated the burden of proof on these claims because the Government, admittedly, was exposed to privileged materials, and therefore, it bears the burden of proving non-use. The Defendant seeks disclosure by the Government of documents showing any use of the privileged calls, an order compelling the Government's attorney, Mr. Restaino, to testify, or the Court should find an adverse inference from his refusal to testify and hold a *Kastigar* hearing to resolve this question. The Defendant asks the Court to dismiss the SSI or the affected counts, or alternatively to suppress the wiretap and the fruits of its poisonous tree, which include ***1107** the evidence seized during the search of Defendant Renzi's insurance company or at a minimum hold further hearings to determine the scope of the fruits resulting from the unlawful wiretap.

FINDINGS OF FACT

The Court agrees with the Magistrate Judge's finding that the affidavit supporting the wiretap Order expressly provided for minimization of all attorney-client privileged conversations, (Evidentiary Hearing, 6/17/2009, Gov't Ex. 40: Odom Affid. ¶¶ 100–101, 106), and all such recordings would be securely preserved, with logs showing the date

and time of calls, parties involved, the subject of the call, and if and when minimization occurred, *id.* ¶ 102.

The minimization provisions were distinct from the taint team provisions described for conversations that might contain information covered by the Speech or Debate Clause privilege, which were as follows: "the monitor will stop listening, and the remaining conversation will be recorded but not reviewed, placed in an envelope and sealed pending a review by an independent group of investigators and/or prosecutors ...." *Id.* ¶ 105(c).

As the Magistrate Judge noted, before monitoring would commence, written instructions were issued to the FBI agents assigned monitoring duties articulating the current policies and considerations in maintaining lawful standards for minimization, particularly what kinds of conversations would be regarded as privileged between lawyer and client. *Id.* ¶ 103. (Evidentiary Hearing, 6/17/2009, Gov't Ex. 38: Memorandum at 11.) Agents were instructed:

> ***Unless otherwise addressed in this memorandum,*** never knowingly listen to or record a confidential conversation between a person and his or her attorney when other parties are not present. Anytime that an attorney or law office employee is a party to a conversation, call the agent supervising the interception —... If it is determined that a conversation involving an attorney constitutes confidential legal consultation of any kind, notify the agent supervising the interception, shut off the monitor and stop recording....

Id. The memorandum identified the following attorneys as Renzi's lawyers: William J. McGinley and Benjamin L. Ginsberg from Patton Boggs, LLP, a Washington, D.C. law firm in the FEC investigation and criminal attorney Grant Woods. The memorandum instructions were as follows: "Any time that the above-referenced lawyers or firms are parties to a conversation, the monitoring personnel should assume that the conversation is privileged, shut off the monitor and stop recording immediately." *Id.*

There is no mention of attorney Maria Baier in the memo. She had, however, contacted the United States Attorney, Paul Charlton, on October 23, 2006, to complain about Renzi's opponent, who was publically alleging that the FBI was going to indict Congressman Renzi. (Evidentiary Hearing, 6/17/2009, Gov't Ex. 6: Memo to file.) Congressman Renzi had made a similar call on October 20. *Id.* Ex. 5: Memo to file.

The wiretap began on October 27, 2006. Four calls from Maria Baier were intercepted, 1982, 1997, 2032, and 2035. The Government recorded all of the first three of Ms. Baier's conversations with Renzi without minimization, except the third call was minimized when Grant Woods and Tyrone Mitchell joined the call. The fourth call was minimized after six of the eight minute long conversation. The first two conversations with Ms. Baier were classified as pertinent and transcribed for prosecution team review. In the second call, 1997, Defendant Renzi told Ms. Baier ***1108** to "please put a note for our defense, for our legal defense." In the third call, 2032, Ms. Baier told Defendant Renzi that she was an attorney licensed to practice in Arizona and he characterized her as his "personal attorney." (R & R at 1120–21; Taint Attorney's Objection at 6 ¶ 12.) This call was not classified as pertinent and not transcribed. The fourth call was the same, but minimized after six minutes. (Evidentiary Hearing, 6/18/2009, Taylor, TR at 15.) During this call, Agent Taylor was informed of the Baier Rule. *Id.* at 55.

Following the third call, the Government implemented the so-called "Baier Rule" because it could not determine whether Ms. Baier was serving as an attorney for Defendant Renzi or as a member of his day-to-day "operations group." The "Baier Rule" preserved the intercepts between Ms. Baier and Mr. Renzi in the event that she was not his attorney, while simultaneously seeking to ensure that the prosecution team was not exposed to privileged communications in the event that Ms. Baier was in fact Mr. Renzi's attorney. (Taint Attorney's Objection at 3.) Correspondingly, the ten-day wiretap reports submitted to the Supervising Court explained that taint team review was being used for calls "between Renzi and an unlicensed law-trained political operative who may be assisting the attorneys in the provision of legal advice." (Evidentiary Hearing, 6/17/2009, Gov't Ex. 25: First Report dated 11/6/2010; Ex. 26: Second Report dated 11/15/2010; Ex. 31: Third Report dated 11/27, 2010.)

The Government's position was not supported by the facts. On the very first day of the wiretap, October 27, 2006, the Government intercepted conversations that reflected Maria Baier was an attorney representing Defendant Renzi. An agent accessed the Arizona State

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

Bar's public website and determined that Maria Baier was a licensed attorney and printed a copy of her profile from the website. It was placed in a folder and placed in a file cabinet near Agent Odom's desk, never to be seen again until just before the start of the evidentiary hearing before the Magistrate Judge. On October 30, 2006, prosecuting attorney Restaino asked his colleague, AUSA Roetzel, to act as a taint attorney and told Roetzel that Baier was a "long-time political operative" and that a review of the hard and electronic Bar directories reflected she was not a licensed attorney, although, she claimed to be an attorney. The Baier intercepts, except for the most telling one, 2032, [1] were sent to the taint attorney. (Renzi's Objections at 5; Evidentiary Hearing, 7/16/2009, Roetzel, TR at 211.) On November 6, 2006, Roetzel advised Restaino that an attorney-client relationship existed between Maria Baier and Defendant Renzi, and the calls were privileged. (R & R at 1121–22.) Nevertheless, the Government did not discontinue the "Baier Rule," and it continued to represent to the Supervising Court in every ten-day report for the duration of the 30–day wiretap that she was an unlicensed law-trained political operative.

The Government admits that after it intercepted the Maria Baier calls on the first day of the wiretap, it recorded 37 telephone calls between Defendant Renzi and his attorney Maria Baier. (Taint Attorney's Objection at 8.) The Magistrate Judge also found that the Government failed to minimize two attorney-client conversations (2997, 3295) between Defendant Renzi and Glenn Willard and one conversation (3084) between Renzi and Kelly Kramer. In all of these calls, agents were on notice that these attorneys represented ***1109** Defendant Renzi. It became clear during the conversations that these calls involved attorney-client privileged conversations. Agents failed to minimize the calls 2997 and 3084, or belatedly minimized call 3295. The calls were transcribed and/or synopsized. (R & R at 1122–23.)

After admitting that in call 2182, "somebody says Kelly Kramer and Laurie Miller represent—from Nixon Peabody represent Rick Renzi," (Taint Team Objection at 17), the Government defends interception of call 3084 by arguing that "the record [ ] does not reflect that Agent Taylor was on actual notice that Mr. Kramer was an attorney when he was monitoring Session 3084." *Id.* Agent Taylor attests he did not recall monitoring that call or another call where Defendant Renzi said Kelly Kramer would call him, and Agent Taylor did not recall being made aware that Kelly Kramer was identified as Mr. Renzi's lawyer. *Id.*

The Court rejects this position. Agent Taylor should have known Kelly Kramer was Mr. Renzi's attorney because call 2182, which was recorded on the fourth day of the wiretap, established this fact. Thereafter, Kelly Kramer's name should have been posted on the automatic-minimization list for every agent, including Agent Taylor to see while monitoring the wiretap.

The Government concedes that it should not have recorded the Willard–Renzi conversation 2997, and Agent Dillender, who was the monitoring agent should not have listened to it, should not have written a synopsis of the call, and should not have passed the information on to the next shift. Additionally, call, 3295, with attorney Willard was not immediately minimized, but was monitored for several minutes before the agent concluded it should be minimized. This call was classified pertinent, transcribed and provided to the prosecution team.

As the Magistrate Judge correctly found, "[n]one of the privileged calls, including the 'taint' calls, were ever sealed or marked as privileged, in violation of DOJ's own electronic surveillance manual." While synopses and transcripts were deleted and shredded, agents retained copies of the privileged calls on compact discs that were stored, unlocked, on desks. (R & R at 1123–24.) Because privileged calls were never sealed or even segregated, several were produced to Renzi's co-defendants, including an hour-long legal conference call. As late as July 2009, when Agent Dillender was prepared for the evidentiary hearing before the Magistrate Judge, Agent Radtke listened to call 2997.

Additionally, and most importantly, the Government failed to inform the Supervising Court that it had special taint team procedures for intercepting privileged attorney-client communications between Defendant Renzi and Maria Baier and failed to inform the Court that it had intercepted other attorney-client privileged communications. Instead, it reported to the Supervising Court that all attorney-client communications had been minimized and Maria Baier was an unlicensed law trained political operative. These misrepresentations precluded the Supervising Court from precluding interceptions and from ensuring that proper procedures were in place

to address intercepted attorney-client calls once they occurred.

The Magistrate Judge made the following findings in respect to the reasonability of the Government's conduct, as follows:

> ... as to the non-Baier calls, the government adopted reasonable procedures to assure compliance with the minimization requirement. The Magistrate Judge further finds that the government acted reasonably, and in good faith, to minimize all privileged calls with the following exceptions: the government ***1110** acted unreasonably by: 1) failing to direct the minimization of the Baier calls after Renzi identified Baier as his "personal attorney" and government investigation revealed that she was a licensed attorney, 2) failing to direct the minimization of the Baier calls after Roetzel determined that the Baier calls were privileged, 3) Agent Dillender's failure to minimize Call 2997 with Glenn Willard, and, 4 the failure to immediately minimize the call with Kelly Kramer, despite Renzi's identification of him in earlier calls as his attorney.

(R & R at 1128.) The Court agrees further:

> [I]n addition to failing to act reasonably to minimize those calls, the government also acted unreasonably by 1) failing to designate any of the privileged calls as privileged, which would have restricted the number of agents who had access to those calls, 2) Agent Dillender's recording, monitoring, synopsizing and designation of Call 2997 as pertinent, when it was clearly privileged, 3) the failure to designate the recorded portion of Call 3295 as privileged and the review of this call by prosecutors, distribution of privileged calls to Renzi's co-defendants, 5) the failure to inform the Supervising Court of calls which were monitored and recorded in violation of Renzi's attorney-client privilege, and 6) the failure to seal all calls and seek direction from the Supervising Court at the conclusion of the intercept pursuant to 18 U.S.C. § 2518(8)(a).

Id.

The Court agrees with the Magistrate Judge that these aspects of the wiretap were unreasonable. The Government does not object to the Magistrate Judge's recommendation to suppress the unlawfully collected privileged evidence, but objects to suppression of the entire wiretap. *Id.* at 18. The Government argues the violations "address a small window of the overall interception period." (Government's Objection at 26.) "Minimization requires that the government adopt reasonable measures to reduce the interception of conversations unrelated to the criminal activity under investigation to a practical minimum while permitting the government to pursue legitimate investigation." *Id.* at 25 (citing *United States v. Torres,* 908 F.2d 1417, 1423 (9th Cir.1990)).

The Government submits that of the 1,270 intercepted communications, 52 were attorney calls of which 41 involved Maria Baier, and there were 11 other non-Baier calls involving attorney-client privilege. Because the Court finds that the Government knew Maria Baier was Defendant Renzi's attorney after the first three calls were intercepted on the first day of the wiretap, the Government illegally recorded, without any minimization 37 attorney-client privileged conversations. According to the Magistrate Judge, the Government unreasonably intercepted 2997, 3084, and part of 3295. In other words, the Government got it right 12 out of 52 times. But the percentage of privileged conversations is not a sure guide to the answer in a suppression case. *See e.g.,*

Scott v. United States, 436 U.S. 128, 140, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978) (discussing why high percentage of intercepted nonpertinent calls does not necessarily mean the wiretap was unreasonably conducted). Higher numbers may reflect a wiretap of long duration or "when the investigation is focusing on what is thought to be a widespread conspiracy more extensive surveillance may be justified in an attempt to determine the precise scope of the enterprise." *Id.* This same logic applies "[d]uring the early stages of surveillance [when] the agents may be forced to intercept all calls to establish categories of nonpertinent calls which will not be intercepted thereafter." *Id.* at 141, 98 S.Ct. 1717. ***1111** The Court noted that "[i]nterception of those same types of calls might be unreasonable later on, however, once the nonpertinent categories have been established and it is clear that this particular conversation is of that type." *Id.*

The Government asserts that application of the objective standards set out in *Scott* results in a finding of reasonability. (Government's Objection at 23–31.) The Court rejects the Government's conclusion under *Scott* and finds the Magistrate Judge properly applied the law. (R & R at 1125 (citing *Scott,* 436 U.S. at 139–41, 98 S.Ct. 1717)). The Court has no hesitation in finding that the Government knew or should have known at the end of the first day of the wiretap that interceptions of conversations between Defendant Renzi and Maria Baier were covered by the attorney-client privilege. This finding is supported by the Government's taint attorney's opinion on November 6, 2006, and memorialized in writing on November 24, 2006. The Court rejects the Government's assertion that the Baier Rule was reasonable. The same goes for the Government's interception of call 3084 with attorney Kramer, who was unequivocally identified as being one of Defendant Renzi's attorneys by the fourth day of the wiretap, and attorney Willard, who's privileged conversation was admittedly recorded, transcribed and synopsized without any excuse.

The Court agrees with the Magistrate Judge that by recording attorney-client privileged conversations the Government seized evidence beyond that authorized by the wiretap, which required such evidence to be minimized, and that by this conduct the Government acted unreasonably in executing the wiretap. More importantly, the Government chose to conceal from the Supervising Court that it was recording, albeit for taint team review, and not minimizing attorney-client privileged conversations. The Government also failed to disclose the other non-Baier attorney-client privileged interceptions, which violated the DOJ's Electronic Surveillance manual requirement for prompt notification to the supervising court whenever a privileged communication is intercepted. (R & R at 1125.) Like the Magistrate Judge this Court finds that the Government violated Title III by breaching its duty of candor to the court. *Id.* (citing *United States v. Lopez,* 300 F.3d 46, 55 (1st Cir.2002)). The Government's conduct, in its totality, warrants a more significant sanction than just suppressing the privileged evidence. The Court suppresses the wiretap.

CONCLUSIONS OF LAW

The Court adopts the law applicable to Title III and the Fourth Amendment as set out in the R & R, without exception. The Court finds *Simels* discussion of Title III minimization requirements especially helpful. *United States v. Simels,* 2009 WL 1924746 (E.D.N.Y.2009). In *Simels,* the district court reviewed a wiretap of an attorneys' visiting room at a correction center based on the government's belief that the attorneys were part of the same criminal conspiracy as their clients. The court addressed a post-interception minimization process analogous to the one used here, which in *Simels* yielded hours of nonpertinent and privileged conversations but only a few minutes of pertinent, nonprivileged conversation. Relying on Title III, 18 U.S.C. § 2518(5), the court noted that "every order ... shall contain a provision that the authorization to intercept ... shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter ...." *Id.* at *3. The only provision in Title III allowing post-interception minimization pertains to intercepted communications in code or foreign language, when an expert interpreter is ***1112** not reasonably available during the interception. 18 U.S.C. § 2518(5).

The court held that "[b]y definition, an agent cannot minimize the *interception* of communications that should not be intercepted by intercepting all communications and sorting them out later." *Simels,* 2009 WL 192476 at *3. The court found the Supreme Court's objective reasonableness Fourth Amendment standard similarly focused on minimizing interception. *Id.* at *6.

The judge concluded, "the thrust of this legislative history is that when it is impossible to minimize the interception of non-pertinent communications, special steps must be taken to minimize their dissemination." *Id.* at *4. Here, the reason for taint team review under the Baier Rule was to determine whether she was Defendant Renzi's attorney or a political operative. The necessity for the taint team ended once this was determined and there was no reason for further continued taint team review of her calls. There was no suspicion that she was involved in the offenses under investigation. There was simply no reason for the Baier Rule after the first day of the wiretap. This Court agrees with Defendant Renzi that liberal use of taint teams should be discouraged because they present "inevitable and reasonably foreseeable risks that privileged information may be leaked to prosecutors." (Renzi's Objection at 25 (citing *In re Grand Jury Subpoenas,* 454 F.3d 511, 523 (6th Cir.2006)). "That is to say, the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations." *Id.*

The Government argues that there is no evidence of such a breach in this case, and the Baier Rule interceptions deemed unreasonable by the Magistrate Judge were minor and insufficient to convert the wiretap into an impermissible fishing expedition. The Government relies on *United States v. Mittelman,* which is a search warrant case where the Government seized evidence from a law office. *United States v. Mittelman,* 999 F.2d 440 (9th Cir.1993). The district court suppressed all evidence because agents seized entire contents of files, failed to follow proper sealing procedures, and perused the indexes of computer files and seized a number of computer disks. *Id.* at 442. The district court held the search was beyond that authorized by the warrant, which required documents be reviewed by a magistrate judge if they could not feasibly be sorted on site. The court of appeals reversed and remanded for a determination as to whether the breadth of the search converted it to an impermissible general search, i.e., an indiscriminate fishing expedition. If not so extreme, the district court should suppress only the evidence seized in violation of the warrant. Here, the Baier Rule was more akin to a fishing exercise because taint team review was wholly unnecessary to minimize interception of privileged attorney-client calls after the first day of the wiretap.

This same procedure, condemned here as an unreasonable interception, nevertheless, saves the day for the Government in respect to Defendant Renzi's Motion to Dismiss the SSI. It prevented the prosecution team from being exposed to the bulk of the privileged calls at issue in the case. The Court agrees with the Magistrate Judge's conclusion that "[t]he taint team did not feed any information back in the instant case, and as a result there was, simply put, no intrusion as to the Baier taint calls." (R & R at 1131.)

In addition to the unreasonable interception of all Maria Baier calls under the ***1113** Baier Rule, the Magistrate Judge found the wiretap was unreasonable in its failure to "designate any of the privileged calls as privileged, which would have restricted the number of agents who had access to those calls," and unreasonable as to "Agent Dillender's recording, monitoring, synopsizing and designation of [the Willard] Call 2997 as pertinent, when it was clearly privileged," and "the failure to seal all calls and seek direction from the Supervising Court at the conclusion of the intercept[ion] ...." (R & R at 1128.) The Court finds that even if agents had access to privileged interceptions, the prosecution teams' exposure was limited by deleting the synopses for the Willard (2997) call intercepted by Agent Dillender and the Kramer (3084) call intercepted by Agent Taylor and shredding the transcript of the Dillender (2997) call.

The Magistrate Judge found that the prosecution team only reviewed the recorded portion of a call with attorney Willard, call 3295, before it was minimized because it was designated as pertinent and not designated as privileged. (R & R at 1128.) The prosecution team consisted of FBI Special Agents Odom and Burris and prosecuting attorneys Senior Trial Attorney John Scott and Assistant United States Attorney Gary Restaino. The remainder of the players were FBI agents responsible for monitoring the wiretap, with Agents Radtke and Dillender supervising the operation. It is undisputed that Agent Tjernagel, assigned as a monitoring agent at the time of the wiretap, was later promoted to the prosecution team "even though he monitored multiple privileged calls (Calls 1982, 1997, 2032, and 3084) and listened to privileged calls (Calls 2032 and 2067)." (Renzi's Objection at 27.) "Still more egregious, Agent Tjernagel was selected to lead the insurance investigation even though he personally handled a transcript of Call 2997, even though he was exposed to a synopsis of the call while serving as a

monitor, and even though he kept a copy of the call, unlocked, at his desk." *Id.* As the Magistrate Judge noted Agent Tjernagel was one of the agents, who in addition to Agent Radtke, kept compact disks on their desks with copies of all the wiretap calls, including the non-Baier privileged calls at issue here, which were not locked, sealed, nor even designated as privileged. (R & R at 1123–24.)

Defendant Renzi argues the Magistrate Judge wrongly concluded privileged information did not reach the prosecution team. The Defendant argues "[w]hen the government obtains privileged information during a criminal investigation, it bears the burden of proving that those communications did not influence the nature or scope of its investigation." *Id.* at 34 (citing *United States v. Danielson,* 325 F.3d 1054, 1074 (9th Cir.2003)). " 'Once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other governmental organizations responsible for prosecution.' " *Id.* (quoting *Briggs v. Goodwin,* 698 F.2d 486, 495 (D.C.Cir.1983)). Thus, because the Government elected to use a taint team to review potentially privileged documents, it " 'bears the burden to rebut the presumption that tainted material was provided to the prosecution team.' " *Id.* (quoting *United States v. Neill,* 952 F.Supp. 834, 841 (D.D.C.1997)); *see also, United States v. SDI Future Health, Inc.,* 464 F.Supp.2d 1027, 1040 (Nev.2006). Consequently, Defendant Renzi argues that the question must be addressed in a *Kastigar*-like hearing. *Id.* (citing *In re Grand Jury Subpoenas,* 454 F.3d 511, 523 (6th Cir.2006)). Defendant complains that the Magistrate Judge did not consider these cases.

[2] *Danielson* raised a Sixth Amendment problem where the Government's confidential informant obtained and communicated ***1114** to the prosecution team, including the prosecuting attorney, defendant's trial strategy. *Danielson,* 325 F.3d at 1069. The Sixth Amendment right to counsel attaches when the government initiates adversarial proceedings; "once indicted a defendant has a right to rely on his counsel as a 'medium' between himself and the government." *Id.* Relying on the Supreme Court's rejection of a *per se* rule that the Sixth Amendment is violated whenever the prosecution knowingly arranges or permits intrusion into this attorney-client relationship, the Ninth Circuit carved out an exception to the general rule that there is no Sixth Amendment violation unless the defendant shows there is actual prejudice. *Id.* at 1069–70.

In *Danielson,* the Ninth Circuit held that where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle and warrants shifting the burden which is usually on the defendant to the Government. *Id.* at 1070. Rejecting the *Briggs per se* approach that mere possession of improperly obtained trial strategy information by the prosecution constituted proof of prejudice, the Ninth Circuit established a two-step analysis: 1) the government must have acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged information, and 2) "once this *prima facie* case has been established the burden shifts to the government to show that there has been ... no prejudice to the defendant [ ] as a result of these communications." *Id.* at 1071 (citations omitted). It was in this context that the court suggested a *Kastigar* hearing.[2] *Id.* at 1072. Defendant Renzi argues that while *Danielson* is a Sixth Amendment case, it applies in the pre-indictment context. (Renzi's Objection at 34 (citing *Danielson,* 325 F.3d at 1069)).

In *SDI Future Health,* the government seized business records and used a taint team to review the documents to identify attorney-client privileged records instead of submitting them for *in camera* judicial determination. The district court agreed generally that when the government chooses to take matters into its own hands instead of relying on neutral judicial review, it bears the burden to rebut the presumption that tainted material was provided to the prosecution. *SDI Future Health,* 464 F.Supp.2d at 1040. The court held the presumption can be rebutted with a showing that procedures are in place to prevent such intragovernmental communications. *Id.* This does not support Defendant's argument for a *Kastigar* hearing.

[3] In *SDI Future Health,* the court did not consider defendant's Sixth Amendment claim because the alleged violation was pre-indictment and held that in the face of Ninth Circuit authority, *Neill's* suggestion that the Sixth Amendment applies to pre-indictment seizures of attorney-client communications is incorrect. *Id.* at 1048 (citations omitted). The court rejected defendant's due process claim under the Fifth Amendment to dismiss the indictment because there was no showing of governmental misconduct so outrageous as to shock the conscience of the court. In the Ninth Circuit, the governmental

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

conduct of deliberately intruding into the attorney-client relationship and the prejudice suffered by the defendant must be ***1115** very severe to violate the Fifth Amendment. *Id.* at 1049.

The cases relied on by Defendant Renzi do not support his assertion that a *Kastigar* hearing must be held whenever there is evidence that the government has obtained privileged attorney-client evidence. Such a rule would require use of taint teams routinely to prevent any and all taint, and necessarily defeat the Defendant's assertion that use of the taint team here was unreasonable. The cases do not support Defendant's assertion that because the Government used a taint team the Court must presume privileged attorney-client communications reached the prosecution. This is certainly not the law in the Ninth Circuit, which expressly rejects such a *per se* rule. The law is as applied by the Magistrate Judge. Defendant must show outrageous Government conduct, which lead to it obtaining privileged attorney-client information, and the information actually prejudiced the Defendant.

There is simply no evidence in this case of whole-sale egregious access by the prosecutor to privileged attorney-client communications, even if the calls were of a type that would prejudice the defendant. The first of the Maria Baier calls, intercepted on the first day of the wiretap, were reviewed by prosecutors, but the Baier Rule ensured that subsequent calls remained with the taint team. The other attorney calls the Court found to be unreasonably intercepted by agents were intercepted inadvertently and in all but one instance remained with the agents monitoring the wiretap. Specifically, the Willard (2997) call remained with Agent Dillender because the synopsis was deleted and the transcript shredded. The second Willard (3295) call was minimized after a few minutes, when it became clear from the content of the call that it involved attorney-client privilege. The prosecution team admittedly reviewed this call. The synopsis reflects the call began with discussions involving the media and was minimized when it moved to legal discussions of the FEC case. The Kramer call (3084) was never transcribed and the synopsis was deleted. Except for the first two Maria Baier calls and the few minutes of the Willard call, there is no evidence that the prosecuting attorneys had access to privileged attorney-client calls.

The Defendant is, however, correct that there is evidence that monitoring agents had access to privileged calls. There is also evidence that there was no "Chinese wall" between monitoring agents and investigating agents. Agents moved between monitoring the wiretap and assisting in the investigation by doing witness interviews and taking statements, exercising the search warrant, etc. (Evidentiary Hearing, 7/16/2009, Odom TR at 83–89.) The most problematic access question involved the storage of all the calls, including privileged calls, on compact disks that were not sealed and were kept in unlocked drawers in two agents' desks, one being Agent Tjernagel, who later became a member of the prosecution team after the wiretap was completed. The Defendant argues that Agent Tjernagel monitored privileged Maria Baier calls including those made on the first day of the wiretap, 1982, 1997, 2032, and 2035 and accessed and listened to other Maria Baier calls. (Renzi's Objection at 19), *see also* (R & R at 1123–24 (finding the evidence supports Renzi's contention that monitoring agents accessed 15 calls that had been recorded for taint review)). Agent Tjernagel admittedly monitored attorney Kramer's call 3084. (Renzi's Objection at 19.)

This Court has already concluded the Maria Baier calls 1982 and 1997 did not reveal she was Defendant Renzi's attorney, and it was not until call 2032 that the Government should have known this. Interception ***1116** of these calls was clearly inadvertent and neither unreasonable nor outrageous. Agent Tjernagel was in the wiretap room when the Kramer call 3084 was intercepted and it was played over the speakers so that Agent Tjernagel heard the call. (Evidentiary Hearing, 7/16/2009, Tjernagel, TR at 11.) This call, like call 2997 with attorney Willard, was intercepted inadvertently. The Court agrees with the Magistrate Judge's conclusion that while these interceptions were unreasonable, they were not outrageous.

The Court also finds that these interceptions were not accessed by the prosecution team. Agent Tjernagel, who was a monitory agent and would later become part of the prosecution team, testified that he never discussed with anyone other than Agent Taylor the Kramer call 3084, *id.* at 13, and he had no independent recollection of the call, *id.* at 14. The Court finds that he did not communicate the substance of this call to the prosecution team.

Agent Tjernagel's involvement with the Willard call 2997 was limited to his responsibility in respect to non-Baier calls to transfer all pertinent calls from the voice

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

box system to the server computer, which he did by identifying the calls by number, then from the server computer he burned them all onto one master CD, and then burned each call file onto its own separate CD and sent it for transcription. The monitoring agents, including Agent Tjernagel, were responsible for reviewing the transcriptions with the CD recordings and making any necessary corrections. Eventually, the final transcripts were uploaded to a computer, the drafts shredded, and the original CD and subsequent individual CDs were stored in his desk, which was unlocked. *Id.* at 17–19.

When Special Agent Odom, who was part of the prosecution team, informed Agent Tjernagel that the Willard call 2997 was not pertinent, Agent Tjernagel retrieved the CD and draft transcript from the transcript review box, shredded the transcript and placed the CD in his desk. He was not told that the intercepted call was privileged only that it was non-pertinent. *Id.* at 70–75.

Except to the extent Agent Tjernagel heard the Maria Baier calls made on the first day of the wiretap, his involvement with the remaining Maria Baier calls was limited to transferring them from the voice box system to the server computer, which he did by identifying the calls by number, and then burning a CD of the calls. He would place Maria Baier's name on the CD, place it in a case, and give it to Supervising Agent Radtke to give to the taint team. *Id.* TR at 23.

Agent Tjernagel never accessed or listened to the CDs after they were secured in his desk. *Id.*

Agent Tjernagel admitted to hearing discussions between Agents Odom, Burris and whichever prosecutor was there on the first day of the wiretap as to whether or not Maria Baier was an attorney. *Id.* at 53. He was emphatic that they discussed it, not him, *id.,* and these discussions occurred up to the time when the Baier Rule was implemented. *Id.* at 87. He also testified that as a monitoring agent, he was not privy to the decisions, discussions, and preparations for the search warrant for Defendant Renzi's insurance company. *Id.* at 67, 69. He never learned any substantive information about the taint team calls or whether any taint team material was used in the course of the investigation. *Id.* at 100. He had no knowledge of whether the Kramer call was discussed formally or informally by the prosecution team. *Id.* at 102. The same went for the Willard calls. *Id.*

The Court rejects the Defendant's argument that the Magistrate Judge erred by denying him access to the privileged recordings ***1117** and by not compelling the testimony of prosecuting attorney Restaino. The Court finds the record, especially the testimony from Agents Tjernagel, Burris and Odom, sufficient to support the conclusion that privileged attorney-client information was not communicated to the prosecution team.

Like Agent Tjernagel, at the time of the wiretap, Agent Burris was not on the investigative team and was not a co-equal with Agent Odom. (Evidentiary Hearing 7/16/2009 Burris TR at 13.) Agent Odom was responsible for supervising the wiretap for the prosecution team and Agent Radtke was responsible for supervising the agents monitoring the wiretap.

Defendant presents evidence that the monitoring agents were not walled off from agents conducting the investigation, (Evidentiary Hearing, 7/16/2009, Odom, TR at 83), but it is clear that privileged interceptions by monitoring agents did not reach the prosecution team: Agent Odom and the attorneys. Specifically, Agent Odom testified that calls were classified as pertinent or non-pertinent by the monitor. *Id.* at 54. Only calls classified as pertinent were brought to his attention by Agent Radtke. *Id.* He did not receive non-pertinent calls, *id.* at 55, or Maria Baier calls, *id.* at 57. At the beginning of every day, Agent Radtke would go to the Title III room and obtain the pertinent calls from the previous day, the ones Agent Odom had not received yet, and provide summaries of the calls to Odom. *Id.* Agent Odom also received the final transcripts of the pertinent calls. *Id.* at 55.

In the two instances where monitors intercepted privileged attorney-client calls, both the Kramer, 3084, and Willard, 2997, calls were classified by the monitoring agents as pertinent, but when the interceptions were brought to the attention of Agent Odom, he had the classifications changed to nonpertinent to preclude all review by the prosecution team. In respect to the Willard call, 2997, Agent Odom testified that "to prevent the potential [ ] disclosure of any information relating to the conversation to be coming to me or to anyone else, I directed Mr. Morton to change the classification [to nonpertinent] and to delete the synopsis, not the recording, ..." *Id.* at 59. When the Kramer call 3084 came to his attention, Agent Odom directed the classification change to nonpertinent

and for agents to delete the synopsis of the call so that neither he nor anyone else would be exposed to it. *Id.* at 61. Agent Odom testified that inadvertently intercepted attorney-client calls were brought to his attention so he could take necessary measures, such as classifying the call as nonpertinent and ordering deletion of the synopsis or shredding of the transcript, to ensure neither he nor anyone else obtained the call information. *Id.* at 109–121. In this way he prevented an "oh shoot" moment, which would have occurred if the attorney-client privileged call had been transmitted to the prosecution team. *Id.* at 111.

The Court agrees with Magistrate Judge Velasco that there is no evidence the prosecution accessed privileged attorney-client material, except for the first two Maria Baier calls, 1982 and 1997, and two minutes of the call with attorney Willard, 3084, before it was minimized. (R & R at 1131.) In other words, there were three "oh shoot" moments. "Of these, Agent Odom credibly testified that the government made no use of any information derived from calls 1982, 1997 and 3084 in the insurance investigation, the search warrant or any other part of the investigation." *Id.* at 22; *see also* (Evidentiary Hearing, 7/16/2009, Odom, TR at 28–29, 31–32, 34–35, 51, 66–67, 135, 141). "Agent Odom credibly testified that the insurance investigation was active and well developed before the wiretap, but that, because of the ***1118** covert nature of the investigation, he did not actively pursue potential witnesses at that time." *Id.* at 22–23, *see also* (Evidentiary Hearing, 7/16/2009, Odom, TR at 63 (explaining that with the wiretap, the team had exhausted covert operations and were moving to overt operations, such as interviews, grand jury subpoenas, and the search warrant for Patriot Insurance). The focus of the wiretap was to discover if Sandlin land-deal money was going to Patriot Insurance. (Evidentiary Hearing, 7/16/2009, Odom, TR at 141–142.)

The Court is entirely confident that the prosecution team did not conduct its pre-trial investigation or develop its trial strategy with the benefit of advanced knowledge of Defendant Renzi's trial strategies. *See Danielson,* 325 F.3d at 1069 (finding 6th Amendment violation where informant intentionally solicited trial strategy from defendant post-indictment; distinguishing *Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), where Supreme Court found 6th Amendment not violated where undercover agent was privy to defense strategy but did not communicate anything to any member of the prosecution team).

The Court finds that the Government's conduct did not violate the Fifth or Sixth Amendments to the United States Constitution which ensure effective assistance of counsel. For the same reasons the SSI is not dismissed under the Fifth or Sixth Amendments to the Constitution, the Court denies the Motion to Dismiss the SSI pursuant to the Court's supervisory powers. (R & R at 1132.) "Disqualification of the prosecutorial and investigative teams is not warranted. Furthermore, Agent Odom's testimony establishes there are no fruits from the privileged calls that would require further suppression." (R & R at 1132.)

The Court agrees with the Magistrate Judge that the appropriate remedial action in this case is suppression of the wiretap. The Government conducted an unreasonable wholesale interception of calls they knew to be attorney-client communications pursuant to the Baier Rule. The Government failed in its duty of candor to the Supervising Court by not revealing the true nature of its interception of these calls under the Baier Rule. The Government failed to identify as privileged and seal attorney-client calls it inadvertently intercepted during the wiretap. While this conduct was not outrageous, it was an unreasonable violation of Title III and the Fourth Amendment and warrants the sanction recommended by Magistrate Judge Velasco.

Accordingly,

IT IS ORDERED that the Report and Recommendation (doc. # 594) is adopted as the opinion of the Court.

IT IS FURTHER ORDERED that the Motion to Dismiss the Second Superseding Indictment (SSI) Based on the Government's Unlawful Recording of Privileged Counsel Calls (doc. 87) is DENIED IN PART as to dismissal of the SSI and GRANTED IN PART as to suppression of all evidence obtained by the wiretap.

IT IS FURTHER ORDERED that this matter remains referred to Magistrate Judge Velasco for all pretrial proceedings and Report and Recommendation in accordance with the provisions of 28 U.S.C. § 636(b). Fed.R.Crim.P. 59(b), and LR Civ. 72.1(a), Rules of

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

Practice for the United States District Court, District of Arizona (Local Rules).

REPORT AND RECOMMENDATION

BERNARDO P. VELASCO, United States Magistrate Judge.

Pending before the Court is Defendant Renzi's Motion to Dismiss the Indictment Based On The Government's Unlawful Recording ***1119** Of Privileged Counsel Calls. (Doc. No. 87.) [1]

Following an *in camera* submission by Defendant Renzi, the Magistrate Judge ordered an evidentiary hearing on the motion.

The Magistrate Judge, having considered the briefing, arguments, and evidence introduced and testimony offered at the evidentiary hearing, in light of the credibility and demeanor of the witnesses, as well as the *in camera* submissions offered by both parties, their post-hearing briefs and the entire record in this matter, RECOMMENDS that the motions to dismiss the indictment based on the Government's unlawful recording of privileged counsel calls be GRANTED IN PART and DENIED IN PART for the reasons discussed below.

The Magistrate Judge FURTHER RECOMMENDS that the evidence obtained through the Title III wiretap be suppressed in its entirety.

I. PROCEDURAL BACKGROUND

The procedural background of this case has been thoroughly summarized in this Court's previous order addressing the issue of severance. (*See* Doc. No. 557). The memorandum and briefs relevant to this hearing are found in Defendant Renzi's Document Numbers 87, 165, 269, 301, 475, 478, 483 (sealed), 485 (sealed) and 543, and in the Government's Document Numbers 139, 282, 520 (sealed), 523, 524, and 526 (sealed).

Fifteen witnesses testified at the evidentiary hearing regarding their involvement in the investigation of Congressman Renzi, particularly in reference to the Title III intercept of a cell phone used by Congressman Renzi. FBI Special Agents Tjernagel, Taylor, Wilson, Anderson, Morton, Gutierrez, and Middleton were assigned to monitor the wiretap in this case. FBI Agent Tjernagel also became a member of the prosecution or investigative team. FBI Special Agents Radtke and Dillender were the Supervisory Special Agent and Assistant Supervisory Special Agent on the wire, respectively. FBI Special Agents Odom and Burris were case agents. AUSA Roetzel and FBI Special Agent Lightfoot were part of the taint team assigned to review the Maria Baier calls. Barry Stewart, not a member of the FBI or prosecution, testified as to his knowledge of the Voicebox system used in the wiretap. John Scott testified as a Trial Attorney with DOJ involved in the investigation and prosecution of Congressman Renzi. Maria Baier, an attorney, also testified regarding the scope of her representation of Congressman Renzi.

II. FINDINGS OF FACT

A. The Wiretap Order and Minimization Protocol

On October 26, 2006, the government applied for an order to allow it to monitor the cellular phone used by Congressman Renzi. Agent Odom was the lead investigator in this matter, and, in preparation for the Title III interception, prepared an affidavit which relied on consensual recordings, an analysis of pen/trap data, source interviews and forensic review of bank records and public filings. The Title III application expressly asserted that probable cause existed to charge Renzi with misappropriation of insurance premiums. Agent Odom had previously drafted a report, in November 2005, stating that the financial investigation had revealed Renzi's misappropriation of several hundred thousand dollars to fund his campaign through a series of potential money laundering transactions. The Court disagrees with Renzi's assertion that, prior to ***1120** the Title III intercept, the government had decided not to pursue the insurance fraud aspect of the case. The evidence submitted by Renzi demonstrates that, in June, 2006, Department of Justice Senior Trial Attorney Scott was going to present the information regarding the insurance fraud portion of the case for "case review" and seek an opinion as to whether the FBI should continue with this aspect of the investigation. There is no evidence that the government thereafter declined to pursue this aspect of the investigation. The Title III application and supporting affidavit submitted by TA Scott and Agent Odom in October, 2006, is a clear demonstration that the government had, contrary to Renzi's assertions,

decided to continue with the investigation. Agent Odom acknowledged in his affidavit that the U.S. Attorney's Office for the Eastern District had declined prosecution of the insurance offenses, "[b]ased on the limited information then available" but that "based on the more detailed information currently available, these claims form part of the instant criminal investigation." At that time, the government had sufficiently developed the insurance aspect of the investigation through bank records and through statements attributed by sources to employees.

On October 20, 2006, Renzi called the Special Agent in Charge of the Phoenix Field Office of the FBI, to ask about the investigation, but did not indicate that he had obtained legal representation for purposes of the investigation. Nonetheless, when it applied for the Wiretap Order, the government identified the Patton Boggs law firm as publicly representing Renzi (from the FEC inquiry) and Grant Woods as a possible lawyer based on press reports. Agent Odom represented to the Supervising Court, in his affidavit, that privileged conversations would be minimized. The Court issued the Wiretap Order directing the government to minimize all interceptions in accordance with Title III's minimization requirement.

The Wiretap Order contemplated the interception of communications that implicated the Speech or Debate Clause, and provided that the government could record such communications for later review by "an independent group of investigators and/or prosecutors," commonly referred to as a "taint team." The Wiretap Order did not authorize the government to record or review communications implicating the attorney-client privilege through the use of taint team review.

The government instructed the monitoring agents, via memorandum, that "[n]o conversation may be intercepted that would fall under any legal privilege." Monitoring agents were directed to never knowingly listen to or record a confidential legal conversation involving an attorney. The monitoring agents were directed to notify the supervising agent of the conversation, shut off the monitor and stop recording. The memorandum instructed the agents not to listen to any conversation involving the referenced attorneys, Grant Woods and Patton Boggs.

B. Maria Baier Calls

On the first day of the wire (October 27, 2006), agents monitored four calls involving Maria Baier, an attorney licensed in Arizona (Call Nos. 1982, 1997, 2032 & 2085). Agent Tjernagel and Agent Taylor listened to these calls over a speaker in the wire room.

The Court finds that, resolving any conflict in favor of the unique protections afforded the attorney-client privilege, *United States v. Mett,* 178 F.3d 1058, 1065 (9th Cir.1999), that all of the calls intercepted between Renzi and Baier were privileged.

***1121** 1. *Call 1982*

Call number 1982 lasted 15 minutes and was recorded in full without any minimization. Thereafter, the call was transcribed. The Court reviewed this call in court. [2]

2. *Call 1997*

Call 1997 was the second call that the government recorded between Renzi and Baier. The government recorded the conversation in full without any minimization, and later transcribed the call. Although Renzi mentions to Baier to "please put a note for our defense, for our legal defense" the monitoring agent, Agent Taylor, perceived Baier to be a member of Renzi's "day-to-day operations group" and not a member of Renzi's legal defense. After recording the call, Agent Taylor played the call between 8 and 9 times.

3. *Call 2032*

Call 2032 is the third call between Renzi and Baier that the government recorded on October 27, 2006. The call was minimized after Grant Woods and Tyrone Mitchell (a member of Renzi's criminal defense team) joined the call. Prior to minimization, Agent Taylor heard Renzi describe Baier as his "personal attorney"

4. *Baier Taint Review*

Because of their content, the monitoring agents were concerned that the Baier calls were privileged. They

discussed the calls with the prosecutors, Senior Trial Attorney John Scott and Assistant United States Attorney Gary Restaino, and with the case agent, Daniel Odom. Even though the Wiretap Order did not authorize the use of a taint team with respect to privileged calls, the prosecutors directed the agents to record all future calls between Renzi and Baier for subsequent taint review. The prosecutors never sought the Court's permission to record these calls or to authorize the use of a taint team.

Although it is not clear who requested the inquiry, an agent accessed the Arizona State Bar's public website, and determined that Baier was a duly-licensed attorney. On October 27, 2006, the agent printed a copy of Ms. Baier's profile from the website. The profile was placed in a folder labeled "Maria Baier," along with copies of her driver's license and motor vehicle registration. The profile was maintained in a file cabinet near Agent Odom's desk. The government did not disclose any of this information to Congressman Renzi or the Court until just before the start of the evidentiary hearing. The government explained that Agent Burris discovered the folder when she was preparing for the evidentiary hearing. The printout had never been conveyed to the prosecution team.

On October 30, 2006, Restaino asked his colleague, Assistant United States Attorney Danny Roetzel, to act as a taint attorney. Restaino advised Roetzel that Baier was a "long-time political operative," adding that "[a] review of the hard and electronic Bar directories shows that she is not a licensed attorney, although in a bio she claims that she is." Restaino then asked Mr. Roetzel to "decide whether the attorney-client privilege applies to conversations between [Renzi] and Baier alone." Roetzel advised Restaino, on November 6, 2006, that he had determined that an attorney-client relationship existed between Renzi and Baier, and that the calls were privileged. Roetzel sent a confirming memorandum dated November 24, 2006, ***1122** stating that the conversations were privileged in whole or part and that the non-privileged portions were "not germane in any regard to the investigation." Despite Roetzel's findings, the government continued to record Renzi's calls with Baier. In fact, the prosecutors instructed him to continue reviewing recorded calls to determine if anything obviated the privilege, or for non-privileged material that was germane. Roetzel testified, however, he never heard anything undermining the privileged nature of Renzi's conversations with Baier.

Under the taint procedures established for calls involving Baier, the monitoring agents were supposed to: (I) record, but not to listen to, calls involving Ms. Baier; and (ii) alert Agent Radtke (the Supervising Special Agent) of any recorded calls so that he could ensure that they were copied and provided to the taint attorney. These procedures were memorialized on a handwritten sign posted in the wire room. While the procedures directed the agents to take off their headphones and turn down the volume, there is no way to verify that the agents in fact did this. It is evident from the minimization of calls in which additional attorneys were conferenced into the calls after Baier's initial conversation with Renzi that the agents were likely listening to these calls or else they would not have known to minimize the conference calls when Renzi and Baier were joined by other counsel on the line.

Additionally, the monitoring agents preserved three conference calls, sessions 3238, 3508 and 3839 between Renzi, Baier and other lawyers.

The prosecutors never advised the supervising court either that Baier was licensed or that the taint attorney had opined that the calls were privileged.

C. Glenn Willard Calls

The government knew that Patton Boggs' attorneys represented Congressman Renzi from the start of the wiretap. The government recorded a series of calls involving Glenn Willard, of Patton Boggs, including a 26–minute privileged conversation between Renzi and Willard on November 9, 2006. The government also transcribed portions of another conversation involving Willard, even though the monitoring agent minimized that call after concluding that it sounded like an attorney-client privileged communication.

1. *Call Number 2997*

The government concedes it should not have recorded Call 2997. Glenn Willard was not identified from his phone number as an attorney during the interception period because he used a personal phone. During the call itself, however, Renzi made repeated explicit references to Willard's role as his attorney in the FEC proceeding. It thus became obvious from the content of the call that the communication was privileged. Nonetheless, Agent

Dillender recorded and monitored call 2997 in full and spent nearly an hour drafting a synopsis of the call, and designated the call as pertinent. When it came to Agent Odom's attention that the monitoring agents had intercepted a privileged call, the draft transcript was shredded and the synopsis deleted, although a copy of the call remained with Agent Tjernagel at his desk. It was not reported to the District Court that a privileged call had been monitored and recorded.

2. *Call Number 3295*

On the same day that Agent Odom directed Agent Morton to delete the synopsis of Call 2997, Agent Ward recorded another call between Willard and Renzi (Call 3295). Agent Ward did not know Willard's identity. After monitoring the call for several minutes, Agent Ward concluded ***1123** that the call sounded privileged, so he minimized the remainder, but he nonetheless designated the call as pertinent.

Even though Agent Ward thought Call 3295 sounded privileged, it was not sealed or marked as privileged, and seven different agents accessed it from the master computer alone. Agent Tjernagel also copied the call onto a compact disk, making it impossible to know how many other agents accessed the call. The government transcribed the non-minimized portions of this call, which the prosecutors concede they have reviewed.

D. Kelly Kramer Calls

The government learned on the first full day of the wire that Renzi had retained the law firm of Nixon Peabody. On the fourth day of the wire agents monitored a call in which Renzi made clear that he had retained Kelly Kramer, of Nixon Peabody. Again, on the next day, agents monitored another call in which Renzi identified Kramer as his lawyer.

1. *Call Number 3084*

Ten days after being put on notice of Kramer's role, the government recorded Call 3084 between Renzi and Kramer. Renzi was calling Kramer to report on a call he had received from a cooperating witness. Agents Taylor and Tjernagel monitored Renzi's call to Kramer together, playing the call on the wire room's external speakers. Kramer's identity was clear; he answered the call by stating "Kelly Kramer." It was also clear from the content that the call was potentially privileged: Agent Taylor testified that Congressman Renzi seemed to be "confiding" "sensitive" and "important" information to Kramer, whom Agent Taylor thought to be either a lawyer or an accountant. Agent Taylor testified that he did not know at the time that Kramer was an attorney, that he thought it might have been an attorney call, but that Kramer might also have been an accountant.

Agent Taylor, who deemed the call pertinent, synopsized it for about an hour. During that time, an FBI agent confirmed that Kramer was an attorney at Nixon Peabody. Agent Taylor continued to work on his synopsis for at least another 35 minutes. More than an hour after the call was first monitored, Agent Odom instructed Agent Taylor to delete the synopsis. The call itself, however, was never sealed.

E. Failure To Protect Privileged Calls

None of the privileged calls, including the "taint" calls, were ever sealed or marked as privileged, in violation of DOJ's own electronic surveillance manual. Although the traditional notion of "sealing" taped calls is not directly applicable to the Voicebox system utilized to monitor and record the Title III calls in this case, the Voicebox system had special password protections that could have been used to designate a call as privileged, and only agents with the required password access would have been able to access the calls.

When an agent accessed a previously recorded call, a notation in the session history report for that call was made. Although the call immediately begins playback when it is accessed, it is not possible to ascertain if the playback was stopped while agents opened the audio control panel for non-content information, such as information about minimization, or pen/trap data.

Several of the agents testified that they did not remember accessing the Baier calls (contrary to the Session History Report's notations), but added that they would have followed the rules by not listening to them. But, as Agent Radtke testified, the agents violated the rules every time they simply accessed one of these calls.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

***1124** The evidence supports Renzi's contention that monitoring agents accessed 15 calls that had been recorded for taint review.

Agent Radtke maintained copies of all of these calls on compact discs that he stored, unlocked, at his desk. Agent Tjernagel maintained copies of some of the privileged calls (including Call 2997) on compact discs that he stored, unlocked, at his desk. Agent Radtke used these working copies to make a production set for the defendants as part of discovery in this case. But because the privileged calls had never been sealed or even segregated, Agent Radtke included several privileged calls, including an hour-long legal conference call, on the discs that were produced to Renzi's co-defendants. As late as July 2009, Agent Radtke (who is not a member of the investigative team) listened to Call 2997 while preparing Agent Dillender to testify.

After completing the synopsis of Call 2997, Agent Dillender designated the call as pertinent. Agent Dillender further testified that she ordinarily followed the practice of apprising the agents taking over the wire about new developments or significant calls. Consistent with that practice, the agents who came on duty after her would have accessed the phone call during the shift change. It is likely, therefore, that Agents Dillender, Taylor, Wilson, and Frank were exposed to this call on the evening of November 9. Agents Wilson and Frank testified that they would not have discussed with the prosecution team any privileged information learned through listening to the call.

In addition, the monitoring agents were directed to "[r]ead all the logs of interceptions on a continuing basis" to help comply with the minimization requirement. Accordingly, assuming compliance with the minimization memorandum's instructions, Agents Radtke, Tjernagel, Rubacalva, Gutierrez, Anderson, Garrison, Morton, Smith, Dillender, Taylor, Wilson and Frank were all exposed to the privileged materials contained in the synopsis.

Because Call 2997 was deemed pertinent, Agent Tjernagel copied it onto a compact disk and submitted it for transcription. A few days later, Agent Odom called Agent Tjernagel to tell him that the call did not need to be transcribed because it was no longer deemed pertinent, but said nothing about the call being privileged. According to Agent Tjernagel, Agent Odom instructed him to destroy the draft transcript. Agent Odom testified that it came to his attention, though he doesn't remember who brought it to his attention, that a call with Willard had been intercepted, and he directed Agent Morton to change the classification and delete the synopsis. Agent Tjernagel testified that he retrieved the compact disk and the draft transcript from the support personnel's outbox and then shredded the transcript. He kept the compact disk at his desk in an unlocked drawer, where it remained as of the time of the hearing.

F. Prosecution Team's Exposure to Privileged Calls

The evidence and testimony demonstrate that the prosecution team reviewed at least five privileged phone calls, including four Maria Baier calls (Calls 1982, 1997, 2032 and 2035), a call with Renzi's defense counsel Kelly Kramer (Call 3084), the minimized portion of a call between Renzi and Willard (Call 3295), but not the call initially synopsized, then later deleted, between Renzi and Willard (Call 2997). The Magistrate Judge finds the government's assertion credible that the substance of Call 2997 was neither conveyed to the prosecution team, nor was it used in the investigation.

***1125** Nonetheless, Agent Odom, aware that a privileged call had been inadvertently recorded, should have notified the supervising attorneys, who in turn would have been obligated to notify the supervising judge, as set out in the Electronic Surveillance Manual. But it is undisputed that the government never notified the Court about the intercepted Willard call, claiming instead it had "completely minimized" calls between Congressman Renzi and his out-of-state attorneys.

G. Government's Representations to the Supervising Court

The Wiretap Order required the government to file periodic reports regarding the conduct of the intercept. In the first report, the prosecutors advised the Court that they were using a taint team to monitor calls involving Baier, but described her as an "unlicensed law trained political operative." Moreover, the prosecutors failed to advise the Court that the government had monitored calls in which Renzi referred to Baier as his "personal lawyer" and in which she had confirmed that she was a licensed Arizona lawyer.

In the second report, the prosecutors repeated their claim that Baier was an "unlicensed law trained political operative," and also failed to disclose that Roetzel had already concluded that the calls involving her were privileged.

The prosecutors also claimed in their second report that the government had "completely minimized calls between Renzi and Arizona or out-of-state attorneys." The government, however, hadn't "completely minimized" the Glenn Willard and Kelly Kramer calls; rather, multiple agents listened to them in their entirety. Further, by failing to disclose these intercepts, the government violated the DOJ's Electronic Surveillance Manual, which directs the government promptly to notify the supervising court whenever a privileged communication is intercepted.

Gary Restaino was the government attorney with principle responsibility for supervising the agents, implementing the taint procedures, and communicating with the taint attorney. The Court agrees with Renzi's assertion that it appears that Restaino personally concluded that Baier was a "political operative," as opposed to a licensed attorney, although it is not evident that anyone on the prosecution team knew, in the first few days of the wire, that Baier, listed on the Arizona State Bar website under the last name Kahn Baier, was licensed to practice law in Arizona. The Court agrees with Renzi's assertion that it appears that Restaino was also the driving force behind the government's decision to record the calls with Baier.

III. CONCLUSIONS OF LAW

A. Title III And Fourth Amendment

To protect citizens' legitimate privacy interests, Title III requires the government to minimize the interception of conversations that are "not otherwise subject to interception." 18 U.S.C. § 2518(5).

[4] **[5]** The government's compliance with Title III's minimization requirement is assessed "on the facts and circumstances of each case" based on a standard of objective reasonableness. *Scott v. United States,* 436 U.S. 128, 139–41, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). While bad faith is irrelevant to determining whether the government violated Title III (*see Id.*), courts may impose more significant sanctions upon finding bad faith. *See United States v. Turner,* 528 F.2d 143, 156 (9th Cir.1975) (recognizing that suppression of the entire wire may be an appropriate remedy when the minimization provision of the wiretap order is disregarded by the government throughout the entire wiretap period.). ***1126** The standard for minimization is reasonableness. *United States v. Torres,* 908 F.2d 1417, 1423 (9th Cir.1990).

Contrary to Defendant's assertion, and the assumption of some courts, that privileged conversations are "not otherwise subject to interception" within the meaning of the statute, the language of the statute does not support such a reading. The statute requires minimization only for the "interception of communications not otherwise subject to interception under this chapter." 18 U.S.C. § 2518(5); *contra United States v. Harrelson,* 754 F.2d 1153, 1168 (5th Cir.1985) (interception of privileged communications must be minimized); *United States v. DePalma,* 461 F.Supp. 800, 821 (S.D.N.Y.1978) (knowing interception of attorney-client communication unreasonable under Section 2518(5)).

[6] Title III authorizes the interception of all pertinent communications. *See* 18 U.S.C. 2518(3)(a)-(b), (4)(c). In fact, the statute, by providing that no "otherwise privileged wire or oral communication intercepted in accordance with or in violation of the provisions of this chapter shall lose its privileged character," 18 U.S.C. § 2517(4), contemplates that privileged communications will be intercepted with appropriate limitations on use and disclosure. The legislative history of Title III supports the plain reading of the statute, that is, the provision was "intended to vary the existing law only to the extent it provides that an otherwise privileged communication does not lose its privileged character because it is intercepted by a stranger," S.Rep. No. 1097, 90th Cong., 2d Sess., 96 (1968), U.S.Code Cong. & Admin.News 1968, p. 2189. In fact, the wiretaps were criticized as "indiscriminate" and, "as authorized by title III thus represent a sweeping intrusion in to private and often constitutionally protected conversations." *Id.* at 2229. "When the Government overhears clients talking to their attorneys, husbands to their wives, ministers to their penitents, patients to their doctors, or just innocent people talking to other innocent people, it is clearly playing an 'ignoble part.' " *Id.* at 2233. Thus, while the use and disclosure of privileged calls is addressed by the statute, there is no statutory requirement that attorney-client privileged calls be minimized, *per se.*

Section 2518(10)(a)(I), however, provides that a defendant may move to suppress the contents of communications intercepted under that chapter on the grounds that "the communication was unlawfully intercepted." The Supreme Court has opined that section (I) "must include some constitutional violations. Suppression for lack of probable cause, for example, is not provided for in so many words and must fall within paragraph (I) unless, as is must unlikely, the statutory suppression procedures were not intended to reach constitutional violations at all." *United States v. Giordano,* 416 U.S. 505, 525–26, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974). The Court finds that the privileged communications were unlawfully intercepted, under § 2518(10)(a)(I), in violation of Renzi's Fourth Amendment protections.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. Because our society recognizes a person's legitimate expectation of privacy when consulting with counsel, *see DeMassa v. Nunez,* 770 F.2d 1505, 1506–07 (9th Cir.1985), the seizure of potentially privileged communications raises serious Fourth Amendment issues. *See, e.g., Klitzman, Klitzman and Gallagher v. Krut,* 744 F.2d 955, 960–62 (3d Cir.1984) (requiring special procedures to protect the attorney-client privilege during the search of a law firm).

***1127** **[7]** **[8]** A search is unreasonable, and thus violates the Fourth Amendment, when it is performed without proper judicial authorization, *Groh v. Ramirez,* 540 U.S. 551, 562–63, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), when the government seizes evidence beyond that which is authorized in the warrant, *United States v. Mittelman,* 999 F.2d 440, 445 (9th Cir.1993), or when the government executes the search in an unreasonable manner. *See San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 971 (9th Cir.2005). Although the Wiretap Order did not address specifically the monitoring of privileged conversations between Congressman Renzi and his attorneys, Agent Odom's specifically represented to the Supervising Court in his affidavit in support of the application for the interception of wire communications, that the government would minimize privileged calls and carefully train the monitors to recognize calls between lawyers and clients. By knowingly recording privileged calls, the government violated the Wiretap Order and seized evidence beyond that which was authorized. For these reasons, the government's seizure of privileged calls violated the Fourth Amendment.

[9] The government also acted unreasonably in executing the search in violation of the Fourth Amendment. Clearly, it was not reasonable for the government to record calls between Congressman Renzi and lawyers the government knew (or should have known) to be representing him. Similarly, it was not reasonable for the government to fail entirely to seal any of those calls in violation of established Department procedure and despite the "inevitable, and reasonably foreseeable, risks to the privilege" that are created when the government seizes privileged information for taint review. *In re Grand Jury Subpoenas,* 454 F.3d 511, 523 (6th Cir.2006)[3].

The government demonstrated, generally, that it acted reasonably with respect to the minimization of privileged calls. The monitoring agents were instructed on the requirements for minimization. Agent Radtke, the supervising agent, kept a running tally of attorneys to guide the agents in the electronic surveillance room. When persons who sounded like they might be attorneys were intercepted, the agents moved quickly to protect Renzi's privilege. Laurie Miller was identified and minimized in her first conversation with Renzi, Grant Woods was identified and minimized in his first conversation with Renzi. As the Title III interception progressed, agents identified other attorneys, and, when known, caller identification information was entered into the Voice Box system to connect a number to a name. The system was not without flaws, however, as some privileged calls were initially monitored due to the use of conference call numbers, and the use of personal phones.

***1128** **[10]** **[11]** **[12]** The Magistrate Judge finds, as to the non-Baier calls, the government adopted reasonable procedures to assure compliance with the minimization requirement. The Magistrate Judge further finds that the government acted reasonably, and in good faith, to minimize all privileged calls with the following exceptions: the government acted unreasonably by: 1) failing to direct the minimization of the Baier calls after Renzi identified Baier as his "personal attorney" and government investigation revealed that she was a licensed attorney, 2) failing to direct the minimization of the Baier calls after Roetzel determined that the Baier calls were privileged, 3) Agent Dillender's failure to minimize

Call 2997 with Glenn Willard, and, 4) the failure to immediately minimize the call with Kelly Kramer, despite Renzi's identification of him in earlier calls as his attorney.

[13] [14] [15] [16] The Magistrate Judge finds that in addition to failing to act reasonably to minimize those calls, the government also acted unreasonably by 1) failing to designate any of the privileged calls as privileged, which would have restricted the number of agents who had access to those calls, 2) Agent Dillender's recording, monitoring, synopsizing and designation of Call 2997 as pertinent, when it was clearly privileged, 3) the failure to designate the recorded portion of Call 3295 as privileged and the review of this call by prosecutors, 4) the distribution of privileged calls to Renzi's co-defendants, 5) the failure to inform the Supervising Court of calls which were monitored and recorded in violation of Renzi's attorney-client privilege, and 6) the failure to seal all calls and seek direction from the Supervising Court at the conclusion of the intercept pursuant to 18 U.S.C. § 2518(8)(a).

[17] The Magistrate Judge rejects the notion that the use of taint review is *per se* unreasonable. However, the use of taint review in this instance, however well-intentioned initially, was not authorized by Title III or by the supervising Court's Wiretap Order. Neither was the use of a taint team to monitor privileged calls contemplated by Agent Odom's affidavit in support of the Title III application. The government was put on notice, on the first day of the wiretap, that Baier was an attorney, licensed to practice in Arizona, and that Renzi considered her his "personal attorney."

[18] As one district court has explained, Title III requires the government to minimize the interception of communications, but, as it noted, "an agent cannot minimize the interception of communications that should not be intercepted by intercepting all communications and sorting them out later." *See United States v. Simels,* No. 08–cr–0640, 2009 WL 1924746, *9 (E.D.N.Y. July 2, 2009). *Id.* at *9–10. The court explained that the way to avoid intercepting privileged communications "is take reasonable steps not to intercept them." *Id.* "Automatically recording everything, even where that is followed by a post-interception minimization protocol, virtually guarantee [s] the interception of communications the government should not have seized. The post-interception minimization may have closed the barn door, but the horse was already gone." *Id.*

Consistent with *Simels,* the Magistrate Judge finds that the government's use of a taint team to review calls with Baier was not authorized by Title III, was not authorized by the Supervising Court's Wiretap Order, and was not contemplated in Agent Odom's representations to the Court. To the extent the Supervising Court implicitly approved of the use of taint review for the Baier calls, such implicit approval was premised on the government's incorrect representation to the ***1129** Court that Baier was an "unlicensed law-trained political operative."

[19] Apart from its decision to implement a taint team to review the Baier calls, the government independently violated Title III by breaching its duty of candor to the court. *See United States v. Lopez,* 300 F.3d 46, 55 (1st Cir.2002) (Title III imposes on government a duty of candor "about the manner in which the wiretap will be conducted"). At the outset of the wire, the government failed to advise the Court that Congressman Renzi was represented by multiple counsel, thus depriving that Court of the ability to craft appropriate protective measures in violation of Title III. During the wiretap, the prosecutors made false statements to the Supervising Court as to Baier's status and as to the minimization of calls with other attorneys. The prosecutors further failed to advise the Supervising Court that it had monitored calls in which Congressman Renzi referred to Baier as his "personal lawyer," and that its own taint attorney had concluded that an attorney-client privilege existed between Congressman Renzi and Baier.

[20] Evidence derived in violation of the Fourth Amendment may not be introduced at trial to prove a defendant's guilt. *See Weeks v. United States,* 232 U.S. 383, 398, 34 S.Ct. 341, 58 L.Ed. 652 (1914) (in federal court, exclusionary rule applies to evidence obtained through Fourth Amendment violation), *overruled on other grounds by Elkins v. United States,* 364 U.S. 206, 208, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

[21] In conclusion, the Magistrate Judge recommends that the government's request for suppression of the unlawfully collected privileged evidence be GRANTED[4]. Further, the Magistrate Judge recommends, based on the government's insistence in pursuing the Maria Baier calls after they were deemed privileged, the imposition of a

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

more significant sanction: the suppression of the entire wire. *See Turner,* 528 F.2d at 156.

B. Fifth and Sixth Amendments

[22] **[23]** The Sixth Amendment grants criminal defendants the right to effective assistance of counsel, including the right to private consultation with counsel. *See McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Daniels v. Woodford,* 428 F.3d 1181, 1196 (9th Cir.2005); *Coplon v. United States,* 191 F.2d 749, 757 (D.C.Cir.1951). Sixth Amendment rights do not attach until criminal proceedings are formally instituted against a defendant. *See Kirby v. Ill.,* 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion); *United States v. Hayes,* 231 F.3d 663, 671–72 (9th Cir.2000) (adhering to the bright line indictment rule, and refusing to apply the Sixth Amendment to a cooperator's consensual conversation with a represented defendant who admitted his intent to lie at trial); *United States v. McNeil,* 362 F.3d 570, 572 (9th Cir.2004) (right to counsel attached at indictment). While some court's have found that pre-indictment interference with a suspect's attorney-client relationships can ripen into a Sixth Amendment violation upon indictment, *see United States v. Stein,* 541 F.3d 130, 152 (2d Cir.2007) (affirming dismissal of indictments against former KPMG partners based on the government's pre-indictment interference with KPMG's ordinary practice of advancing legal fees to individuals, ***1130** which "had post-indictment effects of Sixth Amendment significance"); *In re Grand Jury Proceedings (Goodman) v. United States,* 33 F.3d 1060, 1062 (9th Cir.1994) ("The Sixth Amendment can apply when the government's conduct occurs pre-indictment."), the government's actions in this case did not result in the type of post-indictment consequences of "Sixth Amendment significance" contemplated by those court's decision.

Assuming *arguendo,* that the Sixth Amendment analysis is applicable, the Magistrate Judge finds, as discussed below, that the government's intrusions did not prejudice Defendant Renzi.

[24] **[25]** **[26]** Dismissal of an indictment is warranted where outrageous law enforcement conduct violates due process. *United States v. Simpson,* 813 F.2d 1462, 1464–65 (9th Cir.1987). To warrant dismissal on due process grounds, government conduct must be "so grossly shocking and outrageous as to violate the universal sense of justice." *United States v. Barrera–Moreno,* 951 F.2d 1089, 1092 (9th Cir.1991). Dismissal is a "drastic measure" and a court, when faced with prosecutorial conduct, should tailor relief appropriate in the circumstances. *United States v. Isgro,* 974 F.2d 1091, 1099 (9th Cir.1992) (quoting *United States v. Morrison,* 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed.2d 564 (1982)).

[27] **[28]** The Fifth Amendment's due process clause guarantees a suspect's right to effective and substantial assistance of counsel. *See United States v. Irwin,* 612 F.2d 1182, 1185 (9th Cir.1980); *see also United States v. Haynes,* 216 F.3d 789, 797 (9th Cir.2000); *Coplon,* 191 F.2d at 757. "[A] defendant's remedy for prosecutorial misconduct in the pre-indictment stage is provided in the due process protections of the Fifth Amendment." *See United States v. Marshank,* 777 F.Supp. 1507, 1518 (N.D.Cal.1991).

[29] "[A] claim of outrageous government conduct premised upon deliberate intrusion into the attorney-client relationship will be cognizable where the defendant can point to *actual and substantial prejudice.*" *Haynes,* 216 F.3d at 797 (quoting *United States v. Voigt,* 89 F.3d 1050, 1067 (3rd Cir.1996)) (emphasis added). The defendant bears both the burden of production and persuasion on his outrageousness claim. *Voigt,* 89 F.3d at 1070.

[30] **[31]** Defendant cannot meet the heavy burden of a Fifth Amendment dismissal, which requires outrageous conduct and prejudice. "The defense of outrageous government conduct is limited to extreme cases in which the government's conduct violates fundamental fairness and is shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment." *United States v. Fernandez,* 388 F.3d 1199, 1238 (9th Cir.2004) (affirming denial of dismissal in a case with a dirty informant), *modified on other grounds,* 425 F.3d 1248 (9th Cir.2005)). Extreme cases in which the due process clause might merit dismissal are limited to entrapment scenarios in which the government engineers the crime and cases involving physical or psychological coercion of a defendant. *Id.* Indeed, in a case alleging misconduct for the delayed production of impeachment material, dismissal under the due process clause is inappropriate where, as here, "there is no evidence the government deliberatively withheld [material], lied about the material or failed to "own up" to the mistake once it was discovered." *United States v. Lopez,* 577 F.3d 1053, 1069 (9th Cir.2009). Defendant cites to no cases of alleged improper electronic

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

surveillance minimization that merits a dismissal on due process grounds. While this Court has concerns over the government's conduct in this case, it does not rise to the level of outrageousness.

***1131** **[32]** Moreover, defendant cannot meet his burden under his cited attorney-client interference cases. Defendant is correct in his enunciation of the standard for an intrusion into the attorney-client privilege in the due process context: 1) awareness of an ongoing attorney-client relationship; 2) *deliberate intrusion* into the relationship; and 3) prejudice. E.g., *United States v. Stringer,* 535 F.3d 929, 942 (9th Cir.2008) (denying defendant's claim). Defendant's efforts fail by the second prong because deliberate intrusion is inapplicable in the setting of a taint team where the prosecution cannot access the material. "Most cases finding deliberate intrusion into the attorney-client relationship involve government informants who somehow penetrate the attorney-client relationship to obtain confidential or privileged information, *and then feed that information to the government.*" *Id.* (emphasis added). The taint team did not feed any information back in the instant case, and as a result there was, simply put, no intrusion as to the Baier taint calls. The Court should therefore analyze the due process claim through the standard two-part test: outrageous conduct; and prejudice.

[33] **[34]** Nor has the defendant demonstrated substantial prejudice from the government's actions during the electronic surveillance. Prejudice in this context means actual prejudice, not some vague notion of unfairness. E.g., *United States v. Corona–Verbera,* 509 F.3d 1105, 1112 (9th Cir.2007) (holding that dismissal for preindictment delay requires the defendant to establish that lost witnesses or evidence have meaningfully impaired his ability to defend himself); *Isgro,* 974 F.2d at 1098 (holding that dismissal for grand jury interference requires the defendant to prove that the interference substantially influenced the grand jury's decision to indict). Prior to the interceptions in the instant case, agents had already traced the insurance money into the campaign, and a subsequent warrant of Patriot Insurance was likely. The Baier calls remained with the taint team, and the Willard call remained with Agent Dillender. Agent Tjernagel heard a portion of the last non-taint Baier call (Session 2032) and a portion of the first identified Kramer call (Session 3084), without any recollection of the substance or use in the investigation. Furthermore, any prejudice analysis must be commensurate with the putative misconduct. Even to the extent Renzi can articulate some prejudice from the Kramer call, that prejudice must be weighed against the specific government actions that resulted in the interception, and those actions reflect a careful, quick and reasoned analysis by the monitoring agents once they identified Kramer as an attorney. The government's protective measures protected Renzi's privilege and foreclose any prejudice.

The defendant's contention, that because the government deemed two of the Baier calls to be among the "most pertinent" in the case, that they clearly had some influence on its investigation, strategy and charging decisions, is mere speculation. Moreover, the testimony of the witnesses demonstrates that any influence these calls had on the investigation or prosecution was insubstantial.

Renzi further contends that he was prejudiced by the use of calls as evidence, because prosecutors "plainly believed [Call 1982] was inculpatory, as they considered using it to obtain a search warrant, and it clearly influenced their investigation and overall assessment of the case." This use, however, does not rise the level of actual and *substantial* prejudice required to demonstrate a due process violation. *Haynes,* 216 F.3d at 797.

Renzi contends that several calls containing core defense strategy were "either transcribed, accessed by monitoring ***1132** agents, contextually minimized, or produced to Congressman Renzi's co-defendants." Renzi refers to Calls 1982, 1997, 2067, 3084, 3162, 3367, 3522, and 3839. As previously found, however, of these calls the prosecution team only had access to Calls 1982, 1997, and 3084. Of these, Agent Odom credibly testified that the government made no use of any information derived from Calls 1982, 1997 and 3084 in the insurance investigation, the search warrant or any other part of the investigation. Call 3084 was never transcribed, and an hour after the call was monitored, Agent Odom instructed Agent Taylor to delete the synopses. Agent Tjernagel had no substantive recollection of the contents of Call 3084, and he never shared any information from the call with Agents Odom or Burris.

As previously discussed, this Court finds that Call 2997 did not alter the nature and focus of the investigation. Agent Odom credibly testified that the insurance investigation was active before the wiretap, but

that, because of the covert nature of the investigation, he did not actively pursue potential witnesses at that time.

C. The Court's Supervisory Powers

[35] [36] [37] Even where no due process violation exists, a federal court may dismiss an indictment pursuant to its supervisory powers. *U.S. v. Ross,* 372 F.3d 1097, 1107 (9th Cir.2004). Reckless government conduct may be remedied under the Court's supervisory powers even when prosecutors act in good faith. *See United States v. Chapman,* 524 F.3d 1073, 1084 (9th Cir.2008); *Barrera–Moreno,* 951 F.2d at 1091. While "accidental or merely negligent governmental conduct is insufficient to establish flagrant misbehavior," a finding of "willful misconduct" in the sense of intentionality is not required. *Chapman,* 524 F.3d at 1085. Rather, "reckless disregard" satisfies the standard for sanctions, including dismissal of an indictment. *Id.* When the government acts with reckless disregard for a defendant's rights, dismissal is appropriate if the defendant would otherwise suffer " 'substantial prejudice' and if 'no lesser remedial action is available.' " *Id.* (internal citation omitted); *Marshank,* 777 F.Supp. at 1519, 1521–22 (dismissal is appropriate where "continuing prejudice from the constitutional violation cannot be remedied by suppression of the evidence").

As discussed above, dismissal is not appropriate because defendant has not, and will not, suffer *substantial* prejudice. The appropriate remedial action in this case is suppression of the privileged calls. Disqualification of the prosecutorial and investigative teams is not warranted. Furthermore, Agent Odom's testimony establishes there are no fruits from the privileged calls that would require further suppression. The prosecution team had access to, at most, portions of six calls at issue. No information from those calls appear in witness interviews or grand jury sessions. The government was already actively investigating the insurance fraud aspects of the case.

IV. RECOMMENDATION

Accordingly, the Magistrate Judge recommends that the District Judge enter an order **GRANTING IN PART AND DENYING PART** Motion to Dismiss the Indictment Based On The Government's Unlawful Recording Of Privileged Counsel Calls (Doc. No. 87).

The Magistrate Judge recommends, for the reasons stated above, that Defendant Renzi's motion to dismiss the indictment be **DENIED.**

The Magistrate Judge further recommends that Defendant Renzi's alternative request, to suppress all evidence obtained from the wiretap, be **GRANTED.**

***1133** Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties have fourteen (14) days from the date of this Report and Recommendation to file written objections to these findings and recommendations with the District Court. **Any objections filed should be filed as CR 08–00212–TUC–DCB.**

DATED this 11th day of March, 2010.

All Citations

722 F.Supp.2d 1100

Footnotes

1 This oversight may have occurred because call 2032 was classified as nonpertinent, whereas, the other three Baier calls intercepted that day were classified as pertinent.

2 Defendant Renzi's reliance on *In re Grand Jury Subpoenas,* another Sixth Circuit case, is misplaced on dicta which simply repeats the government's argument in that case for using a taint team, which was that the taint team would have an interest in properly screening attorney-client privileged material because leaking privileged material to the investigative team raises the specter of a *Kastigar*-type hearing.

1 "Doc. No." refers to documents in this Court's file.

2 The presentation of putatively privileged calls took place in court, through the use of a government taint attorney. These portions of the evidentiary hearing have been transcribed and sealed. The Magistrate Judge will not discuss the specific content of these calls in this Report and Recommendation, but has considered them in full in making these findings and recommendations.

3 Section 2518(8)(a) requires prompt sealing of the recording of any taped conversation, and that the recordings be made available to the issuing judge for further direction regarding custody of the tapes. The presence of a seal provided for by

section 2518(8)(a) is a prerequisite for the use or disclosure of the contents of the intercept. There is no evidence that the government made the recordings available to the Supervising Court, nor did the government seal any of the recordings. Although the Defendant has argued that the recordings were never sealed or turned over to the Supervising Court, this statutory provision was not raised by the Defendant as separate grounds for suppression. This provision, however, in addition to the Department of Justice's Electronic Surveillance Manual's requirements of the same, provides additional support for this Court's conclusion that it was unreasonable to not seal the recordings, especially those to which the attorney-client privilege attached.

4 To clarify, the government has not contested the fact that calls between Renzi and Willard, Kramer, Woods or Miller are privileged. To the extent the government contends that the Baier calls, or some of the Baier calls, were not privileged, the Magistrate Judge rejects this contention, as discussed in the factual findings, Section II.B., above.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT B

1

2 UNITED STATES DISTRICT COURT

3 DISTRICT OF ARIZONA

4 United States of America,)
)
5 Plaintiff,) CR 08-00212-TUC-DCB
)
6 vs.)
) Tucson, Arizona
7 Richard G. Renzi,) October 26, 2015
James W. Sandlin,) 1:33 p.m.
8 Defendant.)

9

10

11 OFFICIAL TRANSCRIPT
MOTION HEARING

12

13

14 BEFORE THE HONORABLE DAVID C. BURY
UNITED STATES DISTRICT JUDGE
15 405 W. CONGRESS
TUCSON, ARIZONA 85701

16

17

18

19

20

Cindy J. Shearman, RDR, CRR
21 405 W. Congress, Suite 3500
Tucson, AZ 85701
22 520-205-4286

23

24 Proceedings Reported by Realtime Court Reporter
Transcript prepared by computer-aided transcription

25

1 A P P E A R A N C E S

2

For the Plaintiff:

3

Gary M. Restaino
4 James Knapp
Assistant US Attorneys
5 Sean Mulryne, Department of Justice
40 N. Central Avenue, Suite 1200
6 Phoenix, AZ 85004

7

For Defendant Renzi:

8

Kelly B. Kramer
9 Mayer Brown, LLP
1999 K Street, NW
10 Washington, DC 20006

11 Chris Niewoehner
Steptoe & Johnson, LLP
12 115 S. LaSalle Street, Suite 3100
Chicago, IL 60603

13

14 For Defendant Sandlin:

15 Charles Quigg
Thomas J. Tynan
16 McDermott Will & Emery, LLP
The McDermott Building
17 500 North Capitol Street, NW
Washington, DC 20001-1531

18

19

20

21

22

23

24

25

1 I N D E X

2 WITNESS PAGE

3 PHILIP ARIES

4 Direct examination by Mr. Restaino	6
Cross-examination by Mr. Kramer	20
5 Redirect examination by Mr. Restaino	36

6 DANIEL ODOM

7 Direct Examination by Mr. Restaino	38
Cross-Examination by Mr. Niewoehner	54
8 Redirect Examination by Mr. Restaino	80

9 JONATHAN M. TJERNAGEL

10 Direct Examination by Mr. Mulryne	83
Cross-Examination by Mr. Kramer	96
11 Redirect Examination by Mr. Mulryne	108

12 JANET L. BURRIS

13 Direct Examination by Mr. Kramer	109
Cross-examination by Mr. Knapp	112

14

15

16 E X H I B I T S

17 IDENTIFIED	OFFERED	ADMITTED
18 Joint Exhibits 100-150	19	20
218	76	76

19

20

21

22

23

24

25

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

2 (Call to order of court, 1:33 p.m.)

3 CLERK: Criminal matter 08-212-DCB, United States of

4 America versus Richard G. Renzi and James W. Sandlin, on for a

5 motion hearing.

6 Counsel, please state your appearances for the record.

7 MR. RESTAINO: Good afternoon, Your Honor. Gary

8 Restaino, Sean Mulryne, and Jim Knapp for the United States.

9 Seated with us at counsel table is Special Agent Adam Radtke

10 with the FBI.

11 MR. NIEWOEHNER: Good afternoon, Your Honor. Chris

12 Niewoehner and Kelly Kramer on behalf of Defendant Rick Renzi.

13 MR. TYNAN: Good afternoon, Your Honor. Tom Tynan and

14 my colleague, Charlie Quigg, from McDermott Will & Emery on

15 behalf of Mr. James Sandlin.

16 THE COURT: What happened to what's his name?

17 MR. KRAMER: Mr. Garcia?

18 THE COURT: Yeah, yeah, yeah. Is he okay?

19 MR. KRAMER: He is fine.

20 THE COURT: Oh, all right. Well, this is the

21 defendants' motion.

22 Oh, yeah, I should acknowledge that Mr. Renzi's on the

23 telephone. Can you hear okay?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right. The defendants' motion, I've

1 got a couple of questions, but that should wait, I think, until
2 I take some testimony. That testimony, in my view, should be
3 put on by the government. It's easier for me anyway, and if,
4 Mr. Niewoehner and Mr. Kramer, if you don't have any problem
5 with that, why that's the way I'll proceed, and then deal with
6 my questions, primarily which relate to -- since I think I've
7 got a pretty good idea of what the testimony will be, the
8 question really is what to do with it. So that's something
9 that the lawyers can address.
10 So is that, Mr. Restaino, were you anticipating that as
11 well, that you would, I think you guys --
12 MR. RESTAINO: It's what we've requested, Your Honor.
13 THE COURT: Right. So what testimony would you
14 propose to put on?
15 MR. RESTAINO: Your Honor, if you are allowing the
16 government to tender the witnesses, we would put on Mr. Aries,
17 the civilian witness and confidential human source; we would
18 put on Special Agent Dan Odom; and we would put on Special
19 Agent Jonathan Tjernagel. That would be the extent of the
20 testimony we would put on. We think that the defense might
21 want a small piece of information with respect to retired agent
22 Jan Burris as well to supplement the stipulation the parties
23 entered into.
24 THE COURT: All right. Well, we've got this afternoon
25 to hear this case, and I'm not trying this case over again.

1 And I think I've got a pretty good idea, at least, as to what
2 the witnesses are going to say. So I didn't think we needed
3 much more than this afternoon. But I want some time so that I
4 can talk to the lawyers for a few minutes about the effect, the
5 impact, the import of what that testimony is.
6 So I see our friends back there, not appearing, hmm,
7 from --
8 MR. RESTAINO: David Harbach, Your Honor, is on detail
9 to the FBI so he's not part of our group today.
10 THE COURT: All right. Mr. Restaino, why don't you
11 proceed.
12 MR. RESTAINO: Thank you, Your Honor, the government
13 calls Philip Aries.
14 CLERK: If you could please come step into the witness
15 stand and remain standing to be sworn.
16 PHILIP ARIES, GOVERNMENT WITNESS, WAS SWORN.
17 CLERK: You may have a seat. Please speak directly
18 into the microphone. State your full name and spelling of your
19 last name.
20 THE WITNESS: Philip Aries, A-r-i-e-s.
21 DIRECT EXAMINATION
22 BY MR. RESTAINO:
23 Q. Good afternoon, Mr. Aries.
24 A. Good afternoon.
25 Q. Did you have the opportunity to assist the Federal Bureau

1 of Investigation in its investigation into Rick Renzi and Jim
2 Sandlin?
3 A. Yes.
4 Q. Let's talk about your first meeting with the FBI agents on
5 this case. Do you remember where that was?
6 A. It was in Las Vegas.
7 Q. And approximately September of 2006?
8 A. I believe so.
9 Q. What were you doing in Las Vegas?
10 A. I was coming there to meet with a business associate and
11 was not aware of the fact that I would be meeting with the FBI.
12 Q. Whom did you meet with from the FBI?
13 A. Agent Odom and Agent Burris.
14 Q. Can you describe that meeting?
15 A. Well, I was at first surprised at the fact that we were
16 having a meeting 'cause that wasn't what I thought the day was
17 going to entail. But then they started to explain to me what
18 was going on and quickly brought me up to speed. And they
19 asked me if I was willing to help.
20 Q. Did you first tell them about your dealings with Rick Renzi
21 and Jim Sandlin?
22 A. They asked me all about it, yes.
23 Q. All right. And they also asked you, you said, to assist
24 the investigation. What did you say?
25 A. I said I would be happy to.

1 Q. Why did you agree to assist the investigation?
2 A. I was angry with the situation and I thought that a wrong
3 had been perpetrated against my partners and I wanted to try to
4 set it right.
5 Q. And as part of your assistance, do you remember making a
6 phone call that same day to Jim Sandlin?
7 A. I believe that's correct.
8 Q. So what was your motivation to assist the government in its
9 investigation?
10 A. I felt like I needed to do everything that was asked of me
11 in behalf of the partnership that had been involved in the
12 potential land exchange.
13 Q. Did your motivation ever change during the investigation?
14 A. No.
15 Q. Did you agree to assist the government because you hoped
16 you could get money from the government?
17 A. No.
18 Q. Now, you remember from time to time, Mr. Aries, that agents
19 read you information about your obligations as a source?
20 A. I do.
21 Q. There's a briefing book in front of you. Are you able to
22 turn to Exhibit 105?
23 A. I'm there.
24 Q. Let's go to the third page of Exhibit 105. I'm going to
25 read to you number four: The FBI cannot guarantee any rewards,

1 payments, or other compensation to you.
2 Do you see that?
3 A. Yes.
4 Q. Do you recollect that having been read to you from time to
5 time?
6 A. I believe once a year we did this.
7 Q. And then the follow-up as well, number five: In the event
8 that you receive any rewards, payments, or other compensation
9 from the FBI, you're liable for any taxes that may be owed.
10 Do you see that as well?
11 A. Yes.
12 Q. You also recollect that having been read to you, correct?
13 A. Correct.
14 Q. All right. So when you first heard this, what did you
15 think that meant?
16 A. Well, I understand the words that were there. I think that
17 when this was explained to me initially and then later on, I
18 never felt that it had been promised to me or guaranteed to me,
19 but I felt that there was the possibility of it. And as I --
20 to use my words, which, you know, it may have been either a
21 little selective listening or -- but I -- the way that I read
22 this and when it was read to me again recently, it was sort of
23 -- it made me feel like it was a possibility.
24 Q. Did that ever impact what you told the government about
25 your dealings with Rick Renzi and Jim Sandlin?

1 A. Absolutely not.
2 Q. Did it change your testimony in any way at the trial in
3 this matter?
4 A. No.
5 Q. Now, back in September of 2006, where were you living,
6 Mr. Aries?
7 A. In Rancho Santa Fe.
8 Q. Did you own a house?
9 A. Yes.
10 Q. Was it a big house?
11 A. Yes.
12 Q. Did you own vehicles?
13 A. Yes.
14 Q. What types of vehicles did you own?
15 A. I believe my wife drove an Escalade and I had a Lexus and a
16 diesel truck.
17 Q. What did you need the diesel truck for?
18 A. Hauling horses.
19 Q. And how many horses did you have?
20 A. Five.
21 Q. So at this time in 2006, was it important to you that you
22 thought you could receive money from the investigation?
23 A. Not at all.
24 Q. Now, after 2006, did you have a bankruptcy?
25 A. Yes.

1 Q. Did you have other financial setbacks as well after 2006?
2 A. Yes.
3 Q. And in 2013 after the trial, do you remember that you were
4 offered an opportunity to submit a restitution request?
5 A. I do.
6 Q. Did you do so?
7 A. I did not.
8 Q. Why not?
9 A. Well, there was a combination of reasons. Mostly, I was
10 exhausted by this subject and I just didn't want to think about
11 it anymore. The trial I found stressful and just didn't want
12 to -- I just didn't want to think about it anymore. Plus, I
13 also thought it would be hard to quantify what, you know, my
14 actual damages were personally. So I just decided it wasn't
15 worth the effort.
16 Q. Were you angry after the trial, Mr. Aries?
17 A. I was.
18 Q. Why is that?
19 A. I felt like it had been -- I felt like I wasn't treated
20 very nicely on the stand.
21 Q. Did you, in fact, communicate that in text messages to one
22 of the agents after the trial?
23 A. I did. I had to leave the trial to drive all the way
24 through the night to make it to my daughter's college
25 graduation, and somewhere in the wee hours of the morning I

1 texted my unhappiness.
2 Q. Now, in addition to the obligations that you said agents
3 read to you yearly or so, do you recollect any time prior to
4 the trial when any law enforcement agent referenced with you
5 the possibility of money?
6 A. There was one time that I recollect.
7 Q. And what do you recollect?
8 A. Well, there was one phone call to Congressman Renzi that
9 came at a -- on a very -- at a very challenging moment
10 personally and also the subject matter I was quite a bit less
11 comfortable with. And it was a combination of it being the
12 worst possible day that I had to make this phone call, combined
13 with the fact that the previous phone calls had all been
14 talking about things that I was very familiar with and on this
15 phone call, I was given some information that I wouldn't have
16 otherwise known, like names of companies, things like that.
17 And I just was very uncomfortable in general emotionally
18 and I was very uncomfortable talking to him with information
19 that I was learning for the first time basically at that
20 moment, that it wasn't my own information. And it made me
21 really nervous.
22 Q. Let me stop you there, Mr. Aries. Did you have an
23 opportunity to look at a transcript of a phone call between you
24 and Rick Renzi?
25 A. Yesterday I -- yesterday it was shown to me.

1 Q. So does that help refresh your recollection that this would
2 have been on or about November 10th of 2006?
3 A. Right.
4 Q. Was that a particularly stressful day for you?
5 A. Yeah. It was, like, it was a particularly hard day. I
6 took the call from the, like, a balcony of what was our
7 family's counselor's office. And at that meeting, I basically
8 -- and my personal -- what was going on in my marriage and my
9 children is sort of sprinkled through some of the documents.
10 Through other conversations people know that this was, like,
11 during the unraveling of my home.
12 And basically at that meeting that happened immediately
13 before the phone call, like, in fact, I stepped out and allowed
14 my daughter, my oldest daughter, and my wife, who was her
15 stepmother, to continue with this family counselor, and
16 basically that was the day that I had to decide if I was going
17 to stay married -- basically, at that moment it was decided
18 whether I was going to stay married or I was going to defend a
19 child who needed defending. And that happened in the moments
20 before that phone call.
21 So then the phone call came. I know exactly where I was
22 standing. I know -- this happened over a ten-year period of
23 time. That particular day -- there's a couple of days in this
24 that, because of other things that were going on, that are
25 crystal clear to me.

1 THE COURT: Excuse me a minute, Mr. Restaino.
2 Get that microphone a little closer to you if you would,
3 Mr. Aries.
4 MR. RESTAINO: Thank you, Your Honor.
5 BY MR. RESTAINO:
6 Q. Now, let's talk about that conversation. Do you have a
7 specific recollection about what Agent Odom said to you?
8 A. I mean, as clear as you can be about a conversation that's
9 eight or nine years ago but, yes.
10 Q. Sure. And so tell the Court what you recollect from that
11 conversation?
12 A. Well, as I mentioned, I was uncomfortable talking about
13 something that I was learning about right on the fly and I also
14 felt that it was information that I wouldn't have otherwise
15 known, and I was very afraid that, rather than him just sort of
16 engaging with the information, that he might ask me, like, how
17 did you know that. I was afraid -- I was uncomfortable talking
18 about something that I didn't know about. And I was
19 particularly just -- it was a difficult moment for me
20 personally.
21 Q. And what do you recollect Agent Odom saying to you?
22 A. He said to me that I'd been doing a good job; that this was
23 not the first phone call -- I mean, this hadn't been the first
24 phone call; that people who were listening to the phone calls
25 thought that they were going well. And he said that he knew

1 that this was a big deal, that making phone calls against a
2 sitting member of Congress would be stressful for anyone. And
3 he said that this is the kind of thing that, when this is all
4 over, this is the kind of thing that the agency or the
5 government gives rewards about, you know, this sort of thing.
6 And that's what I took away from it.
7 Q. Did you say anything back to Agent Odom?
8 A. No. I think he -- we just made the call.
9 Q. Did you tell him that money was important to you?
10 A. No.
11 Q. Why did you -- did that conversation -- let me rephrase
12 that.
13 So why did you go ahead and make the phone call?
14 A. Why? I made a bunch of phone calls.
15 Q. And, again, what was your purpose in doing those?
16 A. I did everything they asked me to do. I was trying to be
17 helpful.
18 Q. Now, beyond what you've described as this discussion with
19 Agent Odom in around November of 2006, was there any other time
20 prior to trial -- was there any time prior to trial when you
21 said anything to an agent about the possibility of receiving
22 money?
23 A. Prior to the trial?
24 Q. Correct.
25 A. I do not believe so.

1 Q. How about after the trial?
2 A. Yes.
3 Q. What do you recollect?
4 A. I remember after the trial saying, you know, asking when
5 is, you know, when is this evaluated? You know, when does the
6 subject of potential rewards get determined?
7 Q. And do you remember who you said that to?
8 A. Not precisely but I know that I did -- that I did do it one
9 time prior because I got some information on that call that,
10 when it was repeated to me, it wasn't the first time I'd heard
11 it. So I know that it happened one other time. And that being
12 that the subject wouldn't be addressed until the final appeal
13 was -- had been exhausted.
14 Q. Now, you were represented by a lawyer back in 2006 shortly
15 after you began to cooperate with the government, correct?
16 A. Just in the very beginning.
17 Q. Right. And you and I and your current lawyer had an
18 opportunity to talk about this yesterday, correct?
19 A. Yes.
20 Q. And you're comfortable answering some questions limited to
21 -- well, you're comfortable answering some questions about
22 this, correct?
23 A. Yes.
24 Q. All right. So for that limited period of time in 2006,
25 that was Fred Petti that represented you?

1 A. Yes.
2 Q. During the short time he represented you, did you ever tell
3 him you thought there was a possibility of a reward for your
4 assistance?
5 A. No.
6 Q. Now, after sending an email in March 2015 to the
7 government, did you talk to Fred Petti again?
8 A. Well, he called me to ask -- yes, I have.
9 Q. Okay. And that was around July of 2015?
10 A. I believe that's right.
11 Q. Okay. And what did you tell Mr. Petti at that time when he
12 was no longer your lawyer?
13 A. Well, he -- well, he told me that he didn't think that
14 there was -- you know, that in his experience, there wasn't
15 very much opportunity for a reward in these sorts of cases.
16 Q. And did you respond to him?
17 A. Yes.
18 Q. Okay. And did you tell him what your hope was?
19 A. Well, yes. I had sort of quantified it for him.
20 Q. And before I ask you what you said to him, when you said
21 you quantified it, did you ever tell your quantification to any
22 of the agents in this case?
23 A. Oh, no.
24 Q. What did you tell Mr. Petti in or around July of 2015 about
25 your quantification?

1 A. Well, I told him just for me, my personal financial
2 situation, it had nothing to do with what I thought it may or
3 may not be worth to the government, you know, in this sort of
4 instance. I just told him because he -- his experience with me
5 had been when money was much more prevalent. And I told him
6 for me personally, not that I thought that this was based in
7 anything on -- other than what would be helpful for my own
8 budget, I told him that, you know, if this could be somehow if
9 this was worth a $10,000 reward, that that would be a home run
10 for me. And that -- and that if it was worth 25,000, it would
11 be like winning the lottery. And that if it was more than
12 that, basically it was beyond my ability to even dream about,
13 that I was at a point where $25,000 would be life changing for
14 me, an influx of $25,000. But it had nothing to do with that I
15 thought it was worth $25,000 on the other side. I just said
16 that's what would solve my problems.
17 The reason being that, you know, I have two collections,
18 one to the IRS which I make monthly payments for and one for my
19 daughter's hospital bills. And if I had $25,000, I could pay
20 off the IRS and I could pay off my daughter's hospital bills,
21 and that's my world. And it had nothing to do with -- with
22 that -- that quantity, those dollar amounts were ever in
23 anything other than on my budget, my personal budget. So I
24 just was -- I just sort of let him know what my -- where I was
25 at financially.

1 MR. RESTAINO: Your Honor, may I just have a moment?
2 THE COURT: Sure.
3 BY MR. RESTAINO:
4 Q. Just one -- a couple more questions, Mr. Aries. You do you
5 use LinkedIn?
6 A. I do, heavily.
7 Q. Are you familiar with how LinkedIn sometimes sends out
8 invitations?
9 A. My children have received them and other family members
10 repeatedly, yes. So, yes, I've stopped sending the "You have
11 100 contacts that aren't on LinkedIn. Would you like me to be
12 invited?" So, yes, it's -- it invites you to -- it invites you
13 to connect with -- LinkedIn is like Facebook for business and
14 it invites you to become connected with people who you've
15 emailed before.
16 Q. Did you ever specifically intend to invite me to be your
17 contact on LinkedIn?
18 A. I was never -- up until yesterday, I had no idea that I
19 ever had invited you.
20 Q. Thank you, Mr. Aries.
21 MR. RESTAINO: Your Honor, I have no further
22 questions.
23 THE COURT: Counsel?
24 MR. KRAMER: Judge, just as a housekeeping matter, the
25 joint exhibits we've agreed should be admitted for the purpose

1 of this hearing. You should have a notebook up there for
2 yourself.
3 THE COURT: I do. These are to be admitted. And,
4 Martha, do you have a copy with the numbers?
5 CLERK: I do not.
6 THE COURT: They're admitted.
7 MR. KRAMER: Great.
8 CROSS-EXAMINATION
9 BY MR. KRAMER:
10 Q. Mr. Aries, I'm Kelly Kramer. I represent Mr. Renzi. We've
11 obviously had a chance to talk before, correct?
12 A. Correct.
13 Q. I'd like you to look real quickly at Exhibit 137 in the
14 notebook in front of you.
15 A. I'm there.
16 Q. And you recognize this as the email that you sent to
17 Mr. Restaino in March of 2015, correct?
18 A. 107?
19 Q. 1-3-7, 137.
20 A. Yes, that's my email.
21 Q. Okay. And in this email you were trying to be accurate
22 with everything you were telling Mr. Restaino, correct?
23 A. Yes.
24 Q. And in the email on the second line there it references
25 that the possible reward for your help was mentioned to you on

1 numerous occasions, right?
2 A. Yes.
3 Q. Okay. And that was true when you wrote it, right?
4 A. Yes.
5 Q. Okay. Let's take a look real quickly at Exhibit 138, which
6 is the next exhibit. Okay. Now, you recall that at some point
7 in April of 2015 Agent Radtke came to visit you, correct?
8 A. Yes.
9 Q. Okay. Now, this is a -- I'll represent to you, I don't
10 think you've seen this before. This is a write up that
11 Mr. Radtke did after that meeting with you. I just have a
12 couple of questions for you.
13 A. I've never seen this.
14 Q. I understand that. That's why I'm telling you what it is.
15 Now, you see there in the first paragraph, it talks
16 about -- it talks generally about what you told Mr. Radtke,
17 correct?
18 A. I'm reading it for the first time.
19 Q. Okay. But is this consistent with your recollection of
20 your discussion with Mr. Radke?
21 A. Correct.
22 Q. Okay. I want to focus in on the sentence that begins with
23 the third line where it's talking about the conversations and
24 it says that the conversations were in addition to the CHS
25 admonishments given to you periodically that state that the FBI

1 doesn't guarantee rewards, correct?
2 A. That's what it says here.
3 Q. Okay. And is that consistent with your recollection that
4 you had more than one conversation with agents about potential
5 rewards that were beyond the admonishments?
6 A. No. I've had an opportunity to think quite a bit about
7 this since -- recently. And the only time that it was
8 specifically mentioned outside of the admonishments was the one
9 phone call that I referred to that happened the day of our
10 family counselor's meeting.
11 I believe that that -- and when the admonishment was read
12 to me recently, when it was read to me yesterday, I believe
13 that I was sort of consistent in hearing the optimistic sides
14 of things and perhaps hearing what I wanted to hear or
15 selective listening or being overly optimistic, which is a
16 characteristic of mine, very longstanding. And so even when it
17 was read to me yesterday, the admonishment, I came away with it
18 with: Oh, there's a possibility. You know, it's like, we
19 don't promise you a reward, but if we do give you a reward, you
20 have to pay the taxes on it.
21 Q. Okay.
22 A. And it --
23 Q. Let me just try to focus it because we don't have that much
24 time and there's a few points I'd like to try to get to.
25 A. I'm sorry.

1 Q. No, I understand. This is a stressful thing.
2 So going back to these conversations, you testified with
3 Mr. Restaino about a single conversation with Agent Odom back
4 in 2006 that sticks out in your memory, right?
5 A. What was the last sentence you said?
6 Q. That sticks out in your memory.
7 A. Yes, very much so.
8 Q. And in that conversation he just, as you testified, he told
9 you that you're doing a good job on the calls and that's the
10 kind of thing that can get you a reward, right?
11 A. Yeah.
12 Q. Okay. And I think what I'm hearing you say is that that
13 conversation, in combination with the admonishments, made you
14 think that there's a possibility you were going to get paid in
15 this case, right?
16 A. There was a chance I would receive a reward at the end,
17 yes.
18 Q. Okay. And again, clear, no promise, right?
19 A. Never.
20 Q. And no guarantee, right?
21 A. Yes.
22 Q. Okay. Let's take a look at Exhibit 141. And that middle
23 email there, do you have it in front of you?
24 A. Yes, I do.
25 Q. This is the email you sent to Mr. Restaino in July of 2015,

1 correct?
2 A. Yes.
3 Q. Okay. And it references there that nothing more would
4 happen until the appeal process was over, correct?
5 A. Yes.
6 Q. Okay. And I take it you'd been told by Agent Radtke that
7 the FBI wouldn't make a decision on whether or not you get a
8 reward until after all the appeals were completed?
9 A. Yes.
10 Q. Okay. And is that your understanding of agents on other
11 occasions told you that?
12 A. One other time it was -- I think I'd asked about it one
13 other time after the trial and I was given the same
14 explanation.
15 Q. Okay. And do you remember who you spoke to then?
16 A. I don't. And I don't remember if it was a phone call or
17 what it was. But when he told me this, I know that it was the
18 second time I had heard it.
19 Q. Okay. So shortly after -- was it close in time to the
20 trial?
21 A. After -- after the conviction.
22 Q. Okay. So not right after your testimony, but after the
23 conviction had been reported?
24 A. I believe so. I mean, the exact time when it was is not as
25 clear to me but I know that when I heard that, about that it

1 wouldn't be addressed until after the appeal process had been
2 exhausted, I know that that was not the first time I had heard
3 it.
4 Q. Okay. So as a result of all the interactions with the
5 agents, I take it you hoped you might receive compensation
6 after Mr. Renzi was convicted, right?
7 A. I thought that there was the possibility of it.
8 Q. Okay. Did you think you could get a reward if Mr. Renzi
9 was acquitted?
10 A. I don't think I thought about it, you know, in those terms
11 prior to you asking this question.
12 Q. Okay. Let me ask you a slightly different question. Did
13 you think that you could have gotten a bigger reward if
14 Mr. Renzi was convicted?
15 A. I was just under the -- I had the impression that if there
16 was rewards, they would be allocated based on some
17 prioritization and that I would be, you know, in the
18 discussion. That's all I thought.
19 Q. Okay. And did you think in terms of priority that you'd
20 have a better shot for a reward if there was actually a
21 conviction?
22 A. I didn't think of it in those terms.
23 Q. Okay. You didn't ask for money, I take it, from your
24 testimony until after the trial; is that right?
25 A. I just asked when the subject of the rewards was going to

1 be addressed.
2 Q. Okay. But in the emails, it talks about is there still a
3 possibility that I'll get a reward, correct?
4 A. Correct.
5 Q. Okay. And that's, in fact, what you were doing, you were
6 asking for a reward, correct?
7 A. Correct. Well, I asked if there were going to be any.
8 Q. Well, whether there was going to be any and in particular,
9 if there were, if you would potentially be receiving one,
10 right?
11 A. Yes.
12 Q. And, in fact, when you met with Agent Radtke, it looks like
13 from the discussions you had with him from what you were
14 explaining to him, you thought you deserved a reward, right?
15 A. I hoped I did.
16 Q. Well, in fact, that's what you told him, right?
17 A. I thought that if there were rewards being given, that I
18 would deserve one.
19 Q. Okay. Let me switch to a slightly different topic.
20 Mr. Restaino asked you about your first meeting with the FBI.
21 Do you remember that?
22 A. Yes, I do.
23 Q. Okay. And at that first meeting with the FBI, I take it
24 you had a substantive discussion with them before you had any
25 discussion about perhaps cooperating?

1 A. I believe that's correct.
2 Q. And they asked you a bunch of questions, you gave them a
3 bunch of information, right?
4 A. Yes.
5 Q. Okay. So at that meeting, which was a few months after the
6 whole event, do you recall what you told them about how you
7 learned about the Sandlin property?
8 A. Well, I know how I -- yes.
9 Q. Okay. And do you recall telling them that you first heard
10 about the property from Joanne Keene?
11 A. Well, we've had this discussion before.
12 Q. We've had this conversation generally. And let's back up
13 'cause I don't want to waste the judge's time; he's heard a lot
14 of this. But there's a piece here that I think is important to
15 understand.
16 When we had this discussion last time, we were talking
17 about what actually happened, right? I'm sorry. You just have
18 to answer out loud.
19 A. Yes.
20 Q. And when we talked about what actually happened, I think we
21 agreed that eventually -- eventually we agreed that you first
22 heard about the property from Joanne Keene, right?
23 A. Yes.
24 Q. And I think you described her as an extension of Mr. Renzi,
25 or language to that effect, right?

1 A. Like a proxy.
2 Q. A proxy, that's fine. So at that -- so factually we all
3 know, you heard about the property from Ms. Keene, and I think
4 that that's not in dispute today, correct?
5 A. Correct.
6 Q. Okay. So what I'm getting at now is do you recall what you
7 told the FBI the very first time you spoke with them?
8 A. Well, the -- I do not recall the distinction -- making the
9 distinction because in my recollection that -- of the
10 conversation from Joanne Keene was she always referred to him
11 as "my boss".
12 Q. But hold on because I think we might be getting confused
13 here. I'm getting specifically, do you recollect what you told
14 the FBI that day?
15 A. Well, that's what I'm getting at --
16 Q. Okay.
17 A. -- is that she would deliver messages, "my boss says this",
18 "my boss says that".
19 Q. Uh-huh.
20 A. And I accepted the fact that if she called up and said --
21 prefaced it with, "my boss told me to tell you this" --
22 Q. Uh-huh.
23 A. -- in my mind, I treated it the same as if his words -- his
24 voice had been on the phone.
25 Q. Okay. Okay. And we're having an argument that we don't

1 actually need to have.
2 A. No, but that's how I thought about it.
3 Q. I understand. What I'm trying to make sure is that when
4 you spoke to the FBI, didn't you, in fact, tell them that you
5 had a pre -- you had a discussion with Joanne, right, in
6 advance of the meeting with Renzi, right? That's -- you told
7 them that, right? Sorry. For the record you have to answer.
8 A. Pardon?
9 Q. For the record you have to answer.
10 A. Yes.
11 Q. Okay. And in that you told the FBI, let's be very clear
12 about this, that Joanne Keene told you that she'd spoken with
13 Renzi, that Renzi loved what you were doing, but that Renzi
14 wanted to try to help the base and that the Sandlin property
15 was the way to do it.
16 A. Words to that effect, yes.
17 Q. Yes. Again, it's a long time ago but the substance is is
18 that you told the FBI from the very beginning that that's what
19 Joanne Keene told you in the first instance, right?
20 A. Correct.
21 Q. Now, just very quickly, we fast forward to July 25, 2007.
22 You testified before the grand jury, right?
23 A. Yes.
24 Q. Okay. And --
25 MR. RESTAINO: Your Honor, I'd object to this inquiry.

1 This is going to be established by the record. He doesn't need
2 to go into this with Mr. Aries.
3 THE COURT: I'll overrule it. Go ahead.
4 MR. KRAMER: Okay.
5 BY MR. KRAMER:
6 Q. And at that grand jury testimony, you were asked whether
7 you knew going into that meeting that the Sandlin property
8 would be discussed.
9 Do you recall that?
10 A. Not as well. I don't recall that.
11 Q. Let me just read you from page 17, the interchange that you
12 had. You were asked -- you were asked at the meeting whether
13 Mr. Renzi was interested in some other property.
14 And your answer was: Yes. And Joanne had told me as we
15 were setting up the meeting that he was interested in our
16 proposal and may want to expand it.
17 You were then asked: You didn't know going in what that
18 expansion might mean?
19 And you answered: No.
20 A. That's correct. I knew that he wanted -- that's exactly
21 correct. I knew that he wanted to expand it beyond -- what we
22 were working on was related to the Petrified Forest.
23 Q. No, I understand that. But what I'm getting at is that
24 when you were talking about that expansion, you then went on to
25 say that you hadn't known about the Sandlin property.

1 A. Correct.
2 Q. Okay. And so the expansion, in fact, when you talked to
3 Joanne Keene in the first instance, you knew from even before
4 you met with them that the expansion could include the Sandlin
5 property, correct?
6 A. I didn't know the details of the expansion.
7 Q. Okay.
8 A. I knew that he wanted to include it -- he wanted to expand
9 what we were doing so that it would be helpful to Fort
10 Huachuca.
11 Q. Okay. And, in fact, you knew also about the Sandlin
12 property, right, because that's what we just talked about?
13 A. No, I believe that she -- I would need some help with the
14 dates here, but I believe that the first call that I made to
15 Sandlin was the next -- I believe it was the next day but I
16 don't recall the dates as -- you know.
17 Q. Mr. Aries, look, I'll represent to you that the phone
18 records reflect that the call was before the meeting but I
19 think it's probably neither here nor there and we can move on.
20 You testified also at trial, correct?
21 A. Yes.
22 Q. Okay. And at trial you testified basically in a way that
23 was consistent with your grand jury testimony, right?
24 A. That's my memory of it.
25 Q. You said that when you went into the meeting, that you

1 hadn't heard about the Sandlin property, correct?
2 A. It is my recollection that the call to Sandlin had come
3 directly after the meeting. It could have happened the day
4 before but it was in the -- in that exact window of time.
5 Q. And, Mr. Aries, I don't want to belabor the point because
6 the judge knows the record and I don't think we need to get
7 into sort of a retrial of the case.
8 But just so that the record's accurate here, you testified
9 under questions from the government you were asked: Did you
10 know about the Sandlin property going into that meeting?
11 And your answer was: No.
12 And you were asked: Did you know Jim Sandlin prior to
13 going to that meeting?
14 And your answer was: No.
15 And as we just talked about a second ago, the very first
16 time you talked to the FBI you told them that Joanne Keene had
17 raised with you the possibility of including the Sandlin
18 property, right?
19 A. Yes.
20 Q. Okay. And that was before you ever met Rick Renzi,
21 correct?
22 A. Well, I honestly do not recollect the date of the meeting
23 in Flagstaff with Renzi and the date of the first call with
24 Sandlin but they were in the immediate same time period. And I
25 know that I was provided Sandlin's phone number by Joanne

1 Keene.
2 Q. Okay. And, again, the record is what the record is. The
3 Court knows the dates so we'll move past that. And I don't
4 mean to hurry it along, but it's just that we have limited time
5 this afternoon.
6 A. I don't want you to think that I -- it's such a narrow
7 period of time as to, like, if a call happened before or after
8 the meeting, that part is not crystal clear to me.
9 Q. I understand. And that's fine and we can talk about that
10 with the judge afterwards in terms of what it means. And let's
11 switch topics.
12 After your initial meeting with the FBI, I take it you
13 agreed to cooperate, correct?
14 A. Correct.
15 Q. Okay. And, in fact, a few days later they read you the
16 admonishments for the first time, the FBI admonishments about
17 not guaranteeing rewards but you have to pay taxes if you get
18 one, right?
19 A. I believe I was read the admonishments the first day.
20 Q. Okay. But I assume that the date of the forms would
21 control and you don't have a specific recollection of that from
22 nine years ago, right?
23 A. I sort of recall them reading it to me in that house.
24 Q. Okay. Fair enough. Again, after --
25 A. I believe they did.

1 Q. After the initial round of questioning, correct?
2 A. Correct.
3 Q. Okay. Now, you agreed to cooperate with the FBI either at
4 that meeting or right afterwards, right?
5 A. Yes.
6 Q. Okay. And, in fact, you started making some phone calls,
7 right?
8 A. Yes.
9 Q. Okay. You weren't worried about your own criminal
10 liability, correct?
11 A. No.
12 Q. You thought you and your partners were victims; you didn't
13 think that you had done anything wrong?
14 A. Correct.
15 Q. And it sounds like and, in fact, in terms of the timeline
16 here, most of the calls that you recorded were in the fall of
17 2006, maybe a couple in early 2007, is that correct in your
18 mind?
19 A. Yes.
20 Q. Okay. So between the time of that first meeting we have
21 the discussion about what Joanne Keene had told you about the
22 Sandlin property and the time you go into the grand jury,
23 that's when all the discussions took place about the
24 admonishments and the stressful phone call where Mr. Odom told
25 you that you could receive money for making recorded phone

1 calls like that, correct?
2 A. Well, the admonishments were done annually the whole --
3 Q. Understood. But just so the timeline is very clear, you
4 had your initial discussion with the FBI. Either that day or
5 the few days later you got the admonishments. Shortly
6 thereafter you had the conversation with Mr. Odom. And you're
7 not in the grand jury until 2007, correct?
8 A. No, not correct.
9 Q. Okay. How -- let's go over the order one more time then.
10 A. Well, the conversation, are you talking about the
11 conversation with Mr. Odom I was referring to that happened --
12 Q. In November of 2006.
13 A. Okay. Well, there's -- it's --
14 Q. Let's just go over the dates. September 28, 2006, is your
15 initial meeting with the FBI, right?
16 A. Okay.
17 Q. Okay. Admonishments shortly after that at the end of that
18 meeting or a few days later, correct?
19 A. Okay.
20 Q. November 2006 is when you have the conversation that you've
21 described where Mr. Odom told you you could receive a reward,
22 correct?
23 A. I think it was actually, yeah, mid-November, I think that's
24 right.
25 Q. Okay. And July 2007 is when you go into the grand jury,

1 correct?
2 A. Okay.
3 Q. And just to be clear about this, you were pleased that
4 Renzi's conviction was affirmed, right?
5 A. I was pleased that it was over. I wouldn't say that
6 pleased was -- I was relieved that it was over.
7 Q. Okay. Relieved. And you never wanted to create an issue
8 with the conviction by raising this potential for a reward,
9 correct?
10 A. I thought they were separate subjects.
11 Q. Separate subjects, okay.
12 MR. KRAMER: Judge, if I could just have one minute?
13 THE COURT: Sure.
14 MR. KRAMER: Thank you, Mr. Aries.
15 THE COURT: Any redirect, Mr. Restaino?
16 MR. RESTAINO: Briefly, Your Honor, yes.
17 REDIRECT EXAMINATION
18 BY MR. RESTAINO:
19 Q. Mr. Aries, you spoke with Mr. Kramer about your grand jury
20 testimony in this case.
21 Do you recollect that?
22 A. Just right now?
23 Q. Yeah.
24 A. Yes.
25 Q. During your testimony in the grand jury, did you ever try

1 to change your recollection to match what you thought agents
2 wanted you to say?
3 A. No.
4 Q. And let me ask you about the admonishments again that have
5 been discussed. Do you think that you may have heard the
6 yearly admonishments differently after the conversation you
7 recollect with Agent Odom in November 2006?
8 A. That would be rather consistent with my personality, yes.
9 Q. And just give us a little bit more on that. Why would that
10 be consistent with your personality?
11 A. Well, because I'm -- I tend to be a wishful thinker in all
12 things. My background is real estate sales, and you have to be
13 sort of a dreamer to be in that business. And if there's -- if
14 it's not dead, there's a chance it's going to happen. And I --
15 you know, I -- I had the impression that there was a chance
16 that -- and when it was read to me and when you read it, when I
17 heard it again yesterday, it was sort of catching myself, you
18 know, interpreting it.
19 Q. Thank you, Mr. Aries.
20 MR. RESTAINO: Your Honor, I have no further questions for
21 the witness. May he be excused?
22 THE COURT: Yes, you can step down, Mr. Aries. Thank
23 you.
24 THE WITNESS: I'm done?
25 MR. RESTAINO: Your Honor, the government calls

1 Supervisory Agent Dan Odom next.
2 MR. CARRILLO: Judge, Michael Carrillo. I'm the
3 attorney for Mr. Aries. I didn't know if you wanted to make
4 that clear or not.
5 THE COURT: I forgot to make that --
6 MR. CARRILLO: Well, for the purposes of the record, I
7 was present in the hearing.
8 THE COURT: All right. Thank you.
9 DANIEL E. ODOM, GOVERNMENT WITNESS, WAS SWORN.
10 CLERK: You may have a seat. Please speak directly
11 into the microphone. State your full name and the spelling of
12 your last name.
13 THE WITNESS: Daniel E. Odom, O-d-o-m.
14 DIRECT EXAMINATION
15 BY MR. RESTAINO:
16 Q. Good afternoon, Agent Odom.
17 A. Hi.
18 Q. You're an agent with the FBI, correct?
19 A. Yes.
20 Q. What's your current posting?
21 A. I'm currently assigned to the Atlanta field office.
22 Q. What's your job out there in Atlanta now?
23 A. I'm a supervisory special agent.
24 Q. Tasked to what type of work?
25 A. Public corruptions, color of law investigation.

1 Q. And you previously did some of the same work here in
2 Tucson, correct?
3 A. Yes, sir.
4 Q. I want to start, though, by focusing on some events in
5 Atlanta in the field office there, all right?
6 A. Okay.
7 MR. RESTAINO: Your Honor, may I approach the witness
8 to tender an exhibit?
9 THE COURT: Yes.
10 BY MR. RESTAINO:
11 Q. As part of your work in the field office in Atlanta, did
12 you have occasion to work a prison corruption case?
13 A. Yes.
14 Q. And as part of your -- as part of your work on the prison
15 corruption case, did you also have interaction with another
16 federal government agency?
17 A. Yes.
18 Q. In particular the Office of Inspector General?
19 A. Yes.
20 Q. Was there a complaint issued against you by the Office of
21 Inspector General?
22 A. Yes.
23 Q. Did the FBI, your agency, ultimately close that down
24 without any adverse findings?
25 A. Correct.

1 Q. Tell us what happened.
2 A. One of my agents on my squad was conducting a -- received
3 an allegation regarding a correctional officer at the Bureau of
4 Prisons in Atlanta. She opened a case. Three and a half weeks
5 later, roughly, she subsequently arrested the guard and, once
6 she was arrested, OIG, the supervisor, Eddie Davis, had
7 contacted me and said: Hey, we had a case on that as well.
8 And we had sent a notice to your office prior -- they had
9 opened a case several months prior to us.
10 Q. Let me stop you there and ask you some questions about
11 that. Did OIG make a request for you to provide information to
12 them for the purpose of their investigation?
13 A. After we had arrested the subject and had started the
14 prosecution phase -- we had already arrested and indicted and
15 all -- they had made a request for us to provide documentation.
16 I asked my agent to contact the attorney's office, whoever the
17 AUSA was, to have them weigh in on this because now the
18 documents were no longer in our possession, they were now in
19 the US Attorney's Office possession for prosecution.
20 Apparently she contacted the line AUSA. I contacted the
21 chief division counsel, her name is Kristy Green, and asked her
22 to weigh in on the decision and/or to give me some guidance
23 here. She opined that since the matter is in a federal
24 prosecution level, that we should not give the information
25 over. And then the agent reported back to me that the line

1 AUSA did not want the documents turned over at that time.
2 So I had sent an email to the supervisor, Mr. Davis, and
3 explained, you know, the outcome, and said -- and he had
4 responded he understood or okay.
5 Several months later he recontacted me again through an
6 email, which is on the exhibits here, giving me a date of --
7 I'm going to refer to the email here if you don't mind for a
8 second.
9 Q. You're going to look at Exhibit 1 in front of you, correct?
10 A. Yes. He gave me a date of May 29th to provide
11 documentation. It should be noted also prior to this we had
12 already provided some documentation over to the OIG, the
13 charging document, you know, things of that nature that we had
14 already provided.
15 So I contacted -- the agent was not in the office at the
16 time; she was on annual leave. So I didn't know who the AUSA
17 was so I contacted an AUSA who my squad works with on several
18 matters, his name is Brent Gray, and I asked him if he had the
19 case, and he told me he did not have the case. However, he
20 would look it up and give me the status and who the AUSA who
21 had the case was. So I asked him, the AUSA that I'm referring
22 to, or Gray was a deputy chief over at the US Attorney's Office
23 so I asked for his opinion, should we give the documents over
24 at this time or not. He told me not to give the documents
25 over.

1 And so, following that direction, the direction that was
2 done before, and the chief division counsel's recommendation, I
3 sent an email to Mr. Davis prior to his due date explaining to
4 him that we were not going to provide the documents to him at
5 that time. However, I noted on the last sentence that: If you
6 feel this is unacceptable, by all means call the US Attorney's
7 Office and have them opine and let me know.
8 Q. In looking at this packet, Exhibit 1, do you think there's
9 any ill will by the US Attorney's Office in Atlanta against you
10 now?
11 A. No, absolutely not.
12 Q. In fact, taking a look at that first page, how would you
13 describe that email from AUSA Will Traynor?
14 A. It sounds as though he doesn't remember having a
15 conversation with the line AUSA but that he felt sorry -- in
16 fact, he says that, that he -- interjecting himself in between
17 this discussion between our agencies about the documents, and
18 the matter was basically ended at that time.
19 And it should be noted also on this email communication
20 that we have here, my name's on there, Brent Gray, the deputy
21 chief I spoke to, my supervisor, the Atlanta's division's chief
22 division counsel was on here so everyone knew basically the
23 communications that were occurring between the two offices.
24 Q. Nonetheless the complaint ultimately comes after this
25 email, right?

1 A. It comes after this email, yes.

2 Q. Okay.

3 A. And I don't know the process how it was filed.

4 Q. And any -- any adverse consequences against you by your

5 agency, the FBI, as a result?

6 A. None whatsoever, no.

7 Q. Thank you, agent.

8 Let's move on to discuss Philip Aries. You had an

9 opportunity during the investigation of Rick Renzi and Jim

10 Sandlin to interview Philip Aries, correct?

11 A. Correct.

12 Q. That was in or around September 2006, correct?

13 A. Correct.

14 Q. Why did you wait so long in the investigation before

15 approaching Mr. Aries?

16 A. Well, the investigation took a natural progression. We had

17 contacted Joanne Keene earlier that year. We were trying to

18 determine what investigative steps we could take with her. I

19 then realized we needed to interview other folks. We

20 interviewed Guy Inzalaco, we interviewed Shawn Lampman, and

21 then ultimately we interviewed Mr. Aries.

22 Q. And from Joanne Keene, were you able to learn anything

23 about the financial status of Mr. Aries?

24 A. Well, during the conversation that Joanne and Mr. Aries had

25 that was recorded, Mr. Aries had reported that he had recently

1 moved to California, that he could now afford to move to
2 California; financially he was set to do that. And so his
3 financial appearance seemed as though he had significant amount
4 of money due to the fact that he was now doing something he had
5 always wanted to do, which was to move to California.
6 Q. So what did you do in September 2006 at the interview of
7 Mr. Aries?
8 A. At the interview of Mr. Aries?
9 Q. Well, during the interview, what did you try to learn from
10 him?
11 A. Well, during the interview of Mr. Aries we tried to learn
12 what his involvement was with the federal land exchange between
13 PPLFI, which is Petrified Forest limited partnership -- I can't
14 remember the exact name, but it's PPLFI. And his relationship
15 to Mr. -- or to Congressman Renzi at the time.
16 Q. Let me ask you to slow down a little bit, Agent Odom, and
17 when you speak, to speak into the microphone, all right?
18 A. Yes.
19 Q. Did you also ask Mr. Aries to assist you in the
20 investigation?
21 A. Yes, we did.
22 Q. Why is that?
23 A. Because we thought he was in a position to provide
24 assistance to us.
25 Q. Did he agree?

1 A. Yes, he did.
2 Q. What did you think his motivation was in agreeing to assist
3 in the investigation?
4 A. I think that his motivation was that he was -- felt that he
5 was possibly a victim in the matter. He felt embarrassed in
6 front of his colleagues and his partners. He had arranged the
7 land exchange. He was the broker that was trying to put the
8 land exchange together. He communicated with his partners and
9 he had already had them expend large amounts of money towards
10 the project.
11 Q. So for how long do you recollect Mr. Aries making
12 consensual calls in the investigation?
13 A. Several months. It wasn't a lengthy period of time.
14 Q. Were you the primary agent working with him during that
15 period of time?
16 A. Yes, I was.
17 Q. And how -- let me rephrase that.
18 Did you have discussions with him by phone or in person?
19 A. Primarily by phone.
20 Q. Did he ever call Mr. Renzi in the calls he made?
21 A. Yes, he did.
22 Q. Did you have an opportunity to review a transcript of a
23 call with Mr. Renzi and Mr. Aries in November of 2006?
24 A. Yes.
25 Q. And so thinking about that call in the investigation, do

1 you have any recollection of suggesting to Mr. Aries that he
2 could be paid in order to incentivize him to make the call?
3 A. I have no recollection of that.
4 Q. Does that call in any way stand out in your mind as part of
5 the calls that he was making?
6 A. It doesn't stand out any more significant or less
7 significant than anything else -- any other calls that he had
8 made.
9 Q. Now, did you sign up Mr. Aries as a source?
10 A. Yes, I did.
11 Q. What does that mean?
12 A. You're documenting a person's involvement and assistance
13 with the FBI, that this person will provide information to the
14 Bureau, and we're trying to memorialize that information in
15 some system, some format.
16 Q. How do you get someone to sign up as a source?
17 A. When you approach someone to sign them up as a source, you
18 first of all, you have to be relevant to the investigation. So
19 they have to be in a position to report on the matter.
20 And as you're speaking to them, you -- once you find out
21 they can report on the investigation, you ask them if they're
22 willing to cooperate by providing additional information or by
23 assisting in doing an introduction, as an example of an
24 undercover agent or doing consensual recordings. And in this
25 situation, it was consensual recordings.

1 Q. Do you sometimes have to convince someone to be a source?
2 A. Sometimes you do.
3 Q. Did you have to convince Mr. Aries to be a source?
4 A. We talked about being a source. We didn't have to convince
5 him that -- we didn't have to convince him. It was more
6 explaining the process of what a source does and what they
7 don't do and what we were asking him to do.
8 Q. If you knew someone had a specific need, would you consider
9 offering them a solution to that need in order to get them to
10 sign up as a source?
11 A. Yes.
12 Q. Are you aware if Mr. Aries had any specific needs at the
13 time you signed him up as a source?
14 A. I wasn't aware that he had any specific need.
15 Q. Did you ever suggest to him that he could receive money as
16 an incentive for helping the investigation?
17 A. No, I did not.
18 Q. Now, we'll talk a bit about the admonishments. You know
19 what I'm saying with "admonishments", right?
20 A. Yes, sir.
21 Q. Do you consider the admonishments to be a suggestion to
22 someone that they could get paid?
23 A. It's not a suggestion, no.
24 Q. Let's take a look in the packet in front of you at
25 Exhibit 104. Would you pull that up?

1 A. I have it.
2 Q. Okay. What is this letter?
3 A. This letter is to memorialize the conversation between the
4 FBI and the US Attorney's Office and it's, in essence, you're
5 documenting what's happening to the case. And in this letter
6 specifically I am notifying the United States Attorney's Office
7 that this particular source has -- we've signed this source up
8 as a source for the FBI and that the source will be doing
9 consensual recordings with Jim Sandlin and Rick Renzi.
10 Q. Does it say anything about the possible payment of money in
11 this letter?
12 A. No, it does not.
13 Q. Have you ever seen concurrence letters to prosecutors raise
14 the possibility of payment by the FBI?
15 A. Yes.
16 Q. So why didn't this concurrence letter raise the possibility
17 of payment?
18 A. Because the topic of payment didn't come up and so it
19 wasn't memorialized in this letter.
20 Q. Now, we talked about -- oh, before we move on from
21 Exhibit 104, you can see up top there it says "clean" in
22 parenthesis, right?
23 A. Yes, sir.
24 Q. What is "clean"?
25 A. That's Mr. Aries' code name that I gave him.

1 Q. Okay. And I think you've said before it comes from the
2 advertising character Mr. Clean from the commercials, correct?
3 A. When I first saw Mr. Aries the very first time, as you saw
4 earlier, he's a very large man and initially when I first saw
5 him, he reminded me of that character of the advertisement.
6 Q. Now, that's -- that code name is sometimes known as a
7 payment name in the Bureau on the forms, correct?
8 A. On the Bureau's forms, yes, sir.
9 Q. Okay. Does that payment name mean the person's going to
10 get paid?
11 A. No, sir.
12 Q. What does "payment name" refer to?
13 A. That if there are payments made to any source of the
14 Bureau, that that would be the name that we would use on the
15 payment.
16 Q. Now, let's go to the set of admonishments in Exhibit 105.
17 And taking a look at this three-page -- I'm sorry, this
18 six-page exhibit, do you recollect this as a form that was in
19 use when Mr. Aries was signed up, correct?
20 A. Yes, sir.
21 Q. And generally without describing it, generally, what is it?
22 A. It's an admonishment that FBI agents provide to sources.
23 Q. And to your understanding what is the purpose?
24 A. The purpose of it is to explain to the source what they can
25 and cannot do while they work with the FBI and also the form

1 explains what the Bureau's position is as well.
2 Q. And it does, you can see on page 3, say that the FBI cannot
3 guarantee any rewards, payments, or other compensation.
4 Correct?
5 A. That's -- yes, sir.
6 Q. Is that something that's in the standard admonishments?
7 A. Yes, sir.
8 Q. Now, do you ever recollect a time when Mr. Aries asked you
9 about the possibility of receiving money?
10 A. No, sir.
11 Q. If he had asked you about the possibility of receiving
12 money, what would you have done?
13 A. I would have told him that: I can't promise you any money.
14 However, I would speak to the attorney's office and report back
15 to him to what I would find out and document that conversation
16 into his source file.
17 Q. Now, let's talk about documentation in the source file. At
18 some point during this investigation, you did a detail in
19 Washington, DC, correct?
20 A. Correct.
21 Q. Following the commencement of your detail in Washington,
22 DC, did you hear from Mr. Aries asking for some assistance?
23 A. Correct.
24 Q. Let's take a look at Exhibit 118 in front of you. And what
25 is Exhibit 118?

1 A. We call it a electronic communication where I'm documenting
2 contact with the source; in this case, Mr. Aries.
3 Q. And what was he asking for?
4 A. He was asking for a receipt or a bill or something that he
5 could show to the Internal Revenue Service because he was being
6 audited at that time. I explained to him that I would contact
7 the US Attorney's Office and the Department of Justice, Public
8 Integrity Section, and get back with him.
9 I did, and I explained that it would be from the opinion
10 from the US Attorney's Office and DOJ that that document should
11 come from his attorney at the time, Mr. Fred Petti.
12 Q. All right. At any time in this case do you recollect
13 suggesting to Mr. Aries that he could be paid for his
14 assistance?
15 A. No.
16 Q. Do you think he should get paid for his assistance?
17 A. Yes, I do.
18 Q. Now, he's not the only source in this case to testify. Do
19 you recollect that Joanne Keene also testified?
20 A. I understand she testified, yes.
21 Q. Do you think that she should get paid?
22 A. At the end of the case, yes.
23 Q. And let's go back to Mr. Aries. Why do you think he should
24 be paid?
25 A. Because the FBI asked Mr. Aries for his time, for his

1 efforts, for his willingness to help in the investigation. He
2 made consensual phone calls, he reported activity that was
3 important to us. And so I think he should be paid.
4 Q. What about Joanne Keene?
5 A. The same thing.
6 Q. Now, as you sit here today, do you have any recollection of
7 suggesting to Joanne Keene that she could get paid?
8 A. No.
9 Q. Do you have any recollection of her expressing any opinion
10 about getting paid?
11 A. Yes.
12 Q. What do you recollect about that?
13 A. She did not want to get paid. She, in fact, told me, "I do
14 not want one penny" or "one red cent" from us regarding this
15 matter.
16 Q. What was the context, to the best of your recollection now,
17 when she said that?
18 A. I believe it was during the initial admonishments or the
19 annual admonishments she had brought that up. Because when I
20 read the admonishments, there's that section there talking
21 about no payments or rewards can be, you know, guaranteed, and
22 in that context I believe, if I recall correctly, which I'm
23 sure I do, she said: I do not want one penny.
24 Q. Now, as you were preparing for this hearing, you originally
25 thought that it could have been some other time, right?

1 A. Correct.
2 Q. So tell us first what you originally thought.
3 A. I originally thought -- there was a time where Ms. Keene
4 was confronted by someone in Flagstaff and she felt she was
5 threatened and so she had called me upset and I, you know,
6 trying to get her calmed down, and everything is going to be
7 fine. And I had thought it was during that context that the
8 subject of money had come up where she had made the comment,
9 "not one penny".
10 But after further reflection and thinking through this,
11 from an incident that occurred approximately nine years ago, I
12 believe it was during the admonishment phase is when the "not
13 one penny" comment came up.
14 Q. Now, in Tucson, did you work with any other agents with the
15 sources?
16 A. Yes.
17 Q. Who was that?
18 A. Jan Burris.
19 Q. Prior to today, when was the last time you'd spoken to
20 Agent Burris?
21 A. Five years ago.
22 Q. Did you talk at all about the case and your testimony today
23 when you saw her?
24 A. No.
25 MR. RESTAINO: Your Honor, may I just have a moment?

1 Thank you, Agent Odom.
2 I have no further questions, Your Honor.
3 THE COURT: Counsel, any questions?
4 MR. NIEWOEHNER: Yes, Your Honor.
5 CROSS-EXAMINATION
6 BY MR. NIEWOEHNER:
7 Q. Agent Odom, my name is Chris Niewoehner. I represent
8 Mr. Renzi.
9 A. Hello, sir.
10 Q. You've been a law enforcement -- in law enforcement for a
11 number of years, correct?
12 A. Yes, sir.
13 Q. You've been in the FBI since about when?
14 A. January 1999.
15 Q. You were a police officer for about seven years before
16 that?
17 A. Correct.
18 Q. So you're familiar with the practice of, at times, paying
19 witnesses; is that right?
20 A. Correct.
21 Q. In fact, you've arranged for it yourself at times I
22 imagine?
23 A. I'm sorry?
24 Q. I imagine at times you have arranged for it for witnesses
25 who worked in your investigations?

1 A. To receive payment, yes, sir.
2 Q. So in 2006 when you first met Mr. Aries, you're perfectly
3 well aware that payment could be made in certain circumstances?
4 A. Correct.
5 Q. And you described the admonishments that you gave to
6 Mr. Aries. You said when you first met him in September he
7 agreed to cooperate; is that correct?
8 A. Correct.
9 Q. And either that day or within days you gave him some
10 admonishments that discussed some of his responsibilities as a
11 source, right?
12 A. Correct.
13 Q. If you hadn't booked him as a source, you wouldn't be able
14 to pay him, correct?
15 A. No.
16 Q. In your experience, you've paid people who weren't sources?
17 A. To my experience, I haven't seen them. However, I've seen
18 people receive lump-sum payments from the FBI that you have not
19 sourced.
20 Q. All right. But there are some special admonishments given
21 to sources who receive payments, correct?
22 A. Correct.
23 Q. If you turn to Exhibit 105, that is a form -- that's the
24 form admonishment; is that correct?
25 A. Yes.

1 Q. That's the one that you gave that's dated 10/3 of '06. Is
2 that the first one you documented for Mr. Aries?
3 A. Correct.
4 Q. Was it your practice to read these word for word?
5 A. Yes.
6 Q. You believe you did so in that instance?
7 A. I know I did.
8 Q. And you read No. 5, then, on the third page, which says:
9 In the event that you receive any rewards, payments, or other
10 compensation from the FBI, you are liable for any taxes that
11 may be owed.
12 Correct?
13 A. Correct.
14 Q. That provision contemplates that somebody might get a
15 payment; isn't that right?
16 A. Correct.
17 Q. If the person didn't know they could get payments before,
18 they certainly know it when you read that line, correct?
19 A. Correct.
20 Q. So the very form tells every source that they might get
21 paid, correct?
22 A. Correct.
23 Q. And if you've been told -- in addition to what's on the
24 form, if a witness is told at some point that they might get
25 paid, this form would remind them of that conversation,

1 wouldn't it?
2 A. Repeat it for me one more time, please.
3 Q. Well, if a witness had been told outside of the
4 admonishment process that they could get paid, the form itself
5 would be a reminder that they could get paid; is that right?
6 A. That sounds logical, yes.
7 Q. You gave this -- that admonishment shortly after Mr. Aries
8 was opened up you said in September of '06; is that right?
9 A. Correct.
10 Q. If you look at Exhibit 115, you'll see that's a slightly
11 different admonishment form. If you look at the last page,
12 that again appears to be signed by you; is that correct?
13 A. I'm sorry. What was your question again?
14 Q. This form also appears to be signed by you; is that
15 correct?
16 A. That is correct.
17 Q. This appears to be done in September of 2007; is that
18 right?
19 A. Correct.
20 Q. And if you look at the third page, No. 7, there's language
21 similar to the language we just read a moment ago; isn't that
22 right?
23 A. Correct.
24 Q. It says: Each time a CHS subject in the AGG CHS receives
25 any reward payments or other compensation. It goes on from

1 there.
2 Again, it raises the possibility that the source will get
3 paid; isn't that right?
4 A. Correct.
5 Q. If you look at Exhibit 116, that's the admonishment form
6 from 2008; is that correct?
7 A. Yes, sir.
8 Q. And again, if you look at paragraph 7, it's got the same
9 language as the one we just looked at; is that right?
10 A. That's correct.
11 Q. So on a more or less annual basis the effect of this
12 admonishment is to remind a person that they might get paid;
13 isn't that right?
14 A. Correct.
15 Q. And, in fact, not only -- so you knew that you might pay
16 Mr. Aries. You also -- well, you just said a moment ago you
17 thought he should get paid; isn't that correct?
18 A. Correct.
19 Q. In fact, you laid a paper trail that would justify getting
20 him paid; isn't that right?
21 A. Are you referring to the admonishment as the paper trail?
22 Q. Well, now, let's look at Exhibit 117 for a moment. You
23 recognize this? This is a form you filled out in January 2009.
24 A. Okay.
25 Q. And you describe -- you're talking about Mr. Aries and you

1 describe how he's opened in September of 2006. If you look at
2 the fourth line of the first paragraph, it says: CHS has
3 cooperated fully with the FBI regarding the investigation. It
4 goes on later in the paragraph to point out: From this
5 information a Title Three intercept was obtained and a search
6 warrant was executed.
7 Do you see what I'm referring to?
8 A. Yes, sir.
9 Q. It keeps going. It says on the second full paragraph that
10 he testified before a federal grand jury.
11 Do you see that?
12 A. Yes, sir.
13 Q. And it goes on in the last paragraph on the first page, it
14 says: It was from the testimony and assistance provided by the
15 CHS that enabled the case to move forward to where an
16 indictment was obtained.
17 Is that right?
18 A. Correct.
19 Q. This lays out in paper the services that you view Mr. Aries
20 as providing to the case; isn't that right?
21 A. Correct.
22 Q. This is the kind of thing that, if you wanted to justify a
23 lump-sum payment at some point, you might point to; isn't that
24 right?
25 A. Correct.

1 Q. Now, obviously, one of the things you do as an agent is you
2 deal with witnesses all the time who have biases or reasons to
3 lie; is that right?
4 A. Correct.
5 Q. Dealing with criminal cases. And routinely people are
6 dealing with lies or fraud or something like that?
7 A. Some of those people, yes.
8 Q. One of your jobs as an agent is to assess the possible
9 biases that a witness might have; is that right?
10 A. Correct.
11 Q. One reason that people cooperate is that they have a fear
12 of criminal exposure; is that right?
13 A. That's one reason.
14 Q. But Mr. Aries didn't have that fear; is that right?
15 A. Correct.
16 Q. In fact, your office and the US Attorney's Office made sure
17 of that. If you look at Exhibit 108 for a moment, you see that
18 in October 26th of 2006, US Attorney's Office for the District
19 of Arizona sent a letter to Mr. Aries informing him that he was
20 not considered either a target or a subject of the
21 investigation.
22 Do you see that?
23 A. Yes, sir.
24 Q. And in layman's terms, you basically say he's a witness at
25 that point; is that correct?

1 A. Yes, sir, yes, sir.
2 Q. So at that point, you really didn't have any leverage on
3 Mr. Aries by threatening him with criminal exposure. You had
4 to persuade him to the degree you needed to with other
5 incentives; is that right?
6 A. Correct.
7 Q. Now, you were aware that Mr. Aries had provided a
8 significant investment of his time in cooperating with the FBI;
9 is that right?
10 A. Correct.
11 Q. He would travel to meet you on occasion?
12 A. He would travel to meet me probably one or two times over
13 the course. Again, he didn't live here in Tucson so I mostly
14 spoke to him on the phone.
15 Q. But he did travel on occasion to see you; is that right?
16 A. On occasion.
17 Q. He sat and prepared for testimony in the grand jury; is
18 that right?
19 A. Correct.
20 Q. He participated in consensual recordings; is that correct?
21 A. Correct.
22 Q. You would debrief him before and after those consensual
23 recordings; is that right?
24 A. Correct.
25 Q. You also learned at times that Mr. Aries did have concerns

1 about money; isn't that right?
2 A. During the time that I was dealing with Mr. Aries, money
3 concerns were not brought to my attention.
4 Q. Well, he did -- I'm going to direct you to Exhibit 118 for
5 a moment. You talked about this a moment ago. There was an EC
6 where he came to you and he asked for -- there was an
7 electronic communication where you relayed how he was seeking
8 help effectively justifying a $15,000 expense he'd done on his
9 taxes; is that right?
10 A. That is correct.
11 Q. Now, you did want Mr. Aries to continue to cooperate with
12 the investigation; isn't that right?
13 A. Yes, sir.
14 Q. He was an important witness?
15 A. Yes, sir.
16 Q. He was also a witness who could stop at any time should he
17 choose; isn't that right?
18 A. Yes, sir.
19 Q. There was nothing forcing him to record calls with
20 Mr. Sandlin or Mr. Renzi?
21 A. Correct.
22 Q. And you are aware at times that it's an unpleasant thing to
23 record conversations against other people?
24 A. Correct.
25 Q. It is stressful at times?

1 A. Correct.
2 Q. It could be particularly stressful if you were
3 uncomfortable with what you were saying, the cooperator was
4 uncomfortable with what they were saying in terms of not
5 knowing about it; isn't that right?
6 A. Correct.
7 Q. So there are times as an agent you have to coax or persuade
8 your witnesses to continue to cooperate; isn't that right?
9 A. Yes.
10 Q. And at those times, you look for things that will encourage
11 them and incentivize them to continue to cooperate; isn't that
12 right?
13 A. Yes.
14 Q. One thing that incentivizes people is the prospect of being
15 paid for their time and trouble; is not that right?
16 A. That's one of them, yes.
17 Q. And, in fact, at times in this case you have contemplated,
18 at least when there was a problematic situation, encouraging
19 somebody by suggesting they might get paid; isn't that right?
20 A. Could you repeat the question again? I'm sorry.
21 Q. In this case, you have encouraged people to continue to
22 cooperate by suggesting that they might get money?
23 A. Through the annual admonishments those topics came up, yes.
24 Q. Well, there's also the situation with Ms. Keene that you
25 mentioned in your direct.

1 Do you recall that?
2 A. Yes.
3 Q. She was given the same admonishments?
4 A. Yes.
5 Q. You now recall that in one of those admonishments she made
6 some statement along the lines of she didn't want any money?
7 A. Correct.
8 Q. You didn't document that though, did you?
9 A. No.
10 Q. You did have a conversation with her about money which was
11 not documented?
12 A. Yes.
13 Q. And you said there was a particular instance in which she
14 was particularly concerned for her safety following -- or
15 apparently somebody confronted her in the supermarket and
16 another thing along those lines happened.
17 Are you with me?
18 A. I'm tracking with you, yes.
19 Q. And you thought initially that that was an instance in
20 which you had encouraged her to continue to cooperate by
21 suggesting that she might be paid?
22 A. I had thought that, and then I realized that was not that
23 time period.
24 Q. But that is something you have done on occasion, isn't that
25 right?

1 A. I've never had a source call me and tell me that their life
2 was threatened. So in that context, no, I have not done that.
3 Q. There have been times, to encourage people to continue
4 cooperating, you suggested they could get paid?
5 A. Yes.
6 Q. You're more likely to do that at a stressful time in their
7 cooperation; isn't that right?
8 A. I'm more likely to do that to a source who has been paid in
9 the past and who will continue to receive payment from us.
10 Those conversations have come up. For sources that have
11 cooperated with us who have not received payment, then, no.
12 That doesn't come up because it's never come up.
13 Q. It's never come up with one of your witnesses who has not
14 been paid before that they could get paid?
15 A. I don't recall a witness that I had in a case that had
16 never been paid money and then now, to have them continue to
17 help us, for me to tell them to pay -- or that we would now pay
18 money. I don't recall any -- that incident ever occurring.
19 Q. You don't recall it?
20 A. I don't recall an incident, as I just explained, occurring,
21 no.
22 Q. All right. Now, Mr. Aries did describe the call he recalls
23 with you. Do you know anything about what Mr. Aries has said
24 in that regard?
25 A. I wasn't privy to what Mr. Aries said.

1 Q. If he were to have said something along the lines of you
2 told him that recording a phone call in a public corruption
3 case is exactly the type of conduct that might get a witness
4 compensation, would you agree with me that a witness in a
5 public corruption case who does consensual recordings is the
6 kind of witness who would get paid?
7 A. Witnesses that do that type of work can get paid, yes.
8 Q. So it would be true, if you had told him -- assume for the
9 moment you did -- if you had told him that a person in a public
10 corruption case who was doing consensual recordings, that is
11 the kind of person who gets paid, that would be a true
12 statement?
13 A. If I said that, then, yes.
14 Q. Now, you did not disclose to anyone that you told Mr. Aries
15 he might get paid outside of the admonishment procedure; is
16 that fair?
17 A. I did not tell anyone that he would get paid outside the
18 admonishment -- can you repeat the question? I want to make
19 sure.
20 Q. A little bit different. You never told the prosecutors in
21 this case, for example, that you had told Mr. Aries that he
22 might get paid as a result of his cooperation?
23 A. I never told the prosecutors that he might get paid because
24 I -- you need to rephrase the question for me because I'm not
25 tracking.

1 Q. All right. You never disclosed to the prosecutors that you
2 had a conversation with Mr. Aries in which you suggested he
3 might get paid for his cooperation?
4 A. I --
5 MR. RESTAINO: Judge, I have a foundation objection to
6 that question. There might be a better way to --
7 THE COURT: Well, I had a problem with it the first
8 time you asked him but now it's the third time and it's better
9 phrased, I think. I'm going to overrule it. He can answer it.
10 THE WITNESS: I never had a conversation with the US
11 Attorney's Office that I told Mr. Aries that he could get paid.
12 But, to quantify that, I never told Mr. Aries he could get
13 paid. So, thus, I wouldn't tell the US Attorney's Office that
14 so it's almost -- I'm trying to -- I'm trying to understand.
15 BY MR. NIEWOEHNER:
16 Q. It's not designed to be a hard question.
17 A. No.
18 Q. Your testimony is you don't recall saying that to
19 Mr. Aries. And I'm confirming that you don't believe you would
20 have told Mr. Restaino that you had told Mr. Aries he might get
21 paid.
22 A. If I had told Mr. Aries he would get paid, I would have
23 told the US Attorney's Office. But I did not tell the US
24 Attorney's Office that I did not tell him that he did not get
25 paid.

1 Q. And the reason is -- that you would have informed
2 Mr. Restaino is because you recognize that you would have had
3 an obligation to do so; isn't that right?
4 A. Absolutely, yes.
5 Q. Because you understand that a witness who thinks they may
6 get money might lie; isn't that right?
7 A. If I think that a witness might get money might lie?
8 Q. You understand that a witness who thinks they may get paid
9 because a person might get convicted would have an incentive to
10 lie?
11 A. Yes.
12 Q. And that's why, pursuant to your Brady and Giglio
13 obligations, you understood that if you had that conversation,
14 it would have to be disclosed?
15 A. Correct.
16 Q. Otherwise it would be unfair?
17 A. Correct.
18 Q. But there's no such disclosure made in this case of any
19 conversation you had with Mr. Aries, is that right, or at least
20 not before trial?
21 A. Correct.
22 Q. And, in fact, to your mind, Mr. Aries should still get
23 paid; isn't that correct?
24 A. I think he should, yes.
25 Q. And there would have been no disclosure to the defense of

1 that fact except for the fact that Mr. Aries happened to send
2 an email to Mr. Restaino; isn't that right?
3 A. Correct.
4 Q. Because if he hadn't done that and this case ends and a
5 payment is made, there would be no disclosure at any point to
6 the defense?
7 A. Correct.
8 Q. Now, agent, I understand that you recognize that you would
9 have an obligation to disclose the conversation with Mr. Aries
10 if you would suggest he might get paid.
11 We agree on that, correct?
12 A. Correct.
13 Q. You understand that that would have a potentially negative
14 effect on his credibility?
15 A. Repeat the question again.
16 Q. You understand that if the defense were to know that
17 Mr. Aries thought he might get paid, it could negatively affect
18 his credibility?
19 A. Correct.
20 Q. This is a case you -- this case, the Rick Renzi case, is a
21 case you worked long and hard on; isn't that right?
22 A. Correct.
23 Q. You were the case agent on it?
24 A. Correct.
25 Q. You wanted to convict Mr. Renzi?

1 A. Correct.
2 Q. You thought he committed a crime?
3 A. Correct.
4 Q. This is a case that's been important to you personally;
5 isn't that right?
6 A. As all my cases are, yes.
7 Q. You were promoted in about 2009; isn't that right?
8 A. Correct.
9 Q. You became a supervisory special agent at that point in
10 time?
11 A. Correct.
12 Q. And you moved to a public corruption unit; is that right?
13 A. Correct.
14 Q. It was helpful to your -- that promotion that you had been
15 involved in the Renzi case; isn't that right?
16 A. Correct.
17 Q. That promotion occurred prior to the wiretap in this case
18 being suppressed; isn't that right?
19 A. Correct.
20 Q. So you wanted this case to be as strong as possible?
21 A. Yes, as all of my cases, yes.
22 Q. And you didn't want Mr. Aries to be impeached any more than
23 he had to be; isn't that right?
24 A. Correct.
25 Q. So there were incentives that would lead you to not

1 disclose bad facts about Mr. Aries; isn't that right?
2 A. Which fact about Mr. Aries?
3 Q. Any bad fact about Mr. Aries.
4 A. Any negative fact? Yes.
5 Q. And, in fact, there is one significant fact that you didn't
6 disclose; isn't that right?
7 A. No. Perhaps you can help me.
8 Q. Sure. When you first met with Mr. Aries in September of
9 2006, your very first interview with him, he explained to you
10 and Agent Burris that the first time that he was presented with
11 the Sandlin property was actually by Joanne Keene a few days
12 before he met Mr. Renzi; isn't that right?
13 A. If you have a document for me to review, that would be
14 helpful.
15 Q. Sure. I'll show you --
16 A. Again, it was nine years ago, so --
17 Q. Let me show you what's been marked as 101. Do you
18 recognize -- I don't know, have you seen this document lately?
19 A. I've seen it in the last few days.
20 Q. You recognize this to be your notes of your interview with
21 Mr. Aries on September 28th, 2005?
22 A. Yes, these are my notes.
23 Q. It's your practice when you take notes to be as accurate as
24 you can; is that correct?
25 A. Try to be, yes.

1 Q. You understand this is what's going to turn into a 302
2 someday?
3 A. Correct.
4 Q. All right. And if you look at about the ninth line down,
5 you see a line that says: R squared likes the idea that R
6 wants to help the base. I think it says property something
7 something Sandlin.
8 Do you see that line?
9 A. Yes.
10 Q. What that reflected was Mr. Aries telling you and Agent
11 Burris that in his first conversation with Joanne Keene before
12 he met with Mr. Renzi, she explained to him that Rick Renzi
13 liked the idea of a land exchange but he wanted to include the
14 Sandlin property?
15 A. It doesn't say Joanne Keene in reference to that comment.
16 I see -- I'm reading as you did -- Renzi likes the idea but
17 Renzi wants to help with the base for the property or for the
18 Sandlin property.
19 Q. See the line above it, it says discussed concept to I
20 believe it's Joan?
21 A. Yeah, in exchange -- yes.
22 Q. And if you look at Exhibit 103, you see that's the 302 that
23 corresponds to your -- I'm sorry. Are you not with me?
24 A. I'm looking at 103 and it's the --
25 Q. 102, I apologize.

1 A. Okay. Yes.
2 Q. When you look at the second full paragraph and you see
3 there's a line in there, the last line of that paragraph, it
4 says: Aries had been called a few days prior to that.
5 Do you see that?
6 A. Yes.
7 Q. There is nothing in that paragraph that suggests that
8 Joanne Keene was the first one to raise the Sandlin property
9 with Mr. Aries before he met with Mr. Renzi; is that right?
10 A. It suggests -- I'm reading the last sentence and it says
11 that Aries had been called a few days prior to the meeting by
12 Joanne Keene.
13 Q. Right. It does not -- but there's nothing in the paragraph
14 that says at that -- in that conversation that Ms. Keene told
15 Mr. Aries about the Sandlin property?
16 A. Correct.
17 Q. So if you accept with me for the moment that your notes
18 reflect that Mr. Aries told you that, it is not in the 302
19 that's generated from that interview?
20 A. Correct. However, I'd like to make a statement. I did not
21 write the 302.
22 Q. Well, you reviewed it, correct?
23 A. I reviewed it just to overall review, yes.
24 Q. Well, it is your job -- Agent Burris is the one who wrote
25 this but it is your job as the FBI agent at the scene, you

1 participated in the interview, to review it for accuracy; isn't
2 that right?
3 A. To the best of my ability, yes.
4 Q. It's your standard FBI procedure, correct?
5 A. To review the 302s, yes.
6 Q. And this particular 302 was done the day after that
7 interview, correct?
8 A. Correct.
9 Q. And this was a very important interview, wasn't it?
10 A. Correct.
11 Q. So one you would have been taking care to review?
12 A. Correct.
13 Q. And the upshot is if you read this 302, you would have no
14 way of knowing that Ms. Keene -- a few days before Aries met
15 Renzi that Ms. Keene had told Aries about the Sandlin property,
16 correct?
17 A. Correct.
18 Q. And, in fact, that's what you testified to -- you testified
19 in grand jury.
20 Do you recall that?
21 A. Yes.
22 Q. I guess just to wrap up on that point, so there was no
23 disclosure in the official 302 about this fact that Ms. Keene
24 told Mr. Aries about the Sandlin property before he met with
25 Renzi?

1 A. Correct.
2 Q. You'd agree with me that that's an important fact?
3 A. Correct.
4 Q. And that it should have been in the 302?
5 A. Correct.
6 Q. And that its absence -- you understand that the defense
7 attorneys do not receive the notes, they get the 302s, correct?
8 A. It was my understanding that defense attorneys can receive
9 the notes as well. I don't know if it happened in this case,
10 but I know that's -- that can happen.
11 Q. Well, if the defense did not get your notes prior to the
12 trial, they wouldn't know from the 302, would they, that this
13 had happened?
14 A. If -- then, correct.
15 Q. And in addition, let's view your grand jury testimony for a
16 moment. I give you --
17 THE COURT: Well, we need a short break. We want a
18 ten-minute recess. And I hope you can conclude here shortly.
19 MR. NIEWOEHNER: I will, Your Honor.
20 THE COURT: All right. Then, about ten minutes.
21 MR. NIEWOEHNER: Thank you.
22 (A break was taken.)
23 THE COURT: All right. Back on the record. We have
24 counsel here.
25 MR. NIEWOEHNER: Your Honor, may I approach? There is

1 one exhibit that's not in the binder; it's grand jury
2 testimony.
3 THE COURT: Yes.
4 BY MR. NIEWOEHNER:
5 Q. Agent Odom, I'm going to direct you to Renzi Exhibit 219.
6 MR. NIEWOEHNER: Do you have any objection to that?
7 MR. RESTAINO: Let me see that, counsel.
8 MR. NIEWOEHNER: Excuse me one second, Your Honor. I
9 managed to grab the wrong thing. Your Honor, may I approach
10 again?
11 THE COURT: Yes.
12 BY MR. NIEWOEHNER:
13 Q. Let me show you what's been marked as Renzi Exhibit 218.
14 MR. RESTAINO: No objection.
15 MR. NIEWOEHNER: I think we can admit it without
16 objection, Your Honor.
17 THE COURT: All right. It's admitted, 218.
18 BY MR. NIEWOEHNER:
19 Q. Agent Odom, you recall that you testified in the grand jury
20 in this case?
21 A. Correct.
22 Q. And did you testify on May 14th, 2008?
23 A. Correct.
24 Q. I'm going to direct your attention to what's marked as
25 page 84 of the exhibit.

1 Are you there?
2 A. Yes, sir.
3 Q. And you were asked a question at line 4: And now I take it
4 at or around the time of that letter, which is April 12, 2005,
5 Resolution makes a determination.
6 And if you want to look at page 83 just for context so you
7 understand which letter you're talking about, feel free.
8 A. Yes, sir, I have context.
9 Q. You recall there's a letter that Bruno Hegner mails to
10 himself on about April 12th, 2005?
11 A. Yes, sir.
12 Q. Or at least -- although it's postdated April 13th, 2005.
13 All right. So you recall the letter we're discussing --
14 A. Yes, sir.
15 Q. -- or you're discussing, I should say.
16 And your answer at line 7 to that question about the letter
17 is: They're done. They just walked away from the deal.
18 They're very uncomfortable with the demands that Congressman
19 Renzi has made upon them. You know, it's for genesis for
20 Mr. Hegner to write the letter.
21 And what you explained to the grand jury at that point in
22 time is that Resolution Copper, as of about April 12th of 2005,
23 is walking away from their efforts to get a deal with
24 Congressman Renzi; is that right?
25 A. Correct.

1 Q. And then you're asked a question: Now, serendipitously,
2 within a week or so what happens?
3 And at that point you answer at line 13: There is a
4 meeting in Flagstaff, Arizona, between Phil Aries, Joanne
5 Keene, and Congressman Renzi, and during that meeting, as you
6 heard me say earlier today, Congressman Renzi says: Buy the
7 Sandlin property. And Aries comes in and says: Hey, I don't
8 use land exchanges like you propose basically. And Renzi says:
9 Okay. Include this piece of property as well. And he directs
10 him to the Sandlin property.
11 Do you see that testimony?
12 A. Correct.
13 Q. You do not say in your testimony that before this meeting
14 Joanne Keene had told Philip Aries about the Sandlin property,
15 do you?
16 A. No.
17 Q. That changes that meeting, doesn't it? Instead of
18 Mr. Aries hearing for the first time on this meeting about the
19 Sandlin property from Mr. Renzi -- that's how it was portrayed
20 to the grand jury; isn't that correct?
21 A. Correct.
22 Q. When, in fact, Mr. Aries hears about the Sandlin property
23 prior to that meeting from Mrs. Keene; isn't that right?
24 A. Correct.
25 Q. And the way these two answers are sequenced, first

1 suggesting on April 12th that Resolution Copper is done with
2 trying to do a land exchange deal and three days later
3 Mr. Renzi is telling Aries to insert the Sandlin property,
4 that's the sequence that's presented to the grand jury at this
5 point; isn't that right?
6 A. Correct.
7 Q. And that sequence isn't accurate, is it?
8 A. I think the sequence that I was trying to explain is that
9 the Aries property was discussed a few days after Resolution
10 Copper was no longer wanting to be involved and that a meeting
11 occurred in Flagstaff to discuss that property.
12 Q. And the point you say is and Renzi says: Okay, include
13 this piece of property as well. That's what your testimony
14 was; isn't that right?
15 A. During the meeting in Flagstaff between Joanne, Philip, and
16 Renzi, Renzi -- according to witnesses that reported to me,
17 Renzi tells Aries to buy or include the Sandlin property during
18 that meeting.
19 Q. And as far as the grand jury knows from that evidence,
20 that's the very first time Mr. Aries hears about the Sandlin
21 property; isn't that right?
22 A. Correct.
23 MR. NIEWOEHNER: One moment, Your Honor?
24 THE COURT: Okay.
25 MR. NIEWOEHNER: Nothing further, Your Honor. Thank

1 you.

2 THE COURT: Any redirect?

3 MR. RESTAINO: Yes, Your Honor, briefly.

4 REDIRECT EXAMINATION

5 BY MR. RESTAINO:

6 Q. Agent Odom, Mr. Niewoehner suggested that you have

7 career-based incentives not to disclose information adverse to

8 Mr. Aries so let me ask you a few questions about that.

9 How would it affect your career to come into court today

10 and lie on the stand?

11 A. I would face termination.

12 Q. How would it affect your career to deliberately omit or

13 conceal information in a 302?

14 A. If I purposely did that, then I could face termination.

15 Q. As you sit here today and as you've discussed this 302 on

16 your initial interview with Mr. Aries, do you think that that

17 fairly represents what he said to you and Agent Burris?

18 A. That we purposely omitted something, that is a false

19 statement. We didn't purposely omit anything in the 302.

20 Q. Well, let me ask you a question about on Exhibit 102,

21 paragraph 4. You see there that your 302 reflects that Renzi

22 said to Aries in the presence of Keene: Don't tell anyone. I

23 get one free pass through committee. If you buy the Sandlin

24 property you will get my one free pass.

25 Do you see that?

1 A. Yes, sir.
2 Q. Any recollection of Mr. Aries, either before you had him
3 cooperate or after you had him cooperate, wavering on that?
4 A. He never wavered on that point.
5 Q. Is that an important fact in this case?
6 A. I think it's a significant fact in this case.
7 Q. And let me also ask you, then, about this grand jury
8 testimony that Mr. Niewoehner was discussing on page 84 at
9 Exhibit 218 here. If you can take a look at line 13 to
10 line 20, does it say anywhere in there that you told the grand
11 jury this was the very first time Mr. Aries learned of the
12 property?
13 A. No.
14 Q. Do you think that paragraph very fairly summarizes the
15 meeting you were trying to summarize?
16 A. I think it does.
17 Q. Thank you, Agent Odom.
18 MR. RESTAINO: Your Honor, I have no further
19 questions. Sandlin's counsel reminds me they have an
20 opportunity as well.
21 THE COURT: Oh, I'd forgotten about you guys.
22 MR. TYNAN: No further questions, Your Honor. Thank
23 you, though.
24 THE COURT: All right. Let me ask you, Agent Odom.
25 Is there an FBI protocol or a standard operating procedure that

1 with a cooperating witness who the FBI expects to testify, that
2 that witness not be told that he could expect payment?
3 THE WITNESS: No, there's not that protocol. In fact,
4 in the admonishments, as I explained earlier, it brings up the
5 possibility -- or not the possibility, that in the event of we
6 can't guarantee payment -- and I can read that admonishment if
7 you'd like.
8 THE COURT: No standard operating procedure that
9 you're -- regardless of what the admonitions say -- that you
10 are not to tell a witness that you propose to have testify that
11 he would be paid?
12 THE WITNESS: No, sir, there's not.
13 THE COURT: So does that mean that sometimes the FBI
14 does tell a witness who they expect to testify that he will be
15 paid and he's told that before he testifies?
16 THE WITNESS: Correct, that could happen, yes.
17 THE COURT: Okay. Thank you, sir. Agent, you can be
18 excused.
19 THE WITNESS: Thank you, sir.
20 THE COURT: All right. Anything else?
21 MR. MULRYNE: Yes, Your Honor. The government calls
22 FBI Special Agent Jonathan Tjernagel.
23 CLERK: If you could please step into the witness
24 stand and remain standing to be sworn.
25 JONATHAN TJERNAGEL, GOVERNMENT WITNESS, WAS SWORN.

1 CLERK: You may have a seat. Please speak directory
2 into the microphone. State your full name and the spelling of
3 your last name.
4 THE WITNESS: Jonathan Tjernagel, T-j-e-r-n-a-g-e-l.
5 MR. MULRYNE: Thank you, Your Honor.
6 DIRECT EXAMINATION
7 BY MR. MULRYNE:
8 Q. Good afternoon, Agent Tjernagel.
9 A. Good afternoon.
10 Q. Are you still currently an FBI special agent?
11 A. Yes.
12 Q. And where are you currently posted?
13 A. In the Bemidji RA in the Minneapolis field office.
14 Q. And when did you become involved in the case involving the
15 defendant, Richard Renzi?
16 A. In October of 2006.
17 Q. Okay. And did there come a time after you joined the
18 investigation that you went on a temporary leave or detail to
19 another office?
20 A. Yes.
21 Q. When did that occur approximately?
22 A. It was approximately October of 2010.
23 Q. So is that about ten years after you started on the case?
24 I'm sorry, about four years after you started on the case?
25 A. That's about right, yes.

1 Q. Okay. And when did you return --
2 Well, let me ask, where did you go on your detail?
3 A. I went to the FBI academy in Quantico, Virginia.
4 Q. What were you doing there, by chance?
5 A. I was firearms instructor in the firearms training unit.
6 Q. When did you return to the Tucson office and resume working
7 on the Renzi matter?
8 A. In April of 2012.
9 Q. And did you continue to work on that case until you left
10 the Tucson office to go to the -- to your current location?
11 A. Yes.
12 Q. And just to close out the loop on this timeline, when did
13 you leave Tucson to go to Minnesota?
14 A. November of 2013.
15 Q. Prior to joining the case in October of 2006, did you have
16 any communications with Philip Aries?
17 A. No.
18 Q. And I think you stated that you were on your detail to
19 Quantico from approximately October 2010 to April of 2012.
20 Does that sound about right?
21 A. Yes.
22 Q. During that time, did you have any contact at all with
23 Mr. Aries?
24 A. No.
25 Q. So focusing on that period when you were working this case

1 between October of 2006 and before you left for Minnesota, at
2 any point -- and I'm sorry. Let me rephrase.
3 From the time that you started working on the case in
4 October of 2006 until the time of trial, when this case went to
5 trial, was there ever any discussion between you and Mr. Aries
6 regarding any sort of payment or reward?
7 A. No, there was not.
8 Q. Did you ever hear about any other agent having a
9 conversation or communication with Mr. Aries regarding any
10 reward or the possibility of that?
11 A. I did not.
12 Q. I want to take a moment just to turn your attention to a
13 joint exhibit that's marked 128. It should be in the binder in
14 front of you. Do you recognize this as an FBI annual source
15 report?
16 A. Yes.
17 Q. And this one is dated October 26th, 2012.
18 Do you see that?
19 A. Yes.
20 Q. And is this a report that you had completed?
21 A. Yes, it is.
22 Q. Okay. Could you just generally and briefly tell us what is
23 an FBI annual source report?
24 A. It's a report that was done annually on each CHS just to
25 make sure information was updated and if there was any changes,

1 anything that would need to be noted.
2 Q. Are these reports typically done for all human sources?
3 A. Yes, they are.
4 Q. If you would turn your attention to page 3, and I'm looking
5 toward the bottom under section three that's listed motivation.
6 Do you see that, Agent Tjernagel?
7 A. Yes.
8 Q. And if you follow along, it reads: Describe the CHS's
9 motivation for providing information to the FBI and how this
10 was determined.
11 Before I go any further, let me ask, do you know to whom --
12 do you recognize this report as referring to Mr. Aries?
13 A. Yes.
14 Q. Okay. Returning to that section, you see there where it
15 says: Willing to assist the United States government out of
16 patriotism.
17 Do you see that?
18 A. Yes, I do.
19 Q. What do you understand that to mean generally?
20 A. That Mr. Aries' motivations for helping as a source in this
21 case was because he was asked by the government and he was
22 doing it to assist just as doing the right thing.
23 Q. At any point did you understand Mr. Aries' motivations to
24 include money or a reward?
25 A. Did I understand them to change?

1 Q. I'm sorry. Let me rephrase. At any point up to and
2 including the trial in this case of Mr. Renzi, did you ever
3 understand Mr. Aries' motivation to include money or a reward?
4 A. No, I did not.
5 Q. Okay. If we look under that same section, you'll see
6 line B where it reads: Had the CHS's motivations changed
7 during the review period?
8 Do you see that?
9 A. Yes, I do.
10 Q. And it lists: No.
11 If you had learned that Mr. Aries was interested in
12 financial reward, would you have marked that here or elsewhere?
13 A. Yes.
14 Q. So we were talking about the period leading up to the trial
15 in this matter. Let me ask you, during the trial, did you have
16 communications or interactions with Mr. Aries?
17 A. Yes, I did.
18 Q. And could you just briefly describe what kinds -- what was
19 the substance of those communications?
20 A. We had communications that were preparing him type
21 interviews to go over his testimony in court and then just
22 making sure that he was here at court on the day that he was to
23 testify.
24 Q. At any point during the lead up to the trial here or during
25 the trial itself, did Mr. Aries ever mention anything to you

1 about money or a reward?
2 A. No, he did not.
3 Q. Did you ever mention those subjects to him?
4 A. No.
5 Q. And, to your knowledge, did any other FBI agent or
6 government official discuss a reward or money with him during
7 that time?
8 A. No.
9 Q. Following Mr. Aries' appearance at trial, did you have any
10 contacts with Mr. Aries?
11 A. Yes, I did.
12 Q. And when did that occur approximately?
13 A. Shortly after, a day or two after he testified, I received
14 some text messages from Mr. Aries.
15 Q. If you would turn in the binder in front of you to joint
16 Exhibit 133. And what does this document here memorialize,
17 Agent Tjernagel?
18 A. This is a CHS contact report which is showing that I
19 received these text messages from Mr. Aries.
20 Q. And the text message is appended to the report, and if you
21 turn to the next page, we see those are marked -- they're dated
22 May 17th, 2013.
23 Do you see that?
24 A. Yes.
25 Q. And we won't go through this verbatim at this time but what

1 was your understanding of what Mr. Aries was telling you in
2 this text message?
3 A. He had told me that he had been driving a while already
4 since leaving Tucson, he was going to attend his daughter's
5 college graduation, and he expressed to me how he had felt
6 mistreated by attorneys for Mr. Renzi and that he had requested
7 if I would share that with the judge.
8 Q. Were there any phone calls or any other contacts that you
9 had with Mr. Aries around this time related to the subject
10 matter of these texts?
11 A. No.
12 Q. Was there any mention in this text of any reward or money
13 that Mr. Aries was interested in receiving?
14 A. No, there was not.
15 Q. Was there a time after the trial in which you had further
16 contact with Mr. Aries?
17 A. Yes, there was.
18 Q. When did that occur?
19 A. It was approximately a couple of weeks after trial.
20 Q. And when you say "after trial", at this point had Mr. Renzi
21 been convicted?
22 A. Yes, he had.
23 Q. Could you tell us about how that conversation between you
24 and Mr. Aries came about?
25 A. Yes. I had called Mr. Aries, as I had called a lot of

1 witnesses who testified at trial, and I thanked Mr. Aries for
2 coming to Tucson, thanked him for his time. I knew it had
3 taken a lot of time out of his work, he had had a fairly new
4 job, and just wanted to thank him and, you know, check and see
5 how he was doing, if he had made it to the graduation okay and
6 had a good celebration.
7 Q. And I think you mentioned this a moment ago but was it
8 typical for you to make those kinds of phone calls to
9 witnesses?
10 A. Yes, it was.
11 Q. As a courtesy?
12 A. That's correct.
13 Q. Okay. During that phone call, did the subject of money or
14 a reward ever come up?
15 A. Yes, it did.
16 Q. And could you please tell the Court how that happened?
17 A. At the end of the conversation, Mr. Aries asked me if there
18 was going to be any chance of a possibility of a payment.
19 Q. And how did you respond to that?
20 A. I informed Mr. Aries that that decision wasn't up to me,
21 that I could not guarantee any payment to him, and if that time
22 was ever going to come, it was a long time away still.
23 Q. Did Mr. Aries, during this conversation, mention to you at
24 all any conversations that he may have had with any other
25 agents or government officials regarding a reward or money?

1 A. He did not say anything about that.
2 Q. Prior to this phone call, did you ever have any
3 conversations with Mr. Aries that was similar in that you were
4 discussing rewards or money?
5 A. No.
6 Q. Did you document this particular phone call with Mr. Aries?
7 A. No, I did not.
8 Q. And why is that?
9 A. It was a phone call just like I'd made to other witnesses.
10 It didn't pertain to any facts of the investigation and it was
11 merely a courtesy on my point to say thank you.
12 Q. Did it matter to you as well that this phone call happened
13 after the trial had concluded?
14 A. It did, yes.
15 Q. And why is that?
16 A. Because in my eyes, the matter had already been -- it had
17 gone through court, the jury had decided on it, and there was
18 no more work that Mr. Aries was going to do, no more taskings
19 that he would receive in any way.
20 Q. Did there ever come an occasion in which you spoke to
21 anyone else about the possibility of Mr. Aries receiving a
22 reward?
23 A. Yes, there was.
24 Q. Okay. And with whom did you have those discussions?
25 A. I spoke with my supervisor at the time and I spoke with

1 Special Agent Odom and also it was discussed with AUSA
2 Restaino.
3 Q. When did these conversations occur?
4 A. They were after the trial had concluded, sometime in the
5 months of July, August, or September of 2013.
6 Q. And why did you have those conversations?
7 A. There was a number of reasons. If payments were going to
8 be considered to a source at all, it would have been after the
9 trial had concluded.
10 One other reason was that towards the end of each fiscal
11 year, we get reminders or notices from management or source
12 coordinator that if any kinds of source payments are going to
13 be paid, to make sure and get that request in before
14 end-of-the-year money is used up.
15 In this matter, we thought that before any requests were
16 going to be made, it was going to be a lengthy time period and
17 management at headquarters was going to want to have kind of
18 a -- just something on their radar to keep it in mind because
19 they have turnover as well. And a couple of years later there
20 may be no one there who even was aware of the case or what
21 happened.
22 Q. Let me turn your attention to joint Exhibit 135. And,
23 Agent Tjernagel, do you recognize this as another one of those
24 annual source reports that we were just discussing?
25 A. Yes.

1 Q. And is this one that you had completed that's dated
2 October 3rd, 2013?
3 A. Yes.
4 Q. If you'd turn to page 3, and we're just looking down here
5 at the same block that we had previously looked at. It's block
6 three, motivation. We see again that it's consistent with what
7 you had previously listed; is that correct?
8 A. That's correct.
9 Q. All right. If we go to page 5 -- and I did not ask you
10 about this in the previous annual source report but I'll ask
11 you about it here. If we look under, I believe that's
12 section 9, reliability evaluation, if we look at subheader C,
13 site case agent observations of the CHS's behavior, do you see
14 that there?
15 A. Yes, I do.
16 Q. And it says: CHS has been nervous over the past couple of
17 years due to slowing land development business with the current
18 economic conditions. Is that -- what's listed there,
19 consistent with what you understood Mr. Aries' concerns or
20 nervousness to be about over the years?
21 A. That was one of the two things, yes.
22 Q. Okay. And just focusing on this one for a moment, could
23 you just briefly, briefly describe to us what the concern was
24 as you understood it?
25 A. Mr. Aries was in land development business and at that time

1 the real estate markets had really dropped. Mr. Aries had lost
2 a considerable business associate because of the land deal that
3 fell through regarding Mr. Renzi, and so as business in general
4 was slowing down, one of his main contacts was lost.
5 Q. And in relation -- in relation to those concerns, did
6 Mr. Aries, prior to that phone call post trial, again ever ask
7 you or mention a possibility of a reward?
8 A. No, he did not.
9 Q. Again, was that something that you ever broached with him?
10 A. No, it was not.
11 Q. And just to conclude on this, we see the second sentence
12 there, it says: CHS was slightly nervous regarding testifying
13 in court but no more than the average witness.
14 Was that the second concern you were alluding to?
15 A. Yes.
16 Q. Finally, on this exhibit, if you just turn to the next
17 page, this is page 6, and if we look at the final section there
18 that reads, "Comments", we see a subsection that reads:
19 Author's comments.
20 Do you see that, Agent Tjernagel?
21 A. Yes.
22 Q. All right. There's two sentences. The first one reads:
23 CHS should remain open until after appeals. And that is
24 followed by the second sentence that says: Payment would be
25 considered at that time.

1 Can you tell the Court what that is intended to mean?
2 A. Yes. So the first sentence there was that Mr. Aries should
3 remain open on the -- as a source for the FBI until all appeal
4 matters in this investigation had finished, just as a matter of
5 that's what was going to do with all the sources in this case.
6 The second sentence there was that after the appeals had
7 all finished, at that time, the FBI would consider requesting
8 any payments for sources in this investigation, and just wanted
9 it to be, you know, listed in there as one of those reasons I
10 talked about earlier of keeping it in people's attention.
11 Q. Remind us again, when did you leave the Tucson office to go
12 to your current post?
13 A. I left in November of 2013.
14 Q. And at that point -- by that point, had any requests, to
15 your knowledge, ever been made regarding Mr. Aries and any
16 reward?
17 A. No, it had not.
18 Q. At any point did you ever communicate to Mr. Aries the fact
19 that there even was the consideration or the possibility of a
20 reward?
21 A. No, I did not.
22 MR. MULRYNE: One moment, Your Honor.
23 THE COURT: Yes.
24 MR. MULRYNE: No further questions, Your Honor.
25 THE COURT: Any questions, counsel?

1 MR. KRAMER: Yes, Your Honor.
2 CROSS-EXAMINATION
3 BY MR. KRAMER:
4 Q. Hello, Agent Tjernagel. I'm Kelly Kramer, one of
5 Mr. Renzi's lawyers. We've spoken before, correct?
6 A. Correct.
7 Q. I just want to follow up on a point you just made there. I
8 think you were just asked if you had ever communicated the
9 possibility of a reward to Mr. Aries, correct?
10 A. That is correct.
11 Q. And, in fact, I believe you testified earlier that when he
12 asked you a question about getting a reward, you told him it
13 was possible but you couldn't guarantee it and the decision
14 would be made down the road, right?
15 A. Yes.
16 Q. Okay. So when you said that you never discussed the
17 possibility, you weren't referring to that conversation?
18 A. I believe it was up until that time was the question.
19 Q. Gotcha. So you're saying at the very end when you were
20 there, after you wrote that note in the file, you hadn't
21 discussed that with Mr. -- you didn't discuss it with
22 Mr. Aries, right?
23 A. Yeah. It was discussed before that note in this file, this
24 one in October, yes.
25 Q. Got it. Okay. So it had been discussed before; that's all

1 I wanted to make clear.
2 A. Sure.
3 Q. Just -- I just want to pick up on a couple of things. I
4 don't want to belabor it because I think your direct covered
5 most of this.
6 Just to be very clear, did you document the phone call from
7 Mr. Aries when he raised the prospect of money in his source
8 file?
9 A. The same phone call as when I thanked him, that was not
10 documented.
11 Q. Okay. And was it documented in any file, anywhere?
12 A. No.
13 Q. Okay. Was it disclosed at the time to any other FBI agent?
14 A. I don't know that I talked to anybody right at the time
15 about it or specifically that, no.
16 Q. Did you disclose it to any AUSA?
17 A. No.
18 Q. Okay. Did you disclose it to anybody at all from the
19 Department of Justice, any lawyer, prosecuting lawyer?
20 A. No.
21 Q. And I think you said at the time that you made that
22 decision because you felt like the case was over, right?
23 A. It was partly that.
24 Q. Okay. But that was one of the reasons. But you knew,
25 right, that Mr. Renzi's motions for a new trial were pending,

1 right?
2 A. I'm not sure that I knew what motions were pending at that
3 time.
4 Q. Okay. Did you make any effort to find out whether there
5 was still an attack on the verdict?
6 A. I knew that there were some things but, no, I didn't know
7 what the motions were.
8 Q. Okay. And did you realize that a judgment, a conviction,
9 doesn't actually become final until the judge enters a judgment
10 of conviction at sentencing?
11 A. Yes.
12 Q. Okay. So at the time this phone call came in, in fact,
13 Mr. Renzi's conviction was not final, was it?
14 A. That -- the -- well, no, he had not been sentenced.
15 Q. Correct. So there was no judgment of conviction, correct?
16 A. Correct.
17 Q. Okay. In retrospect, not disclosing that phone call was a
18 mistake, wasn't it?
19 A. Not disclosing it, did you say?
20 Q. Yeah, not disclosing it to other FBI agents or to the
21 prosecutor.
22 A. It could have been disclosed, yeah.
23 Q. It should have been disclosed, right?
24 A. Looking back on it now, it could -- sure, should have.
25 Q. And it should have been documented in the source file,

1 right?
2 A. It could have been documented as a contact I suppose, yes.
3 Q. But, again, I mean, it probably should have been, right? I
4 mean, it's a request from a cooperator for money and you think
5 that that's just completely insignificant and didn't need to be
6 documented?
7 A. It didn't seem like a request from the source for money
8 when I was having that conversation.
9 Q. Okay. But it is -- but there's no doubt about it. It's an
10 inquiry from him about whether it's possible for him to receive
11 money for his cooperation, right?
12 A. He did inquire that, yes.
13 Q. We talked a little bit about the FBI policies in this case,
14 and just to be clear about that, the FBI policies regarding
15 confidential human sources, they're not public, right?
16 A. The policies on it?
17 Q. Yes.
18 A. No, I don't believe so, no.
19 Q. Okay. In fact, they're confidential, right? They're
20 closely held by the FBI?
21 A. Yes.
22 Q. Okay. Now, we asked for and Mr. Restaino has sent us a
23 letter in the case, and so I'll ask you to take a look at joint
24 Exhibit 150.
25 A. I'm sorry, 150 did you say?

1 Q. Yep. If you'd just let me know when you're there.
2 A. I'm on 150.
3 Q. Okay. Now, you can see in this letter Mr. Restaino is
4 disclosing to us excerpts of some of the FBI policies that are
5 applicable to the case.
6 Do you agree with me?
7 A. Yes.
8 Q. Okay. And I want to focus your attention in particular on
9 the second page of the document where it talks about the
10 potential for a lump-sum payment.
11 Do you see that?
12 A. Yes.
13 Q. Okay. And one of the things I think you've mentioned is
14 that under the FBI policies, confidential human sources are
15 eligible to receive lump-sum payments; am I right?
16 A. They're eligible, yes.
17 Q. Okay. And, in fact, every confidential human source it
18 turns out is eligible to receive a payment; isn't that right?
19 A. Correct.
20 Q. And the way that the lump-sum payment source's payment
21 policy seems to work, at least for testifying witnesses, is
22 that a payment isn't going to be made until after all the
23 appeals are completed, am I right?
24 A. I'd want to read through it to make sure.
25 Q. Well, is that your general understanding from your own

1 experience in this case?
2 A. In this case, my understanding was that, yes, we were going
3 to wait until all appeals were finished before any request
4 would be made.
5 Q. Okay. And one reason to wait is because you know if you
6 made a payment prior to a witness testifying, that it could be
7 used to impeach his credibility, right?
8 A. Yes, it could.
9 Q. Okay. And so, from your perspective, in terms of
10 protecting a witness's credibility, it's a lot better to wait
11 to make a payment to them until after the case is finished than
12 to do it along the way, right?
13 A. That way they wouldn't have to -- yes.
14 Q. Okay. And so the fact is is that, as you sit up there
15 today, you know that that fact, the fact that these
16 confidential human sources could be paid at the end of the case
17 was never disclosed to defense, was it?
18 A. I don't know if the fact that a source was eligible to
19 receive a payment, if that was disclosed or not.
20 Q. Okay. And did you at any point in the case, did anyone
21 ever disclose to the defense that the FBI was actually
22 contemplating making a payment to Mr. Aries?
23 A. Again, I don't know that that was disclosed. I don't know
24 that I made that judgment myself even or that thought of it
25 until afterwards.

1 Q. All right. Let's go back to the policies here just for a
2 second. And we don't need to go through each and every one of
3 them; the judge can read them for himself, too, but generally
4 speaking, the policies seem to give the FBI broad discretion
5 about when and whether to make payments to cooperators; is that
6 fair?
7 A. I'd say there's a pretty broad discretion.
8 Q. And they give you a bunch of factors to consider, things
9 like the importance of the case, the significance of the
10 cooperation, whether the cooperator's been paid in other
11 contexts. There's just -- there's several factors listed in
12 the policy, right?
13 A. That's correct.
14 Q. Okay. But at the end of the day, it's basically up to the
15 FBI to make a decision about how they value the value of the
16 cooperation and to recommend an appropriate reward in the FBI's
17 judgment, right?
18 A. If they're going to recommend a reward at all but, yes.
19 Q. Okay. Now, let's talk a little bit about what you actually
20 were discussing as it related to Mr. Aries. I believe on
21 direct you testified to a conversation with your supervisor,
22 Mr. Odom, and Mr. Restaino about potentially recommending
23 Mr. Aries for a reward.
24 Did I get that right?
25 A. There were conversations that we had about whether any

1 source in this investigation was going to be recommended for a
2 reward at some point.
3 Q. Okay. And did you reach any judgments as to whether any of
4 the sources would be recommended for a reward?
5 A. No, no judgments were reached.
6 Q. Okay. And did Mr. Odom express his view that Mr. Aries
7 should receive a reward?
8 A. We did discuss both sources in the case.
9 Q. And just so we're clear, but Mr. Odom actually said: I
10 think Mr. Aries should get a reward.
11 Isn't that right?
12 A. My recollection was that Special Agent Odom thought he
13 didn't need a reward.
14 Q. Okay. And if he testified to the contrary here today, then
15 you would defer to his recollection?
16 A. I would defer to his recollection. That was my
17 recollection.
18 Q. Did you believe that Mr. Aries deserved a reward?
19 A. I thought he should be considered for it, yes.
20 Q. Okay. What about Joanne Keene, did you believe that, too?
21 A. I thought she should be considered for it, too.
22 Q. Was there any other witness that you believed should be
23 considered for a reward?
24 A. Those are the only two sources who testified in the case
25 that were open for a substantial period, so those were the two

1 that I thought should be considered.
2 Q. So other sources who didn't testify, for example, you
3 didn't think necessarily deserved rewards?
4 A. I don't think that their involvement was very substantial
5 or would merit that consideration.
6 Q. Okay. And so just so we're very clear about who we're
7 talking about then, it's Mr. Aries and Ms. Keene are the two
8 that you thought might merit consideration for a reward?
9 A. That's correct.
10 Q. Okay. Did anyone else at that meeting express a view?
11 A. It wasn't a meeting that we had. I had separate
12 conversations, one with Special Agent Odom, I had a
13 conversation with the supervisor. I had a general conversation
14 with AUSA Restaino.
15 Q. And did you document those conversations anywhere?
16 A. Those were internal conversations we had. I didn't
17 document them other than you'll notice on that annual report I
18 documented that we would consider it at a later time.
19 Q. Let's talk about that annual report for a minute. That's
20 joint Exhibit 135. So let's talk first on page 3 where you
21 talk about the view that Mr. Aries was going to cooperate out
22 of patriotism.
23 Do you see that?
24 A. Yes.
25 Q. And it references in the question, it asks you how that was

1 determined. You don't actually respond to that question in the
2 form, do you?
3 A. No, I did not.
4 Q. And when you look at page 4, it indicates at the bottom
5 that Mr. Aries' cooperation was historical in nature, correct?
6 A. That is -- that's correct.
7 Q. Okay. And, in fact, Mr. Aries hadn't actually done
8 anything as a cooperator in terms of gathering information
9 since, like, 2007, correct?
10 A. That's about the correct time frame, 2007, yeah.
11 Q. So he was kept open as a confidential human source simply
12 because he was going to testify at Mr. Renzi's trial, right?
13 A. Because he had been open and there was great potential for
14 him to testify, yes.
15 Q. Okay. And then once he had actually testified, he was kept
16 open because Mr. Renzi was going to take an appeal, right?
17 A. Well, he was kept open until that appeal time had run,
18 whether he would -- whether there would have been appeals filed
19 or not. But, yes.
20 Q. Okay. And, of course, you know in this case there were
21 appeals filed and the case ultimately was affirmed and you
22 communicated that or did you communicate that to Mr. Aries or
23 did one of your other -- did one of the other agents do that?
24 A. I did not. I was no longer dealing with him at that point.
25 I'd transferred. I don't know if somebody else let him know

1 that.
2 Q. If we look back at that form on page 5 -- this report, just
3 so we're comfortable, this is the October 3rd, 2013, report
4 where you just -- you see this part C, cite case agent
5 observations in CHS's behavior. Do you see that where it says
6 that he's nervous, he's been nervous about testifying but no
7 more so than the average witness?
8 A. Okay, yes.
9 Q. So this would have been after you had the conversation with
10 Mr. Aries when he raised the possibility of receiving a reward,
11 right?
12 A. This was after that time, yes.
13 Q. Okay. And the fact that he'd raised that possibility isn't
14 reflected in this report, is it?
15 A. No, it's not.
16 Q. And then if we look at the last page where it talks about
17 the comments that you made about payment will be considered at
18 that time, do you see what I'm talking about?
19 A. Yes.
20 Q. Okay. Now, you have an SSA comment, and that he seems to
21 say keep open, correct?
22 A. That is correct.
23 Q. Is that the supervising special agent?
24 A. Yes, it is.
25 Q. So just in the hierarchy, is that sort of the person you

1 report to in the FBI?
2 A. That's correct.
3 Q. And then there's an ASAC. Is that assistant special agent
4 in charge?
5 A. That's correct.
6 Q. Okay. And that's, I take it, someone who is even higher in
7 this the hierarchy in this field office?
8 A. That's correct.
9 Q. Okay. And if you look at both of those gentlemen, whoever
10 they may be, they both indicate that the source is going to be
11 kept open, that they're approving that as well?
12 A. That is correct.
13 Q. And no one comments on this idea that payment is going to
14 be deferred until after Mr. Renzi's challenge has been
15 completed, correct?
16 A. There's no comments there, no.
17 Q. In fact, so far as you know, as of today, Mr. Aries is
18 still eligible for a reward, isn't he?
19 A. He could be considered for an award at some point.
20 Q. Once all the appeals are resolved, right?
21 A. Yes.
22 Q. Okay. And presumably once this challenge is over as well,
23 correct?
24 A. Yes.
25 MR. KRAMER: Could I have just one second, Your Honor?

1 THE COURT: Yes.
2 MR. KRAMER: Agent Tjernagel, that's all I have.
3 Thank you for coming in.
4 THE COURT: Any redirect?
5 MR. MULRYNE: Your Honor, just one thing.
6 REDIRECT EXAMINATION
7 BY MR. MULRYNE:
8 Q. Agent Tjernagel, Mr. Kramer asked you about Agent Odom's
9 views as to whether or not Mr. Aries should be paid and he
10 asked you about your own views as to whether or not Mr. Aries
11 should be paid.
12 Do you recall that?
13 A. Yes.
14 Q. Were either your views or Mr. -- or Agent Odom's views ever
15 shared with Mr. Aries?
16 A. No, they were not.
17 MR. MULRYNE: No further questions, Your Honor.
18 THE COURT: All right. You can step down, agent. You
19 can be excused.
20 MR. RESTAINO: Judge, can we just get a confirmation
21 that Mr. Sandlin's done as well?
22 MR. TYNAN: No further questions.
23 MR. RESTAINO: Judge, can I just have two minutes to
24 consult with counsel about presenting this next witness? I
25 think it will be short.

1 THE COURT: All right.
2 MR. RESTAINO: Judge, this is Mr. Knapp's witness but
3 here's what we'd like to do. We filed a stipulation this
4 morning or this afternoon as to most of Agent Burris'
5 testimony.
6 THE COURT: Okay.
7 MR. RESTAINO: With that, we'd like to just tender
8 this witness for the defense to do the direct. We think that
9 will be the fastest and most efficient way to do it.
10 THE COURT: All right. Go ahead.
11 MR. KRAMER: In that case, we call Agent Jan Burris --
12 retired agent Jan Burris.
13 CLERK: If you could please step into the witness
14 stand and remain standing to be sworn.
15 JANET BURRIS, GOVERNMENT WITNESS, WAS SWORN.
16 CLERK: You may have a seat. Please speak directly
17 into the microphone, state your full name and the spelling of
18 your last name.
19 THE WITNESS: Janet Burris, B-u-r-r-i-s.
20 DIRECT EXAMINATION
21 BY MR. KRAMER:
22 Q. Good afternoon, Ms. Burris. I'm Kelly Kramer. We've
23 spoken by phone. I'm not sure if we've met in person before.
24 A. Yes.
25 Q. We apologize for making you come in today. We really did

1 try to get a stipulation to get rid of your need to appear at
2 all. We came really close so we have just one tiny area that
3 we weren't able to come quite to an agreement and I wanted to
4 ask you just a few questions about.
5 You were the -- you were a case agent, assistant case agent
6 I suppose, working with Mr. Odom on the Renzi case, am I right?
7 A. Yes, it would be a co-case agent.
8 Q. Co-case agent, okay. And we talked a little bit about your
9 -- by phone about your first meeting with Mr. Aries in
10 September 2006. And that's what we're going to talk about
11 today, okay?
12 A. Okay.
13 Q. In front of you you've got a notebook, I think. And I
14 believe that there is an exhibit marked as 101B.
15 A. Yes.
16 Q. Okay. Now, just for context here, you retired from the
17 bureau several years ago, right?
18 A. Yes, September of 2012.
19 Q. Okay. And between September 2012 and just last week I
20 assume you had little or nothing to do with the Renzi case,
21 right?
22 A. I had absolutely nothing to do with it, not after
23 retirement.
24 Q. Nothing to do with it, okay. And so when you first were
25 contacted about this particular hearing, I take it your

1 recollection of what actually happened at the meeting was
2 probably pretty limited; is that fair?
3 A. Yes.
4 Q. Okay. And, as I understand it, you had an opportunity to
5 review the 302 and your notes with the government prior to our
6 telephone call last week; is that right?
7 A. That's correct.
8 Q. Okay. And having had an opportunity to review the notes
9 and the 302, I understand it refreshed your recollection.
10 Am I right?
11 A. Correct.
12 Q. Okay. And in particular with respect to the meeting, what
13 Mr. Aries told you, as I understand it, your recollection --
14 your refreshed recollection was that Mr. Aries told you that he
15 first heard about the Sandlin property when it was raised to
16 him by Joanne Keene; am I right?
17 A. Correct.
18 Q. And, in fact, that's reflected in your notes in sort of the
19 second paragraph, correct?
20 A. Yes.
21 Q. And as I understand, what you recollected what had happened
22 is that Mr. Aries said that he briefed Ms. Keene about the
23 exchange before he ever met Mr. Renzi, right?
24 A. Yes.
25 Q. And that Mr. Renzi -- sorry. That Ms. Keene then told him

1 before the meeting with Mr. Renzi words to the effect of:
2 Mr. Renzi loves what you're proposing but he wants to do
3 something to help the base and you should include the Sandlin
4 property in the exchange.
5 Is that about right?
6 A. Yes.
7 MR. KRAMER: I think that that might be it, Your
8 Honor. Let me just check. I think that's it, Your Honor.
9 Thank you.
10 THE COURT: Thank you.
11 MR. TYNAN: No further questions.
12 THE COURT: Any questions?
13 MR. KNAPP: Just briefly, Your Honor.
14 THE COURT: All right.
15 CROSS-EXAMINATION
16 BY MR. KNAPP:
17 Q. Ms. Burris, do you have a stack of exhibits in front of
18 you?
19 A. I do.
20 Q. Mr. Kramer was asking you about your notes, and they're
21 marked as 101B. Can you pull up 101B?
22 A. Yes.
23 Q. All right. He was asking you about whether Joanne Keene
24 first proposed -- first mentioned, according to your
25 recollection at the Aries meeting, whether Joanne Keene first

1 mentioned to Aries the Sandlin land.
2 Do you recall that?
3 A. Yes.
4 Q. Okay. Just in your notes here it actually -- can you just
5 read me in the second paragraph there starting with, "Renzi
6 loves what you have proposed"?
7 A. Renzi loves what you have proposed. Property important to
8 the base. If you include this piece of property, it will
9 really -- I think it should be make Renzi happy. Phil knew
10 that RCC was pushed by Renzi to include the Sandlin property.
11 Q. Okay. It's a tiny little piece but I'm just curious. The
12 first part of that refers to the piece of property. It's later
13 that it's referred to as the Sandlin property.
14 A. Right.
15 Q. It's been nine years but do you recall that this piece of
16 property that Joanne Keene proposed, as Mr. Aries related to
17 you at the meeting, was the Sandlin property?
18 A. That's definitely my recollection. That was what we were
19 there to discuss with him.
20 Q. Okay. And on just a broader issue, do you recall -- do you
21 recall Mr. Aries reading the admonishments about sources; is
22 that right?
23 A. Yes.
24 Q. The standard admonishments?
25 A. Yes.

1 MR. KRAMER: Object to the scope. This is covered by
2 the stip.
3 THE COURT: I think it is.
4 MR. KNAPP: That's fine, Your Honor, nothing else.
5 THE COURT: Anything else? Can this witness return to
6 her retirement?
7 MR. KRAMER: I don't believe so, not from us, Your
8 Honor.
9 THE COURT: All right. Thank you, ma'am, for coming
10 in.
11 MR. RESTAINO: So, Judge, the last witness available
12 in the event defense wants to question him would be Agent
13 Radtke.
14 MR. NIEWOEHNER: We don't need to question Agent
15 Radtke.
16 THE COURT: So no other witnesses or factual matters
17 to be submitted?
18 MR. TYNAN: Just for the record, Your Honor, no
19 questions for Agent Radtke as well.
20 THE COURT: And Sandlin joins in everything that Renzi
21 has done, right?
22 MR. TYNAN: Yes, yes, Your Honor.
23 THE COURT: Well, I don't know if we have enough time
24 to discuss this case but let me ask you a couple of questions.
25 This trial starts on May 7, 2013, and it's my understanding

1 that there was a disclosure of the admonishments for the first
2 time on May 5, 2013, and I need some help and some refreshment
3 as to what form that disclosure was made, was it -- can you
4 answer that question so far, Mr. Restaino?
5 MR. RESTAINO: I can answer it so far, Your Honor.
6 THE COURT: All right. What form was that? Is that a
7 written disclosure? Was it just telling the lawyers that there
8 are these admonishments -- FBI admonishments? What was the
9 defense told?
10 MR. RESTAINO: Judge, this is sealed Exhibit 10 to our
11 response. We had some clean-up discovery here that we produced
12 and we didn't just dump it on them. We produced the -- what we
13 called the source review EC via email on May 5th, 2013. This
14 is, again, in sealed Exhibit 10. We produced a cover email
15 that generally referred them to particular things, one of which
16 said the new ECs or electronic communications are composed
17 largely of certain probate records that have already been
18 exhibited. One EC also describes the review process for source
19 files, and it goes on to say which I generally described
20 previously to Chris -- meaning Mr. Niewoehner -- in declining
21 to produce a full source file of a different source.
22 And so we produced, then, the source EC that very clearly
23 refers to the admonishments. We did not disclose the
24 admonishments, and I would suggest to you I don't think the
25 admonishments are typically disclosed. But we did not disclose

1 the actual admonishments. We put them on notice that there
2 were.
3 THE COURT: Well, maybe they should be. If the
4 government thinks that when an informant or a source reads the
5 admonishment that there is the possibility of payment, any
6 lawyer knows that that is a good subject for cross-examination
7 of that witness. What he thinks may be -- regardless of what
8 the government actually tells him, the witness who's going to
9 testify thinks that he could get payment for his testimony and
10 perhaps the inference, if not the question, to make the jump
11 that the better he does, if you will, if he leads to a
12 conviction, the more money he's going to get, why wouldn't that
13 be disclosable in every case where there's a confidential
14 source who has been read this admonishment?
15 MR. RESTAINO: If the -- this is a question for the
16 Court to decide factually. The government submits it had no
17 reason to think that Mr. Aries thought he was going to get any
18 reward or payment based on his circumstances.
19 THE COURT: Well, your agent says that that's what
20 they would think. If they heard that admonishment read to
21 them, they would think that there's a possibility for payment.
22 MR. RESTAINO: Again, Your Honor, I was --
23 THE COURT: And you're saying the prosecutors don't
24 know that?
25 MR. RESTAINO: I think defendants know that anybody --

1 any source would probably get paid.
2 THE COURT: Well, the prosecutors don't know that a
3 witness could think that, when he's read that admonishment,
4 that the possibility of payment is available to him when he
5 testifies, right?
6 MR. RESTAINO: Judge, I do not think that that is what
7 the evidence fairly suggests in this case. Obviously, if the
8 Court disagrees, the Court may have to move on to step three in
9 the analysis, which is whether or not this is material.
10 THE COURT: No, that's a question for them. I'm
11 asking you.
12 MR. RESTAINO: Yeah, and I would -- I'm sorry, Judge.
13 THE COURT: It seems like to me that that's
14 discoverable and disclosable in every case where you have a
15 confidential source who has been read that admonishment.
16 Question number two: If the witness, according to the
17 government agents, can think that he's possibly going to get
18 payment for his testimony and the witness -- the government
19 agent thinks that the witness should get payment, he thought
20 that then, and he thinks that today, what about the propriety
21 of the argument of the government when the government gets up
22 and tells the jury that the witness has not been paid one thin
23 dime when the facts are, he could be paid a fat dime in this
24 case, he still could be paid, right?
25 MR. RESTAINO: Sure, Judge.

1 THE COURT: And you don't tell the defendants that.
2 MR. RESTAINO: I can go back to question one and
3 answer question two.
4 THE COURT: All right.
5 MR. RESTAINO: So on question one, Judge, I would say
6 this as simply as I can. We had the admonishments, and by that
7 I mean I had the admonishments. If it turns out you feel that
8 there was a nondisclosure here, that's mine to own. It's not
9 Mr. Mulryne's or Mr. Knapp's or Mr. Harbach's or Agent Burris'
10 or Agent Odom's and Agent Tjernagel's. I think I'm not the
11 only AUSA and I think every AUSA doesn't disclose this
12 information. But to the extent you're going to set down a Bury
13 Rule, we will live with that and I should be the one that bears
14 the responsibility for not disclosing it in this case.
15 On to point two, though, Judge, I don't think that
16 assessment fairly indicates the way impeachment works. In
17 other words, agents want to pay a source. Agents can want to
18 pay a source as much as they want as long as they don't
19 communicate the fact to the source that the agent wants to pay
20 them. It's why many prosecutors will not want there to be a
21 payment until everything's done because then it comes as a
22 surprise.
23 THE COURT: Well, I understand what you're saying, and
24 it is true that he's not been paid one thin dime, right?
25 MR. RESTAINO: That's correct, absolutely.

1 THE COURT: But we're talking about the impression on
2 the witness who gets an idea that he could be paid for his
3 testimony. And you're telling me that you don't think the
4 government has to disclose that? Is that going to be a Bury
5 Rule? Seems like to me it's a no-brainer rule, which may be
6 the same thing as a Bury Rule.
7 MR. RESTAINO: Judge, I don't think that those source
8 admonishments are typically disclosed. I would suggest that I
9 doubt you've seen many in your practice on the bench.
10 THE COURT: I understand. I don't -- I don't accept
11 as a fact that he was told that he would be paid in the case.
12 But that doesn't mean that it doesn't have to be disclosed if
13 the government knows that when people hear that, that they
14 think they could be paid. Because that may bear upon their
15 state of mind and their motivation and their credibility and
16 whatnot in testifying in the case.
17 MR. RESTAINO: I don't know there's much more I can
18 say on that, Judge.
19 THE COURT: What about the propriety of the argument
20 of the government that he has not been paid one thin dime if
21 the government agent in charge of the investigation wants to
22 pay him more than a dime?
23 MR. RESTAINO: Perfectly reasonable not to disclose
24 that and to say that, Judge. The fact that an agent has a
25 desire to pay a source has nothing to do with whether that

1 source thinks they might get paid. And, as Mr. Aries testified
2 today, he realizes he was dealing with some wishful thinking.
3 THE COURT: Well, except here the facts are that the
4 witness is hoping that he'll be paid, he thinks that he might
5 get paid, and the government wants to pay him but the
6 government argues -- and he'd be paid after the case, and the
7 government argues: This witness has not been paid one thin
8 dime.
9 You don't see a problem with that?
10 MR. RESTAINO: Not given the facts of the case, Judge,
11 and the fact that that was invited by the defense. We talked
12 at length in this case about the Blagojevich trial and I know
13 that Mr. Niewoehner likes to respond on that because he tried
14 that case but there were some -- there's a very, very good
15 appellate decision on that case that goes through closing
16 argument. I don't think there's anything to their closing
17 argument concern.
18 I think what there is is your concern about not disclosing
19 the admonishments. Again, that is on me and not on the rest of
20 the team. I would submit to you I don't think that's material,
21 even if you do find that there is a Brady violation, and would
22 certainly encourage you to explore that with the defense.
23 Did you want me to address the notes or anything else,
24 Judge?
25 THE COURT: No. I think we need some -- do you guys

1 want to argue this case? Oh, hey, what a dumb question that
2 is.
3 MR. KELLY: We could argue.
4 THE COURT: I just put up with you guys for a month.
5 You probably want to argue this case.
6 MR. KRAMER: Yeah -- yes, Your Honor, we would. I
7 mean --
8 THE COURT: You know, because the bigger question for
9 you guys is that, not to be disrespectful about it, but what
10 difference does it make? You know, it's hard for me to
11 conceive of any better cross-examination or impeachment of
12 witness Aries than you did in this case. I mean, even to the
13 extent that the witness himself, which I hear for the first
14 time, wants the agent to tell me how he was abused by the
15 lawyers. Well, nobody has to tell me that because I was
16 sitting here watching it.
17 And to argue now that the fact that he thinks that he could
18 possibly be paid for his testimony is like the fighter pilot
19 wanting to take another shot when his target is out of the sky
20 crashing into the ocean. I mean, he was a sinking ship. And
21 you want to say: Well, here's this document that was read to
22 you and it put in your mind that there's the possibility of
23 payment. There certainly wouldn't be any testimony from him or
24 anyone else that there would be payment but there's the
25 possibility of payment that you're saying the result in this

1 case probably would have been different.

2 MR. KRAMER: Well --

3 THE COURT: That's a really big step.

4 MR. KRAMER: But I don't think -- first off, on the

5 standard, I don't think that's the standard we have to meet is

6 that it probably wouldn't have been different. I think that

7 the standard is pretty clear that what you need to show is that

8 there's a reasonable probability that it would have been

9 different. And reasonable, the Supreme Court says, is

10 important. And it means that, in this case, it undermines the

11 confidence in the verdict. And that's basically what the

12 Supreme Court said in Kyles.

13 So, you know, I understand the language, but when you talk

14 about undermining confidence in the verdict here, there's a

15 couple of ways that I think that you would find that this is

16 plainly material.

17 The first is with respect to Mr. Aries himself. I

18 appreciate what the Court has said about the cross. I

19 certainly thought it was a pretty good cross, but obviously the

20 jury concluded that Mr. Aries was at least telling some of the

21 truth.

22 And part of that -- part of the reason we know that is

23 because in the closings the government said, I think it was

24 seven times, that the free pass comment is critical to this

25 case. He's the only witness -- he's the only witness in the

1 whole case who says that Mr. Renzi used this reference to a
2 free pass. So he's absolutely the key witness as far as the
3 government's case is concerned.
4 And we don't know, none of us do, what exactly was in the
5 jury's head when it comes to what they believed about the guy
6 and what they didn't. More to the point, we tried to cross
7 this guy. We tried to cross Philip Aries about money because,
8 as the Court knows, he was getting paid for this expert witness
9 work. And we knew because we got disclosures that they had
10 reimbursed Joanne Keene, for example, on gas expenses when she
11 was a source.
12 So we didn't think that there was any possible way that the
13 government was contemplating paying Mr. Aries. So we stayed
14 away from that. We didn't touch any question, we didn't ask
15 him anything to suggest that maybe he knew or believed that he
16 had a personal financial interest in this case.
17 And we closed, we did the best we could. We talked about
18 the fact that, you know, look, he's trying to keep the
19 government a little bit happy from that money he gets 'cause of
20 the civil contracts.
21 The government then turned around, appropriately given the
22 record that we had, and annihilated that argument. They
23 said -- they made fun of it. They're like: Mr. Niewoehner
24 wants you to believe that that money could have influenced him,
25 but he didn't get one thin dime. And you know what that does?

1 That completely negates the idea that there could have been a
2 financial motivation for Mr. Aries.
3 So whatever we might have done on cross in terms of his
4 bias, in terms of maybe his desire to avoid criminal exposure,
5 maybe the fact that he was mad at Renzi, we were completely
6 unable to expose what I think is the biggest, dirtiest rotten
7 secret of this case. And that's that the confidential human
8 sources in this case are all eligible to get paid today. Keene
9 is, Aries is. We didn't know that.
10 And to the extent that the government suggests that the
11 admonishment policies were disclosed and we could figure this
12 out in some way. Absolutely not. We didn't know what the
13 admonishments said.
14 THE COURT: I think you should have known that.
15 MR. KRAMER: Absolutely.
16 THE COURT: I think they should have told you that.
17 But is it reasonably probable that the result would be
18 different?
19 MR. KRAMER: Yes. And here's why. Not only -- not
20 only could we have gone after Aries in a wholly different,
21 wholly new way, in a much more effective cross, we also --
22 THE COURT: That he possibly could get paid by the
23 government?
24 MR. KRAMER: Absolutely. Because you know why? It
25 doesn't just go to his credibility, it goes to the government's

1 credibility.
2 So when we closed, we were extraordinarily careful. We
3 thought about it, we talked about it. And when we closed, we
4 made sure that what we said was: Look, we're not saying for
5 one second that anybody at the government table has done
6 anything wrong. They just want the facts to be this way. And
7 they didn't look at everything, they didn't check everything.
8 Your Honor, if the jury had known that the agents are
9 running around talking about money for key witnesses, the whole
10 government case loses its credibility. Everything that they've
11 put up all the sudden becomes tainted. And you wonder at that
12 point: What's really going on here? Why are they going after
13 this guy?
14 One of our principle defenses was that this was a great
15 deal. On the merits, that this land exchange was a great
16 exchange, and everyone kind of stipulated to that at the end of
17 the day. Everyone said that it was in the best interests of
18 Fort Huachuca, that it was essential to national security. You
19 recall all of this.
20 And what we set up was a choice for the jury: Either he
21 was doing it for the right reasons or he had some corrupt
22 intent and that's what was going on. And the government's
23 credibility in a case like that is critical. And the fact that
24 they're running around offering -- not offering. The fact that
25 they're running around talking about payments, having annual

1 reminders -- well, you heard Agent Odom sit there on the stand
2 today and say: Yeah, I get it. Looking at these
3 admonishments, if I was a witness, I might think that this was
4 a reminder that I could get paid, too.
5 The government can't do that, Your Honor, not in this
6 country and not in these cases. You cannot possibly put a man
7 in jail on the basis of witness testimony when they don't
8 disclose to us that these guys were all talking about money all
9 along the way.
10 Philip Aries had a bankruptcy. Philip Aries had a million
11 different things go wrong in his life. And he had every
12 incentive to try to get money when he testified. Whether he
13 did in 2006 is a red herring. When he sat on that stand in May
14 2013, he wanted the money, he needed the money. And the best
15 way to get it is to testify in ways that hurt Renzi.
16 THE COURT: Well, except you're taking my hand off and
17 running too far with it 'cause he wasn't -- nobody told him
18 he'd be paid, that they agreed to pay him.
19 MR. KRAMER: Look, I understand that, Your Honor. But
20 let's put yourself in Mr. Aries' head. Mr. Aries testified --
21 and I think maybe one of the truest moments I've ever seen him
22 on the stand, he talked about November 10th, 2006. He's
23 standing there on the balcony. He's got this horrible thing
24 going on in his life. He's stressed beyond belief. And Agent
25 Odom wants him to do a recorded phone call. And what's he

1 want -- and he's like: This sucks. I don't want to do this.
2 Not today.
3 And so what does Agent Odom say: Recording phone calls
4 like that is the kind of thing you can do, it's exactly the
5 kind of thing that will get you a reward. That's what Agent
6 Odom -- that's what Aries explained today. Agent Odom doesn't
7 recollect it. He didn't really deny it. He basically said he
8 doesn't recall ever doing anything like that.
9 But you have a credibility decision to make on that. And I
10 submit to you it's as obvious -- it's as clear as day. Aries
11 has been totally consistent on this in all the emails he sent
12 to Mr. Restaino, in all the conversations he had with
13 Mr. Tjernagel when he asked for money after the trial. He was
14 told, not just in the admonishments but in other conversations,
15 that it was possible for him to get money.
16 You couple what Mr. Odom told him during that incredibly
17 stressful, difficult moment with these admonishments and there
18 is no question in the world that Mr. Aries believed that he
19 could get paid for testifying against Renzi.
20 And you heard Mr. Aries talk about it. He said he hadn't
21 really ever thought about whether he could get a bigger reward
22 or whether he wouldn't get a reward if Mr. Renzi wasn't
23 convicted. But we all know that's true. We all know that
24 fundamentally Mr. Aries isn't getting a reward if Mr. Renzi is
25 acquitted; it's not going to happen. That's not how this

1 works.

2 And so we know that in his head, because of what the

3 government did, he believed he could be paid in this case. We

4 deserved to know that. And that cross would have been

5 materially different.

6 Judge, I had no idea, not one idea, in fact, I had the

7 wrong idea. I had the idea from the disclosures that this man

8 had not been told he could be paid and that he couldn't be

9 paid. I didn't know that the government paid fact witnesses.

10 I didn't realize that confidential human sources, in fact, are

11 eligible to be paid. I didn't know that this policy lets you

12 sort of hide the payment until after an appeal is completed.

13 It stinks. And the idea that that's not ultimately material --

14 THE COURT: I guess you agree with me that it should

15 be discoverable, right?

16 MR. KRAMER: It's not discoverable, Your Honor.

17 There's a constitutional obligation to the prosecution to

18 disclose it. It's not a matter of discovery, it's a matter of

19 a fair trial. But that's what this case is ultimately about.

20 We talk about materiality, what would have made a difference to

21 this jury. Well, think about the factors that the Court of

22 Appeals says you need to think about: How important was the

23 witness? Well, he's incredibly important. He's the only

24 person who claims that there's a free pass in the case. He

25 is -- the government explicitly asked the jury to rely on

1 Mr. Aries when they assessed Mr. Hegner's credibility. These
2 schemes are linked in the government's presentation of the case
3 and it covers all the land exchange counts.
4 What else do they ask you to look at? They ask you to
5 talk -- they look to see whether the comments are corroborated,
6 whether the testimony is corroborated in other ways. And again
7 I go back to free pass. No one corroborates free pass. Joanne
8 Keene says there's a placeholder. A placeholder is totally
9 benign, Your Honor. A placeholder is not a corrupt quid pro
10 quo. You can bet that if there was a corrupt quid pro quo in
11 front of Joanne Keene in this context and that's what she
12 perceived happening, she certainly would have testified to.
13 What else do they got? They've got some of the investors
14 who say: Hey, you said there was a free pass to Aries. But
15 guess what? Aries needed their money. He had every incentive
16 in the world to exaggerate what had happened with Renzi 'cause
17 he didn't have the cash to do an exchange and he saw it as a
18 get-rich-quick scheme. He needed their money and so he had
19 every intention to exaggerate.
20 Guy Inzalaco testified in this case. He doesn't say
21 there's a free pass, he just said: Whatever Renzi told me, I
22 got comfortable with.
23 You have to look at the closeness of the case. Half the
24 counts the jury acquitted. So what is the tipping point here?
25 How close were we? I've got to tell you, when we left this

1 courtroom and we sat outside and we waited in the library for
2 the jury to come back, look, we thought we were in play. We
3 thought we were so close. We thought we were going to win.
4 And we didn't. And that's why juries do what they do and
5 that's okay.
6 But it's not fair to lose this way. It's not fair to me,
7 it's not fair to Mr. Niewoehner, it's not fair to all these
8 lawyers that put all this time in, it's not fair to the Court.
9 The only parties in this room who knew what we all deserved to
10 know are sitting at that table and they didn't tell us. Why?
11 'Cause there's some policy not to disclose generally speaking?
12 I don't even know what that means.
13 THE COURT: All right.
14 Mr. Restaino, let me make sure I've got the context correct
15 of not paid one thin dime. That wasn't in reference to his
16 consulting work, was it, that was in reference to his testimony
17 in the case?
18 MR. RESTAINO: Correct. And, Judge, if I recollect,
19 it's that the defense in their main close attempted to conflate
20 the civil payments with payment for work on the case, and the
21 government in its closing argument in the rebuttal pushed back
22 on that.
23 MR. KRAMER: Your Honor, can I just show on you on the
24 Elmo what the actual argument was?
25 THE COURT: No. The conviction could stand even if

1 there weren't the words used "a free pass"?
2 MR. RESTAINO: Sure, Your Honor. And in several
3 reasons it could stand. May I address that?
4 THE COURT: Sure.
5 MR. RESTAINO: So obviously the insurance counts
6 stand; those haven't even been challenged.
7 The parts pertaining to Resolution Copper, the first object
8 of Count One, Count 26 on the substantive charge, and as to
9 Mr. Renzi alone, the RICO count all could stand. And all of
10 the extortion of PPFLI could stand even without free pass
11 because of the other corroboration and connotation, that
12 Mr. Aries was going out on a limb at the behest of Mr. Renzi,
13 that Mr. Renzi was -- whether it was done obliquely or
14 directly, there has to be a quid pro quo. But we think that
15 there can be a quid pro quo without the words "free pass" being
16 used.
17 We also think free pass has extensive corroboration. He
18 does use it. Mr. Lampman refers to free roll. Mr. Inzalaco
19 talks about the assurance he got from Mr. Renzi. And Keene
20 talks about that placeholder and has the information that she
21 witnessed firsthand with respect to Resolution Copper. All of
22 this helps to corroborate and bolster Mr. Aries.
23 And, Judge, there is not a single shred of doubt in all of
24 the records before and after that Mr. Aries used that free
25 pass. He's never wavered on that. That was not going to be a

1 topic that they were going to be particularly fruitful on and
2 it was simply going to be cumulative, which is another factor
3 that the Ninth Circuit uses, and it was going to be otherwise
4 corroborated, another factor the Ninth Circuit uses.
5 This was simply not anything material. Again, I will own
6 any nondisclosure violation that the Court puts my way. But
7 this was not material. And, in short, there is confidence in
8 the verdict.
9 And I don't particularly care about Mr. Kramer and
10 Mr. Niewoehner and the time they put in. I care about
11 Mr. Renzi and Mr. Sandlin, making sure the verdict was
12 confident for them and we believe that it is. And we believe
13 that this fits all of the standards in all of the case law why
14 this case should be affirmed and there should be no new trial.
15 And, Judge, I would point to some of the cases that the
16 defense has pointed to are just outrageously dissimilar, with
17 witnesses that are in contracts with government agents,
18 contracts to be paid. Nothing like this in case at all, where
19 there were pristine witnesses. And Phil Aries had a difficult
20 day up there and was attacked in many ways at the trial, was
21 hardly a pristine witness.
22 For all these reasons, we believe that this is a verdict
23 worthy of confidence and that even if the Court finds that
24 there was a disclosure violation, from which we all will learn,
25 myself particularly, this is a verdict that should be upheld.

1 Thank you, Judge.

2 THE COURT: All right. I'll get you an order. Thank

3 you. We are adjourned.

4 (Whereupon, the matter was concluded at 4:40.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 C E R T I F I C A T E

2

3 I certify that the foregoing is a correct transcript

4 from the record of proceedings in the above-entitled matter.

5

6 /s Cindy J. Shearman November 6, 2015
CINDY J. SHEARMAN, RDR, CRR DATE

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

EXHIBIT C

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,
Plaintiff,
v.
Richard Renzi;
James W. Sandlin,
Defendants.

CR 08-212 TUC DCB (BPV)

ORDER

Defendants were convicted of numerous counts at trial, the Court sentenced them and entered the Judgment and Commitment for Defendant Renzi on October 28, 2013, and the Judgment and Commitment for Defendant Sandlin on October 29, 2014. Both appealed, and the Ninth Circuit Court of Appeals affirmed the convictions and sentences. The United States Supreme Court denied Defendants' petitions for certiorari.

On June 3, 2015, Defendant Renzi filed a Motion for a New Trial. Defendant Sandlin joins in the motion. Both assert violations of *Giglio v. United States,* 504 U.S. 150, 154 (1972) and *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Defendants argue that the Government failed to disclose material impeachment evidence that a key witness, Phillip Aries, had a financial incentive to testify favorably on behalf of the Government. Defendants assert that if the jury had known Aries expected to be paid for his cooperation and that the FBI was considering paying him, it is "reasonably probable" that the trial's outcome would have been different.

More importantly, the Defendants assert they now know, but did not know at the time of trial that Aries originally told the FBI that it was Joanne Keene, not Renzi, "who first

1 suggested that he revise his land-exchange proposal to include the Sandlin property." (Renzi
2 Reply (Doc. 1453) at 3.) Defendants argue that five days after making this statement to the
3 FBI, "Aries learned that he was eligible for a reward" as a confidential human source (CHS),
4 and changed his story to accuse Renzi of being the person who first told him about the
5 Sandlin property. Aries presented this "flip flop" testimony to the Grand Jury and at trial.
6 First the Court notes that it clearly recalls that at the trial, Aries testified he first
7 heard about the Sandlin property from Renzi in Flagstaff on April 15, 2005. Then,
8 Defendants presented Sandlin's telephone records which reflected that Sandlin and Aries had
9 talked the day before the Flagstaff meeting for about half an hour. At trial, it became
10 apparent that Aries had been given the heads up about the Sandlin property from Keene, and
11 Aries had contacted Sandlin and spoken to him before he met with Renzi in Flagstaff.
12 Second the Court notes that the five days referenced above by the Defendants relates to the
13 timing between Aries' initial statements to the FBI and when he was first given the standard
14 Admonition read to confidential human sources (CHS), not necessarily the timing of the
15 change, i.e., flip flop, in his story.
16 The critical inquiry under *Brady* is: 1) the information must be favorable to the
17 accused because it is either exculpatory or impeachment; 2) the government willfully or
18 inadvertently suppressed the information, and 3) the suppressed evidence prejudiced the
19 defense because the information was "material" to the defense and "there is a reasonable
20 probability that the result of the trial would have been different if the suppressed material had
21 been disclosed to the defense." *Strickler v. Greene*, 527 U.S. 263, 289 (1999). An innocent
22 failure to disclose favorable evidence can constitute a *Brady* violation, *United States v. Price*,
23 566 F.3d 900, 908 (9th Cir. 2009), and suppression occurs when the Government fails to turn
24
25
26
27
28

over even evidence that is only known to a police investigator and not to the prosecutor, *Youngblood v. West Virginia*, 547 US. 867, 869-70 (2006).[1]

Defendants argue that the evidence suppressed by the Government reflects that Aries believed that he would, or at least might, receive payment for assisting the Government by testifying against Renzi. Defendants rely on the following evidence.

Pretrial, Aries was routinely given a CHS standard form FBI Admonition on: 10/3/06; 9/10/07; 9/4/08; 1/20/11, and 5/14/12. Each included: 1) "The FBI cannot guarantee any rewards, payments or other compensation to you, "and 2) "In the event that you receive any rewards, payments, or other compensation from the FBI, you are liable for any taxes that may be owed." (Reply (Doc. 1453), Ex. 10.) The Government admits it did not disclose the admonishments to the Defendants. The Government's attorney submitted to this Court that typically the admonishments are not disclosed. (Hearing 10/26/15: TR (Doc. 1473) at 115.) It is the Government's position that disclosure of the Admonitions was not warranted under *Brady* because they do not reflect that Aries believed he would be paid. *Id.* at 115-119. The Court does not agree. The express terms of the Admonitions include language that clearly

---

[1]Raised for the first time in the Reply, Defendants assert that, pursuant to *Naupe v. Illinois*, 360 U.S. 264 (1959), the Court should set aside the convictions because the Government knowingly solicited false testimony. The Defendants submit newly discovered evidence that the Government suppressed hand written notes from the FBI's first interview with Aries, which reflect that Aries said at this initial meeting that Keene first told him about the Sandlin property. Defendants argue that the Government, therefore, knowingly solicited false testimony from Aries when they asked him questions that elicited his response that Renzi first introduced the purchase of the Sandlin property at the Flagstaff meeting. *United States v. Agurs.*, 427 U.S. 97, 103 (1976) (finding that the knowing use of perjured testimony by a prosecutor generally requires that the conviction be set aside). Generally, an argument raised for the first time in a reply brief is considered waived. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). The Court does not reach the question of perjury. The Court notes that the Government did not rely on the false testimony in closing argument and Defendants' impeachment of Aries with Sandlin's telephone records made it quite clear to the jury that it was Keene, not Renzi, who first told Aries about the Sandlin property. The handwritten FBI note would have been cumulative to the Sandlin telephone records.

contemplated the possibility of payment, *id.* at 56 (FBI SA Odam's admission on cross examination), *but see id.* at 47 (denying on direct examination that Admonishment suggests payment). Aries was read these admonishments annually. This is enough.

Additionally, Aries credibly testified that on November 10, 2006, he hesitated during a family counseling session to make a telephone call to Renzi at the behest of Agent Odam, and Agent Odam encouraged him to make the call by telling him that this was the kind of thing that, when it was all over, might result in a reward. *Id.* at 13-15. He also credibly testified that he was never told he would receive a reward; the Admonitions expressly informed him that he was not guaranteed a reward. There is no evidence that Agent Odam communicated to Aries that he believed Aries should receive a reward. Aries believed a reward was only a possibility.

According to the Government, the Admonitions do not need to be disclosed if payment comes after everything is done because then it is a surprise. *Id.* at 118. As the Court suggested at the hearing, it does not agree. The clear language of the Admonitions suggests the possibility of payment, and the fact "that they think they could be paid . . . bear[s] upon their state of mind and their motivation and their credibility and whatnot in testifying in the case." *Id.* at 119.

The Court is also concerned regarding the propriety of the Government's assertion during closing argument that Aries had not received one thin dime in relation to this case, when at the time the Government knew the case agent wanted him to be paid, *id.* at 51, 58, and he might be paid at the end of the case, *id.* at 117. The Government's response: "Perfectly reasonable not to disclose that and to say that, Judge. The fact that an agent has a desire to pay a source has nothing to do with whether that source thinks they might get paid." *Id.* at 119. While true in the context of what a source thinks when testifying, what the agent or agency plans regarding a reward is relevant in the context of the Government's avowal to the jury.

1 The Court has already rejected the propriety of not disclosing that Aries might
2 reasonably believe a reward was possible in the context of impeachment material. The Court
3 also rejects the propriety of the Government's "one thin dime" assertion in closing
4 arguments. At best it was a disingenuous representation to the jury in response to
5 Defendants' assertion that Aries had some financial incentive to testify favorably for the
6 Government due to civil contracts he held with the Government for land-appraisal work.

7 And so the question is whether there is a reasonable probability that the trial outcome
8 would have been different if the Government had disclosed that Aries had been told a reward
9 was a possibility that would be determined at the end of the case, but there was no guarantee
10 of any reward, and if it had not been told Aries would not receive one thin dime for his work
11 on the case.

12 The Court concludes the suppressed information was favorable to Defendants
13 because it could have been used to impeach Aries' credibility in testifying about Renzi's
14 offer of one "free pass." The Government admits it made a conscious decision to not
15 disclose the Admonitions. The critical question is: whether the suppressed evidence
16 prejudiced the defense because the information was "material" to the defense and "there is
17 a reasonable probability that the result of the trial would have been different if the suppressed
18 material had been disclosed to the defense." *Strickler v. Greene*, 527 U.S. 263, 289 (1999).
19 The Court must consider whether confidence in the verdict is undermined by assessing
20 whether the withheld evidence would have altered at least one juror's assessment of guilt.
21 *Kyles v. Whitley*, 515 U.S. 419, 434 (1995); *United States v. Price*, 566 F.3d 900, 914 (9th
22 Cir. 2009). The Court considers the suppressed evidence collectively and the record in its
23 entirety. *Kyles*, 515 U.S. at 436.

24 The Government suppressed evidence of the Admonitions, the flip-flop, and Agent
25 Odam's confirmation to Aries on November 10, 2006, that he was providing the type of
26 assistance which could make a reward possible. This is not the highly prejudicial scenario
27
28

1 asserted by the Defendants: "if the jury had known that the agents [were] running around
2 talking about money for key witnesses." (Hearing 10/26/15: TR (Doc. 1473) at 125.) As the
3 Court noted at the hearing, the Defendants are: "running too far." *Id.* at 126. There is no
4 evidence that agents were running around talking about money for key witnesses. The
5 Admonitions are the Defendants' best evidence and they expressly state there is no guarantee
6 to a reward. The Admonitions do not expressly state there is a possibility of a reward. The
7 Admonitions merely suggest such a possibility. According to Aries, Agent Odam told him,
8 on one specific occasion, in generalized terms that he was performing the type of CHS work
9 that might be rewarded. The remainder of the conversations between the Government and
10 Aries occurred post-trial.

11 The flip flop evidence is of minimal value because it is duplicative of the flip flop
12 evidence admitted at trial through the Aries-Sandlin telephone records. Aries' explanations
13 given at trial as to why his Grand Jury and trial testimony did not correctly reflect that Keene,
14 not Renzi, first brought up the Sandlin property, would apply equally here. He simply forgot
15 the sequence of events between the time they occurred and he first spoke to the FBI,
16 September 28, 2006, and when he testified before the Grand Jury, July 2007, and at trial, July
17 2013. *Id.* at 29-36. Additionally, Aries did not attach an important distinction in his mind
18 between information obtained from Keene and Renzi because Keene worked for Renzi, and
19 Aries considered what she said to be coming from Renzi because she was "like a proxy." *Id.*
20 at 28.

21 Finally, the Court must consider the materiality of Aries' testimony regarding
22 Renzi's culpability. Defendants argue that Aries was "absolutely the key witness as far as
23 the government's case is concerned" because he was the only witness to testify that Renzi
24 offered a "free pass" for land exchange legislation that included the Sandlin property. *Id.* at
25 123. Again, Defendants overstate the argument.
26
27
28

1 Aries was most certainly not the Government's key witness in this case. Aries'
2 credibility was thoroughly impeached at trial. In addition to the Sandlin telephone records,
3 Defendants presented evidence that Aries held a grudge against Renzi because the Sandlin
4 deal had ruined him financially and damaged his professional reputation, and that some
5 financial incentive existed to "keep the Government a little bit happy," *id.* at 123, because
6 he was a civil contractor doing property appraisals for the Government. As the Court
7 described Aries at the hearing, he was a sinking ship. *Id.* at 121. Would it have made a
8 difference, if the jury had known that Aries believed there was a possibility of an award, but
9 there was no guarantee? The Court believes this "financial incentive" impeachment evidence
10 would have been merely cumulative, and it is not reasonably probable that the trial's outcome
11 would have been different.

12 At trial, Aries was emphatic that at the Flagstaff meeting Renzi pushed the Sandlin
13 property. Aries testified that Renzi told him that Renzi had "one free pass" through the
14 Natural Resource Committee, which Renzi would give to Aries if he added the Sandlin
15 property to the land exchange legislative package. Keene testified that she did not recall the
16 "one free pass" offer but that Renzi offered Aries a placeholder. Defendants assert these are
17 two different things, but a placeholder is where you include a property, intending to
18 ultimately swap it out for another, presumably, the Sandlin property. It is not true, therefore,
19 that Aries' testimony of "one free pass" is wholly uncorroborated.

20 Even if the cumulative financial incentive evidence would have tipped the credibility
21 scale against believing Aries' testimony that Renzi offered him a "free pass, "this is not
22 enough. Aries was not the only witness who testified regarding the quid pro quo element of
23 the offense. The Government's Response includes examples. Keene testified about a
24 telephone call between Renzi and Bruno Hegner describing Renzi as being upset and that
25 after this telephone call there were no further discussions about Resolution purchasing the
26 Sandlin property. (Resp. (Doc. 1446) at 12, Ex. 6, TR at 169-170). Bruno Hegner testified
27
28

about Renzi's agitation at being questioned over his and Sandlin's relationship and, subsequently, the "no Sandlin property, no deal" exchange. *Id.* at 12-13, Ex. 11, TR at 233-34; Ex. 12, TR at 34-35). Inzalaco testified that before he tendered the last million and a half dollars needed to purchase the Sandlin property, he spoke directly to Renzi and received assurances from Renzi that the legislation would move forward once the Sandlin property was purchased. *Id.* at 107. Karen Lynch, a former Renzi staffer, testified as to Renzi's instruction to take care of Sandlin as a special guest and as to payments received and anticipated from Sandlin. *Id.* at 13, TR at 132, 137-39.) Without citing to the trial record, the Court notes there was the paper trail of the immediate payment of money by Sandlin to Renzi following the sale of the property. The Government presented evidence beyond Aries' testimony reflecting that Renzi intended to enter into a quid pro quo agreement, i.e., that Renzi solicited a bribe by offering to trade an official action for a thing of value.[2]

The Court finds that no juror would have been persuaded in their assessment of guilt if Defendants had offered the suppressed evidence of the Admonitions and the conversation between Odam and Aries regarding a possibility of a reward. The Court considers the suppressed evidence collectively, including the evidence Defendants assert reflects a flip flop by Aries, and the record in its entirety, including the contrary assertion by the Government during closing arguments. The "not one thin dime" assertion to the jury during closing arguments by counsel while technically true was in fact misleading in the context of broad sweeping spirit of the avowal made to the jury. Nevertheless, it was weak rebuttal to the

[2]The Court rejects the Defendants' notion raised for the first time at oral argument that the suppressed evidence doesn't just serve to undermine Aries' credibility but also undermines the Government's credibility, tainting the entire case, because if the jury had heard the suppressed evidence it would have found Renzi wanted the Sandlin property to be included in the land exchange packages for good reasons, not for the allegedly corrupt reasons charged by the Government. (Hearing 10/26/15: TR (Doc. 1473) at 125.) This is not the standard for finding a quid pro quo agreement. Additionally, the Court finds that the FBI standard Admonitions and the generalized conversation between Agent Odam and Aries regarding a possible reward do not reflect an intent by the Government to go after Renzi.

Defendants' thorough and effective impeachment of Aries at trial. The Court finds that the suppressed "financial incentive" evidence is cumulative of impeachment evidence presented at trial, and does not undermine the Court's confidence in the jury's verdict of guilt, even when considered in the context of the Government's "one thin dime" closing argument.

Accordingly,

IT IS ORDERED that Defendant Renzi's Motion for New Trial (Doc. 1429) and Defendant Sandlin's Joinder (Doc. 1438) are DENIED.

DATED this 30th day of December, 2015.

David C. Bury
United States District Judge