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H. Marshall Jarrett, Counsel
Office of Professional Responsibility
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

RE: Unethical Conduct of AUSA Faith Devine

Dear Sir:

I wish to initiate a complaint against AUSA Faith Devine for several acts of misconduct during her prosecution in my case **U.S. v. Jacquot**, Case # 08CR1171-W, U.S. District Court for the **Southern District of California**. These acts include:

1. Intentional exclusion of exculpatory evidence from the Grand Jury.
2. Knowing submission of a false declaration to the Court.
3. Fraud in soliciting a conflict waiver from the Defendant.

Each of these allegations are described herein below:

Rather than attach hundreds of pages of exhibits to this letter, I will refer to documents that are filed in the public record by their document number in the case docket. Items not filed in the record will be attached hereto as Exhibits.

Case History.

A bit of case history is necessary to set the context for the actions of AUSA Devine.

1. Jacquot and the other lawyers in his firm represented the xelan family of companies. Beginning around 2000, xelan came under investigation by the IRS. Throughout the investigation into xelan, the government decried the legitimate strategy and legal tactics Jacquot employed to defend xelan and its clients. This case does not result from a legitimate exercise of prosecutorial discretion, but from a bad-faith desire to punish the one person the government most blames for its humiliating defeat in the xelan case and to chill and deter zealous representation by making an example of Jacquot. During the summer of 2004, Mr. Jacquot was interviewed by two IRS criminal investigators at his home in Idaho. The agents asked many questions about his representation of xelan, but **asked no questions regarding Mr. Jacquot's taxes or the law firm tax returns.**

2. In late 2004, government attorneys, including the prosecutor in this case AUSA Faith Devine, filed an ex parte action against Jacquot, his clients, and others in the Southern District of California, designated Case No. 04CV2184-W. The government seized all the defendants' assets and their passports. The case was unsealed and at the very first hearing on the matter before Judge Larry Burns, the government suffered a humiliating defeat. The Court dismissed the TRO and denied the government's application for a Preliminary Injunction and returned to all the defendants their assets and passports. Several days later the Court issued a written opinion harsh to the government. That opinion included, but was not limited to, findings that:
 - the government's allegations of a "ponzi scheme" are "**without merit,**"
 - "**no evidence**" that the defendant's are dissipating their assets,
 - "**no evidence**" that assets are traceable to criminal activity,
 - "**the government conceded**" that it can produce "**no evidence**" that the xelan program violated internal revenue statutes or regulations,

- the government’s evidence that the xelan programs were not legitimate was **“speculative,”** and
 - the government did **not** show that **“the tax implications of any particular xelan product were mischaracterized.”**
3. The Court also ordered the government to pay hundreds of thousands of dollars in attorney fees to the defendants in the case and the government voluntarily dismissed their case. **(Exhibit 2 to Document 47** contains Judge Burn’s final order). It is important to note that **nowhere in the complaint or in the Ex Parte TRO/receivership application or the supporting declarations is there a single mention of any problem or issues with individual tax returns for Jacquot, Jacquot’s law firm or any other person.**
 4. Shortly after the government dismissed its case, and even though the government’s claims were unsupported by the false declarations that AUSA Faith Devine presented to the Court, Ms. Devine indicated to Jacquot’s attorney Jim Frush that she was going to continue to pursue criminal charges on the same allegations that Judge Burns just dismissed. The standard for criminal charges is much higher than for a TRO and **this action by AUSA Devine alone should raise questions of vindictiveness and improper prosecutorial behavior.**
 5. Ultimately, the various xelan programs entered into settlement agreements with the IRS upholding the deductibility of the alleged fraudulent programs. In other words, no fraud was found and the alleged improper deductions were allowed to stand.
 6. **Only after these embarrassing defeats** did the government seek to attack Jacquot’s law firm’s tax returns. Around mid-2006, AUSA Faith Devine stated to Jacquot’s attorney Jim Frush that she was no longer focusing on alleged xelan fraud and stated that she believes that the law firm did not file a corporate tax return in 2004, and that the amounts on 2001 through 2003 corporate tax returns were wrong. **This is the first time that alleged errors on law firm corporate tax returns were raised.** AUSA Faith Devine later told Jim Frush that they found the 2004 return that they previously stated had not been filed. The numbers the

government alleges that should be on the returns have changed numerous times. Ultimately, the government alleges numbers below (**See attached Exhibit 1**).

Year	Government's Calculation of Payments Net of Non-Taxable Reimbursements	Amount Shown on Return
2001	\$469,639	\$344,250
2002	\$876,205	\$745,578
2003	\$744,758	\$897,340
2004	\$116,878	\$418,975
Total	\$2,206,980	\$2,405,143

7. More details regarding the case history can be found in the Statement of Facts and Supporting Declaration (**See Documents 28, 29, 32**).

Intentional exclusion of exculpatory evidence from the Grand Jury.

8. The Department of Justice Policy Manual states that a prosecutor **must** provide known exculpatory evidence to the Grand Jury:

9-11.233 Presentation of Exculpatory Evidence.

It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

9. Although the government has refused to provide copies of the Grand Jury transcript, it is apparent from the information received in discovery that the AUSA Devine did not present evidence of tax years 2003 and 2004 to the Grand Jury. In the government's Opposition to Jacquot's Motion to Suppress, AUSA Devine submitted a proffer of the government's intended case. **See Document 35** In that proffer she claims that Cheryl Bartley will produce the evidence regarding law firm payments from xelan, stating:

“The government will call former xelan controller Cheryl Bartley. She will testify that Defendant had a contractual relationship with xelan and was paid for legal services. Ms. Bartley will introduce into evidence”

10. The government recently provided discovery that contains a copy of the Declaration of Cheryl Bartley that was submitted to the Grand Jury. (**See Exhibit 2 attached**). This declaration **does not** contain information for 2003 and 2004. AUSA Devine clearly knew of this exculpatory information, because she had previously met and discussed it with Jacquot’s counsel Jim Frush on 11 July 2006. Yet **despite the mandatory Justice Department policy, she did not present it to the Grand Jury.**
11. The 2003 and 2004 returns are clearly admissible evidence. Tax returns surrounding the tax year in question are admissible in tax cases, **even when such years are not part of the investigation.** However here, 2003 and 2004 **were** part of the investigation. The courts have routinely held that returns containing similar acts (in this case misstatement of gross income) in prior and subsequent years are admissible. See United States v. Middleton, 246 F.3d 825, 836-837 (6th Cir. 2001); Matthews v. United States, 407 F.2d 1371, 1381 (5th Cir. 1969); United States v. Johnson, 386 F.2d 630, 631 (3d Cir. 1967); United States v. Magnus, 365 F.2d 1007, 1009-10 (2d Cir. 1966); United States v. Alker, 260 F.2d 135, 139, 149 (3d Cir. 1958). If the government’s investigation is correct, the 2003 and 2004 returns are relevant and exculpatory as to the elements of willfulness and intent. The overstatement of gross income in 2003 and 2004 defeats the government’s contention that the law firm was deliberately understating its income to cheat on its taxes. Admission of such returns on the element of intent has also been routinely allowed by the Courts. See Hoyer v. U.S. 223 F.2d 134 (8th Cir 1955); Leeby v. United States, 192 F.2d 331 (8th Cir 1951); Lisansky v. United States, 31 F.2d 846 (4th Cir 1929).
12. AUSA Devine had a mandatory obligation to provide the 2003 and 2004 returns and payments as exculpatory information to the Grand Jury and did not do so. Only by excluding

the findings for 2003 and 2004 was AUSA Devine able to improperly contort the system to allow her to obtain indictments for 2001 and 2002.

13. In addition to being exculpatory and damaging to the government's allegations, the tax returns from 2003 and 2004 were executed in Idaho. With tax years 2001 and 2002 allegedly in California and tax years 2003 and 2004 in Idaho, the case would have been more appropriate in Idaho where Jacquot resides. **Using the government's theory, 2003 and 2004 are equally as false as the 2001 and 2002 returns.** Introduction of this evidence and indictment for all 4 years of alleged false returns would have stripped AUSA Devine's ability to file her retaliatory indictment and attempt to obtain the vengeance she seeks. Due process can be vindictively violated in regards to the exercise of venue rights. See United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), cert. denied, 434 U.S. 827 (1977). Only by excluding the findings for 2003 and 2004 was AUSA Devine able to improperly contort the system to allow her to retain venue.

14. **The violation of venue is not harmless.** The case may have never been indicted if a non-vindictive AUSA in Idaho was involved. An objective review by a non-vindictive AUSA may have resulted in the case never being presented to a Grand Jury, or presented fairly to a Grand Jury that did not indict. Mr. Jacquot also contends that the make-up of a jury in the San Diego Metro area is drastically different than a jury in Northern Idaho, and such difference could have a major impact on a verdict at trial. Lastly, being hailed into Court in San Diego has imposed significant expense in both time and money to Mr. Jacquot. Attendance at each hearing in the matter means that Mr. Jacquot must miss 2 to 4 days of work, and each trip costs \$500 to \$1000.

Knowing submission of a false declaration to the Court.

15. The Defendant filed a Motion to Suppress the evidence seized by the government in a search conducted on 4 Nov. 2004. The Defendant's basis for the suppression of the evidence was submission of false affidavits by the government in support of the warrant.

16. In response the Motion to Suppress, AUSA Devine submitted an Opposition (**Document 35**) containing intentional false information. These false pleadings were supported by the declaration of IRS CID Supervisory Agent Sara Brana, which was also intentionally false. The attempt by the government to justify their search with intentionally false declarations and pleadings violates the Defendant's Constitutional Rights.

17. AUSA Devine and IRS CID Agent Brana knowingly and willfully prepared and submitted a false declaration in this case. The false declaration is **Document # 36** filed in the case. ("hereinafter the "False Declaration"). Such submission is a violation of:

- 18 USC 1621 & 1623 (perjury) by Agent Brana,
- 18 USC 1622 (subordination of perjury) by AUSA Devine,
- 18 USC 371 (conspiracy) by both Agent Brana and AUSA Devine,
- 18 USC 1505 (obstruction of justice) by both Agent Brana and AUSA Devine,
- Multiple attorney ethics rules by AUSA Devine.

18. The False Declaration **is not the first time** that AUSA Devine has submitted false declarations against this Defendant in this Court.

18.1. In late October 2004, the San Diego U.S. Attorney's office via AUSA Faith Devine filed an ex parte complaint, temporary restraining order /receivership under seal alleging a \$500 million ponzi scheme and other erroneous claims. As described below, the declaration supporting this action was false. Simultaneously, an affidavit for a search warrant was filed. The Defendant is informed and believes (and has previously alleged and such allegation has not been denied) that this affidavit was virtually identical to the declaration supporting the TRO application, and therefore is also false.

18.2. As described in the case history above, in early December 2004, the initial hearing on the TRO is heard before Judge Larry Burns in San Diego. It is case # 04-CV

2184 LAB (AJB). At the hearing, Judge Burns set aside the TRO, denied the government a Preliminary Injunction and dissolved the receivership. After considering the declaration of the government supporting their case, he issued a 12 page opinion that was harsh to the government. His opinion included the findings described in **Paragraph #3 above**.

18.3. In short, Judge Burns found that the declaration supporting the TRO and civil case was false. Since the affidavits for the search warrant are virtually identical to this declaration, they are also false.

19. When the search was challenged by the Defendant, AUSA Devine and Agent Brana prepared and submitted the False Declaration and AUSA Devine prepared and submitted her false pleadings.

19.1. Agent Brana, is a IRS Criminal Investigation Supervisory Agent with over 23 years of experience. As a supervisor with vast experience in criminal investigation, Agent Brana clearly knows what false statements, conspiracy, obstruction of justice and perjury are, yet she conspired with AUSA Devine and knowingly executed the False Declaration that AUSA Devine then submitted to this Court.

19.2. When AUSA Devine was challenged on this matter, her response can best be characterized as there was no problem, merely “*differing points of view*.”

19.3. The standard of review for the determination of submission of false evidence to the court is one of objective reasonableness, not one of subjective analysis of “*differing points of view*.” Subjective belief that the declaration and pleadings are correct, is **not a defense**. Objective good faith is the standard for review and “*An empty head but a pure heart is no defense*” Thorton v. Wahl, 787 F. 2d 1151, 1154 (1986). Contrary to the allegations of the government, this is not a case of “*differing points view as to what was said on 4 Nov 2004 to Special Agent Brana by Mr. Harrington*.” This is about objectively perjured/false statements.

19.4. Agent Brana's declaration states that "*We did not search any offices known to us to be attorney offices...*" and "*We did not search ... any areas known to contain attorney client records.*" AUSA Devine states in her Opposition that "*law enforcement agents did not search any offices or premises that were occupied by lawyers.*" These are clear, simple, definitive statements not subject to "*differing points of view.*"

19.4.1. Both the statements of AUSA Devine and Agent Brana are objectively false. This falsity can be shown through the government's own documents and the declarations provided to the Court.

19.4.2. Agent Brana's own declaration states that she knew attorney Silas Harrington was present at the search. It states, "*There were several attorneys present during the execution of the search. Among those present were...Silas Harrington.*" (Paragraph #4 Agent Brana's Declaration). Thus Agent Brana and AUSA Devine clearly knew that attorney Silas Harrington was present at the time that they prepared the False Declaration.

19.4.3. The search inventory prepared by the government shows that Mr. Harrington's office, computer and laptop were searched. See the extract attached as Exhibit 2 to the Defendant's Reply to the Government Opposition (**Document 38**) that shows the following search inventory Control #s:

- A81 "*Silas Harrington's Fujitsu Laptop...*"
- A104 "*Image of computer (C1) found in room G (Silas' Office)...*"

19.5. Thus Agent Brana and AUSA Devine clearly knew that attorney locations and property were searched at the time that they prepared the False Declaration. **These government created documents, by themselves, clearly show that the statements of AUSA Devine and Agent Brana are knowingly false and not merely a "*differing point of view.*"**

19.6. However, there are more facts that further prove the statements of AUSA Devine and Agent Brana are false.

19.6.1. Silas Harrington, a licensed attorney, submitted a declaration that he was present and objected to the search. There is nothing in the record to suggest that Mr. Harrington was untruthful about being present and that his office and that his office and laptop were searched. In fact, Agent Brana's own declaration and the search inventory collaborate Mr. Harrington's statements. Likewise there is no reason to believe that Mr. Harrington statement that he objected to the search is untruthful.

19.6.2. The agents searching the location somehow knew that "Room G" was "Silas' Office," as this is listed on the search inventory as Control # A104. The government has produced no evidence as to how they knew that Room G was Silas' Office, or how they knew who were the occupants of the other offices listed in the Search Inventory. However, the Defendant has produced unrefuted evidence in the record to explain this. Silas Harrington's declaration states that he escorted agent(s) through the suite and told them who was the occupant of the various offices.

19.6.3. The declaration of Silas Harrington is collaborated by one of the government's own witnesses, Cheryl Bartley who states that she heard Mr. Harrington identify himself as an attorney and object to the search. (**See Exhibit 2 to Document 48**). The government clearly does not want to have to impeach their own witness, so they did not attempt to refute the specific factual allegations, but rather attempted to dismiss their lies by broadly stating that there is "*differing points of view.*"

19.7. In summary, the government's own documents and the unrefuted declarations (described above) unmistakably show that Agent Brana's statements that "*We did not search any offices known to us to be attorney offices...*" and "*We did not search ... any areas known to contain attorney client records*" are perjured. It further shows that AUSA Devine's statement s in her Opposition that "*law enforcement agents did not*

search any offices or premises that were occupied by lawyers” is false. AUSA Devine knowing submitted this false evidence against the Defendant. This is not a case of mere “differing points of view.”

20. **Contrary to the allegations of the government, this is not a case of “differing views on what constitutes privileged information.”** Again, this is about objectively provable perjured/false evidence. The search inventory shows that some information was treated as privileged and allegedly sealed and not reviewed by the government. However, the search inventory shows a significant amount of information that should clearly be classified as “potentially privileged”. These include:

Control # A81	Silas Harrington’s Fujitsu Laptop
Control # A104	Computer in Silas Harrington’s Office
Control # B113	xwbt files: General Counsel 2001 and 2002 xwbt files: Williams Counsel correspondence
Control # C38	-xelan General Counsel Memorandum – 05/09/01 & 11/06/00 -Xelan Law Firm to xelan home office and xelan financial counselors – 10/27/00 -Xelan General Counsel memo – 03/18/99
Control # C57	Complaints/lawsuits in state and federal court against xelan Inc. and Pyramidal Funding Systems, Inc. – 2004
Control # D37	Xelan General Counsel Memos
Control # D75	Binder of General Counsel Memos
Control # D76	Letters from law offices of Miller, Canfield, Puddode and Stone
Various Control #s	Servers with DJPA files and law firm email records
Control # B25	26 Zip Disk backups and 16 hard disk misc backups
Control # B50	2004 Court Filings
Control # B72	File titled: Mike Gunter (attorney)
Control # B109	Memo re: Legal Items
Control # C24	Email to Silas Harrington (attorney)
Control # C58	Binder xelan Foundation IDR and TECH Advice – Aug 2003 and others
Control # D40	Jacquot Employment Contract 11/1/01 and 10/15/98
Control D89	Files titled: Jacquot
Control # D91	Michael Surnew Law Offices File

20.1. Agent Brana in the False Declaration states that “... none of the members of the prosecution team has reviewed the boxes” of potentially privileged records. AUSA Devine in her Opposition states ““All potentially privileged items have been segregated and not reviewed by members of the prosecution team.” These are clear, simple, definitive statements not subject to “differing points of view.” It is important to note that

both AUSA Devine and Agent Brana speak of “*potentially privileged records*” and not privileged records.

20.2. Both the statements of AUSA Devine and Agent Brana are objectively false. This falsity can be shown through the government’s own documents and the declarations provided to the Court.

20.2.1. Clearly within the category of “*potentially privileged records*” are Silas Harrington’s computer and laptop. As stated in his declaration, Mr. Harrington was a former associate attorney in the Defendant’s law firm and his computer contained, amongst other things, client files and other materials that were the property of the Defendant’s law firm. In modern legal practice, the computer records of attorneys contain vast amounts of privileged information. Clearly the computers of an attorney must be deemed to contain “*potentially privileged records.*” The government’s own search inventory shows that these items were seized and **placed on the general inventory**, not on the allegedly segregated and sealed inventory.

20.2.2. Also within the category of “*potentially privileged records*” are numerous individual General Counsel Memos and the binder of General Counsel Memos. These General Counsel Memos are memorandums from the Defendant’s law firm to its client and are clearly “*potentially privileged records.*” The government’s own search inventory shows that these items were seized and **placed on the general inventory**, not on the allegedly segregated and sealed inventory.

20.2.3. More examples of items on the search inventory can be considered “*potentially privileged records.*” However in the interest of brevity, they will not be addressed. However if you desire further analysis, I will gladly provide it.

20.3. AUSA Devine states in her Opposition that Agent Weeks had a computer with **images of every document seized (Document 35. Page 6 Line 23)**. Additionally, AUSA Devine states that Agent Weeks has access to all the original documents . Agent

Weeks was the investigating Agent of the Defendant. Therefore the statement that that the no one on the prosecution team has reviewed potentially privileged records is false because the Agent investigating the Defendant was the custodian of every document seized including the “*potentially privileged records*” consisting of attorney Silas Harrington’s computer and the Defendant’s General Counsel Memorandums.

20.4. **The government’s own search inventory and the statements of AUSA Devine in her Opposition clearly show that the statements by AUSA Devine and Agent Brana regarding “*potentially privileged records*” are knowingly false and not merely a “*differing point of view.*”**

20.5. However there is still more evidence that the statements of **AUSA Devine and Agent Brana regarding “*potentially privileged records*” are knowingly false and not merely a “*differing point of view.*”**

20.5.1. **Exhibit C** to AUSA Devine’s Opposition (**Document 35**) is a forged letter on the letter head of the Defendant’s law firm. This letter was produced by Michael Suverkubbe. Mr. Suverkubbe (and/or his accomplices) cut and pasted portions of the Defendant’s letterhead, the footer and signature into a document. Attached to the Defendant’s Reply to the Government’s Opposition **Document 38 Exhibit C** is the declaration of attorney Silas Harrington that he heard Michael Suverkubbe admit he forged this letter. Additionally, there should be email records in the information that the government seized and is holding that would show that this document is false.

20.5.2. The fact that the letter was forged is **not** the issue here. **Rather the fact that the document appears on letterhead of the Defendant’s law firm is the issue.** This letter was obviously reviewed by AUSA Devine, Agent Brana and likely by other Agents on the “prosecution team” before it was attached to the Opposition. As a letter on attorney letterhead, it is a “potentially privileged record”. In order for the AUSA Devine **to know that it exists** and **know the contents** of it, she, Agent Brana

and/or other members of the prosecution team needed to review it. Therefore the statements made by **both** AUSA Devine and Agent Brana that the no one on the prosecution team has reviewed “*potentially privileged records*” is false.

20.5.3. In the government responses to this allegation, AUSA Devine completely misses the point on the forged letter they submitted. The fact that the letter appears on the Defendant’s law firm letterhead makes it a “*potentially privileged record.*” This letter was **not** listed on the search inventory so it is impossible to tell if it was stored in the general items searched or in the allegedly segregated and sealed records. This letter was obviously reviewed by AUSA Devine, Agent Brana and likely by other Agents on the “prosecution team” before it was attached to the Opposition. In order for the AUSA Devine to **know that it exists and know the contents of it**, she, Agent Brana and/or other members of the prosecution team needed to review it. Therefore the statements made by **both** AUSA Devine and Agent Brana that the no one on the prosecution team has reviewed “*potentially privileged records*” is false.

21. **The government’s submission of the False Declaration is a serious Due Process**

violation. Two recent 9th Circuit cases address this issue. Due Process is violated when there has been a fraud on the Court. Dixon v. Commissioner of Internal Revenue, 316 F. 3rd 1041 (9th Cir. 2003). Due Process is also violated when the prosecution knows or should have known that false evidence has been submitted and takes no steps to correct the wrongdoing. Hayes v. Brown. 399 F. 3rd 972 (9th Cir 2005).

21.1. **Fraud on the Court.** “*Fraud on the Court occurs when the misconduct harms the integrity of the judicial process...*” Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989).

21.1.1. Agent Brana’s perjured declaration is fraud on the Court. Intentional submission of the False Declaration by a supervisory law enforcement agent to justify an alleged illegal search is clearly misconduct that harms the integrity of the judicial process.

21.1.2. Moreover, Agent Brana's perjured declaration is part of a long pattern of government misconduct, and such pattern of misconduct is also a fraud on the Court. The 9th Circuit held that a **pattern of misconduct by IRS employees** was a fraud on the Court in Dixon v. Commissioner of Internal Revenue, 316 F. 3rd 1041 (9th Cir. 2003). In the case at hand, there is a long pattern of misconduct by IRS employees and other government agents. See the **Defendant's Statement of Facts** and supporting Declaration for a description of the pattern of government abuses in this matter. Additionally, see the **Motion for Sanctions, paragraph 8** for a description of previous filings of false declarations by AUSA Devine against the Defendant. The pattern of misconduct by the government in this case is misconduct that harms the integrity of the judicial process.

21.1.3. Lastly, AUSA Devine's knowing submission of the False Declaration and her intentional preparation and submission of the false pleadings are also a fraud on the Court that harms the integrity of the judicial process. This conduct is misconduct that harms the integrity of the judicial process.

21.2. Prosecutorial Misconduct. One of the bedrock principles of our democracy is "*that the State may not use false evidence to obtain a criminal conviction*" Hayes v. Brown. 399 F. 3rd 972 (9th Cir 2005). Specifically, Due Process is violated when there has been prosecutorial misconduct in which:

- There is false evidence used
- The prosecutor knew **or** should have known it to be false, and
- The false evidence is material

Each of these three elements will be examined below.

21.2.1. The Evidence is False. “*Due Process protects defendants against the use of any false evidence by the State, whether it be by document, testimony, or any other form of admissible evidence.*” Hayes v. Brown, 399 F. 3rd 972 (9th Cir 2005); Phillips v. Woolford, 267 F.3d 966 at 984-85 (9th Cir 2001). This protection from false evidence includes perjured evidence such as the False Declaration but also includes all other forms of false evidence and even applies when a witness fails to be entirely truthful. Alcorta v Texas, 355 U.S. 28 (1957). Subordination of perjury is not required for a due process violation. See Napue v. Illinois, 360 U.S. 264 (1959). No reasonable conclusion is possible that the False Declaration and pleadings are truthful. Since the False Declaration and pleadings were submitted to the Court, false evidence was used.

21.2.2. AUSA Devine knew or should have known the False Declaration and pleadings were false. As described in the Motion for Sanctions, paragraph 12, AUSA Devine clearly knew that the False Declaration and pleadings were untruthful. Even if AUSA Devine claims she didn’t know the False Declaration was false, she should have. It is a Due Process violation when the prosecutor knew or should have known that the evidence is false. U.S. v. Agurs, 427 U.S. 97 (1976). The Motion for Sanctions describes facts that would cause any reasonable person to believe that the False Declaration and pleadings were false. Therefore, AUSA Devine should have known that the False Declaration was false.

21.2.3. The False Evidence is Material. The standard for materiality is that the false evidence is material if there is any reasonable likelihood that the false evidence could affect the outcome of the case. Hayes v. Brown, 399 F. 3rd 972 (9th Cir 2005). Stated another way, Due Process is violated: “*unless the misconduct can be proven to be harmless beyond a reasonable doubt.*” Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir 1991)

21.2.3.1. The outcome of this case could be affected by the credibility of Agent Brana. She is a Supervisory agent and supervised the search and the agents

that will testify in this case. She is listed as a significant witness in the government proffer of their case. Her Declaration is in direct contradiction to government witness Cheryl Bartley. There is more than a reasonable likelihood that perjury of a government witness could impact the case, thus the credibility of Agent Brana is clearly material.

21.2.3.2. The Supreme Court stated in the Napue case:

“The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. Napue v. Illinois, 360 U.S. 264 (1959).”

21.2.3.3. Thus the fact that “*the false evidence presented by the State dealt only with credibility does not change the materiality calculus.*” Hayes v. Brown. 399 F. 3rd 972 (9th Cir 2005). Undoubtedly, perjury by an important government witness is material, therefore the submission of the False Declaration meets the materiality requirement.

22. Failure to Correct. As a separate and distinct Due Process violation, AUSA Devine did not correct the error when it was brought to her attention. At the hearing on 8 September 2008 the falsity of the declaration was raised. The Motion for Sanctions was filed on 6 January 2009, approximately 16 weeks later. During this 16 week period, AUSA Devine took no steps to correct the falsehood as required by the U.S. Supreme Court rulings. In Alcorta v Texas, 355 U.S. 28 (1957) the U.S. Supreme Court held that it is a violation of a criminal defendant’s Due Process rights when the government allows false evidence to go uncorrected when it appears. See also Pyle v. Kansas 317 U.S. 213 (1942); Hayes v. Brown. 399 F. 3rd 972 (9th Cir 2005). Even after the false evidence was described in detail in the Sanctions Motion, AUSA Devine did not correct the error. In fact, rather than correct the error, AUSA Devine did just the opposite, stating in her Opposition that the “*government confirms the statements made in the declaration and submits that they are truthful*”.

Fraud in soliciting a conflict waiver from the Defendant.

23. It came to the attention of AUSA Devine that a potential conflict of interest may exist between Mr. Jacquot and his lawyer, Mr. Jenkins. She requested that Mr. Jacquot read a Memorandum and acknowledge and waive any conflicts that might exist. Mr. Jacquot had his lawyer inquire into what AUSA Devine was going to do with the waiver, and she replied in an email:

“We have no intention to take any action regarding the Memorandum or your clients acknowledgement that he has reviewed it and waives any conflicts. The waiver is simply for our files in the event that your client raises at a later date that his Sixth Amendment right to counsel was violated due to a conflict of which he was not aware but which was known to the government.”

24. Mr. Jenkins notified AUSA Devine that the waiver would be forthcoming. However, on January 16, 2009, just one (1) day after Mr. Jenkins embarrassed AUSA Devine by pointing out in his Reply Brief (**Document 51**) that she was misleading the Court by arguing a legal theory supported with cases that had been abolished by the Supreme Court fifteen (15) years ago, she retaliated. Rather than simply send an email and stating that she had not received the waiver, she filed the Memorandum with the Court in a clear effort to retaliate and embarrass or discredit Mr. Jenkins in the eyes of the Judge

25. AUSA Devine was clearly untruthful when she stated in her email “We have no intention to take any action regarding the Memorandum.” Such action constitutes fraud in seeking a waiver of conflict regarding the alleged conflict of interest described in the memo.

I thank you in advance for your cooperation and efforts to look into this matter. If you have questions, do not hesitate to contact me.

Sincerely,

David Jacquot

cc: AUSA Faith Devine