No. _____

In The
Supreme Court of the United States

RICHARD D. MEADE, JOHNETTA JONES,
JOHNNY C. GROOMS, AND
KATHERINE L. MACPHERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A lower court order that threatens or interferes with a coequal branch's ability to discharge its constitutional responsibilities is the standard for shielding presidential or vice presidential communications on a writ of mandamus. *See Cheney v. United States Dist. Court*, 542 U.S. 367 (2004). In the present case, the coequal branch threatened is this Court, and the constitutional responsibility interfered with is its exclusive power to declare two structural errors in three criminal cases, one of which, is also a statutory offense and an internal Article III structural crime. This is also a separation of powers civil and criminal controversy that arose while the affected defendants' cases were on interlocutory and direct appeal, and it is a historical first for that reason. Because the first structural error involves a jurisdictional defect and constitutional question so significant, this Court has granted certiorari to consider it in two different factual contexts in *United States v. Cotton*, 535 U.S. 625, 630 (U.S. 2002) and *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), but has yet to have the opportunity to finally resolve it until the present case:

Whether a constitutionally deficient indictment is a structural error.

The second error involves the same question Justice Sotomayor wrote a concurring opinion on in 2012 in *United States v. Jones*, 132 S.Ct. 945 (2012), with which Justice Alito joined and indicated a desire

QUESTIONS PRESENTED – Continued

to address. It has since become the biggest constitutional issue, crisis and scandal, and source of public outrage currently facing this country; specifically, because it was the product of a duty of candor violation first committed before Congress and then in this Court's actual physical presence during oral argument in *Clapper v. Amnesty International* in 2013, which this Court dismissed for lack of Article III standing. Several congressmen and senators have also recently spoken out about that ethical violation and their desire to see the Court correct it *sua sponte*, notwithstanding the Justice Department's refusal to do so, which is also a historical first for this reason.

Only this Court has the constitutional power to correct that error automatically, precisely because *only* the nine Justices of this Court have both *personal* and third party standing do so. Accordingly, the multiple questions presented are:

1. Whether the Supreme Court has automatic appellate jurisdiction in accordance with §§1-2 of Article III and §§8, 9 of Article I, as a matter of the Justices' personal right and a Criminal Justice Act-appointed *appellate* attorney's physical safety, over the denial of a writ of mandamus by a *district court* that simultaneously satisfies the standards for shielding executive communications in a *civil* separation of powers case, but obstruct this Court's ability to perform its separation of

QUESTIONS PRESENTED – Continued

powers role in a *criminal* separation of powers case.

2. Whether the Supreme Court has automatic and exclusive jurisdiction to interpret cl. 1, §1 of Article III in accordance with the Preamble of the Constitution, *Marbury v. Madison* and other founding documents, and the scope of its own appellate jurisdiction under §2 of Article III in view of modern technology.

3. Whether a constitutionally deficient indictment is a structural error.

4. Whether a defendant has third party standing to challenge the violation of a co-defendant's Fourth, Fifth and Sixth Amendment rights.

5. Whether the exclusionary rule applies to Fifth Amendment violations.

6. Under what circumstances is a district or circuit court required to: (a) certify a case to the Supreme Court under 28 U.S.C. §1254(2); and (b) consider a §2255 claim on direct appeal or do so *sua sponte* upon being made aware of a duty of candor violation?

7. Whether the Government may ever invoke this Court's inherent contempt power on its own behalf to sanction the content of a filing or legal argument that it disapproves of; does a district court's ruling that it may be used for such a purpose simultaneously violate the contempt statute and already satisfy the requirements of: (a) a structural error, and

QUESTIONS PRESENTED – Continued

therefore the collateral order doctrine and mandamus relief; (b) the *per se* ineffective assistance of counsel standard; and (c) a subsequent 42 U.S.C. §1983 action for monetary damages, as a matter of Supreme Court precedent?

8. Whether a jurisdictional or structural error, or a knowingly committed plain error that rewards the Government for violating the duty of candor about Supreme Court precedent, satisfies the collateral order doctrine for purposes of an immediate interlocutory appeal. If such an error is re-affirmed by a circuit court, is it appealable to the Supreme Court as a matter of right within the meaning of §2 of Article III?

9. Whether orders and acts entered or undertaken by lower court(s) or their clerk's offices acting alone – for the specific purpose of preventing Supreme Court review of a structural error in a criminal case – simultaneously violates the contempt statute and constitutes contempt of the Supreme Court.

10. Whether the National Security Agency's domestic surveillance and information-sharing practices simultaneously violate: (a) cl. 1, §1 of Article III and the Third and Sixth Amendments; and (b) the Necessary and Proper Clause §§8-9 of Article I and the First, Fourth, Fifth and Ninth Amendments.

QUESTIONS PRESENTED – Continued

Alternatively, does using tax payer dollars to fund a Department of Defense agency that shares information obtained by violating the *Fourth* Amendment, via an equally illegal Fifth Amendment taking of private corporate property and communications infrastructure, simultaneously violate all *four* purposes set forth in the Preamble of the Constitution, the Sixth Amendment and 42 U.S.C. §1983?

11. Does the Supreme Court have original power in accordance with cl. 1, §1, cl. 3, §2 of Article III and §§8, 9 of Article I, to appoint ***itself*** as a Special Master to investigate: (a) First, Fourth and Sixth Amendment constitutional and statutory crimes committed against the Court and also against one of the members of its Bar; and (b) fraud on the Court involving the electronic filing system, civil damages and attorney fees, and potential criminal charges, because no federal law enforcement agency or statutorily created court is capable of doing so objectively?

12. If the Government violates the duty of candor by advancing a legal argument on either direct or interlocutory appeal based on a knowing misrepresentation of the law, or by refusing to acknowledge and yield an argument to controlling Supreme Court precedent by confessing error, does that automatically render a defense attorney ineffective for purposes of immediate §2255 relief, since no ethical reply is possible without also

QUESTIONS PRESENTED – Continued

committing an ethical violation by either failing to address it on the defendant's behalf, or misrepresenting this Court's precedent and otherwise making up non-existent "law" as well?

13. Does an attorney, who has suffered actual harm in the form of physical, financial, and professional damages and unpaid attorney fees resulting from a structural failure at the district and circuit court levels, but who also cannot ethically withdraw at the Supreme Court level, have the equivalent political right, constitutional power, and a structural right under cl. 1, §1 of Article III to initiate proceedings for personal redress on behalf of herself, clients, and on behalf the Justices of the Supreme Court – from the Court in a civil trial – and Congress simultaneously, in an original separation of powers case?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Richard D. Meade, Johnetta Jones, Johnny C. Grooms, and Katherine L. MacPherson, respectfully petition for a writ of certiorari to review the judgments and orders of the United States Court of Appeals for the Sixth Circuit and the U.S. District Court for the Eastern District of Kentucky, Case No. 11-00051. Ms. MacPherson further petitions for a rule nisi as against: (1) the Honorable Gregory F. Vantatenhove; (2) the Solicitor General's Office; (3) the Office of Professional Responsibility; (4) the U.S. Attorney's Office; (5) the U.S. Attorney's Office for the Eastern District of Kentucky; (6) the National Security Agency; and (7) the Foreign Intelligence Surveillance Court.

OPINIONS AND ORDERS BELOW

On February 10, 2014, the U.S. District Court for the Eastern District of Kentucky entered an order denying the Petitioner Meade's *post-trial* motion to arrest judgment and dismiss a jurisdictionally defective indictment as untimely. (Pet. App. at 4-29). *See* 6th Cir. Case No. 14-5209, Doc. 1. On April 11, 2014, the Sixth Circuit dismissed the appeal for lack of jurisdiction citing the final judgment. (Pet. App. at 1-3). On April 15, 2014, the circuit court clerk's office also rejected the amended notice of appeal on a post-notice subsequently filed Rule 59(e) motion with the district court.

On April 28, 2014, while Petitioner Meade's *en banc* petition was still pending before the Sixth

Circuit, the Government demanded that his counsel, Petitioner MacPherson, be ordered to show cause as to why she should not be held in contempt over the content of a F.R.A.P. 28(j) pre-oral argument supplemental appellate brief ("Rule 28(j)") filed with the Sixth Circuit the day before, on April 24, 2014, in Criminal Justice Act-appointed Petitioner Johnny C. Grooms' direct appeal originating from the Eastern District of Tennessee, *United States v. Grooms*, 6th Cir. Case No. 11-6482, in advance of the same oral argument that was scheduled to take place *before this Court* on the same day, April 29, 2014, in *Riley v. California*.

Accordingly, a timely petition for rehearing *en banc* was filed on April 25, 2014, which included an alternative motion for a certificate of appealability to this Court pursuant to 28 U.S.C. §1254(2), and a timely notice of a direct appeal to this Court from the April 30, 2014, order unsealing and admitting the Rule 28(j) into the record to be used for this purpose was filed in compliance with F.R.A.P. 4(a)(1)(b).

STATEMENT OF JURISDICTION

The indictment in Petitioner Meade's case is jurisdictionally defective, because it charges Petitioner Meade with a hybrid money laundering offense that does not exist under any single Title 18 statute. Thus, the district court did not have subject matter jurisdiction over the case, because it was never properly invoked in accordance with 18 U.S.C. §3231.

However, the Sixth Circuit did have appellate jurisdiction over the Petitioner's post-trial interlocutory appeal, within the meaning of 28 U.S.C. §1291, in accordance with the double jeopardy exception to the collateral order doctrine and this Court's decisions in *Abney v. United States*, 431 U.S. 651 (1977), *United States v. Santos*, 553 U.S. 507, 527-28 (2008), and Rule 34 of the Federal Rules of Criminal, Appellate, and Civil Procedure. The district court had and continues to have no jurisdiction over any of the defendants affected by the April 30, 2014 order, including their attorney. Accordingly, by invoking this Court's singularly possessed cl. 1, §1, Art. III inherent authority and contempt power, the ***Government*** itself has invoked this Court's jurisdiction under the supremacy clause of §1 of Art. III, cl. 3, §2 of Art. III, and 18 U.S.C. §401, via the April 30, 2014, district court order. The Petitioners respectfully and fully agree with the Government and consent to this Court's exclusive original jurisdiction and its original appellate jurisdiction in, this historically significant separation of powers case.

The Court's appellate jurisdiction is also invoked pursuant to 28 U.S.C. §1254(1) *and* (2), and also: (1) 28 U.S.C. §47, 28 U.S.C. §§2240, and 2255; (2) §2 of Article III and 18 U.S.C. §1651; and (3) §§8-9 of Article I. This petition is being timely filed within 90 days of the denial of Petitioner Meade and Grooms' petitions for *en banc* rehearing and alternative motions for a certificate of appealability to the

Supreme Court respectively, in compliance with Sup. Ct. R. 13(1) and (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Preamble of the United States Constitution states:

> We the people of the United States, in order form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article III of the Constitution states:

Section 1:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . to

all Cases affecting Ambassadors, other public Ministers and Consults . . . to Controversies to which the United States shall be a party; [and] between Citizens of different states.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or place as the Congress may by law have directed.

Section 3:

Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or

> forfeiture except during the life of the person attainted.

Section 8 of Article I of the Constitution states in relevant part:

> The Congress shall have power . . .
>
> To constitute tribunals inferior to the Supreme Court;
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9 of Article I further states:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.
>
> No bill of attainder or ex post facto Law shall be passed.

The First Amendment states:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Third Amendment states:

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment states in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. §47 states: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

28 U.S.C. §455 states: "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

18 U.S.C. §401 states:

A court of the United States shall have the power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as –

(1) Misbehavior of any such person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. §3231 states: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

28 U.S.C. §1651 states:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court, which has jurisdiction.

28 U.S.C. §1254 provides in relevant part:

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods . . . (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. §2240 states in relevant part:

(a) Writs of habeas may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions.

28 U.S.C. §2255 states in relevant part:

(a) Application for the original writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. . . . The applicant may, under 28 U.S.C. §2253, appeal to the court of appeals from the district court's order denying the application.

The Criminal Justice Act, 18 U.S.C. §3006A(d)(4)(D)(i)-(v), states in relevant part:

A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance . . . through appeal, including ancillary matters to the proceedings.

The statutory notes to the Act further state:

During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation

> expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith.

42 U.S.C. §1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

> Rule 34 of the Federal Rules of Criminal Procedure states: "Upon the defendant's motion or on its own, the court must arrest judgment if the indictment does not charge an offense, or the court does not have jurisdiction over the charged offense." Fed. R. Crim. P. 34(a)(1)-(2).

> Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure states in pertinent part that "any time while the case is pending," a defendant may file a motion alleging "that the indictment or information fails to invoke the court's jurisdiction or to state an offense."

Rule 34 of the Federal Rules of Appellate Procedure states:

> (a) In General. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) The appeal is frivolous;
>
> (B) The dispositive issue or issues have been authoritatively decided; or
>
> (C) The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.
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> ***
>
> (e) Nonappearance of a Party. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.
>
> (f) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

F.R.A.P. 34(a), (e), (f).

Rule 34 of the Federal Rules of Civil Procedure states:

> Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land For Inspection and Other Purposes
>
> (a) In General. A party may serve on any other party a request within the scope of Rule 26(b):
>
> (1) to produce and permit the requesting party or its representatives to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
>
> (a) any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form. . . .

The Relevant ABA Model Rules of Professional Conduct State as follows:

> Rule 3.1 Meritorious Claims and Contentions:
>
> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for

doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.3 Candor Toward the Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. . . .

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party And Counsel:

A lawyer shall not

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other

material having potential evidentiary value.

Rule 3.5 Impartiality and Decorum of the Tribunal:

A lawyer shall not:

(a) seek to influence a judge, juror, or prospective juror or other official by means prohibited by law;

(b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order.

STATEMENT OF THE CASE

A. Introduction

This case involves five issues over which the Supreme Court has exclusive *personal* jurisdiction, original jurisdiction, appellate jurisdiction and grants certiorari as a matter of course: (1) jurisdictional and structural error; (2) "the scope of federal contempt powers"; (3) Article III standing; (4) "construction of the federal rules of criminal and civil procedure"[1]; and (5) exceptions to the collateral order doctrine. This is also the first case of its kind, and this petition has taken the full ninety days to draft and revise for the same reason stated by Justice Scalia in this Court's June 26, 2014 decision in *National Labor Relations*

[1] *See Bruner v. United States*, 343 U.S. 112 (1952); *Carlisle v. United States*, 517 U.S. 416, 419 (1996); *Sacher v. United States*, 343 U.S. 1 (1952).

Board v. Noel Canning, 134 S.Ct. 2473 (2014): "Liberty inheres in structure."

B. Recent Decisions

On June 25, 2014, in *Riley v. California*, and two years earlier on January 23, 2012 in *United States v. Jones*, 132 S.Ct. 945 (2012), this Court held that: (1) law enforcement officers may not search the digital contents of an individual's cell phone without a warrant (*Riley*)[2]; and (2) a GPS tracking device surreptitiously installed on a defendant's vehicle constitutes a search within the meaning of the Fourth Amendment (*Jones*). In *Jones*, the Court stated: "At bottom, the Court must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Id*. at 951. In a concurring opinion joined by Justice Alito, Justice Sotomayor wrote separately to expressly address and explain why "it may be necessary to reconsider" third-party standing in the digital age, in view of rapidly advancing Government surveillance technology, stating:

> With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by

[2] *See Riley v. California*, 134 S.Ct. 2473 (2014) (Stating: "Our answer to the question of what police must do before searching a cell phone seized incident to arrest is accordingly simple – get a warrant.").

> enlisting factory – or owner – installed vehicle tracking devices or GPS-enabled smartphones. . . . Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse . . . by making available at a relatively low cost such a substantial quantum of intimate information about any person whom ***the Government, in its unfettered discretion, chooses to track – may "alter the relationship between citizen and government in a way that is inimical to democratic society."***
>
> ***I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse***, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to prevent "a too permeating police surveillance." More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *Id*. at 959 (emphasis added).

The next day, on June 26, 2014, the Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2250 (2014), and recognized and re-confirmed the importance of its own constitutional role in deciding all cases involving separation of powers questions, stating: "[W]hen questions involving the Constitution's

governing-structural provisions are presented in a justiciable case, 'it is the solemn responsibility of the Judicial Branch "to say what the law is."'" However, in an opinion (concurring in judgment only), in *NLRB*, Justice Scalia also forewarned of a possible diminishment or dilution of this Court's power and participation in such cases, but also stated:

> [S]o convinced were the Framers **that *liberty of the person inheres in structure*** that at first they did not consider a Bill of Rights necessary. Those structural provisions reflect the founding generation's deep conviction that checks and balances were the foundation of a structure of government that would protect liberty. It is for that reason that "***the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances***. Those decisions all rest on the bedrock principle that the constitutional structure of our Government is designed first and foremost ***not to look after the interests of the respective branches, but to protect individual liberty***." *Id.* at 2593.
>
> ***
>
> The real tragedy of today's decision . . . is the damage done to our separation-of-powers jurisprudence more generally. It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution's structural provisions.

> Most of the time, the interpretation of those provisions is left to the political branches – which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. ***We should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment***. Our failure to do so today will resonate well beyond the particular dispute at hand. Sad, but true: [It] will be cited in diverse contexts including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds ***and undermining respect for the separation of powers***. *Id*. at 2618.

The reason for which, at present, is also because executive privilege does ***not*** apply to shield any executive communications about this Court's personal, privileged or confidential communications.

Because the Petitioners' appellate counsel is also the first lawyer in American history to be threatened with the prospect of being held in contempt of "the Government," which, two years after this Court issued its opinion in *Jones*, somehow now consists of the DOD and NSA, the DOJ, the Solicitor General's Office, the U.S. Attorney's Office, and the U.S. Attorney's Office for the Eastern and Western Districts of Kentucky and Tennessee, by and on behalf of a district court judge, personally, who is also the former U.S. Attorney for the Eastern District of Kentucky because "the Government" and the district court didn't approve of the legal arguments she made on

behalf of her clients to the Sixth Circuit Court of Appeals, discussing a jurisdictionally defective indictment and Supreme Court-defined and automatically reversible Sixth Amendment structural errors resulting from duty of candor violations committed by Government lawyers by *specifically*, *deliberately* refusing to acknowledge this Court's clear precedent.

In addition to that historical first, the Petitioners' appellate counsel also happens to be the one and only lawyer in the country that is both a member of this Court's Bar, and was also CJA-appointed appellate counsel in a direct appeal with the combined first and third-party factual scenario of *Riley v. California*, *United States v. Jones*, and *NLRB v. Canning*, who also squarely raised and advocated on behalf of protecting both the federal judiciary – and ***this Court in particular*** – and the members of the Bar and Press ***from***: the exact political encroachment, fear and chilling effect caused by the exact orders now before the Court, which specifically, because they were entered by and on behalf of the very same agency that conducts and engages in the same judicially unsupervised, surreptitious electronic surveillance and information-sharing practices described by Justice Sotomayor in 2012 in *Jones*, with the same Department of Justice on whose behalf the Solicitor General ***also*** committed a duty of candor violation in this Court's physical presence during oral argument in *Clapper v. Amnesty International*; and the commission of which, the Justice Department has ***also*** for the ***first*** time in American history refused to correct

with this Court for the same first- and ***third***-party standing-related reason.

C. Rule 8 of the Rules of the Supreme Court

More specifically, all findings of "attorney misconduct or disciplinary actions affecting members of its Bar are provided to this Court from the periodic reports of the American Bar Association Center for Professional Responsibility, which maintains a computerized information system referred to as the National Discipline Data Bank."[3] This data bank "records disciplinary actions of all state, federal, and appellate courts and bar authorities," which the Court's Clerk's Office monitors carefully, and "provides the Center with information concerning disbarment or discipline imposed by the Court."[4] Imagine the constitutional magnitude of the destruction – to all justice *and* American democracy in this country – if the Justices of the United States Supreme Court could not speak freely with the public about an unlawful detention in their own Court (Article III) and in their own home (Third Amendment); precisely because a lawyer could not speak freely to federal circuit court judges about her own life and an unlawful electronic imprisonment of herself in her own home, both in person and *ex parte* with the same

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[3] *See* M. SHAPIRO, ET AL., SUPREME COURT PRACTICE, 997 (2013).

[4] *Id*. at 997-998.

circuit court via email or the CM/ECF electronic filing system; precisely because those who were responsible for that obstruction were also aware of the fact that, now, she actually needs nine very specific Justices to order her own personal protection and that of her clients, so they may appear before this Court *on a common law* – non-statutory-non-political and absolutely guaranteed by Article III and §§8 and 9 of Article I – *original writ of habeas corpus*.

Meaning that, the Justices absolutely cannot be denied access to this document, nor can it be censored or altered or somehow shielded from their knowledge or awareness in any way, because the questions presented are ***about*** the use of their own exclusively possessed judicial power to commit a silencing crime against *themselves*, which are questions that only they have the power to decide for that exact reason: It is a crime committed against the only nine Justices who simultaneously possess the collective constitutional rights, and the structural and political power of the entire judicial *branch* of the federal Government.

Accordingly, because the monumental public importance of this case is self-evident from the Questions Presented, nor does this Court need to be convinced as to the reasons why failing to protect itself, and on behalf of itself and one of its members, by removing a political encroachment and a military usurpation of its own judicial power to silence itself is constitutionally critical and because one cannot travel backwards in time for the same reason this case should be constitutionally impossible, but is

nevertheless now automatically before the Court under its own ethical Rules.

A detailed recitation of the facts was already set forth in the documents that were attached to an emergency application filed on May 5, 2014, and *also* in a subsequent supplemental brief and *ex parte* petition, which was confirmed as received in a voice mail by the Court's clerk's office at 10:51 a.m. on May 22, 2014 and distributed to the Court on May 23, 2014 (Case No. 13-A-1101). Accordingly, this petition will provide a condensed version of only the most relevant facts and recent developments after Meade's application was denied on May 29, 2014 without addressing the *ex parte* petition, and actual technology behind that *ex parte* constitutional impossibility as well.

Which is also the same reason Ms. MacPherson actually knew how to predict, read and perfect a record *backwards* all the way *up* to the Supreme Court so as to file a timely notice of a direct appeal to the Supreme Court on behalf of herself on May 30, 2014, and all three of the Petitioners, and on behalf of the Justices of the Supreme Court themselves on May 8, 2014, personally, ***from*** a district court order in a criminal case that simultaneously satisfies the requirements of a *writ of mandamus* and *prohibition*, an *original habeas* petition, and a *writ of error coram nobis* as a matter of Supreme Court precedent. Which is considered the "holy grail" of all writs and can only be awarded ***by*** the Supreme Court, precisely because: (1) an appellate lawyer should never actually need to

know how to perfect such an appeal ***as to herself*** backwards, per Judge Sullivan's "backwards looking" contempt quote from *United States v. Aleo*, 681 F.3d 290, 304-306 (6th Cir. 2012) as set forth below, which is also the same reason; (2) an application as to the latter two writs *cannot* be filed first with the district court as is required by F.R.A.P. 4(a)(1)(C) and F.R.A.P. 22 in this case, which is also the same reason; (3) the same district court judge in the present case also will *not* issue a certificate of appealability under 28 U.S.C. § 2253 and has yet to grant Ms. MacPherson's motion to withdraw in the present case as well. Because it included a motion for a certificate of appealability to the Supreme Court from the order granting ***or*** denying the motion, which he is ethically obligated to grant to this Court and should not be precisely because of that fact.[5]

Because the order "squarely presents the question of whether state [Kentucky] and local [Supreme Court] ***sealing practices*** violate the ***Sixth*** Amendment [Article III]," and Ms. MacPherson's specific purpose in asking that question was to allow this Court to answer it publicly by and on behalf of itself.

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[5] Stating: (a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

D. Factual Background

Petitioner Richard D. Meade is a sixty-seven year old man from Ashland, Kentucky, who owns the oldest Hertz franchise in the country. On August 11, 2011, Meade was indicted as part of a money laundering conspiracy; specifically, Count 1 charges Meade with conspiring to engage in "financial transactions in criminally derived property affecting interstate commerce," "involving the proceeds of" specified unlawful activity, the "interstate shipment of stolen motor vehicles" between 2000 and 2008. The remaining Counts as to Meade, 3, 6 and 7 identify the proceeds as three different custom motorcycles, and according to the Government, by signing his name to the title after purchasing them for his business with fully traceable checks from Greg and Jason Chapman for $10,000 to $15,000 per bike, Meade committed money laundering.

Unbeknownst to him, the bikes were made from the parts of motorcycles stolen by the Chapmans and various co-defendants from bike rallies held in different states across the country between the years of 2000 and 2006, and: (1) driven to the state of Kentucky, which was their only connection to interstate commerce; (2) stored for several years and stripped of all of their identifying parts and information; (3) reassembled using different bike frames and parts; (4) inspected by law enforcement officers and issued clean titles by the Kentucky Department of Transportation, and; (5) sold as "kit" or "custom" bikes to

Meade and similarly situated Co-Defendants John Slusher and Mark Justice.

Unbeknownst to all of the defendants' lawyers, the indictment charged their clients with a crime that doesn't actually exist under any single Title 18 statute. Instead, it charges them with a hybrid offense consisting of the "financial transactions" offense element from § 1956 and the "criminally derived property" offense element from § 1957. The Government was also aware of this fact throughout the entire case, because Congress did not define "proceeds" in the money laundering statute until ***2009*** after this Court's 2008 decision in *United States v. Santos*. Furthermore, even as defined today, post-2009 amendment, "gross receipts" is the definition under § 1956 in all cases. Nevertheless, the grand jury was also grossly mis-instructed that "proceeds" meant property "involved in" unlawful activity, which has never been correct under any current or former definition in any case.

On December 5, 2012, the district court denied the defendants' pre-trial motion to dismiss the indictment. In response to Meade, Slusher and Justice's argument that none of the defendants were charged with the "specified unlawful activity" identified in the indictment, and the prosecution was time-barred by the federal five-year statute of limitations period. Unbeknownst to the defendants, the district court's holding not only expressly contradicted the Court's 2008 decision in *United States v. Santos*, 553 U.S. 507, 517-519 (2008) and the Sixth Circuit's decision to

apply *Santos* retroactively in *Wooten v. Cauley*, 677 F.3d 303 (6th Cir. 2012), it cited *United States v. Cantrell*, which is a double jeopardy ***§ 1957*** case. As a result of the district court's ruling, all of the co-defendants except Meade and Justice, pled guilty.

On August 5, 2013, a little over a week before sentencing was scheduled to take place and while researching a reply to the Government's response to a Motion for Release Pending Appeal filed on July 16, 2013 on his behalf, Meade's appellate counsel, Attorney Katherine MacPherson, stumbled across *Santos*, and like all of the other defense attorneys in the case, learned the true legislative history of the "proceeds" definition for the first time. Accordingly, counsel filed a Motion to Arrest Judgment and Dismiss the Indictment ("Motion to Arrest and Dismiss"). Upon receiving no response from the Government, and with sentencing only two days away, Meade's attorneys agreed that a petition for writ of mandamus and prohibition was in his best interests. Ms. MacPherson filed the petition at 10:42 a.m. via email on August 12, 2013, and then drove 450 miles from Michigan to Lexington, Kentucky and arrived late that night, so as to be able to argue on his behalf.

The Sixth Circuit called for a response from the Government, the significance of which is that per the Sixth Circuit's own rules it only does so when a petition presents a "substantial question" of law, which is also the legal standard required for *granting* a motion for release pending appeal, which is also: (1) the legal standard for *granting* a petition for

rehearing *en banc*, because; (2) it is also the standard for *granting* a petition for a writ of certiorari to the Supreme Court. Notwithstanding that fact, the Government's response violated the duty of candor and refused to acknowledge *Santos* or *Wooten*, and the panel ultimately denied the petition at around 5:00 p.m. on August 13, 2014.

On August 14, 2013, the district court held the scheduled sentencing hearing, but limited it to objections to the Pre-sentence Report only. This was the first and only hearing Ms. MacPherson attended, and she was admitted *pro hac vice* and present for purposes of arguing Meade's Motion for Release *only*, which the district court refused to hear argument on that day. Immediately after the hearing concluded and the judge left the bench, the AUSA responsible for initiating the case and indicting the defendants, AUSA Steven C. Smith, along with two of the FBI/TFO's who testified before the grand jury cornered her in the courtroom, verbally assaulted and physically intimidated her, and then threatened her with a "complaint to the Bar" over the content of the mandamus petition.

For that reason, and the fact that making that exact threat is ethically prohibited by the Rules of Professional Conduct[6] *and* the Judicial Code of

[6] *See* SCR 3.130(3.4)(c),(f)) Stating: "A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;" or "present, participate in presenting, or

(Continued on following page)

Conduct *and* the contempt statute, upon returning to Michigan from the August 14, 2013 hearing, Ms. MacPherson: (1) located the Government's Criminal Resource Manual ("CRM") online, found its discussion of *Santos* and its own pattern charging language for pleading a § 1956 offense, versus a § 1957 offense; (2) filed an Objection to Further Proceedings informing the district court about the duty of candor violation in the Government's filings and lack of subject matter jurisdiction, and; (3) sent a letter to the U.S. Attorney's Office for the Eastern District of Kentucky and cc'd the Office of Professional Responsibility and the Solicitor General's Office, which discussed both the indictment defect and the above-described incident and threat in the courtroom.

Included with the letter was also a copy of a ten-page single spaced letter previously sent by Co-Defendant John Slusher's defense attorneys, Mark Wohlander and James Lowry, to the ethics compliance officer detailing AUSA Smith's other acts of misconduct which, just like the present case, included threatening them with contempt and an obstruction of justice charge – because they had to obtain *Brady* material from outside sources that AUSA Smith deliberately withheld to cover up his own ethical violations before the grand jury.

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threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter."

E. Legal Background

In 2012 in *United States v. Aleo*, 681 F.3d 290, 304-306 (6th Cir. 2012), the Sixth Circuit reversed a district court's decision to monetarily sanction a criminal defense attorney for filing a motion, which the court believed was intended to discourage a sexual abuse victim from testifying at the defendant's sentencing hearing. In doing so, the Court recited the general principle that "a district court may exercise its 'inherent authority' to sanction" attorney misconduct over a pleading only when "a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons,'" the three-part test for which is whether: "(1) the claims advanced were meritless; (2) counsel knew or should have known this, and; (3) the motive for filing it was for an improper purpose such as harassment." *Id*. at 305-306. In footnote 13 of the majority opinion, the court questioned whether and under what circumstances inherent authority may be used in a criminal case, stating:

> It may be questionable whether inherent authority even exists in a criminal case such as this one. An argument can be made that *Federal Rule of Criminal Procedure 42*, covering criminal contempt is the sole mechanism for punishing bad-faith conduct in criminal cases. We do not need to reach this issue because Freeman's conduct fails to merit sanctions under either the court's inherent authority or *Rule 42*. *Id.* at 304 (emphasis added).

In his concurring opinion, Judge Sutton wrote separately and at length, to expressly address this issue. He first addressed this Court's decision in *Chambers v. NASCO*, which was a civil case and he recognized that: (1) "the decision not to import Rule 11 into the Criminal Rules . . . was an intentional and sensible one," because "the risk of sanctions could chill legitimate, indeed constitutionally required, advocacy;" thus, (2) the "best inference" from that omission [wa]s that "Congress and the Rule makers meant to give the federal courts just one tool – the contempt power – to discipline attorneys in criminal cases." *Id*. at 306-309. The opinion further explained that although the contempt statute covers criminal and civil contempt, "criminal contempt is 'imposed for punitive purposes' and does not serve to compensate an aggrieved party or coerce a future action." Therefore, "[i]n a criminal case, most if not all contempt citations will be punitive and ***backwards looking***." *Id*. at 309 (emphasis added). The opinion also expressly distinguished cases in which a given appellate court upheld sanctions against a defense attorney, because in every one of those cases the alleged 'misconduct' was "*unrelated to advancing any legal argument*." *Id*. at 310 (emphasis added).

Finally, Judge Sullivan's opinion partially addressed the actual history and reason the contempt statute was enacted, which was specifically because Missouri district court judge William Peck held an attorney in contempt and imprisoned and disbarred

him for arguing legal error on appeal and submitting an article to the Press about his misconduct in a series of ***civil*** proceedings regarding Spanish-American land grants. As Judge Sullivan stated: "[t]he next time an attorney criticized one of Judge Peck's rulings on appeal, does anyone think the judge could have disregarded Congress's limitations on the contempt power by invoking his inherent sanctioning authority? Of course not: ***a judge may not use inherent power to end-run a cabined power***." *Id*. at 310 (emphasis added).

The full history is that Judge Peck almost didn't have the opportunity to be a federal judge anymore at all after that, because he was almost impeached for that finding and imprisonment of a lawyer, and barely survived a 22-21 vote after congressional hearings that lasted almost a year. A month after his acquittal then-Chairman of the Senate Judiciary Committee (and later President Buchanan), presented a bill to Congress, which passed in 1831 and is now the modern contempt statute. Rev. Stat. § 725, 18 U.S.C. § 401.

On August 27, 2013, the Sixth Circuit issued a second opinion on the issue of inherent authority in *Droganes v. United States*, 728 F.3d 580 (6th Cir. 2013), and held that absent the waiver of sovereign immunity, the same U.S. Attorney's Office for the Eastern District of Kentucky at issue in the present case could not be sanctioned financially for refusing to comply with various court orders and engaging in bad faith conduct using inherent authority. In so

holding, the opinion cited *Aleo* and stated: "At least one recent [Sixth Circuit] opinion expressed doubt that a lower federal court ever has the power to use its inherent authority as opposed to the contempt power established by statute (18 U.S.C. § 401) and implemented by rule (Fed. R. Crim. 42) to punish bad-faith conduct by a party in a criminal case." *Id*.

The very next ***day***, on August 28, 2013, the two Assistant U.S. Attorneys in the same U.S. Attorney's Office for the Eastern District of Kentucky who tried the case against Meade and Justice, AUSAs Ken Taylor and Erin Roth, filed a motion invoking inherent authority on behalf of themselves and the district court judge personally that *cited Aleo*, 18 U.S.C. § 1927 and this Court's decision in *Chambers v. NASCO*, and demanded that Meade's attorneys, but primarily Ms. MacPherson, be ordered to show cause and be "held accountable" for "recklessly" arguing – to the Sixth Circuit Court of Appeals in the mandamus petition and in Meade's Motion for Release Pending Appeal and Motion to Arrest and Dismiss/Objection to Further Proceedings briefs, his actual innocence, various Sixth Amendment structural errors, and duty of candor violations and prosecutorial misconduct that resulted in a guilty verdict – on a jurisdictionally defective indictment for a crime that doesn't even exist.

In response to *that* filing, Mr. Curtis filed Ms. MacPherson and Mr. Wohlander's letters regarding AUSA Smith's conduct into the record, via a motion to submit the documents under seal, and

Ms. MacPherson also filed a personal response. *See* Dist. Ct. Docs. 732-743. Furthermore, because of the content, implications and overt misrepresentations of both fact and law set forth in the show cause motion, and the fact that, since ***filing*** it constitutes statutory contempt of court, it was filed both by and on behalf of the district court judge personally, Meade's attorneys filed a Motion for Recusal. Two weeks later, Ms. MacPherson filed a Motion for Sanctions and attorney fees in accordance with the bad faith, vexatious, and deliberately oppressive standards set forth in *Aleo*. As *Aleo* also explained and cited, they are expressly provided for in the Criminal Justice Act if incurred in any paid case.[7] Those costs and attorney fees in this case are now over ten times the original amount requested.

Specifically, because in response to that motion, the Government refused to acknowledge actual Supreme Court and Sixth Circuit case law, AUSA Taylor stated that he had no idea what the duty of candor was, and then admitted that the Government

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[7] *See* 18 U.S.C. §3006A(d)(4)(D)(i)-(v) and statutory notes, stating:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith.

had emails documenting the fact that its experts in the Asset Forfeiture Money Laundering Section of the DOJ specifically instructed AUSA Smith to proceed with the case using the "gross receipts" definition of "proceeds" under 18 U.S.C. § 1956 only, and ***also*** offered to submit these emails for the district court's review under seal. Upon ***agreeing*** with the Government that "gross receipts" might have been the correct definition of "proceeds" as to the Chapman defendants, except "criminally derived property" from § 1957 was substituted in the indictment and proven at trial instead, three significant events took place:

First, the minute entry from the August 14, 2013 hearing was changed to represent that oral argument had taken place on Meade's Motion to Arrest and Dismiss even though it did not. Second, the motion submitting the letters from Mr. Wohlander and Ms. MacPherson under seal was deliberately un-linked from Meade's recusal reply brief in PACER, and for the exact reason that PACER itself will not allow a district court judge to un-link a document like that from a recusal motion without expressly stating in the record that it was deliberately un-linked. Which is also the same reason in the district court's subsequent opinion *denying* recusal: (1) the judge failed acknowledge and rule on the sealing motion so that it would *not* become part of the opinion, which is also the same reason; (2) after the notice of a direct appeal to this Court was timely filed on May 30, 2014, the motion submitting those documents *under seal* was granted, because it is also the

same reason; (3) the district court ruled with the Government that he could rely on inherent authority to issue a show cause order as to Ms. MacPherson in the recusal opinion, stating:

> It is possible the Court could choose to grant the show cause, deny the show cause, grant the show cause and find the behavior of counsel acceptable (or find the behavior of both government and defense counsel reprehensible) or deny the show cause and sanction neither, one or both parties –

– and then he cited the same Kentucky Rule of Professional Conduct cited in the Government's show cause motion, the commentary for which, also expressly states that it applies only to state court judges – who do ***not*** possess inherent authority precisely because they are ***elected*** and not appointed for life. *See* Doc. 753 at p. 4, 8 at fn. 4. Which is the same reason Ms. MacPherson knew the district court judge was aware of the exact reason why only nine Justices ***personally*** and ***physically*** possess the exact judicial power, whose judicial power he was usurping and threatening to abuse on behalf of himself and "the Government."

Accordingly, Ms. MacPherson filed a Motion for Clarification, which formally requested argument on Meade's pending motions and that the court decide the show cause motion before issuing a ruling on any other motions, because making the same argument on behalf of Meade on what became apparent to Ms. MacPherson at that point was going to be a

post-verdict interlocutory appeal on an automatically applicable ***double*** jeopardy exception to the collateral order doctrine – would ***simultaneously*** violate Mr. Meade's and her own Fifth Amendment privilege against self-incrimination and Sixth Amendment right to effective assistance of *counsel of choice*.

F. Sixth Circuit Proceedings

On November 5, 2013, the Sixth Circuit again addressed the issue of using inherent authority to sanction a defense attorney in a criminal case and harshly reversed an Ohio district court's act of relying on inherent authority and 18 U.S.C. § 1927, which is the only statute cited by the Government in its show cause motion, as a means of instituting disciplinary proceedings and publicly reprimanding and humiliating a public defender after she issued what the district court judge termed an "unauthorized" and "vexatious" Rule 17(c) third-party subpoena and discovery request. *United States v. Llanez-Garcia,* 735 F.3d 483 (6th Cir. 2013). But because her filing did not warrant sanctions at all, let alone reprimand or discipline, the Sixth Circuit once again could not reach the question of whether inherent authority may "ever" be used to sanction a defense attorney over the content of a pleading in a criminal case. Most importantly, in the only two Sixth Circuit cases that involve the sanctioning of a defense attorney using inherent authority in a criminal case (*Aleo* and *LLanez*), the Government defended the defense attorneys on appeal and argued against sanctions,

because it would be required to defend that act on direct appeal to that exact same circuit court, which is indefensible for that exact reason.

In addition to that historical first, and as was stated above, Ms. MacPherson was appointed to represent Johnny C. Grooms in a direct appeal of his drug conspiracy convictions in January of 2012. At issue in his case was a warrantless booking search of a cell phone as was the case in *Riley v. California*, *however*, not only did the phone belong to Grooms' son and alleged co-conspirator, Jonathan Grooms, who was named after his father, it was also unlawfully seized against his will and over his express objections during the execution of an arrest warrant at his ***home***, which was accomplished by placing it in his front shirt pocket after he was handcuffed and could do nothing to prevent it. The officers then transported him to the jail, confiscated the phone immediately as "contraband," downloaded the content onto a computer and searched it.

Thus, she had the opportunity to advance Justice Sotomayor's third-party Fourth Amendment adjustment on standing argument from *Jones*, due to the timing of Edward Snowden's revelations twenty-one days earlier on June 5, 2013, the opening brief discussed the National Security Agency's (NSA) domestic surveillance program, further noted that no person, including attorneys ***and the judges on the panel to whom the briefs were addressed*** were immune from those surveillance practices, and

specifically addressed the resulting chilling effect caused by that fact on ethically required speech and advocacy. While drafting the reply brief, the public was further informed that the NSA is sharing illegally obtained incriminating information with the DEA and FBI for purposes of building *domestic* drug cases against American citizens and covers up the source of that information through a process known as "parallel construction," and *also* that the NSA has complete backdoor access to all iPhones (which Ms. MacPherson also uses) and can essentially search and listen to the communications of any iPhone user at will. Accordingly, this issue was also addressed in the reply brief.

G. FOIA Request

On February 7, 2014, Ms. MacPherson, Mr. Curtis and Mr. Wohlander sent a FOIA request to the NSA. Among the requests for information was their entire NSA file as well as: (1) all records related to any program under which the collection of electronic or cellular communications of attorneys as a targeted group is or has ever been discussed, authorized, or conducted; (2) all records related to any system or mechanism by which the electronic and cellular communications currently being collected by the NSA in bulk using various programs including PRISM and Dishfire, are screened for attorney-client privileged information or attorney work product; and (3) copies of any and all such information or work product collected from the undersigned attorneys,

their computers or cell phones without their knowledge or consent.

Three days later, on February 10, 2014, the district court in Meade's case denied his Motion to Arrest and Dismiss and the Motion for Clarification on the grounds that the Motion to Arrest and Dismiss was "untimely," even though a challenge to subject matter jurisdiction can never be "untimely" or waived, and according to the case cited in the district court's own opinion, denying the defendants' ***pre-trial*** motion to dismiss the indictment, the double jeopardy exception to the collateral order doctrine, which requires that a double jeopardy claim need only be "colorable" automatically applied to Meade's appeal. Nevertheless, after two months of solid briefing, thousands of dollars in attorney fees and costs and over 240 pages of motions and documents filed with the circuit court, which included:

> (1) A motion to transfer the case to a different district court for purposes of deciding the Rule 59(e) and Rule 60(b) motions;
>
> (2) A petition for a writ of mandamus on that same automatically applicable double jeopardy exception notice and filing, after the Government filed a post-notice of appeal motion to impose a sentence immediately as against Meade and Justice, which demanded that the district court judge assist the Government in evading appellate review of its misconduct by entering a final judgment immediately and refusing to rule on either of

> Meade's pending motions – even though a notice of appeal immediately divests a district court of the power to do exactly that upon filing;
>
> (3) A motion to compel the production of the emails between AFMLS and the U.S. Attorney's Office for the Eastern District of Kentucky *and* all emails discussing the show cause motion and those who authorized – it including the district court; and
>
> (4) A sealed *ex parte* motion requesting that a special master be appointed for that exact reason.

On April 11, 2014, the circuit court dismissed the appeal for lack of jurisdiction and rewarded the Government for violating the duty of candor to the Sixth Circuit itself regarding its own jurisdiction and precedent re: *Wooten* and *Santos* well-established-for-over-40-years Sixth Circuit and Supreme Court precedent regarding the double jeopardy exception to the collateral order doctrine, and the absolute supremacy and irreplaceability of the rights guaranteed by the "root meaning" of the entire Sixth Amendment as previously deemed by this Court. And it refused to acknowledge Ms. MacPherson's existence entirely.

Even though her existence, and the conflict of interest deliberately created by the Government's show cause motion and the district court order was the subject of every single filing while the appeal was pending. Even though Erwin Chemerinky filed a notice of appearance with the Sixth Circuit on

Meade's behalf ***and*** on Ms. MacPherson's behalf, and for the exact reason that requires a man with his national reputation and expertise to stand in front of and *protect her* from the contempt-related fear associated with the necessity of even needing to argue the express illegality of that motion to the Supreme Court to begin with.

Stated another way, would the DOJ *dare* to even *think* about authorizing the filing of a motion in a district court demanding that Erwin Chemerinsky, the man whose name is on the cover of every constitutional law textbook because he literally wrote the book on it, be ordered to show cause as to why he shouldn't be held in contempt of a district court judge personally, because the Government didn't happen to approve of the content of his legal arguments to the Sixth Circuit or to this Court?

The answer to that question is not only an emphatic "No," it would make national headlines. Why then, does the Government believe it can treat Ms. MacPherson any differently? Why is she not entitled to the same level of respect from the Government and a district court judge that Mr. Chemerinsky is automatically entitled to because his reputation and credentials include being a member of this Court's Bar just like Ms. MacPherson's do?

H. Rule 28(j) Pre-Oral Argument Supplemental Brief

For that exact reason and the fear associated with receiving a circuit court order that was allegedly signed off on by three circuit court judges and actually refuses to acknowledge one's existence, and then also finding out from a colleague that the oral argument for that same NSA case-related reason for that refusal was also scheduled to take place on the exact same day and at the exact same time the oral argument before this Court was scheduled to take place in *Riley v. California*: On April 24, 2014, Ms. MacPherson filed a pre-oral argument Rule 28(j) supplemental brief in Mr. Grooms' case after learning the identity of the panel. Specifically, the fact that two of the judges were also on the panel that decided *Llanez-Garcia*. Which, once again, should be completely irrelevant, except Ms. MacPherson was actually arguing against the *political* (Article I) and *military* (Article II) interests of a domestic surveillance agency in a domestic *Criminal Justice Act appointed* (Article III and Sixth Amendment) direct appeal, which somehow now has the power to threaten her right to speak on behalf of herself and her clients before this Court, precisely because it has both the technological power and executive-level unfettered access to the CM/ECF electronic filing system to censor this Court's awareness of that fact.

Thus, the supplemental brief specifically addressed the timing of *Riley* and the fact that this Court's decision would be binding as to the search of

Jonathan Grooms' cell phone, and for that reason, the panel would need to ***wait*** to issue an opinion until after this Court's decision in *Riley* was issued, and why the panel in Mr. Grooms' case should emphatically reject the Government's lack of third-party standing argument and move in the exact opposite direction. The next day on April 25, 2014, oral argument was cancelled by the circuit court clerk's office. Upon calling to inquire as to the reason for the cancellation, Ms. MacPherson spoke with the calendaring clerk, Deb Cook, who stated: "sometimes these things just happen."

Except, actually, they don't.

Because it ***simultaneously*** violates the express language of Rule 34 of the Federal Rules of Appellate Procedure (requiring oral argument) *and* Rule 34 of the Rules of ***Criminal Procedure*** (requiring immediate dismissal upon lack of jurisdiction) *and* Rule 34 of the Rules ***Civil Procedure*** (governing the production of ***documents*** and ***electronically*** stored information).

I. Motion to Certify

Accordingly, on May 21, 2014, Ms. MacPherson overnighted a supplemental brief and *ex parte* petition to this Court in conjunction with Meade's stay motion, which was confirmed as received by this Court in a voicemail at 10:51 a.m. on May 22, 2014. Upon receiving that confirmation, at 11:01 a.m., Ms. MacPherson filed a motion asking the panel in *United*

States v. Grooms to certify the case and the inherent authority question to this Court before an opinion was issued in accordance with 28 U.S.C. § 1254(2), so as to allow the Court to ***protect itself***, or alternatively, that the panel decide the latter inherent authority question for itself.

Because if: (1) Judge Boggs and Judge Sullivan (*United States v. Aleo)*, who are two of the most conservative judges on the Sixth Circuit, and Judge Gibbons and Judge Stranch (*United States v. Llanez-Garcia*) who are two of the more moderate/liberal members actually agree on an issue, and also express the desire to reach this question but do not have the ability to do so in two cases in a row, which; (2) further involves a double jeopardy-related constitutional question involving this Court's *Santos* decision that was so significant to the Government and to this Court that a three-judge circuit court panel consisting of Judge Clay and Judge White deemed the case itself retroactively applicable in the Sixth Circuit, and then; (3) Chief Judge Batchelder, who has both the right and the ethical obligation as Chief Judge to reassign the judges on a given panel, and for the exact same supervisory responsibility and protective reason that Judge Gibbons and Judge Stranch ***both*** ended up on the panel for the oral argument in Mr. Grooms' case, does not herself call for an *en banc* vote when subsequently presented with such a petition on a circuit court order that she herself did not see because it overturns binding decisions issued by every single one of the foregoing judges:

Then the order denying the *en banc* petition in Meade's case was *also* fraudulent for the exact statutory illegality and contempt-related reason that made subsequently modifying the record in Grooms' case to state that the case was submitted on the briefs the same day oral argument was granted as well. Because sixteen circuit court judges allegedly just signed off on an act that would result in the impeachment of every last one of them if it were committed in their physical presence during the oral argument given by Mr. Chemerinsky on Ms. MacPherson's behalf after ***granting*** en banc review.

Stated another way, why would an entire *en banc* circuit court *refuse* to certify a specific question twice to the Supreme Court in a case that would allow this Court to protect those same federal judges from the exact same encroachment and domestic eavesdropping on their own judicial power and personal electronic communications? They wouldn't. Because the ability to erase another human being without leaving a trace for ***speaking*** is also the ***exact*** reason one does not lie to the Solicitor General when he is preparing for an ***oral*** argument ***before*** presenting that same oral argument ***before*** the United States Supreme Court. And to be even more specific in the context of this case:

(1) Justice Scalia was part of the ***majority*** opinion in *Clapper v. Amnesty Int'l* dismissing for lack of standing, which Justice Alito authored. Justice

Alito is also the only Justice who does not participate in the cert. pool, and does not do so for the same political objectivity-related reason that he would vote to grant certiorari in this case.

(2) Justice Alito *also* joined Justice Sotomayor's concurring opinion in *United States v. Jones*. Justice Sotomayor was part of the ***dissenting*** opinion in *Clapper*, as were ***both*** Justice Kagan ***and*** Justice Ginsburg.

(3) Justice Kagan is the supervising Justice for the Sixth Circuit and the Justice to whom Meade's emergency application was initially addressed and allegedly denied, and Justice Ginsburg is the Justice to whom it was re-submitted upon that denial, was assigned a case number and set for the Court's May 29, 2014 conference. The supplemental petition filed with this Court on May 22, 2014 also asked the Court to pull up the *Grooms* case to protect itself and Ms. MacPherson, and heavily quoted Justice Scalia's opinions in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007) and *Neder v. United States*, 527 U.S. 1, 30, because she is "presently living out the constitutional dangers and very reasons why the Doctrine of Separation of Powers *exists*." *See* Supp. Pet. at p. 22.

(4) Justice Ginsburg and Justice Scalia were also part of the subsequently issued and *unanimous* opinions in *Jones* and *Riley v. California*, the latter of which was authored by Chief Justice Roberts. Again,

that opinion was issued one month to the day after the potentially contemptuous appellate brief was filed into Meade's case, and unequivocally stated that if law enforcement officers want to search a cell phone then the answer is exceedingly simple, "Get a warrant." Chief Justice Roberts is the same Justice whom Ms. MacPherson would ultimately be held in contempt of for repeating his words and thanking for making that exact statement.

Ms. MacPherson is also currently mourning the loss of the talent, intellect, and voice of the late Robin Williams, who recently committed suicide.

Who also said: "No matter what people tell you, words and ideas can change the world."

Speaking of which, this Court would be appalled at the number of derogatory and insulting comments that were made about Ms. MacPherson at the April 28, 2014 hearing, which were participated in equally by the Government and a federal judge. "She shouldn't be practicing law," stands out most prominently in her mind and she would very much like to see this Court answer that question for itself as to AUSAs Taylor, Smith and Roth after reviewing the record in Meade's case. The former of whom actually called her a liar and re-demanded – on behalf of the United States Government – that she be ordered to show cause for being *physically* unable to attend a hearing to argue a rule 60(b) fraud on the court motion on behalf of her actually innocent client, because that day, on April 28, 2014, she actually had

to seek emergency medical treatment due to the physical, health-related side-effects associated with being threatened by her own "Government" with being ***silenced*** on a contempt finding for ***refusing*** to commit an act of silence that would be contemptuous if committed in the presence of the Justices of the same Supreme Court –

– whose voices she was also simultaneously mourning the loss and idea of what will happen to her and her own clients who need her to be able to speak freely both *ex parte* and in person about that fact with the Justices, ***and*** the idea of what might happen to the Justices themselves ***during*** the oral argument the next day if they also could not immediately hear ***of*** her so they could simultaneously, and ***standing*** side-by-side, speak publicly ***with*** her and ***on behalf*** of her.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are self-evident. The orders created a separation of powers controversy that arose on appeal over a usurpation and threatened abuse of this Court's exclusively possessed inherent authority and contempt power to chill ethically required speech on behalf of the Justices. Accordingly, since constitutions and statutes do not protect judicial independence, people do, the Petitioners respectfully asks this Court to grant certiorari so that it may do so both by and on behalf of itself.

Dated: August 18, 2014

Respectfully Submitted,

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No. 14-5209

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHARD D. MEADE, Defendant-Appellant.	)	ORDER (Filed Apr. 11, 2014)

Before: COLE, GRIFFIN, and KETHLEDGE, Circuit Judges.

Richard D. Meade appeals a district court's pre-judgment order denying his motion to arrest the judgment and dismiss the indictment for failure to charge an offense. Meade moves to stay any further proceedings below pending the disposition of his appeal and to permanently enjoin the entry of a judgment of conviction against him. Further, he moves to expedite a ruling on his motion to stay, to transfer his underlying proceedings to a different district court judge, and to direct the newly-assigned judge to transfer his proceedings to this court. The government moves to dismiss the appeal as being taken from a non-final and non-appealable order. Meade opposes dismissal and, alternatively, requests that the court grant him relief in mandamus or prohibition. He also moves to compel the disclosure of e-mails, documents, and transcribable communications between the United

States Attorney's Office for the Eastern District of Kentucky and the Asset Forfeiture Money Laundering Section of the Department of Justice. Additionally, Meade has filed three *ex parte* motions: to seal his *ex parte* motions, to resume the case, and to expedite a ruling on all pending motions.

The imposition of a sentence is the final judgment for purposes of appeal in a criminal case. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). Although there are limited and narrow exceptions to this general rule, none are applicable here.

Alternatively, Meade seeks relief in mandamus or prohibition. Mandamus is an extraordinary remedy that is infrequently used by the court. *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008). "[F]or the writ to issue, petitioners must demonstrate a clear abuse of discretion on the part of the district court." *Id*. (citation and internal quotation marks omitted). Thus, to warrant relief in mandamus, a petitioner must show that his right to the writ is "clear and indisputable." *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). Like a writ of mandamus, a writ of prohibition is a drastic remedy only available in extraordinary situations where the petitioner shows its right to the writ to be clear and indisputable and where there are exceptional circumstances amounting to a judicial usurpation of power. *In re Alea*, 286 F.3d 378, 380 (6th Cir. 2002) (order); *In re Gregory*, 181 F.3d 713, 715 (6th Cir. 1999) (order).

Meade previously filed a writ of mandamus and/or prohibition seeking similar relief, docketed in this court as No. 13-6038. We concluded that Meade had not shown a clear and indisputable right to the immediate dismissal of his indictment then, and our reasoning remains sound. Moreover, Meade has an adequate alternative remedy – an appeal from his conviction and sentence following the entry of a final judgment.

Ex parte motions are generally disfavored. None of the *ex parte* motions were served on the government; therefore, the government has not had the opportunity to respond to those motions.

The motion to dismiss is **GRANTED**. The petition for a writ of mandamus and/or prohibition is **DENIED**. The motions to stay, to expedite, and to compel are **DENIED AS MOOT**. The *ex parte* motions to resume and to expedite are **ORDERED STRICKEN**, and the motion to seal the *ex parte* motions is **ORDERED UNSEALED** and is **DENIED AS MOOT**.

ENTERED BY ORDER
OF THE COURT

/s/ Deb S. Hunt
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA, Plaintiff, V. ROBERT JASON CHAPMAN, et al., Defendants.	))))))))	Criminal No: 11-51-GFVT **MEMORANDUM OPINION & ORDER** (Filed Feb. 10, 2014)

* * *

Defendants were indicted of several counts all arising from the theft of motorcycles. Most defendants pled guilty. Three, however, elected to go to trial. Two of those defendants, Mark Justice and Richard Meade, were convicted and now have filed numerous motions challenging the verdict. For the reasons set forth, all of the motions will be denied.

I

The procedural history in this case is lengthy and important to the resolution of the pending motions. The trial began on February 25, 2013 [R. 591] and lasted 14 days, concluding on March 19. [R. 615.] The jury found Justice and Meade guilty. [R. 615; 616; 618.] On April 1, the United States filed a Motion for an evidentiary hearing on the issue of forfeiture. On April 2, Justice filed a motion for a new trial [R. 624]

and on the next day he filed a motion to set aside the verdict. [R. 625.] On July 16, Meade requested release pending appeal. [R. 701.] On August 8, Meade filed a motion to arrest judgment and dismiss the indictment for failure to charge an offense. [R. 711.] The next day, Justice joined in Meade's motion to arrest judgment. [R. 712.] He also filed a motion for bond pending appeal the same day. [R. 713.] On August 23, Meade objected to the Court hearing any further proceedings in this matter before ruling on his previously filed motion to arrest judgment. [R. 725, (referring to R. 711)]. On August 28 and 29, the United States filed a motion and amended motion to show cause regarding the allegedly inappropriate tactics employed by Defense Counsel [R. 729; 730], which has been fully briefed. [R. 733; 740.] In early September, Defendants asked the Court to recuse and, finally, on September 12, Meade filed a motion requesting attorney's fees and sanctions. [R. 743.] On October 29, the Court denied Defendants' motion seeking this Court's recusal. On November 25, the parties were ordered to enter the transcripts from trial into the record and to resubmit their motions with references to the transcripts. The parties having complied, the Court now considers the outstanding motions that attack the verdict.

II

A

Federal Rule of Criminal Procedure 34 provides "[u]pon the defendant's motion or on its own, the

court must arrest judgment if: (1) the indictment or information does not charge an offense; or (2) the court does not have jurisdiction of the charged offense." Fed. R. Crim. P. 34. The rule establishes that "[t]he defendant must move to arrest judgment within 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere." *Id.* When, as is the case here, the Court is asked to arrest judgment on the basis of a bad indictment, "[t]he sufficiency of an indictment is reviewed de novo." *United States v. Gibson,* 409 F.3d 325, 331 (6th Cir. 2005) (citing *United States v. Gatewood,* 173 F.3d 983, 986 (6th Cir. 1999)).

Meade filed a motion to arrest the judgment of this Court, which alleges that the indictment fails to effectively charge Meade and, as a result, this Court lacks the proper jurisdiction to have heard the case. Justice has joined Meade in this motion. [R. 712.]

1

As stated in the rule, defendants have fourteen days from when "the court accepts a verdict or finding of guilty" to file a motion to arrest judgment. Fed. R. Crim. P. 34. *See also United States v. Posr,* 463 F. Supp. 2d 434 (S.D.N.Y. 2006) (time for defendant to file motion to arrest judgment began running on date of conviction). Defendants concede this point in their August 8 Motion. [R. 711-2, stating "Normally, a defendant has 14 days after entry of the judgment or verdict, or a plea, within which to bring such a

motion."] In this case, the Court accepted the jury's verdict and finding of guilt on March 19. This happened when, after the Jury returned the verdict, the Court asked Mr. Justice to stand and stated:

> The defendant, Mark Justice, having pled not guilty to the offenses charged in the superseding indictment Counts 1, 5, and 9, and the jury having found you guilty of those offenses, I do find you guilty of those offenses.

[R. 772 at 216 (Tr. Mar. 19).] After advising Justice, the Court spoke to Meade:

> The defendant, Richard Meade, having pled not guilty to the offenses charged in the superseding indictment to Counts 1, 3, 7 and 8, and the jury, having found you guilty of those offenses, I do find you guilty of those offenses, having pled not guilty, and to the offense charged in the superseding indictment at Count 6, and the jury having found you not guilty of that offense, I hereby enter a judgment of acquittal on that offense.

[Id. at 217 (Tr. Mar. 19).] Verdict forms were then entered into the docket. [R. 616; 618.] These acts constituted this Court's acceptance of the Jury's finding of guilt.

Despite the deadline imposed in the rule, Defendants waited over four months before filing this motion to arrest judgment on August 8. The apparent justification for this delay was Defense Counsel not "discovering a Supreme Court opinion, *United States v. Santos,* and a Sixth Circuit decision *Wooten v.*

Cauley, indicating that the indictment in this case fails to charge . . . an offense of the money laundering statute" until the time of the filing. [R. 743 at 3.] Defendants argue, however, that there is no time limit for a court to arrest judgment on its own motion. [Id. at 3.]

It is unclear whether the Rule 34 time limit applies to the Court acting on its own motion. *See* Fed. Prac. & Proc. Crim., § 603, Time for Motion, (4th ed.). While Rule 34 has been recently amended, earlier case law actually suggests that the fourteen day timeline imposes a jurisdictional bar on the Courts. See *United States v. Braswell,* 51 F. App'x 783, 784 (9th Cir. 2002) (District court did not err by denying motion for arrest of judgment because it was not filed within time period stated in rule.); *Rowlette v. United States,* 392 F.2d 437, 439 (10th Cir. 1968) (Referring to motions for arrest of judgment, judgment of acquittal and a new trial, the appellate court explained "[t]hese motions were untimely filed . . . and, therefore, deprived the trial court of jurisdiction to consider them."); *U. S. v. Reeves,* 293 F. Supp. 213, 214 (D.D.C 1968) (Referring to a motion to arrest judgment, stated "the Court is not permitted to enlarge the time permitted for the filing of such a motion.") Since this request to arrest judgment has been presented to the Court through a Defense motion, this Court finds it unnecessary to decide the issue of whether a judge could, *sua sponte,* arrest judgment outside the fourteen day window.

In what is fashioned as a *Notice of Objection to Further Proceedings,* filed on August 23, 2013, Defendants makes their case for why the Court should consider their motion to arrest judgment. They argue that since their motion alleges "constitutional and jurisdictional flaws, which divest the Court of the authority to conduct any further proceedings in this matter," the Court must rule on the motion before proceeding to sentencing. [R. 725.] In support of this proposition, and likely with the knowledge that their motion to arrest judgment was untimely, the Defense looks to a District Court decision from Michigan, *U.S. v. Brown,* 154 F. Supp.2d 1055 (E.D. Mich. 2001). In that case, defense counsel argued, post-verdict, that problems with the indictment divested the Court of jurisdiction. The Court struggled to find what procedural device would allow it to consider the objection. As has been argued in this case, the Court in *Brown* concluded that the best tool was a Rule 34 motion to arrest judgment, however, that motion would have been untimely. The Court then looked to the earlier edition of the same treatise cited *supra,* Charles Allen Wright, Federal Practice and Procedure, § 193, at 334-35 (3rd ed. 1999), and focused in on what the treatise, and ultimately the Court, construed as an inconsistency between Rule 34 and Rule 12(b)(3)(b).[1]

[1] At the time of *U.S. v. Brown,* 154 F. Supp.2d 1055 (E.D. Mich. 2001), the rule actually cited was 12(b)(2) but due to an update in the Federal rules the provision is now at Rule 12(b)(3)(b).

That rule provides that "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or state an offense." Fed. R. Crim. P. 12(b)(3)(b).

This Court elects not to go to such lengths to get around the clearly imposed time limit in Rule 34. Rules governing post-verdict motions, which contain specific timelines, were designed to provide finality following a verdict. If Congress sought to permit the filing of motions to arrest judgment any time before sentencing or before appeal, they could have written that into the rule. They did not. This court will not circumvent the rule's clearly written timeline to justify responding to an untimely filed motion.[2]

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[2] While the Court finds it ultimately unnecessary to address the motion to arrest judgment on its merits, the Court has, out of an abundance of caution, reviewed the arguments and concluded they are without merit. A brief summary of the crux of Defendants' motion provides some context to this discussion. Defendants allege that the indictment fails to charge them with an offense. [R. 711-2.] Defendants were, they argue, improperly charged with engaging in financial transactions involving *criminally derived property* (motorcycles) that was *proceeds* of *specified unlawful activity*. [R. 711-2.] Defendants argue that, at the time of the allegedly criminal behavior, *proceeds* was defined as either "profits" or "gross receipts" and that the Government had to show Defendants engaged in financial transactions using either "profits" or "gross receipts" of *specified unlawful activity*. This is based on the Supreme Court's holding in *United States v. Santos,* 553 U.S. 507 (2008). Following the Supreme Court's holding in *Santos,* Congress amended the money laundering statutes. Defendants argue it was these

(Continued on following page)

B

After a jury has reached a verdict, a defendant is permitted to file a motion for judgment of acquittal challenging the sufficiency of the evidence pursuant to Federal Rule of Criminal Procedure 29. Fed.R.Crim.P. 29(a), (c). "A defendant making such a challenge bears a very heavy burden." *United States v. Tocco,* 200 F.3d 401, 424 (6th Cir. 2000). When undertaking such review, the court "must decide whether, after viewing the evidence in a light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gardner,* 488 F.3d 700, 710 (6th Cir. 2007). Moreover, courts are precluded from weighing the evidence, considering witness credibility, or substituting its judgment for that of the jury. *United States v. Chavis,* 296 F.3d

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amendments that made *criminally derived property* a recognized subcategory of *proceeds* but that this did not happen until after the Defendants' allegedly criminal behavior occurred. They argue the Sixth Circuit's decision in *Wooten v. Cauley,* 677 F.3d 303 (6th Cir. 2012) to not apply *Santos* retroactively makes the Government's charging language in the indictment faulty. In Defendants' opinion, "[w]hen the financial transactions were conducted in this case, the statute . . . criminalized . . . the laundering of money and its various permutations" but not items of property, like motorcycles. [R. 711-2 at 6.] Defendants also take issue with whether the language used in the indictment to identify the *specified unlawful activity* (the interstate shipment of motor vehicles) does, in fact, constitute a *specified unlawful activity* under the statute and whether the elements of those activities were sufficiently explained in the indictment. [R. 711-2 at 5.]

450, 455 (6th Cir. 2002). "A judgment is reversed on insufficiency-of-the-evidence grounds 'only if [the] judgment is not supported by substantial and competent evidence upon the record as a whole.'" *Gardner,* 488 F.3d at 710 (quoting *United States v. Barnett,* 398 F.3d 516, 522 (6th Cir. 2005); *United States v. Beddow,* 957 F.2d 1330, 1334 (6th Cir. 1992)).

Rule 33 establishes that "[u]pon the defendant's motion, [a district] court may vacate any judgment and grant a new trial if the interest of justice so requires." *U.S. v. Munoz,* 605 F.3d 359, 373 (6th Cir. 2010); *see also* Fed.R.Crim.P. 33(a). The phrase "interest[ ] of justice" is not defined within the rule, and courts have had marginal success in trying to "generalize its meaning." *Id.* (quoting *United States v. Kuzniar,* 881 F.2d 466, 470 (7th Cir. 1989)). Still, several themes remain constant in the Rule 33 context. The conventional use of a Rule 33 motion "is to seek a new trial on the ground that 'the [jury's] verdict was against the manifest weight of the evidence.'" *Id.* (quoting *United States v. Crumb,* 187 Fed.Appx 532, 536 (6th Cir. 2006)); *see also United States v. Legette-Bey,* 147 Fed.App'x 474, 486 (6th Cir. 2005); *United States v. Graham,* 125 Fed.App'x 624, 628 (6th Cir. 2005); *United States v. Solorio,* 337 F.3d 580, 589 n. 6 (6th Cir. 2003). Finally, "[w]ith a Rule 33(a) motion for new trial on the ground that the verdict is against the weight of the evidence, the power of a court is much broader because a court may weigh the evidence and consider the credibility of the witnesses." *U.S. v. Dimora,* 879 F.Supp.2d 718, 724

(N.D. Ohio 2012). Justice raises six substantive errors that he believes entitle him to either a new trial or acquittal.

1

Justice argues that Seargent Riley's opinions on identifying marks indicating serial number modifications were improperly admitted. [R. 624 at 1-5.] He argues that Riley was not qualified to provide testimony regarding metallurgy, specifically about whether a vehicle identification number (VIN) ever existed on the frame of the motorcycle at issue in Count nine of the indictment. [R. 624 at 2.] Riley's contested opinion, as characterized by Justice, was that a VIN had once been on the motorcycle, had been removed and then was permanently destroyed by acid during Riley's testing. [R. 324 at 2 (citing R. 763 at 125-127 (Tr. Mar. 4)).] Justice argues there was no indication a VIN ever existed in that location and that Riley did not provide any basis for this conclusion except that he thought the motorcycle frame was a Harley Davidson. [R. 624 at 2.] Justice contends that the VIN's obliteration is a scientific impossibility and that only one witness, Dr. Tobin, was qualified to render opinions on the ability of acid to melt steel. Tobin's tests established that "there were no indications of modifications to the metal, nor had any acid or grinding done anything that would have modified the metal to the degree necessary to obliterate a VIN." [R. 624 at 4 (citing R. 768 at 157-161 (Tr. Mar. 13)).] Justice believes that Riley's opinion testimony was

improperly admitted, over his objection, as it was outside the scope of Riley's expertise. [R. 624; R. 650 at 2.]

The United States disagrees, arguing that police officers' testimony is often admissible as expert testimony. In the *United States v. Anderson,* the Sixth Circuit concluded that an officer's testimony that "he had over nine years of law enforcement experience before joining the DEA in 1991 and that he had participated in other drug raids" was sufficient to justify the Officer's testimony that seized items were consistent with drug trafficking. 89 F.3d 1306, 1312 (6th Cir. 1996). The United States refers to the Sixth Circuit's conclusion that "[c]ourts have overwhelmingly found police officers' expert testimony admissible where it will aid the jury's understanding of an area, such as drug dealing, not within the experience of the average juror." *United States v. Thomas,* 74 F.3d 676, 682 (6th Cir. 1996).

This is not the first time that the Court has addressed the scope or nature of Riley's testimony. In an Order issued on December 12, 2012, this Court found that Riley was an expert and capable of testifying regarding "techniques utilized to complicate and obscure motorcycle[s] and motorcycle part identification." [R. 396.] This qualifies him to state his opinion in this subject area. Riley's testimony fell into this realm and was permissible. Justice overstates the technicality of Riley's opinions.

Furthermore, the jury received thorough instruction from the Court on judging witness credibility and weighing opinion testimony:

> You have heard testimony from William Tobin, who testified as an opinion witness.
>
> You do not have to accept Mr. Tobin's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.
>
> Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

[R. 707 at 36.] Jurors also received special instruction on how to consider Riley's testimony as he testified to both fact and opinion:

> You have heard the testimony of Sergeant Robert Kenney of the Connecticut State Police and former Detective William Riley of the Kentucky State Police. They testified to both facts and opinions. Each of these types of testimony should be given the proper weight.
>
> As to the testimony on facts, consider the factors discussed earlier in these instructions for weighing the credibility of witnesses.
>
> As to the testimony on opinions, you do not have to accept Sergeant Kenney or Mr.

> Riley's opinion. In deciding how much weight to give it, you should consider the witnesses' qualifications and how they reached their conclusions along with the other factors discussed in these instructions for weighing the credibility of witnesses.
>
> Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

[R. 707 at 37.] These instructions directly address Justice's concerns. To the extent that either witnesses testimony lacked credibility or scientific support, the parties were able to argue the point to the jury. Finally, a jury is well provisioned to evaluate the testimony. If Riley gave opinion testimony that the Defense considered scientifically questionable then the jury was able to lend it little credence. This is what juries do.

In terms of Rule 29, the Court is precluded from "substituting its judgment for that of the jury." *Chavis,* 296 F.3d at 455. The Court similarly finds no reason to upset the Jury's verdict in light of the more stringent Rule 33 standard. The testimony was properly admitted in light of Riley's status as an expert witness.

2

Justice suggests he is entitled a new trial on the grounds that the United States willfully withheld polygraph results which demonstrated George

Ferguson's testimony was false. Justice argues that the Government was obligated to disclose the information pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). [R. 624 at 6-7.] Furthermore, they argue that, had this information been provided "prior to the cross-examination of George Ferguson it would have been extremely effective in impeaching him." [Id.]

The Government acknowledges that a polygraph exam was taken by Ferguson but denies error, claiming the Defense had been notified of the examination, despite the fact that the occurrence of this polygraph examination does not qualify as "material" evidence under the standard set out in *U.S. v. Bagley,* 473 U.S. 667 (1985). [R. 647 at 3-4.]

First, the Government points out that documents addressing the polygraph were provided in discovery. An FD-302, dated January 31, 2013 states, "[t]his interview was conducted following the administering of a polygraph test to Mr. Ferguson." [R. 647, Exhibit A.] The Government claims this report was disclosed in supplemental discovery. [R. 647 at 3.] The Government also refers to a discussion, mid-trial, where Counsel for Mr. Ferguson objected to the admission of a statement made immediately following the polygraph examination. [R. 766 at 183-189 (Tr. Mar 11).] The parties spoke at length about Ferguson's testimony, the polygraph examination, and the circumstances surrounding it. The Court concluded that the statement was admissible as evidence with the caveat that no mention was made of the polygraph. [R. 647 at 4; R. 766 at 182 (Tr. Mar 11).] Ferguson

testified on March 14, after the discussion about the polygraph.

Second, even if Justice had been unaware of the polygraph, the Government's non-disclosure would not have qualified as a violation of *Brady v. Maryland*. The due process clause requires the government disclose material evidence that is favorable to the defendant. *Brady v. Maryland,* 373 U.S. 83 (1963). In *Brady,* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Thus, "[t]here are three components of a true *Brady* violation: the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Green,* 527 U.S. 263, 281-82 (1999). A defendant is prejudiced when there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley,* 514 U.S. 419, 433-34 (1995) (quoting *Bagley,* 473 U.S. at 682). Evidence that falls into this category is called *material evidence* and the term "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682.

In the case at hand, the Government claims the evidence does not implicate *Brady* for multiple

reasons. First, the evidence was not favorable to the accused as it merely established Ferguson did have knowledge of the motorcycles being stolen. [R. 647.] Second, the government points out that evidence of the polygraph could not be material because the results are inadmissible – precluding justice from using it to impeach Ferguson. [R. 647 at 4.] *See United States v. Barger,* 931 F,2d, 359, 370 (6th Cir. 1991) ("Generally, the results of a polygraph examination are inadmissible into evidence.") Furthermore, as previously discussed, the evidence was not suppressed by the Government. Quite to the contrary, the Defense was, at least constructively, on notice of the polygraph exam.

The Sixth Circuit addressed a very similar issue in *U.S. v. Gardiner,* 463 F.3d 445 (6th Cir. 2012). In that case, the Defendant was convicted and then argued that he was entitled to a reversal on the ground that the government did not disclose that one of the witnesses had failed a polygraph test. The Sixth Circuit disagreed, stating that "a prosecutor has no constitutional duty even to *disclose* to a criminal defendant the fact that a witness has 'failed' a polygraph test." *Gardiner,* 463 F.3d at 468 (quoting *King v. Trippett,* 192 F.3d 517, 522 (6th Cir. 1999); citing *Wood v. Bartholomew,* 516 U.S. 1, 5-6 (1995)). This rule hails from the highest Court of the land which has, too, considered polygraphs and for the reasons explicated decided that their non-disclosure is permissible. The Court sees no reason why this rule should not also apply to co-defendants. For all

the aforementioned reasons, the Court did not err and neither Rule 29 or 33 requires the Court to grant relief from the judgment.

3

Justice next argues that the Court erred by not granting motions to dismiss Count two early enough in the proceedings. He claims it was too late when Count two was dismissed just before the closing argument.[3] [R. 624 at 7.] Justice argues that the United States' willful inclusion of an unsupported charge tainted the jury. [Id.] The United States conceded at trial that not enough evidence had been produced to support giving the charge to the jury but argues that there was no error in prosecuting the Count as the Grand Jury determined probable cause existed to support the Count. [R. 647 at 7.] The Court overruled no less than three motions to dismiss Count two before trial.[4] In the Court's February 11, 2013 Order [R. 349], the Court notes Justice's failure to provide any case law or facts to support his argument. Justice now assigns error to the Court's previous decisions not to dismiss the Count. It is worth

[3] The Court notes that Count two was dismissed following the close of the Government's case, not "just before closing arguments."

[4] In addition to the objections filed at trial, Justice also filed objections at R. 276, R. 349, R. 485 and also filed a motion to dismiss Count two as part of R. 502. The Court addressed Count two at R. 402, R. 584, at trial and presently.

noting, however, that Justice has again cited no case law or provided any facts to support his current objection.

The allegation in Count two suggests that Justice knowingly transferred title from a Harley Davidson, despite knowing the motorcycle was illegally obtained, and then transferred the bike to conceal the nature, location, source, ownership and control of the motorcycle. [R. 157 at 2-3; R. 544 at 1.] The Court stands by its earlier Orders. Justice has provided no reason for the Court to believe the charge was not properly indicted. "An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States,* 350 U.S. 359, 363 (1956).

When it became clear that the Count could not be sent to the Jury, it was dismissed. Justice claims that "the allegation was discussed in opening statement, yet no witnesses or evidence were ever introduced" to support Count two but, at the same time, complains because the Court did not instruct the jury to "ignore the evidence given" on that Count. [R. 624.] Justice cannot say no evidence was offered and then complain about the evidence going to the jury. The Court supposes that Justice's ideal corrective instruction would have instructed the jury to ignore references made in opening statements to the Count as no other evidence was submitted in support of it. The Court's instructions to the jury provided a thorough

explanation of the law to be considered in returning their verdict.

As addressed in detail in the Court's February 11 Order, unsupported accusations about "willful" decisions by the United States to advance unsupported charges are inappropriate.[5] [R. 544.] Neither Rule 29 or 33 provide Justice the relief he seeks. Viewing the evidence in the light most favorable to the Government, the Court permitted the charge to survive until the close of the Government's case when it was dismissed. This was not error.

4

Justice argues Count five, which charges money laundering in violation of Title 18 United States Code § 1956(a)(1)(B)(i), should have been dismissed as the motorcycle at issue was built from scratch, with no part being identified as stolen. [R. 624 at 7.] The United States argues sufficient testimony was given to provide the charge to the jury. The Court notes

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[5] Specifically, the Court Stated: "For an Assistant United States Attorney, charges of misconduct should be taken seriously and can have significant career implications. For that reason, allegations of misconduct should not be made recklessly. They should be made only after careful consideration and based only on a credible record consistent with the law. This is decidedly not the case here. Seeking to discredit the government prosecutor instead of the case being prosecuted raises serious ethical concerns when based on such a thin reed. Defense counsel are on notice that further unsubstantiated charges will not be tolerated." [R. 544.]

that the defense moved for the dismissal of Count five following the close of the Government's case and the motion was denied. [R. 768 at 48 (Tr. Mar 13).]

The Government lays out exactly what facts support Count five being given to the jury. The record shows that Curtis Withrow testified that parts for his motorcycle were supplied by Mark Justice and that the motorcycle had been assembled in Justice's garage. [R. 766 at 87-104 (Tr. Mar. 11).] William Riley testified that parts of the motorcycle seized from Curtis Withrow (which had been assembled in Justice's garage) were traced to a motorcycle stolen from Glyndon Register. [R. 762 at 156-157 (Tr. Feb. 28).] Glyndon Register testified that his motorcycle had been stolen and, when shown the motorcycle in question, confirmed that he believed the bike to be his. [R. 765 at 110-114 (Tr. Mar. 7).]

The standard for whether a charge should be dismissed, before the case is submitted to the jury is explained in Criminal Rule 29:

> After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the *evidence is insufficient to sustain a conviction.*

Fed. R. Crim. P. 29 (emphasis added). "A judgment is reversed on insufficiency-of-the-evidence grounds 'only if [the] judgment is not supported by substantial and competent evidence upon the record as a whole.' "

Gardner, 488 F.3d at 710 (quoting *Barnett,* 398 F.3d at 522; *Beddow,* 957 F.2d at 1334. This is a high burden for Justice to clear. He did not meet the Rule 29 burden when he argued the issue at trial and he does not meet the burden here. Sufficient evidence did exist for the charge to go to the jury. Additionally, the Court finds no reason to believe "the verdict was against the manifest weight of the evidence" and so it also fails under Rule 33.

5

In a three sentence objection which cites no case law, Justice assigns error to the Court permitting Sgt. Kinney to decline answering questions on cross examination about the basis for his answers on direct examination. [R. 624 at 8.] Kinney's declination was rooted in the belief that, by answering the questions, he would divulge industry secrets about identifying markings on motorcycle parts. The United States does not appear to contest the facts underlying this objection but argues the Court's actions do not constitute error.

The Sixth Amendment establishes that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This clause has been interpreted to provide two different types of protections: "the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie,* 480 U.S. 39,

51 (1987) (citing *Delaware v. Fensterer,* 474 U.S. 15, 18-19 (1985) (*per curiam*)). Justice implicates the second protection. The Supreme Court, however, has explained, assuredly to the dismay of many a criminal defendant, that the confrontation clause only guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish." *Ritchie,* 480 U.S. at 53 (citing *Fensterer,* 474 U.S. at 18-19 (*per curiam*)). "Trial courts 'retain great discretion to impose reasonable limits on the cross-examination of witnesses. . . .'" *United States v. Lanham,* 617 F.3d 873, 884 (6th Cir. 2010) (citing *United States v. Davis,* 430 F.3d 345, 360 (6th Cir. 2005) (internal quotations and citations omitted)). To evaluate whether the district court abused discretion in limiting the cross examination, the question is "'whether, despite the limitation of cross-examination, the jury was otherwise in possession of sufficient information . . . to make a 'discriminating appraisal' of a witness' motives and bias.'" *Lanham,* 617 F.3d at 884 (quoting *United States v. Kone,* 307 F.3d 430, 436 (6th Cir. 2002) (internal citations, quotations, and alterations omitted)).

Kinney's permitted refusal to answer questions about identifying markings did not prevent the jury from discriminately appraising the motives or biases of his testimony. His background and expertise was known to the jurors and he answered, more broadly, questions about the markings and the motorcycles.

The Court finds no error justifying relief under either Rule 29 or 33.

6

Finally, Justice claims the Court erred when it denied a hearing on the issue of whether a juror, who allegedly felt intimidated by Justice, was biased. [R. 624 at 8.] Justice moved for a mistrial on juror bias grounds during the trial and the Court issued a mid-trial Order addressing the request. [R. 597.] Justice rests his argument on the rule that perceived juror intimidation is remedied by the holding of a hearing where the defendant has an opportunity to prove actual juror bias. *United States v. Pennell,* 737 F.2d 521 (6th Cir. 1984) (quoting *Smith v. Phillips,* 455 U.S. 209, 215 (1982)). This rule does not apply here because the "perceived juror intimidation" does not rise to the level where it might potentially affect the verdict. In its March 8, mid-trial Order, this Court summarized Sixth Circuit law on the issue of what type of juror contact requires a hearing:

> . . . the Sixth Circuit has been careful to note that "not all communications with jurors warrant a hearing for a determination of potential bias." *United States v. Frost,* 125 F.3d 346, 377 (6th Cir. 1997) (quoting *United States v. Rigsby,* 45 F.3d 120, 123 (6th Cir. 1995)). "Instead, an allegation of an unauthorized communication with a juror requires a *Remmer* [*v. United States,* 347 U.S. 227 (1954),] hearing only when the alleged

> contact presents a likelihood of affecting the verdict." *Frost,* 125 F.3d at 377 (quoting *Rigsby,* 45 F.3d at 123). "Intentional improper contacts" require a hearing. *Id.* And contacts that have "an obvious potential for improperly influencing the jury" obligate a court to hold a *Remmer* hearing. But an unintentional contact does not per se justify court intervention. *Id.*

[R. 597 at 3.] Not all contact justifies the Court holding a hearing. From the outset it is crucial to note, somewhat paradoxically, that there was no juror contact alleged. Rather, the juror reported to the Court Security Officer that they felt Justice was staring at the jury. The Court, having the issue raised, was more vigilant in the following days and noticed no inappropriate conduct or staring.

As was also discussed in the Court's earlier order, *United States v. Owens,* 426 F.3d 800 (6th Cir. 2005) presents nearly identical facts. In that case, the judge received a note from a juror which conveyed her discomfort with the defendant as she believed he was "staring at her." *Id.* The District Judge in Owens denied a *Remner* hearing. The Sixth Circuit upheld the decision as the staring was not an *extraneous influence,* defined as "one derived from specific knowledge about or a relationship with either the parties or their witnesses." *Owens,* 426 F.3d at 805 (*quoting United States v. Herndon,* 156 F.3d 629, 635 (6th Cir. 1998)). The alleged staring in this case, and its impact on the juror, is remarkably similar to those

in *Owens*. To grant Justice relief in this situation would incentivize defendants, like Justice, to make jurors feel uncomfortable. See Owens, 426 F.3d at 805 (Cf. *United States v. Reesor,* 2001 WL 523931, *6 (6th Cir. 2001)). These facts do not qualify Justice for either a new trial or a judgment of acquittal.

C

Defendant's motion for clarification addresses numerous, seemingly unrelated issues. If a concrete theme or request were to be gleaned from this entry it is that the Defendants are unclear whether the Court would like to hear oral arguments on the motion to arrest judgment and on Meade's motion for release pending appeal. As the Court has now ruled on the motion to arrest judgment and the motion for release pending appeal has been fully briefed, oral arguments are unnecessary. Therefore, the motion to clarify will be DENIED.

III

Meade's motion to arrest judgment was not timely filed. Justice's multiple objections offered no grounds for this Court to either grant a new trial or enter a judgment of acquittal. In sum, Defendants' are entitled no relief. Accordingly, it is hereby **ORDERED** as follows:

1. Justice's Motion to Join [R. 712] in Meade's motion to arrest judgment and dismiss indictment shall be **GRANTED**;

2. Meade's motion to arrest judgment and dismiss the indictment [R. 711.] is **DENIED**;

3. Justice's motion for a new trial [R. 624] is **DENIED**;

4. Justice's motion for judgment of acquittal [R. 625] is **DENIED**, and

5. Meade's motion for clarification [R. 751] is **DENIED**.

This 10th day of February, 2014.

Signed By:

[SEAL] ***Gregory F. Van Tatenhove*** [illegible]

United States District Judge

No. 14-5209

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHARD D. MEADE, Defendant-Appellant.	)	ORDER (Filed May. 19, 2014)

BEFORE: COLE, GRIFFIN, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

ELECTRONICALLY FILED

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD MEADE, et al.,

Defendants.

Case No. 11-CR-00051

Hon. Gregory F. Van Tatenhove

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Richard Meade, Johnetta Jones, Johnny Carl Grooms, by and through the undersigned counsel, Katherine L. MacPherson, along with counsel personally and in her capacity as CJA appointed counsel for Ms. Jones and Mr. Grooms, hereby give notice that they appeal to the United States Supreme Court from the orders identified below, which were entered or issued by the United States District Court for the Eastern District of Kentucky, the United States Court of Appeals for the Sixth Circuit, and/or the respective clerk's offices of each court. Although the present case is criminal, this appeal is a civil matter.

Notably, although the Supreme Court is considering a related matter at its upcoming conference on

May 29, 2014, in Case No. 13A1101: (1) the resulting orders list will not be available until the following Monday, June 2, 2014, which will be more than 30 days after the district court orders identified below were entered, and; (2) the circuit court orders affected thereby were entered after the application, petition, and supplemental brief and petition was filed with the Supreme Court in Case No. 13A1101.

Therefore, this Notice of Appeal is being filed for purposes of preserving the direct appellate rights of the above-named parties, and those of any other interested organizations or potential parties, in the event that the Supreme Court denies Meade's Application and Petition for Writ of Certiorari on May 29, 2014, without calling for a response from the government, and without all of the most recent and relevant information.

The district court orders at issue are Docs. 839 and 840, which were entered on April 30, 2014, and admitted into evidence/ordered the filing of a Rule 28(j) Supplemental Brief that was filed with the Sixth Circuit Court of Appeals on April 24, 2014, on behalf of CJA appointed client Defendant-Appellant Johnny C. Grooms in a direct appeal of Mr. Grooms' convictions and in advance of an oral argument that was supposed to have taken place on April 29, 2014. *United States v. Grooms*, Case No. 11-6482, Doc. 104. *See* Orders and CM/ECF Confirmation Emails, attached as *Exhibit A*.

B. Constitutional and Statutory Provisions

The constitutional and statutory provisions under which this appeal is being taken are: Article III § 1; 28 U.S.C. §§ 1254(2), § 1253 and 22 U.S.C. § 2281; § 2255; 18 U.S.C. 3006A(d)(4)(D), and 42 U.S.C. § 1983.

Date: May 30, 2014

s/ Katherine L. MacPherson

Katherine L. MacPherson
Counsel of Record
The Law Offices
of Katherine L. MacPherson, PLLC
Attorney for Richard D. Meade,
CJA Appointed Counsel for
Johnny C. Grooms and Johnetta Jones
200 N. Division Ave.
Grand Rapids, MI 49503

CERTIFICATE AND PROOF OF SERVICE

In compliance with Supreme Court Rule 18 and 29, I, Katherine L. MacPherson, hereby certify that on May 30, 2014, this Notice of Appeal was filed with the U.S. District Court for the Eastern District of Kentucky in Case No. 11-00051, via the district court's CM/ECF system, and electronically served on all parties thereto.

I further certify that, in compliance with Supreme Court Rule 29, service was also made on the following parties via U.S. mail.

Johnny C. Grooms
No. 12847-074
FCI Oakdale
Federal Correctional Institution
P.O. Box 5000
Oakdale, LA 71463-5000

Johnetta Jones
No. 24640-076
FCI Greenville
Federal Correctional Institution
P.O. Box 5000
Greenville, IL 62246

The Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Date: May 30, 2014

s/ Katherine L. MacPherson

Katherine L. MacPherson
**Counsel of Record*
Attorney for Defendants Richard Meade,
Johnetta Jones and Johnny C. Grooms
The Law Offices
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200 N. Division Ave.
Grand Rapids, MI 49503

[Exhibit A On File With Supreme Court,
Case No. 13A1101, Supplemental Brief Confirmed
Received By Clerk's Office On May 22, 2014]

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LONDON, KENTUCKY

IN RE:	CASE #2009R00188
DATE AND TIME:	THURSDAY, [AUGUST 11, 2011]*
TESTIMONY OF:	MARCUS HOPKINS, KSP/FBI TFO
PLACE:	GRAND JURY ROOM
	U.S. FEDERAL BUILDING
	LONDON, KENTUCKY
APPEARANCES:	STEVE SMITH, ATTORNEY

NO. OF GRAND JURORS PRESENT: 21

COURT REPORTER: BRENDA YANKEY

* * *

[31] Harris property?

A. That would be. He's had a garage there at his house where he was building motorcycles and had for years with his son. He had one there, as a matter of fact when we were there.

Q. And did Norman McKenzie and Jay Messer corroborate that?

---

* Date changed to reflect actual date of testimony. All other information on this cover page is accurate.

A. Yes.

Q. That they've taken bikes stolen from this organization to those places?

A. Yes they did.

Q. Okay, we also have John Slusher's name on a deed in 119 Kentucky Avenue. Is that the address at the pawn shop where these bikes were sold?

A. It is.

Q. Okay. We also have some certain properties that are already described by the indictment as motorcycles, and there's six of them there with their vehicle identification numbers. Are those the six that are also named in the Counts previously summarized?

A. Yes.

Q. Okay, and so those would be obviously because of the fact of their involvement they've been stolen, they're also proceeds from this unlawful activity?

A. Right.

Q. Further the indictment alleges that if there's not sufficient property which to satisfy this 2.5 million dollars

* * *

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200 N. Division Avenue • Grand Rapids, MI 49503 •
ph. 505-321-7955 • fx. 616-731-5911 •
e: katie@wohlanderlaw.com

Date: April 24, 2014

Re: *United States v. Grooms*, Case No. 11-6482

Dear Ms. Burkowski:

Pursuant to 6 Cir. R. 28(j), enclosed please find a copy of a recent, unpublished decision, which was recently issued by a panel of this Court on March 7, 2014, *United States v. Jones*, Case No. 13-5107, the related briefing, a copy of the Supreme Court's decision in *Michigan v. Tucker*, 417 U.S. 433 (1974), along with the following explanation of the foregoing authority, all of which, Defendant Grooms would like to bring to the panel's attention in advance of next week's oral argument.

On April 29, 2014, the Supreme Court will hear argument in two cases involving questions closely related to the questions presented in this appeal: (1) "Whether the Fourth Amendment permits police to search a cell phone seized from a person who has been lawfully arrested without first obtaining a search warrant," (*United States v. Wurie*, Case No. 13-212), and; (2) "Whether or under what circumstances the Fourth Amendment permits police officers to conduct a warrantless search of the digital contents of an individual's cell phone." (*Riley v. California*, Case No. 13-132). Since the constitutional validity of the search and the facts of the present case

are one step further removed from the facts at issue in *Riley* and *Wurie*, and because the Supreme Court's decision will be binding on this Court as to the reasonableness of the search of Jonathan Groom's cell phone only, the undersigned attorney intends to focus her argument on rebutting the standing-based unreviewability argument advanced by the Government in its response brief. Counsel further intends to explain why, in view of the Court's recent, opinion in *United States v. Jones*, this appeal provides it with the opportunity to remove what have become the three most effective bypasses of the Fourth, Fifth, and Sixth Amendments in history: lack of standing and waiver, inapplicability of the exclusionary rule, and lack of candor to the court – all of which, for the reasons explained below, this Court has the opportunity to squarely address and resolve in the context of this single appeal.

By way of background, I was appointed to represent Ms. Johnetta Jones in *United States v. Jones*, Case No. 13-5107. By sheer coincidence, I also represented a young man named Charles Hocker in an appeal from a § 1983 unlawful use of deadly force claim, and a finding of qualified immunity in favor of the defendant Kentucky police officers. On March 4, 2014, the Supreme Court heard oral argument in another Sixth Circuit case, *Plumhoff v. Rickard*, the facts of which, were almost identical to, but far less egregious and compelling, than the facts in Mr. Hocker's case. With the panel's published decision in *Hocker*, there is a full-on, *intra*-Circuit split and an

irreconcilable conflict in *published* authority in this Circuit now over the appropriate qualified immunity analysis in a § 1983 deadly force claim. In that single opinion, the panel overruled all three Supreme Court decisions governing that exact analysis: *Scott v. Harris, Saucier v. Katz*, and *Tennessee v. Garner*, along with multiple prior, published decisions requiring that all facts and evidence be construed in favor of the plaintiff, because the purpose of this Court is to decide questions of law only. The significance of which, is that that has never happened before in the history of this Circuit's jurisprudence. Again, that was a Kentucky case.

By sheer coincidence, I am also the same attorney that Erwin Chemerinsky filed a notice of appearance and offered to argue on behalf of [Mr. Meade and myself] in *United States v. Meade*, Case No. 14-5209. The necessity of which, was because . . . a group of government lawyers in the U.S. Attorney's Office for the Eastern District of **Kentucky** filed an 'inherent authority' based show cause motion against me in the district court, which specifically demanded that I be ordered to show cause as to why I should not be held in contempt of the district court for filing a writ petition *with this Court* last August, wherein, I argued that the Government, one government lawyer in particular along with one **Kentucky** police officer, usurped federal authority and committed prosecutorial misconduct by violating the duty of candor in the Government's Rule 16 and **17(c)** discovery disclosures,

and knowingly indicting Mr. Meade for a crime that does not exist under any single Title 18 statute.[1]

Again, and by sheer coincidence, I was also appointed to represent Mr. Grooms in the present case as well. That fact might actually save me right now. Because I do not think that anyone has been accurately informed about me, any of my pleadings, or what is going on in the district court right now. But when the Government's lack of standing, waiver, and un-reviewability argument is viewed in conjunction with the facts, holding, and current procedural posture of the above-referenced cases, and the situation that I am facing right now, the fundamental, and now systemic, problem caused by that exact argument is un-mistakable.

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[1] And since the truth of all of the above is fully documented in both the record and in one single letter alone (Doc. 732) that was filed with the district court and in the sealed *ex parte* motion filed with this Court. And since the district court clerk's office has un-linked that letter from the undersigned attorney's filings four different times and refused to rule on the motion to submit it under seal; and since that letter along with the motion to which it was attached and filed with this Court was also struck from the record as *ex parte*, even though the letter itself was to the Government and both the Government, and the district court, have a copy of it; and since it was the entire factual basis for everything set forth in the extraordinary writ petition, which is also the subject of the show cause motion that is continuing to be allowed to be held over the undersigned attorney's head – she is now attaching it to this filing out of self-preservation, to make sure that it is somewhere on file so this Court can review it, and so she can cite to it later if she needs to.

First, in the *Meade* case, the Government relied on a long-established Supreme Court mandated impeachment-related principle, which specifically comes from a case called *Palermo v. United States*, 360 U.S. 343, 350 (1959): that an un-signed or otherwise un-adopted statement set forth in a law enforcement officer's report can never be used to impeach a witness's testimony at trial, because according to the Supreme Court and the Government itself in its own motions (an example of which is also attached), impeaching a witness with a statement that he neither made, wrote himself, nor adopted as his own is "grossly unfair." Therefore, because such a statement can never be used to impeach a witness at trial, the Government is not required to disclose those statements under the Jencks Act when responding to a Rule 16 discovery request.

In *United States v. Jones*, the undersigned attorney made that ***exact*** same impeachment-related evidentiary argument on Ms. Jones' behalf in the opening brief on appeal, which the Government itself relies on all the time and relied on heavily in the *Meade* case. That case is precisely why she was so familiar with it.

Because as the attached letter documents, what the prosecutor in the *Meade* case did was cite that exact same Supreme Court case and impeachment principle in various *motions in limine*, (an example of which is attached), all of which, he filed because he violated the duty of candor when presenting evidence and testimony from various law enforcement officers

to the grand jury. And then, he: (1) failed to disclose what were fully adopted statements (FD-302's), which would have proven that false testimony and the defendants' actual innocence when responding to their Rule 16 discovery requests; (2) he then blocked all attempts by those defendants to obtain that evidence via **Rule 17(c)** subpoenas to third-party witnesses (which sounds an awful lot like one of the facts at issue in this Court's most recent opinion on inherent authority that two members of this panel were in on), and then; (3) after the attorney who represented one of Mr. Meade's co-defendants obtained some of those FD-302's from other defense attorneys in the case, that same government lawyer relied on ***Palermo*** and managed to convince the district court to exclude what were plainly admissible, fully adopted FD-302's, so as to prevent himself and those law enforcement officers from being impeached with them at trial. I've attached an example copy of the motion to this supplement.

Against that backdrop, and as the Fourth Circuit very succinctly explained in *United States v. Shaffer*: "The general duty of candor and truth . . . takes its shape from the larger object of preserving the integrity of the judicial system." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 458 (4th Cir. 1993). And because maintaining the integrity of the justice system itself is so incredibly important, a "[l]egal argument based on a knowingly false misrepresentation of law" can result in severe sanctions – across the board and in every circuit – up to and including

disbarment.[2] Furthermore, because a three-judge panel cannot over-rule or undermine a published, and therefore controlling, decision previously issued by another three-judge panel, if a lawyer intends to advance a legal argument that is directly foreclosed by either Supreme Court or published authority issued by that circuit – because the concept of binding authority being truly binding is the very principle on which equal justice under the law is based – then that lawyer is supposed to acknowledge that fact up front and submit an *en banc* petition when her opening brief on appeal is due, so as to provide the entire Court with the opportunity to weigh in on the question presented – and conflict themselves out of deciding it if necessary.

However, when an appellate lawyer does not anticipate that there could be any **possible**

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[2] *See, e.g., United States v. Griffin*, 521 F.3d 727, 731 (7th Cir. Ind. 2008) (citing the duty of candor and stating: "Counsel has a professional duty to speak up if they notice that the court happens to forget a portion of the colloquy" or otherwise makes a legal or procedural error, "because [a] lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel") (emphasis added); *Benta v. Bryan*, 420 Fed. Appx. 214, 219 (3d Cir. 2011) (stating: "a lawyer shall not knowingly make a false statement of fact or law to a tribunal"); *Smith v. Davis*, 48 Fed. Appx. 586, 587 (7th Cir. Ind. 2002) (emphasis added) (stating: a prosecuting attorney "must disclose controlling but adverse precedent. If they do not, they will be sanctioned") (emphasis added) *Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 at fn. 2 (9th Cir. 1986).

disagreement from the Government over a reversible error; specifically, because its prejudice and reversibility are dictated by a Supreme Court decision or established law on which the Government itself relies all the time and for the exact same reason, like the *Palermo* case above, then that defense attorney will assume the defendant's opening brief on appeal need not be accompanied by an *en banc* petition. Because refusing to confess that error will require that government lawyer to go on the record and advance a legal argument – *to a federal circuit court of appeal* – that is a deliberate misrepresentation of the Government's own knowledge of the applicable law.

In the Government's response brief in *Jones*, the prosecutor refused to acknowledge his and the Government's own understanding and knowledge of *Palermo*'s impeachment rule: Of a 50 year old Supreme Court case that he relies on in every single case that he works on, because that case dictates what law enforcement officer reports and grand jury testimony he is required to disclose under Rule 16 and in accordance with *Brady v. Maryland, Giglio* and the Jencks Act. Instead, he ignored Ms. Jones entire argument on this issue, re-framed the question presented as a *Miranda* issue in his response brief and argued that appellate review of his act of ***impeaching*** my client with an un-adopted, un-signed, full confession as to everything my client was charged with, which was set forth in an FD-302 law enforcement officer's report, was waived now, because Ms. Jones' trial attorney failed to file a motion

challenging the statement's admissibility prior to trial. I was ***floored.***

Not only because that prosecutor just unabashedly violated the duty of candor to what, is once again, a federal circuit-second-highest-court-in-the-country-court, but because in doing that, he also admitted that Ms. Jones has a 100% valid § 1983 claim under *Brady v. Maryland.*

I'll explain exactly why that is in a moment.

In counsel's reply brief, she had to re-clarify that this was not and can never be a *Miranda* issue; it is a basic, Sixth Amendment right to a fair trial impeachment argument; that right can never be waived for that exact reason; it is subject to the plain error standard of review; and the principle itself is further based on the holding of a famous Supreme Court case that dictates *that AUSA's own* disclosure requirements under the Jencks Act; it contradicts a published, Sixth Circuit decision from 1977 that condemned an impeachment act just like that and the testimony itself wasn't even that of the defendant in that case, and how grossly unfair it

* * *

If the United States Government is going to do all of that, then it is going to have to get through me first; it is going to do it over my dead body, which is going to require it to sacrifice his own lawyer along with him for doing what she is ethically obligated as a member of the Bar to do, meaning that she has no

choice, by doing her job and defending him; therefore, that act will be done in broad-daylight for everyone to see. And the United States Government is going to do that on the altar of the most sacred Constitutional right guaranteed to every person in this country, as identified by the Supreme Court itself: Sixth Amendment right to effective assistance of counsel.

Which leads me to the final point of this supplement:

Over the course of the last 50 years, the Government has created what is now not only embodied in the present case, but in the person of the undersigned attorney and what she is suffering through right now – a perfect bypass, double standard, and complete work-around, of the only three Amendments that stand between its ability to do exactly what it did to my client: the Fourth, Fifth, and Sixth Amendments. And it has successfully managed to do that by its *own* continued citation and insistence, ***itself***, on the principle of *stare decisi* and adherence to Supreme Court precedent that favors it – because it shields it from appellate scrutiny on the grounds of standing, waiver, the exclusionary rule, and the exceptions to the Fourth and Fifth Amendments. Which standing and un-reviewability rules it relies on while simultaneously ignoring its own obligations under the duty of candor – just like it did in the *Jones* case. And in doing so under the particular facts of the three cases at issue, and because I represented all three of the defendants, it has finally managed to shift the entire

weight of what is supposed to be its ***own*** constitutional, evidentiary burden – to the defense attorneys who represented those people at trial – and finally all of that weight onto ***me***.

Those of us who practice criminal appellate law do it out of sheer academic devotion to constitutional law and ethical principle, a genuine desire to help our fellow humans, and based our sincerely held belief that *there is supposed to be honor* in this profession and that *everyone*, even if he has been convicted of a crime, is entitled to have someone who will protect him and make sure that his very basic, constitutionally guaranteed rights were respected by the Government – when it obtained that guilty verdict and resulting conviction.

That is the specific reason why the Contempt Statute was enacted: because those of us who do this type of work – on appeal – we are *supposed* to be constitutionally protected zealously defending our clients by arguing a legal error or a Fifth or Sixth Amendment violation, and we are supposed to be constitutionally protected from government lawyers for arguing that they engaged in unethical behavior, because not only are we voluntarily choosing to take that on and put ourselves in harm's way for the sake of our client's lives – we are their last chance on direct appeal and we are ethically *required* to do exactly that: We are ethically obligated to argue all Fourth, Fifth, and Sixth Amendment violations, which are always going to be – ***by definition*** – going to be prosecutorial misconduct-related *Miranda,*

Brady, Giglio, *Napue*, *Berger*, and Jencks Act non-disclosure violations, all of which, is because the United States Government can get itself sued if it actually manages to convict someone specifically because it violated the Fifth Amendment, the Jencks Act, the Supreme Court's holdings in *Brady* and *Giglio*, and that defendant's Sixth Amendment right to a fair trial.

However, as is exemplified by the combination of cases described above and the undersigned attorney's current inherent authority-based situation, the Government has now removed all incentive to conform its conduct to the requirements of those three amendments. There is now finally an impossible double standard, work-around, and perfect pass-through of all three amendments.

Which, most recently came in the form of the *Jones* case by finally, and successfully, pre-emptively foreclosing appellate review of a defendant's **Sixth Amendment** right to a fair trial, which can never be waived, via a **pre-trial** procedural default on the part of a defense attorney, because that defense attorney failed to object and preserve a **Fifth Amendment** *Miranda* error – even though the Government testified itself that it did not *Mirandize* anyone in that case at all. Which legal argument that prosecutor made based on his own open, flagrant, and deliberate misrepresentation and ignoring of binding Supreme Court case law, which he specifically accomplished by ignoring the holding of a 50 year old Supreme Court case that he relies on in every single case because of

that exact "grossly unfair" impeachment reasoning and holding. And instead, that prosecutor made a waiver argument to this court, which required him to openly and in the most blatant way that the undersigned attorney has ever seen in her entire career, misrepresent the law, by making a counter-argument that ignored all of the law that was set forth in one of the Government's ***own*** *motions in limine* filed in the *Meade* case. And instead, that prosecutor based his entire counter counter-argument on a **post-trial § 2255 ineffective assistance** of counsel case, in which, a defense attorney failed to object and preserve error on a pre-trial *Miranda* and violation, in which, the defendant had actually given an **adopted**, self-incriminating statement to police officers.

More specifically, the Government itself testified that it deliberately did not *Mirandize* any of the defendants pre-indictment, and that it used their own self-incriminating statements to indict them for the exact same crimes to which the Government itself claimed that they had confessed.

Those people literally testified against themselves before a grand jury, in violation of their own Fifth Amendment right against compulsory self-incrimination.

And they pled guilty to those crimes because they were too afraid not to do so in view of the ten-year mandatory minimum sentence. (Waiver). But Ms. Jones lacked standing to assert a violation of their Fifth Amendment self-incrimination rights (Standing); yet,

their plea agreements required them to testify against her. But because the prosecutor didn't have enough evidence to convict her at trial, even with their testimony, that prosecutor actually got away with using an un-adopted, un-signed, non-discoverable under Rule 16, Jencks Act-immune report from a law enforcement officer to impeach her in flagrant violation of *Palermo* and Rule 3.3/the duty of candor, he did that in front of the jury and on the record, and that was how he won that case at trial. But because her defense attorney did not anticipate pre-trial that he would do something he is ethically prohibited from doing by filing a pre-trial *motion in limine*, the argument was waived. (Waiver). And because that defense lawyer had also been previously up against that AUSA and was intimidated by him, and he wanted to stay in that AUSA's good graces, *he did not object at trial to the impeachment of his own client with a law enforcement officer's report that he did not receive in response to his Rule 16 discovery requests.*

And finally, as a result of that prosecutor's misrepresentation of the Government's own knowledge of the law in his response brief and his refusal to confess an error to a federal circuit court on direct appeal, which he specifically refused to do so as to avoid a Sixth Amendment *Brady* claim and § 1983 action because Ms. Jones was innocent and the DEA Agent's testimony alone established that – ***that prosecutor was rewarded for doing something at trial that has never been allowed in histor****y*.

And then, that prosecutor turned around and opposed Ms. Jones' request to have her ineffective assistance of counsel claim considered on direct appeal, which was based entirely on the appellate record, this Court's holding in a case called *Wunder,* and her trial counsel's failure to object to that prosecutor's impeachment of her at trial in violation of her Sixth Amendment fair trial rights. Which that prosecutor opposed, specifically, because *based on the § 2255 case law used in his own waiver argument she should have won that argument and gone free*, even though the Government created what is a Sixth Amendment due process and right to a fair trial violation and error deliberately at trial to secure a guilty verdict.

The weight and consequences of his act of dishonesty were then shifted onto me in my reply brief. And that prosecutor was **rewarded** for doing that. He **won** that appeal. And then I was scolded in this Court's opinion for doing what I am ethically required to do.

And also, as a result of his actions and dishonesty, my truly innocent client will now spend the next ten years of her life in prison on a mandatory ten-year minimum sentence, *all because she took the stand in her own defense because she was innocent*, unless I can somehow manage to convince either this Court right now – because I have the evidence that that . . . prosecutor lied through his teeth and the Government itself agrees that she should have won that appeal (the attached motion) – or unless I can

convince the Supreme Court to take up an issue that it ***already*** decided 50 years ago when it decided *Palermo.*

In Mr. Grooms' case, the undersigned attorney filed an actual *Anders Brief* the first time around because the pass through to ineffective assistance was so gaping-wide that she didn't even see it. Specifically, that brief was a result of the fact that: (1) Mr. Grooms and his son have the same first and last names; (2) one of the court reporters' names was missing in the 6th Circuit ECF system, so the undersigned attorney missed the transcript from the hearing re: the search of Jonathan's Grooms' cell phone and the validity of the search warrant; (3) which further stated that the validity of the warrant was decided on the basis of the four corners of the document itself; thus, getting a much more favorable standard of review and scrutiny on appeal. And finally, after speaking with Mr. Grooms' trial counsel for over an hour about the case prior to filing the Anders Brief, and because one does not typically review the documents and filings related only to other co-defendants in a multi-defendant case – *for the exact same reason the Government argued in its response brief* in this appeal – lack of standing, and because Jonathan Grooms pled guilty shortly after the district court's ruling on the search of his cell phone, thereby waiving his own right to challenge that issue, the undersigned attorney missed the constitutional magnitude of what happened in this case. Even though, the constitutional validity of an

almost identical search – as to the actual owner of the cell phone himself – is such a big deal that it is being argued before the Supreme Court this very same month.

The constitutional un-reasonableness of that search as applied to Mr. Grooms in this case, however, was exponentially worse, because: (1) his Fourth Amendment Rights were violated, because by searching his son's cell phone without a warrant, and by virtue of the fact that the message content would have been identical on both phones, doing so was the functional equivalent of searching his own cell phone as well (Standing); (2) his Fifth Amendment rights were also violated, because any incriminating statements or information gathered from those messages were his own self-incriminating statements; therefore, any evidence that was obtained from those incriminating statements was, by definition, not excluded from trial and they were used against him; and (3) his Sixth Amendment rights were violated, because by pleading guilty shortly after the district court ruled the search admissible, he waived both his own right, and his father's right, to challenge the validity of that search. And finally, because the undersigned attorney has no way to identify for this Court what those text messages even said – she can't identify any of the evidence or information that was obtained as a result of the search, and argue its prejudicial effect.

In the *Meade* case, all of the undersigned attorney's attempts to preserve appellate review of the

exact same issue in *Jones* – documented prosecutorial misconduct, which, according to the Government's argument in the *Jones* case, ***I will waive if I do not do so,*** have either been blocked, and now, met with not just hostility but open threats and aggression from the Government itself. Even though, for the exact same reason explained above, I am legally and ethically obligated to preserve that error on my client's behalf in the district court, because the level of prosecutorial misconduct at issue in that case eviscerated the entire Sixth Amendment. Under the facts set forth in the attached letter, Doc. 732 and Doc. 780, alone establish that the prosecutor deliberately presented false testimony to the grand jury, once again from a law enforcement officer. Which also happened to be about the definition **of the one essential offense element** of 18 U.S.C. § 1956 offense that satisfies a § 2241 actual innocence claim – according to this Court's own published decision in *Wooten v. Cauley*: the definition of 'proceeds' under that statute.

So, given what happened in this case, the only reason why I would **not** preserve that issue, would be because of a direct conflict of interest – because I am either too afraid of that prosecuting attorney and want to remain in his good graces for purposes of future cases against him – or because I am working against my own client's interests and want him to lose. Yet, even though the content and basis of the government's own show cause motion satisfies both the *per se* ineffective assistance of counsel standard

for purposes of review ***on direct appeal,*** under *Strickland v. Washington*, and the legal standard **for civil liability** in a subsequent § 1983 action, the United States Government has, nevertheless, allowed a show cause motion to remain pending against a defense attorney for defending her own client from a malicious prosecution by one of its own lawyers and has continued to refuse to confess an error that it has never before in history made so openly on the record. Because it satisfies a § 2241 ineffective assistance claim.

This is absolutely not acceptable.

Exclusionary Rule: In view of all of the above, the undersigned attorney respectfully encourages this Court to re-claim the Fourth, Fifth, and Sixth Amendments for the people who reside within this Circuit – because the rights protected by those Amendments are the only thing standing between them and what did and is still happening in the Meade case – and to me right now.

Specifically, the undersigned attorney first respectfully encourages the Court to re-adopt its own prior reasoning and decision to extend the exclusionary rule to Fifth Amendment violations. Although the Supreme Court in *Michigan v. Tucker*, reversed this Court's decision to do so back in 1974, that was *solely* because there was no intentional *Miranda* violation or bad faith conduct on the part of the police officers in that case. According to the Government's own statements in *Jones* – over the course of the last 30+

years, it has now become constitutionally acceptable for the United States Attorney's Office to openly state, on the record, that it told law enforcement officers not to give *Miranda* warnings to a group of alleged co-conspirators – at all – and it is now acceptable under the Fifth Amendment to then indict those people for the exact same crimes to which the Government – itself – claimed that Ms. Jones confessed, specifically, because she did not adopt the statement as her own and the prosecutor never disclosed it.

Most importantly, formally and officially re-extending the exclusionary rule to Fifth Amendment violations will effectively, ***and preemptively,*** foreclose the use of one's own Government-intercepted telephone, text message, or email communications and conversations from being used against him or her before a grand jury or at trial. Stated another way, if, as the Government has argued on at least two occasions now to two different federal courts – it is now constitutionally acceptable to violate every clause of the Fourth Amendment: by seizing, storing, and randomly searching every text message, email, and other electronic communication – with no reason to believe that those people have ever committed any kind of crime to give rise to any need to them at all – and do so in the interest of national security, then if this Court re-adopts and re-extends the exclusionary rule to Fifth Amendment violations now, specifically because of the facts in this case – it will effectively cut-off the Government's ability to later use those

statements, and any other statements or evidence, or constitutionally protected speech – just like my Writ Petition to this court last August.

Thus, because the Fourth Amendment is now essentially gone – per the Government itself and its current practices – by extending the exclusionary rule to the Fifth Amendment, this Court will also be reinforcing the First Amendment's protections and guarantees as well.

Furthermore, since a government lawyer just actually managed to convince a panel of this Court that Ms. Jones waived her entire Sixth Amendment right to a fair trial based on a pre-trial procedural default, in the form of her trial attorney's failure to anticipate and object to a prosecutor's use of an inadmissible *Palermo* statement that can never be used to impeach a witness, and he used it to impeach her testimony in front of the jury at trial anyway. Which legal argument required that prosecutor to openly misrepresent what the Government itself and every single defense attorney knows is the Government's own knowledge of that very same Supreme Court-mandated impeachment rule. Which argument was based entirely on a post-direct appeal, § 2255 ineffective assistance of counsel Fifth Amendment case involving a defendant who actually did make and adopt an incriminating statement as his own. And then the Government opposed Ms. Jones' request that this Court evaluate her ineffective assistance of counsel claim on direct appeal – which he opposed specifically because according to the case law *on*

which his own 6th Amendment waiver argument was based, she wins on that claim right now as a matter of law – and when he secured entire indictment and conviction as a direct result of his own act of dishonesty and misconduct, which both the Supreme Court itself and this Court have openly condemned in published decisions.

Because a government lawyer just did all of that – *unabashedly*, on the record, meaning that he just gutted the entire Sixth Amendment. And then he had the nerve to oppose a post-reply brief motion to allow me to amend my opening brief to fix a few citation and formatting errors that were caused purely by a computer issue, after I got the notice indicating that this case would be decided on the briefs. Instead of showing a little professional courtesy by not opposing, and even better, confessing one of the biggest errors that has ever been committed in history and notwithstanding the duty of candor. And since he actually won on that argument, notwithstanding the fact that it was a knowing and flagrant violation of the duty of candor to a federal circuit court –

Defendant Grooms respectfully submits that this Court should extend that same exclusionary-rule level of protection to Sixth Amendment violations as well – because the Sixth Amendment is the only amendment that guarantees a fair trial at all and protects innocent people from exactly what happened in Ms. Jones' case. The Court can accomplish this in two ways:.

First, as the attached letter documents, the fundamental problem in the *Meade* case is the fact that he and his co-defendants did not have standing to assert what were flagrant violations of one another's Sixth Amendment rights. Furthermore, due to a Kentucky state and local sealing practice, which requires that documents and pleadings involving allegations that could give rise to attorney disciplinary proceedings be either filed under seal or sealed by chambers – The number one problem in that case was that grand jury transcripts must also be filed under seal. Therefore, when a Sixth Amendment violation is actually committed before the grand jury itself, and then that pleading is sealed because it involves the grand jury, none of the other co-defendants are able to discover the prosecutorial misconduct. Accordingly, the undersigned attorney respectfully submits that, to preserve the very intent and meaning of the entire Sixth Amendment, which, per the Supreme Court itself, requires absolute compliance with the duty of candor to the court (*Berger, Napue, Brady, Giglio,*) this Court should:

(1) Open up the rule on standing and allow a defendant to assert the violation of a co-defendant's Fifth or Sixth Amendment rights; and also (2) When reviewing a sufficiency of the evidence challenge on direct appeal, exclude all evidence, which, post-trial, appellate counsel discovers was either:

> (a) Obtained in violation of a testifying co-defendant's Fifth Amendment rights and was not discovered and therefore raised and objected to by trial counsel; or
>
> (b) Was withheld or introduced into evidence at trial in violation of the Sixth Amendment – even if trial counsel did not object to its admission at trial.

Adopting a new exclusionary rule like that will shift the Government's burden of proof, *and its own* obligation to conform *its own* conduct to the requirements of the Fifth and Sixth Amendments back to the Government itself, *which is where it belongs*. Not on the shoulders of a defense attorney who the Government's *own lawyers* have intimidated into submission – to the point where he fails to object while his client gets impeached on the stand with a document that was written by a DEA Agent, its use of which at trial, in and of itself, amounted to a full confession and a guaranteed guilty verdict of everything that that innocent woman was indicted for. His use of which to impeach her at trial also conclusively establishes the Government's own liability for a *Brady* violation and a 100% valid § 1983 claim, because as was stated above, in fact, the Government was required to disclose it as being exculpatory evidence, along with the grand jury transcripts. It did not do so, and she could have impeached the Government itself with the grand jury transcript and the fact that she did not sign or adopt that statement. Therefore, the Government, by definition, actually indicted her by presenting

completely false testimony from a law enforcement officer to the grand jury, in which, he stated that she had confessed to everything the Government then indicted her for.

Finally, the undersigned attorney respectfully submits that something must be done by this Court about what is happening in this Circuit. There are attorneys in both Kentucky and Tennessee who, as the attached documents establish, are afraid to represent their own clients – because they are afraid of Government retaliation and exactly what is happening to me right now. They're afraid of a show cause motion. This 'inherent authority' practice needs to end.

Because this time, someone actually authorized a government lawyer to file a show cause motion in a federal district court against an appellate lawyer – over the content of a document that she filed **with this Court**, the content and basis of which, is fully documented in the record itself, and its own act of which, violates the entire Sixth Amendment and an Act of Congress.

In other words, that person authorized a public filing that asks a federal, Article III, appointed-for-life judge, who is supposed to be completely objective and immune from political influence – to judicially overturn ***the very same statute that was specifically enacted to protect me from exactly what I am being subjected to right now,*** but not only that, to hold me in contempt – *of a government lawyer*.

And a three-judge panel of this Court was made aware of all of that and provided with the documents establishing the indisputability of all of it.

And they did not step in on my behalf.

That is the first time ***in history*** that that has ever happened.

* * *